Note from the Attorney General's Office:

1912 Op. Att'y Gen. No. 12-594 was modified by 1959 Op. Att'y Gen. No. 59-643.

1912 Op. Att'y Gen. No. 12-475 was overruled by 1988 Op. Att'y Gen. No. 88-058.

1912 Op. Att'y Gen. No. 12-262 was overruled by 1966 Op. Att'y Gen. No. 66-104.

(To the Governor)

301.

ABSTRACT OF TITLE—DEED OF STATE OF OHIO FROM THE GOVERNOR—CORRECTION OF ERRORS IN DEEDS BY DEEDS EXECUTED BY GOVERNOR—PROPERTY OF O. S. APPLEGATE IN PAULDING COUNTY, OHIO.

April 9, 1912.

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

DEAR SIR:—I have carefully examined the enclosed letter of Messrs. Snook & Savage, Attorneys at Law, of Paulding, Ohio, together with the accompanying abstract and papers submitted therewith, and beg leave to submit my conclusions thereon as follows:

1. It appears from said abstract that cn November 23, 1888, the State of Ohio issued to one, O. S. Applegate of Paulding County, Ohio, a certificate of purchase of the following described real estate:

> "Situated in the county of Paulding and State of Ohio, and known as being the central part of the northeastern quarter of Section 31, Township 3 north, Range 2 east, containing thirty-five acres of land."

2. The abstract discloses that on the 21st day of July, A. D. 1892, said O. S. Applegate, in consideration of $200.40, by him paid, received a deed from the State of Ohio for the following described real estate, to-wit:

> "The south part of the west half of the northeast quarter of Section 31, Township 3 north, Range 2 east, containing sixty acres of land more or less." (Abstract, page 28)

3. The abstract further discloses that on the 23d day of January, 1855, the State of Ohio, for a consideration of twenty dollars executed to one, Joshua Davis, a deed for the following described lands, to-wit:

> "The south part of the east half of the northeast quarter (south of reservoir) of Section 31, Township 3 north, Range 2 east, containing sixty-five acres of land more or less." (Abstract, page 36)

4. The tract described in paragraph 3 finally became the property of Francis B. Dewitt, by virtue of a deed from the State of Ohio, dated March 12, 1892, for a consideration of $213.20. (Abstract, page 30)

5. Taking into consideration the sale of the tracts described in paragraphs 2 and 3 hereof, there could be but thirty-five acres remaining in the whole quarter

section, to-wit: Fifteen acres off of the north end of the east half of said quarter section, and twenty acres off of the north end of the west half of said quarter section.

6. It is evident, therefore, that a mistake was made in the description of land sold to said O. S. Applegate, and that the same should have been described as fifteen acres off the north end of the east half of said northeast quarter of said Section 31, and the west half of said section, less sixty acres, off the south part of said Section 31.

7. The expressed consideration in said certificate of purchase was $583.45, to be paid in five equal installments, together with interest from date at six per cent. per annum, on deferred payments: of which amount there remains due and unpaid four installments, together with interest thereon at six per cent., from the 23d day of November, 1888, amounting in all to $_____.

8. On November 2, 1910, said O. S. Applegate duly sold and conveyed to one, Richard S. Woodrow, fifteen acres off the north side of the east half of the northeast quarter of said Section 31. (Abstract, page 33)

9. On March 1, 1911 said Woodrow sold and conveyed to one James C. Culbertson, all of the east half of the said northeast quarter, expecting one acre out of the northeast corner of said east half of said northeast quarter of said Section 31. (Abstract, page 35)

10. Said Woodrow, on the 5th day of November, 1911, quitclaimed to the Board of Education of Crane Township, Paulding County, Ohio, one acre out of the northeast corner of the east half of the northeast quarter of said Section 31. (Abstract, page 34)

11. Said land is now owned and held by the following persons, in parcels described as follows, to-wit:

Leona Dysinger, Ora Reeb, Elida Stiver, Verda Murphy and Ray Applegate, as heirs of said O. S. Applegate, deceased, own the west half of the northeast quarter of said Section 31, less sixty acres off the south end thereof; James C. Culbertson owns the east half of the northeast quarter of said Section 31, less sixty-five acres off the south end thereof, less one acre taken out of the northeast corner of said east half of said northeast quarter; the Board of Education of Crane Township, Paulding County, Ohio, owns one acre of land in the northeast corner of the northeast quarter of said Section 31, and particularly described as follows, to-wit:

> "Beginning at the northeast corner of said northeast quarter of said Section 31, thence south sixteen rods, thence west ten rods, thence north sixteen rods, thence east ten rods, to the place of beginning."

12. The heirs of said O. S. Applegate, have offered to execute and deliver to the State of Ohio a release, in due form, of the land described in said certificate of purchase, and pay the balance remaining due upon the purhase price, upon condition that the State of Ohio execute and deliver deeds to the several parties for the several tracts of lands described in parapraph 11 hereof.

13. In this connection, I desire to call your attention to the following pertinent provisions of the General Code of Ohio, to-wit:

> "Section 8527. When the purchaser has died before deed made, and the lands have passed to another, by descent or devise, and the title still remains in him, or when the person to whom the lands have so passed, has conveyed them, or his interest therein, to another person, by deed of general warranty or quitclaim, upon the proof of such facts being

made to him and the attorney-general, the governor shall execute the deed directly to the person entitled to the lands, according to the true intent and meaning of this chapter, although he derives his title thereto through one or more successive conveyances from the person to whom the land passed by descent or devise.

"Section 8528. When, by satisfactory evidence, it appears to the governor and attorney general, that an error has occurred in a deed executed and delivered in the name of the state, under the laws thereof, or in the certificate of any public officer, upon which, if correct, a conveyance would be properly required from the state, the governor shall correct such error by the execution of a correct and proper title deed, according to the intent and object of the original purchase or conveyance, to the party entitled to it, his heirs, or legal assigns, as the case may require, and take from such party a release in due form, to the state, of the property erroneously conveyed."

14. I have prepared three deeds for the parties respectively entitled thereto, for the tracts of land described in paragraph 11 hereof, and submit the same herewith for your consideration and approval.

Very truly yours

TIMOTHY S. HOGAN,
Attorney General.

720.

VACANCIES DO NOT EXIST IN OFFICES OF CHIEF JUSTICE OF SUPREME COURT, JUDGES OF SUPREME COURT AND JUDGES OF COURT OF APPEALS WHEN JUDICIAL REFORM GOES INTO EFFECT BY CONSTITUTIONAL AMENDMENT.

Inasmuch as there is no provision of law for the election, nor for the term of office, nor for the salary of the chief justice of the supreme court, authorized by Article IV., Section 2 of the Constitution as amended, such office cannot be deemed to have been created, and there is, therefore, no vacancy in that office which the governor at the present time is authorized to fill by appointment.

Under the provision of Article IV., Section 2, of the new Constitution, which prescribes that "the judges now in office" shall continue therein until the ends of the terms for which they were respectively elected, and the object of which is manifestly to make use of the machinery of the old Constitution and laws, until the new provisions could be set in motion, the judges elected this year who will take office on January 1, 1913, when the amendment goes into effect, will be properly in office and will remain therein until the ends of the terms for which they were elected.

There will be no vacancies on January 1, 1913, therefore in the offices of the Supreme Court Judges which will be required to be filled by appointment by the governor.

Inasmuch as under Article IV., Section 6, of the new Constitution, vacancies in the Court of Appeals are to be filled by the electors and as laws are to be passed to prescribe the time and mode of such elections, and in view of the fact that the new Constitution further provides that Court of Appeals districts, until otherwise provided by law, shall be the same as circuit court districts, and that circuit courts shall merge into the Court of Appeals, the intention is disclosed to use all the machinery of the circuit court until all the machinery of the new Constitution for Courts of Appeals may be put into operation. These provisions, therefore, disclose that no vacancies in the Court of Appeals were contemplated by the amendments.

The governor will therefore have no duty to perform in respect to the appointment of Judges of the Court of Appeals, February 9, 1913, when the present terms expire, and those judges elected to the circuit court in November, 1912, shall on said February 9, 1913, take their seats as Judges of the Court of Appeals.

November 18, 1912.

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

DEAR SIR:—You asked me verbally for an opinion as to whether or not there would be a vacancy in the office of Chief Justice of the Supreme Court of Ohio on January 1, 1913, and whether it would be the duty of the Governor at that time or in due season thereafter to appoint a Chief Justice to fill such vacancy.

The investigation into this question brought into view a consideration of the jurisdiction of the Governor to appoint not only a Chief Justice of the Supreme Court, but also judges of the Supreme Court and judges of the Court of Appeals, and while your inquiry related only to the appointment of a Chief Justice, yet inasmuch as the Governor may have presented to him the question of vacancies in the Supreme Court in reference to the judges and vacancies in the Court of Ap-

peals on account of the provisions of the new Constitution in relation to judges, I have deemed it advisable to assume the liberty of going beyond the scope of your inquiry and expressing an opinion on:

(*a*) Will there be a vacancy in the office of Chief Justice;
(*b*) Will there be a vacancy in the office of judges of the Supreme Court;
(*c*) Will there be a vacancy in the Court of Appeals?

FIRST:—As to vacancy in the office of Chief Justice. Section 2 of Article IV of the Constitution of Ohio as amended provides:

> "The supreme court shall, until otherwise provided by law, consist of a *chief justice* and *six judges,* and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. * * * It (the supreme court) shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. The judges of the supreme court shall be elected by the electors of the state at large for such term, not less than six years, as may be prescribed by law, and they shall be elected, and their official terms shall begin, at such time as may now or hereafter be fixed by law."

Section 13, Artivle IV, Constitution of Ohio, in reference to vacancies in the office of any judges, provides as follows:

> "In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

Articles XVII, of the Constitution, provides in part, as follows:

> "Any vacancy which may occur in any elective state office other than that of a member of the general assembly or of governor, shall be filled by appointment by the governor until the disability is removed or a successor elected and qualified. Every such vacancy shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty (30) days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by law." (As adopted November, 1905.)

At this point it may be observed that while Section 13 of Article IV is special and would ordinarily control with reference to the filling of a vancancy, yet it will be kept in mind that Article XVII is a late amendment, and undoubtedly is intended to embrace judges of the supreme court as well as other state officers, and is to be considered exclusive for the purposes of the present question. Sections 141 and 142 of the General Code bear out this idea, Section 141 being as follows:

> "A vacancy occurring in an elective state office, other than that of a member of the general assembly or of governor, shall be filled by ap-

pointment by the governor until the disability is removed, or a successor is elected and qualified. Such vacancies shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term."

Section 142, General Code, provides as follows:

"If the office of a judge becomes vacant by reason of the expiration of the term of the incumbent, and a failure to provide therefor at the preceding election, such vacancy shall be filled by appointment by the governor. The person so appointed shall hold the office until a successor is elected and qualified. Such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after such appointment."

Under Section 142, of the General Code, the Governor's power to appoint is limited to vacancies in the office of a judge by reason of the expiration of the term of the incumbent and a failure to provide therefor at the preceding election. The authority of the Governor ceases when these conditions do not exist. There being no such office as Chief Justice now there could be no expiration of the term of the incumbent, and the only possible provision authorizing the appointment of a Chief Justice by the Governor would arise under Section 141, General Code, and Article XVII of the Constitution afore quoted.

The question, therefore, to be determined is, Will there be on January 1, 1913, in Ohio, an elective state office legally known as the office of Chief Justice? In my opinion the answer should be in the negative. The first sentence of Section 2 of Article IV does not make the office of Chief Justice elective. If the Chief Justice is embraced in the following, which I doubt very much, to-wit: "Judges of the supreme court shall be elected by the electors of the state at large for such term, not less than six years, as may be prescribed by law, and they shall be elected, and their official term shall begin, at such time as may now or hereafter be fixed by law," it is by such provision alone, unaided by any other, made elective, and will come within the whole of the terms of the provisions and not part of them. In other words, if within its terms we could paraphrase the sentence as follows: "The Chief Justice of the supreme court shall be elected by the electors of the state at large for such term, not less than six years as may be prescribed by law (which means as may in the future be prescribed by law) and he shall be elected and his official term begin at such time as may now or hereafter be fixed by law," then there is no law now in existence providing for the election of a seventh judge.

We now have Section 1466, of the General Code, which provides as follows:

"The supreme court shall be composed of six judges, two of whom shall be chosen in each even numbered year. Each judge shall hold his office for a term of six years, commencing on the first day of January next after his election."

It appears, therefore, clearly that the law as it now exists and is prescribed provides only for terms of office and their election for six judges and no more, and it further appears from the Constitution itself making the office elective that the election shall be for such term as may be or as is prescribed by law and the elective feature presupposes a term and provision for election.

As to what is meant by the term "vacancy" in Ohio we will find the case of

Attorney General vs. Heffner, 59 O. S., 368, instructive. The second syllabus of that case appears to be in point here; that is, vacancies in office refer to such vacancies as may occur *fortuitously* and not by creation.

The authorities seem clear that the Governor has no inherent power as Chief Executive to fill a vacancy. His power arises from the provisions of the law and the Constitution.

For the foregoing reason I am clearly of the opinion that no duty will devolve upon the Governor in the absence of legislation upon the subject to appoint a Chief Justice for the Supreme Court of Ohio January 1, 1913, or thereafter. It might be added further that it is not to be assumed that the appointment of a Chief Justice would be contemplated in the absence of any provision for salary or term of office. These two elements are proper subjects for legislation and are important elements in determining whether or not the office itself has been fully created. Should an appointment be made of a Chief Justice the appointee would either have to be one of the present incumbents in office or an entirely new judge. If one of the present incumbents in office his term would be governed by the law at present defining supreme court judges; if an entirely new appointee his term would be entirely undefined. This shows conclusively that as the term of office would be entirely dependent upon the person chosen for the office that there could not be in contemplation of law at the time when the new Constitution goes into effect such an office and such a vacancy as the Chief Justice of the Supreme Court.

SECOND:—Now as to the second question: This is discussed here only in relation to the Governor; it not being the intention to discuss this question at all in relation to the Court, because that would be improper and entirely outside of the jurisdiction of this department.

In the light of the provisions of Section 142, General Code, this is a very important matter because unless those elected to the supreme bench at the recent election under the provisions of the old Constitution are entitled to take their seats as judges of the supreme court for the term commencing on the first day of January, 1913, there would be three vacancies for the governor of this state to fill.

To determine this requires consideration of the meaning of the first sentence of Section 2, Article IV of the new Constitution, said section being as follows:

> "The supreme court shall until otherwise provided by law consist of the chief justice and six judges, and *the judges now in office* in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign."

It will be kept in mind that Section 2 of Article IV of the new Constitution takes effect on January 1, 1913, and the terms of office of the supreme judges commence on January 1, 1913. As the dates for the commencing of the term of office of the judges and the taking effect of the new Constitution are one it might be said without straining a point that the newly elected judge is in office in the "now" mentioned in the Constitution; but I do not believe we need to rely upon this reasoning. To meet a situation like the present one a liberal construction of both statutes and Constitution is certainly to be applied; a construction that will avoid and not lead to difficulty; a construction based on the common sense of the situation. It is apparent upon reading the provisions of the new Constitution with reference to the judiciary that it is intended to make use of the machinery of the old Constitution and the laws passed in pursuance thereto until the machinery of the new Constitution and the laws to be passed in pursuance thereto is set in mo-

tion in regular order. The law, like nature, abhors a vacuum, and to my mind the expression "judges now in office" as well embraces the judges of the supreme court elected at the recent election under the present Constitution, and who under it in the absence of the new Constitution would take their seats January 1, 1913, as those who are actually now in the bench and whose terms of office will not expire until the new Constitution is in effect. The very fact that no provision is made by the new Constitution for either the election or appointment of judges other than those elected and provided for under the present order of things is the strongest proof that it was intended that the newly elected judges should assume their places on the bench as well as the present ones should continue on the bench. There might be some narrowly logical and purely technical objections to this reasoning, but any other conclusion would seem to me to be only substituting shadow for substance. The people unquestionably elected the supreme judges-elect for a purpose and not in vain, and any interpretation that would deprive the people of their clearly expressed purpose, and these judges of a right that is clearly theirs, would seem to me to be not well founded.

Therefore, in respect to this it is my opinion that the Governor will have no duty to perform and that the rights of the newly elected judges to sit is one which the Court will determine for itself.

THIRD:—Coming now to the third question whether there will be a vacancy in the Court of Appeals warranting appointment by the Governor.

Section 6 of Article IV of the new Constitution provides:

> "The judges of the circuit court now residing in their respective districts shall be the judges of the respective courts of appeals in such districts and perform the duties thereof until the expiration of their respective terms of office. Vacancies caused by the expiration of the terms of office of the judges of the courts of appeals shall be filled by the electors of the respective appellate districts in which such vacancies shall arise."

Section 6 of Article IV of the present Constitution provides:

> "Such (circuit judges) shall be elected at such time and for such terms as may be prescribed by law."

The law by Section 1514, General Code, provides that circuit judges shall be elected "and shall hold his office for six years beginning on the 9th day of February next after his election."

The new amendment provides "The judges of the circuit court now residing (January 1, 1913) in their respective districts shall be the judges of the respective courts of appeals in such district and perform the duties thereof until the expiration of their terms of office."

Many of the circuit judges now in office in Ohio were re-elected on the 5th day of November, 1912. Technically, it might be said that by the language of "judges of the circuit court now residing in their respective districts shall be the judges of the respective courts of appeals in such district and perform the duties thereof until the expiration of their terms of office" would noly permit them to fill out the terms they are serving on January 1, 1913. For instance, the term of one of the judges of the Fourth Judicial Circuit will expire on February 9, 1913, and this same judge was re-elected at the recent election. It might be said that the provisions of the Constitution entitle him to serve only until February 9, 1913, but we think that the same reasoning applies in this case that applies with

reference to the newly elected supreme judges. There is nothing in the expression "until the expiration of their respective *terms* of office" to conflict with this idea. There is nothing contrary to the conclusion that the circuit judges-elect at this time have the right to two fixed terms of office, one ending next February, and one given them by the aforesaid provisions of the Constitution and statutes fixed for the period of six years from the 9th of February "next after his election."

It seems to me that the rule of construction is not too far stretched by holding that the "respective terms of office" referred to in the recent amendment be applied to those two fixed terms which the circuit judges-elect now hold, nor is it necessary to refer to a long line of decisions which provide that in order to meet situations of this character liberal construction should be applied to Statutes and Constitutions.

Section 6 of Article IV provides that "Vacancies caused by the expiration of the terms of office of the judges of the courts of appeals shall be filled by the electors, etc.;" also "Laws may be passed to prescribe the time and mode of such election, etc." Now, therefore, as the vacancies in this particular instance would be caused, if there were such vacancies, by the expiration of the terms of office, and if such vacancies were to be filled by the electors under a form of election not as yet prescribed, it follows that no vacancies are contemplated on account of the expiration of the term of office until the machinery shall have been supplied for the holding of election to fill those vacancies, and as on the 9th of February, 1913, the present judges of the circuit court will be then judges of the court of appeals, and as that date will end the term of such judges of the court of appeals whose terms would expire as circuit judges on that day it is apparent that there will be no vacancies on the 9th day of February, 1913, by reason of the circuit judges-elect not being entitled to sit as judges of the courts of appeals.

The new Constitution further provides that the courts of appeals districts until otherwise provided by law shall be the same as the circuit court districts. It is further provided that the circuit courts shall merge into the courts of appeals this disclosing the intention to use all the machinery, as it were, of the circuit court until all the machinery of the new Constitution of courts of appeals may be put into operation.

For the foregoing reasons I am of the opinion that the Governor will have no duty to perform in respect to the appointment of either Chief Justice or Judges of the Supreme Court, or Judges of the Courts of Appeals under the laws as they now exist and under the present conditions.

It is not intended herein to express an opinion as to what would be the situation in case of action by the Legislature upon any of the above subjects, that question being reserved for investigation should a contingency arise.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the General Assembly)

72.

OFFICES INCOMPATIBLE—HEALTH OFFICER AND MEMBER OF THE GENERAL ASSEMBLY—SALARY—CONSTITUTIONAL PROHIBITION.

Under the inhibitions of Article II, *Section* 4, *of the Constitution of Ohio, a person who accepts the appointment to the position of Health Officer in a Village is non-eligible as a Member of the General Assembly and may be refused his salary as such member.*

COLUMBUS, OHIO, January 25, 1912.

HON. J. V. WINANS, *Member House of Representatives, Madison, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 23, 1912, which is as follows:

> "Chas. Kempel, Clerk of the House of Representatives, writes that 'he (the Attorney General) has also ruled that if any member has accepted any other office * * * * such member shall forfeit his compensation for the year."
>
> "The mayor and council of our village have offered me the Health Officer of our village for the ensuing year. Would an acceptance of the office cause a forfeiture of the 1912 salary as a member of the legislature?"

Section 4404 and 4405 of the General Code are as follows:

Section 4404:

> "The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

Section 4405:

> "If a municipality fails or refuses to establish a board of health or appoint a health officer, the state board of health may appoint a health officer therefor and fix his salary and term of office. Such health officer shall have the same powers and duties as health officers appointed in villages in place of a board of health, and his salary as fixed by the state board of health, and all necessary expenses incurred by him in performing the duties of a board of health shall be paid by and be a valid claim against such municipility."

Section 4 of Article II of the Constitution provides:

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

My opinion is that the office of health officer must be regarded as a lucrative office under the authority of the State of Ohio, and as it does not come under the exceptions provided in said Section 4, the fact that you held such office, should you accept the appointment, would make you non-eligible as a member of the General Assembly. That is you would lose your title to a seat in the General Assembly, and if the payment of salary for the year 1912 to you, as a member of such General Assembly, were resisted, you could not recover the same.

Very truly yours

TIMOTHY S. HOGAN,
Attorney General.

717.

OFFICES INCOMPATIBLE—MEMBER GENERAL ASSEMBLY AND MEMBER OF TOWNSHIP BOARD OF EDUCATION.

Since the office of member of a township board of education is a lucrative office, held under authority of this state, under Article 2, Section 4, of the Constitution, a person holding such office cannot occupy a seat in the General Assembly at the same time, nor can he be elected to the General Assembly whilst holding the former position.

A person so elected, should resign from the board, however, and may hold his seat, pending the raising of the question of his eligibility.

Opinion to Van S. Deaton, M. D., Representative-elect, Alcony, Ohio.

November 20, 1912.

VAN S. DEATON, M. D., *Representative-Elect, Alcony, Ohio.*

DEAR SIR:—Under favor of November 18th, you request my opinion as follows:

> "Will you kindly give me your construction of Section 4, Article 11, of Constitution of Ohio, relating to eligibility of members of Legislature. I am a member of the Board of Education of Elizabeth Township, Miami County, Ohio. Am I a township officer under the provision? I have been elected member of Legislature for coming session."

Article 11, Section 4, of the Constitution is as follows:

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

I am of the opinion that there can be no question that townships and township school districts are independent divisions. The powers of township officers and of members of a township board of education are entirely separate and distinct, with reference to general administrative and taxing functions. There can be no doubt that a member of a township board of education is not a township officer within the meaning of the above constitutional provision.

Indeed, under Section 4723, General Code, which provides for the abolition of joint sub-districts and the annexation of territories actually within another township, the territorial jurisdiction of this office may differ. This principle is made clearer in Section 4712, which provides that the board of education of a township school districts are independent divisions. The powers of township officers and This section clearly evidences a distinction existing in the legislative mind, between members of a township board of education and *township officers.*

Since, therefore, a member of a township board of education is not a township officer, that office cannot be within the exception to Article 11, Section 4, as set out.

The term "eligible" is defined by the Century Dictionary, as follows:

> "1. Fit to be chosen; worthy of choice; desirable.
> "2. Qualified to be chosen; legally qualified for election or appointment."

It is clear, therefore, that since the position of member of township board of education is a lucrative office, held under the authority of this state, you cannot hold such position, and at the same time, occupy a seat in the General Assembly. Furthermore, in view of the above definition of the term "eligible," it is clear that under a technical construction of this constitutional provision, you could not have been elected to that position, whilst holding a position on the board.

Under date of September 30, 1911, however, I rendered an opinion to Mr. M. J. Jenkins, member of the House of Representatives, Plain City, Ohio, in which I held that, although Mr. Jenkins was a member of the board of public affairs of his village, and therefore not eligible to, nor entitled to have a seat in the General Assembly, I advised him, that he might resign as member of the board of trustees of public affairs at once, under the apprehension that no question would be raised about his membership in the General Assembly.

I feel that I can, therefore, adopt the policy of the former opinion, and advise you to resign immediately from your position as member of the board, in the belief that no question will be raised with reference to your eligibility for the General Assembly.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

718.

OFFICES COMPATIBLE—MEMBER GENERAL ASSEMBLY AND MEMBER OF VILLAGE BOARD OF EDUCATION.

Since the office of member of a village board of education is not a lucrative office, a person holding such office is eligible to and may at the same time have a seat in the General Assembly.

Opinion to Chas. A. White, Representative-Elect, Lisbon, Ohio.

November 19, 1912.

MR. CHAS. A. WHITE, *Representative-Elect, Lisbon, Ohio.*

DEAR SIR:—Under favor of November 14th, you wrote as follows:

> "Having been elected one of the State Representatives for Columbiana County at the election held on the 5th inst., I am writing you to know if I can serve as a member of the Board of Education of our village, of which I am at present a member, and also be a member of the Legislature?"

Article 11, Section 4 of the Constitution of Ohio is as follows:

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

I am of the opinion that this provision is not applicable to your case, inasmuch as the statutes do not provide compensation for the office of member of village board of education.

There are no other legal limitations which I can recall, which would prevent you from holding both of these positions. The office of member of village board of education is not a lucrative office, and you may, therefore, retain the same if you are able to perform its duties, while at the same time, occupying a seat in the General Assembly.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Secretary of State)

9.

ARTICLES OF INCORPORATION—RIGHT TO EMPLOY A NAME SIMILAR TO THAT OF AN EXISTING CORPORATION.

The Secretary of State shall not file Articles of Incorporation wherein the corporate name is similar to that of an existing corporation whose Articles have been filed according to law.

COLUMBUS, OHIO, January 6, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

MY DEAR SIR:—I beg to acknowledge receipt of your letter of November 28th, enclosing a copy of letter addressed to you by Mr. Augustus B. Stoughton, and requesting my opinion upon the question presented in Mr. Stoughton's letter.

I have delayed answering your letter for the reason that Mr. Stoughton requested, and was given by me, the privilege of submitting authorities upon the question which he raised.

That question is as follows:

> "May the Secretary of State, lawfully file and record articles of incorporation where in the name of the proposed company is the same as that of a foreign corporation authorized to transact business in Ohio?"

Section 8628, General Code, provides as follows:

> "The secretary of state shall not file or record any articles of incorporation wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes, or if such name is that of an existing corporation, or so similar thereto as to be likely to mislead the public, unless the written consent of the existing corporation signed by its president and secretary, be filed with such articles."

The statute does not provide that the Secretary of State shall not file or record articles of incorporation wherein the corporate name is that of an existing *domestic* corporation, but simply that he shall withhold official action in the premises of the corporate name is similar to that of an existing *corporation.*

Unless, therefore, there is some good reason for holding that the scope of the section is limited to domestic corporations in this particular, the primary meaning of its language, which is applicable as well to foreign as to domestic corporations, ought to be given effect.

This precise question must be answered, in my opinion, by a consideration of the purpose and intent of the entire section above quoted. It seems to me that the purpose of the statute is clearly disclosed by the repeated use of the phrase, "likely to mislead the public." The statute is not one passed primarily for the protection of any class of corporations, but for the protection of the public. The possibility of fraud upon the public is equally as great when a foreign and a domestic corporation having the same name are both engaged in business in the state at the same time as it would be when two domestic corporations having the same name were engaged in business in the state at the same time.

The duty of protecting the public from the possibility of fraud of this

character is cast by the section upon the Secretary of State. That officer has the right to persume that no foreign corporations are or will be engaged in business in the State of Ohio excepting those which have complied with the provisions of the statutes of this State requiring the securing of a certificate of compliance from the Secretary of State as a condition precedent to the doing of business in Ohio.

From all the foregoing, it is my opinion that when proposed articles of incorporation of a domestic corporation are presented to the Secretary of State, it is his duty to examine not only the files and records of domestic corporations, but also those of foreign corporations authorized to transact business in Ohio, for the purpose of ascertaining whether the name proposed to be used by the incorporators of the new company is the same as or similar to a name of an existing corporation of either class; but that when the Secretary has conducted such an examination and has found no corporation having such a name, his duty in the premises is discharged, and he is not obliged to search beyond his own records, or to taken cognizance of any information as to the possession of the name by any corporation other than that disclosed to him by his own files and records.

I deem it proper to say in this connection that while in all other particulars the section under consideration imposes a sound discretion in the Secretary of State, it is otherwise with respect to the class of cases concerning which the present inquiry is made. That is to say, the question being as to whether a given name is likely to mislead the public as to the nature of the business to be transacted by the proposed corporation, the determination of this question rests in the discretion of the Secretary, so, also, when there is mere similarity of name, and the question is as to whether or not such similarity is likely to mislead the public. But when it appears that the name chosen by the incorporators of the proposed company is the same as that of any existing corporation, either domestic or foreign, licensed to do business in the State, the Secretary has no discretion whatever, and it is his mandatory duty to refuse to file or to record the articles of the proposed corporation until the name thereof is changed.

Very truly yours

TIMOTHY S. HOGAN,

Attorney General.

10.

ARTICLES OF INCORPORATION OF THE HOCKING VALLEY BRICK COMPANY—PURPOSE CLAUSE—RIGHT TO PERFORM VARIOUS KINDS OF BUSINESS.

Articles of Incorporation containing a purpose clause disclosing an intention to conduct various kinds of business can be legally filed if the various kinds of business which the corporation proposes to carry on may be lawfully carried on by two or more corporations incorporated under the laws of this State for such kinds of business exclusively.

COLUMBUS, OHIO, January 5, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 18th, enclosing application of the Hocking Valley Brick Company, a corporation organized under the laws of the State of Maine, for a certificate entitling it to transact business in this state. Attached to the application is a sworn copy of the certificate of organization of the corporation under the laws of the State of

Maine. You request my opinion as to the legality of the purpose clause of said certificate of incorporation as bearing upon your duty with respect to the issuance of the certificate as requested in the application.

The purpose clause in question is very lengthy and I shall not burden this opinion with a complete quotation of it. Suffice it to say that it enumerates several unrelated business purposes. Unquestionably, under Section 8623 General Code as interpreted in the case of State ex rel vs. Taylor, 55 O. S., 67, the purpose clause of the certificate of incorporation is one which could not be used to define the powers of a domestic corporation for profit.

The duty of the Secretary of State in the premises, however, is defined by Section 178 of the General Code; the first sentence of that section is as follows:

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

While there is great multiplicity of purposes in the clause under consideration, I am unable to state in my opinion that any one of the various purposes is such a purpose as might not lawfully be carried on by a domestic corporation for profit; or, putting it in another way and in the language of the statute, I am of the opinion that the various kinds of business which the corporation proposes to carry on may be lawfully carried on by two or more corporations incorporated under the laws of this State for such kinds of business exclusively.

I am, therefore, of the opinion that the language of the purpose clause of the certificate of incorporation of The Hocking Valley Brick Company affords no obstacle to issuance by the Secretary of State of the certificate entitling the corporation to do business in the State of Ohio.

Very truly yours

TIMOTHY S. HOGAN,

Attorney General.

26.

CORPORATIONS—CERTIFICATE OF WINDING UP THROUGH BANKRUPTCY—CERTIFICATE OF TAX COMMISSION—DISSOLUTION—REVOCATION OF CHARTER.

A certificate of the winding up of a corporation through bankruptcy proceedings is such a certificate as may not be permitted to be filed by the Secretary of State unless the Tax Commission shall certify that all reports required to be made to it have been filed by the corporation provided in Section 1321 *of the Act of June* 2, 1911, (102, O. L. 254)

Such certificate, however, cannot be accepted by the Secretary of State as in effect a certificate of dissolution or Revocation of the Charter of the Bankrupt Company as is contemplated by Section 11974 *and* 11975 *of the General Code.*

The winding up by proceedings in bankruptcy is in effect a dissolution of the Corporation rather than a revocation of its charter.

COLUMBUS, OHIO, December 25, 1911.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipts of your letter of December 7th transmitting to me a certificate of H. D. Grindle, Referee in Bankruptcy of the District Court of the United States for the Northern District of Ohio, Western Division in the matter of the Anderson Piano Company, Bankrupt, setting forth that a voluntary petition was filed before him the said Referee; that the said Anderson Piano Company be adjudged a bankrupt and that the judgment of the Referee is that the said company be declared and adjudged a bankrupt accordingly. Also a certificate of the said H. D. Grindle discharging the trustee in bankruptcy in the matter of the Anderson Piano Company. You request my opinion upon the following questions:

1. Is a certificate of the winding up of a corporation through bankruptcy proceedings such a certificate as may not be permitted to be filed by the Secretary of State unless the Tax Commission shall certify that all reports required to be made to it have been filed by the corporation in pursuance of law, etc., as provided in Section 1321 of the act of June 2, 1911, 102 O. L. 254 therein designated as Section 5521 General Code?

2. Is the certificate submitted in effect a certificate of dissolution or revocation of the charter of the Anderson Piano Company as contemplated under Section 11974 General Code?

3. Is the winding up by proceedings in assignment or bankruptcy of a corporation, or rather the filing of a certificate thereof in the department of the Secretary of State in effect a dissolution of the company or the revocation of its charter?

Answering your first question I beg to state that the intention of Section 132 of the Act of June 2, 1911 is made clear by the first clause thereof which is as follows:

> "In case of dissolution or revocation of its charter, on the part of a domestic corporation, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify etc."

The word "revocation" makes it clear that the General Assembly did not intend to limit the scope of the section to certificates of voluntary dissolution. This

section applies to all cases of dissolution or retirement excepting to the case of the dissolution or revocation of the charter of a foreign corporation by a court of competent jurisdiction. The failure of the section to comprehend certificates of this sort seems to be accidental as Section 11975 requires a certificate of such action to be filed with the Secretary of State. If the Anderson Piano Company was a domestic corporation for profit then it is a corporation, a certificate of dissolution or revocation of the charter of which may not be filed by the Secretary of State unless the Tax Commission shall certify that all reports due it have been filed by the corporation and all taxes or fees thereon have been paid.

Your second question involves consideration of Section 11974 and 11975 General Code which provide in part as follows:

> "In case of dissolution or revocation of its charter, every domestic corporation shall file with the secretary of state a certificate thereof.* * *"

Section 11975:

> "In case of dissolution or revocation of charter by action of a competent court, *or the winding up* of a corporation either domestic or foreign, by proceedings in assignment or bankruptcy, such certificate shall be signed by the clerk of the court in which such proceedings were had. The fees for making and filing it, shall be taxed as costs in the preceding, be paid out of the corporate funds, and have the same priority as other costs."

It is significant that in Section 11975 the winding up of a corporation by proceedings in assignment or bankruptcy is treated separately from the dissolution or revocation of a charter by action of a competent court. They are clearly not the same thing. The effect of the discharge in bankruptcy is not necessarily the dissolution of the corporation nor, indeed, has the federal court jurisdiction to dissolve a corporation in the State of Ohio by proceedings in bankruptcy. No provision of the bankruptcy law attempts to impose such jurisdiction in the District Courts of the United States, and it has been expressly held wherever the question has been raised that neither an adjudication of nor a discharge in bankruptcy puts an end to the corporate existence. Holland vs. Heyman & Bros., 60 Ga. 174; National Surety Co. vs. Medlock, 58 S. E. (Ga.) 1131, 19 American Bankruptcy Reports 654).

As I have already stated Section 11975 seems to recognize a distinction, and at the same time to recognize that the administration of the assets of a bankrupt or insolvent corporation in all but the most exceptional of cases puts a practical end to the corporation and terminates the enterprise in furtherance of which the corporation was formed.

It is clear to me that a certificate of winding up as described in Section 11975 is to be regarded as in a sense a certificate of dissolution within the meaning of Section 11975. It is at least a certificate which must be filed with the Secretary of State and for which a fee must be paid to the Secretary. This is apparent upon the face of Section 11975.

Upon a careful consideration of the subject but without attempting to indicate or express an opinion as to what procedure ought to be followed in all cases in the federal courts—a matter which would seem to be outside of this department—I beg to state that in my opinion the "winding up" of a corporation, which under Section 11975 is to be certified to the Secretary of State, and evidently to have the effect of a dissolution of the corporation, is virtually a voluntary disso-

lution. That is to say, the court cannot, apparently against the will of the stockholders of the corporation, put an end to the corporate existence in bankruptcy proceedings but because of the express provisions of Section 11975 and the necessary implications flowing therefrom a court having jurisdiction in bankruptcy or insolvency may, with the consent of the stockholders of the bankrupt or insolvent corporation enter a decree declaring the corporation wound up. The certificate spoken of in Section 11975 should show a copy of such a journal entry.

From all the foregoing it follows that a referee in bankruptcy has no power whatever over the corporate existence by consent or otherwise, and for this reason as well as for the reason that neither of the certificates which you hand me are "signed by the clerk of the court in which the proceedings were had"—that is the clerk of the District Court of the United States for the Northern District of Ohio, Western Division—I am of the opinion that neither of the certificates in question complies with Section 11974 and 11975 or can be accepted by you as in effect a certificate of dissolution or revocation of the charter of the Anderson Piano Company.

The answer to your third question is suggested by what I have said in discussing your second question. The winding up by proceedings in assignment or bankruptcy of a corporation when evidenced by a certificate of the kind above described filed in the office of the Secretary of State, is in effect the dissolution of the company rather than a revocation of its charter. The difference, however is academic inasmuch as the law treats the winding up, the revocation and the dissolution alike for the purposes of record in the office of the Secretary of State. It must not be forgotten, however, that the certificate which the secretary is authorized to accept as a "certificate of dissolution" must be that of the clerk of the District Court of the United States, showing a judgment entry or decree, not only discharging the corporation as a bankrupt but also by consent winding up the existence of the corporation itself.

Very truly yours
TIMOTHY S. HOGAN,
Attorney General.

63.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE OF THE TRINITY MUTUAL FIRE INSURANCE ASSOCIATION—MUTUAL PROTECTIVE ASSOCIATIONS—NON-COMPLIANCE WITH STATUTORY REQUIREMENTS.

Not complying with the provisions of Section 9594, *General Code.*

The purpose clause of the Articles of Incorporation of the Trinity Mutual Fire Insurance Association is defective.

COLUMBUS, OHIO, January 20, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return herewith the proposed articles of incorporation of THE THINITY MUTUAL FIRE INSURANCE ASSOCIATION, unapproved by me. The purpose clause of said articles of incorporation is as follows:

> "Said corporation is formed for the purpose of assisting its members and protecting them against loss to buildings and personal property by fire."

This clause seems to evince an intention to engage in the business of a mutual protective association, as defined in Section 9593, General Code. Section 9594, General Code requires the articles of incorporation of such an association to define specifically one or more of the purposes enumerated in Section 9593, and to provide that the association shall enforce any contract entered into by its members whereby the parties thereto agree to be assessed specifically for incidental purposes and for the payment of losses. Measured by the requirements of these two sections, the purpose clause of THE TRINITY MUTUAL FIRE INSURANCE ASSOCIATION is defective.

Very truly yours
TIMOTHY S. HOGAN,
Attorney General.

64.

ARTICLES OF INCORPORATION—PURPOSE CLAUS—THE MUTUAL MOTOR VEHICLE INSURANCE ASSOCIATION—AMBIGUITY AND DEFICIENCY.

COLUMBUS, OHIO, January 20, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return herewith the proposed articles of incorporation of THE MUTUAL MOTOR VEHICLE INSURANCE ASSOCIATION, unapproved by me, for the reason that the language of the purpose clause is ambiguous as to the kinds of losses proposed to be insured against and the property to be insured, and for the further reason that the articles do not state that the property to be insured shall be in this state, as required by Section 9593, General Code. In other respects, the purpose clause, while somewhat roughly drawn, is in compliance with the statutes.

Very truly yours
TIMOTHY S. HOGAN,
Attorney General.

67.

ARTICLES OF INCORPORATION OF THE REFORM MEDICAL INSTITUTE—PROFESSIONAL BUSINESS—"SANITORIUM"—CONSTITUTIONAL RESTRICTIONS.

Articles of Incorporation disclosing the purpose of conducting a "Sanitorium" where medical services can be contracted for, shall not be filed.

If it is the intention of the Incorporators to conduct a "Sanitorium" in the statutory sense of the term i. e. a place where patients are to be received and cared for, such a business might be conducted if the purpose was clearly expressed.

If, on the other hand, the intention was that of arranging for medical and surgical treatment to all persons in general, such business could not be conducted.

COLUMBUS, OHIO, January 10, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 5th, enclosing the proposed articles of incorporation of THE REFORM MEDICAL IN-

STITUTE, and requesting my opinion as to the legality of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of conducting an Institute and Sanatorium where medical service and attention can be contracted for by said corporation in behalf of patrons and patients applying for medical, surgical and hygenic treatment; said corporation furnishing under lawful contract the necessary medical services, aid, treatment and assistance; such medical services to be guaranteed and furnished through this corporation to people of humble means and others who may apply to said corporation for aid and assistance in having such service furnished under the supervision of this corporation; this corporation, however, not engaging professionally by itself in the art and science of healing but furnishing on demand and on contract the professional services and experience of medical practitioners, duly authorized by law to engage in their respective professions, such aid, treatment, assistance and advice as may be desired by the patrons of said corporation and its lawful business subscribers, agreeing to remunerate it under lawful contract."

Sections 8623 and 8624 of the General Code provide as follows:

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

> "Section 8624. Corporations for the erection, owing and conducting of sanatoriums for receiving and caring for patients, their medical, surgical and hygenic treatment, and the instruction of nurses in the treatment of diseases and of hygiene, are not forbidden by the next preceding section."

The exception of Section 8624 to the general rule announced in Section 8623 with respect to a carrying on of a professional business by a corporation should, in my judgment, be strictly construed. It is those corporations and those only described in Section 8624 of the General Code which are authorized to be formed for the purpose of carrying on a professional business as defined by the several decisions of the Supreme Court relating thereto.

In my opinion, Section 8624 does not relate to several different kinds of corporations, but to one kind of corporation only, namely, those corporations engaged in the conduct of sanatoriums.

The meaning of the word "sanatorium" as used in this connection is well understood. The term is defined by the Century Dictionary as follows:

> "1. A place to which people go for the sake of health; * * * * also a house, hotel, or medical institution * * designed to accommodate invalids * * *.
>
> "2. A hospital * * * *."

Thus, it appears that a sanatorium is in every sense of the word a place where patients are received and cared for. The name could not properly be applied to a mere office where persons desiring medical attention may come to enter into contracts entitling them to the services of medical men. The phrase, "their medical,

surgical and hygienic treatment" as used in the statute refers to the word "patient" immediately preceding, and must be read in connection with what goes before it. Therefore Section 8624 does not authorize the formation of corporations for the purpose of the medical, surgical and hygenic treatment of *any* patients, but does authorize a corporation engaged in the business of conducting a sanatorium to provide the medical, surgical and hygenic treatment of the patients to be received and cared for therein.

While the language of the above quoted purpose clause is not exactly clear, it seems to authorize the proposed corporation to conduct a place—under the name of "Institute and Sanatorium" *where medical services can be contracted for.* It does not seem to be the intention of the incorporators that the company shall receive and care for patients, but merely enter into contracts with them for medical services. If it be the intention of the incorporators to conduct such a place of business without conducting a place where patients are to be received and cared for, as at a hospital, then, in my opinion, such intention cannot lawfully be carried into effect. If, on the other hand, it is the intention of the incorporators to conduct a sanatorium, in the exact sense of the word as used in the statutes, then they have used inappropriate language to express that intention.

For the above reasons I beg to advise that you do not file or record the articles of incorporation of THE REFORM MEDICAL INSTITUTE.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

68.

ARTICLES OF INCORPORATION—NAME, IDENTICAL WITH THAT OF FOREIGN CORPORATION—CANNOT BE FILED.

The Secretary of State is vested with a controlling discretion in the matter of whether or not a corporate name is such as will mislead the Public as to the purpose or the nature of business etc.

In cases, however, where it appears that the name is the same as that of any existing corporation, either domestic or foreign, licensed to do business in the State, the Secretary has no discretion and must refuse to file the Articles.

COLUMBUS, OHIO, January 6, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

MY DEAR SIR:—I beg to acknowledge receipt of your letter of November 28th, enclosing a copy of letter addressed to you by Mr. Augustus B. Stoughton, and requesting my opinion upon the question presented in Mr. Stroughton's letter.

I have delayed answering your letter for the reason that Mr. Stoughton requested, and was given by me, the privilege of submitting authorities upon the question which he raised.

That question is as follows:

> "May the Secretary of State lawfully file and record articles of incorporation wherein the name of the proposed company is the same as that of a foreign corporation authorized to transact business in Ohio?"

Section 8628, General Code, provides as follows:

> "The secretary of state shall not file or record any articles of incorporation wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes, or if such name is that of an existing corporation, or so similar thereto as to be likely to mislead the public, unless the written consent of the existing corporation signed by its president and secretary, be filed with such articles."

The statute does not provide that the Secretary of State shall not file or record articles of incorporation wherein the corporate name is that of an existing *domestic* corporation, but simply that he shall withhold official action in the premises if the corporate name is similar to that of an existing *corporation*.

Unless, therefore, there is some good reason for holding that the scope of the section is limited to domestic corporations in this particular, the primary meaning of its language, which is applicable as well to foreign as to domestic corporations, ought to be given effect.

This precise question must be answered, in my opinion, by a consideration of the purpose and intent of the entire section above quoted. It seems to me that the purpose of the statute is clearly disclosed by the repeated use of the phrase, "likely to mislead the public." The statute is not one passed primarily for the protection of any class of corporations but for the protection of the public. The possibility of fraud upon the public is equally as great when a foreign and a domestic corporation having the same name are both engaged in business in the state at the same time as it would be when two domestic corporations having the same name were engaged in business in the state at the same time.

The duty of protecting the public from the possibility of fraud of this character is cast by the sections upon the Secretary of State. That officer has the right to presume that no foreign corporations are or will be engaged in business in the State of Ohio excepting those which have complied with the provisions of the statutes of this State requiring the securing of a certificate of compliance from the Secretary of State as a condition precedent to the doing of business in Ohio.

From all the foregoing, it is my opinion that when proposed articles of incorporation of a domestic corporation are presented to the Secretary of State, it is his duty to examine not only the files and records of domestic corporations, but also those of foreign corporations authorized to transact business in Ohio, for the purpose of ascertaining whether the name proposed to be used by the incorporators of the new company is the same as or similar to a name of an existing corporation of either class; but that when the Secretary has conducted such an examination and has found no corporation having such a name, his duty in the premises is discharged, and he is not obliged to search beyond his own records, or to take cognizance of any information as to the possession of the name by any corporation other than that disclosed to him by his own files and records.

I deem it proper to say in this connection that while in all other particulars the section under consideration imposes a sound discretion in the Secretary of State, it is otherwise with respect to the class of cases concerning which the present inquiry is made. That is to say, the question being as to whether a given name is likely to mislead the public as to the nature of the business to be transacted by the proposed corporation, the determination of this question rests in the discretion of the Secretary, so, also, when there is mere similarity of names, and the question is as to whether or not such similarity is likely to mislead the public. But when it appears that the name chosen by the incorporators of the proposed company is the same as that of any existing corporation, either domestic or foreign, licensed to do business in the state, the Secretary has no discretion whatever, and

it is his mandatory duty to refuse to file or to record the articles of the proposed corporation until the name thereof is changed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

73.

CORPORATIONS—ARTICLES OF INCORPORATION OF THE BURIAL INSURANCE COMPANY—LEGAL RESERVE LIFE COMPANIES—INCREASE OF CAPITAL STOCK—INCREASE OF NUMBER AND DECREASE OF PAR VALUE OF SHARES—CERTIFICATES OF AMENDMENT—AMENDMENT OF ARTICLES OF INCORPORATION.

The certificate of Amendment to the Articles of Incorporation of the Ohio Burial Insurance Company should be filed, as it complies with the General provisions for such certificates which all Insurance Companies may avail themselves of.

The par value and the number of shares of capital stock is not required to be set forth in the charter of the Legal Reserve Life Company. These facts may be set out however, as among the "such other particulars as are necessary to explain and make manifest the objects and purposes of the Company and the manner in which it is to be conducted" as provided in Section 9340, *General Code.*

Section 9345 *is exclusive and its provision for the increase of capital stock of Legal Reserve Life Ins. Companies by certificate of Amendment represents the only possible procedure for such action.*

Such Companies are not authorized by either general or special provisions to increase the number of shares or to reduce the par value of each share by certificate.

Among the general amendment statutes however, Section 8719 *General Code provides a means by which such results may be accomplished, that is, by amendment to the articles of incorporation.*

COLUMBUS, OHIO, January 23, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 5th, submitting to me for my opinion thereon, the proposed certificate of amendment of the articles of incorporation of "THE OHIO BURIAL INSURANCE COMPANY;" also a certificate of the increase of the capital stock and of the number of shares thereof of the same company; and of your further letter in the same matter advising me of the kind of business which this company is authorized by its charter to carry on.

The certificate of amendment is to the effect, in short, that the name of the company be changed, and shows complete compliance with the laws of this state respecting the manner in which general corporations may adopt amendments to their articles of incorporation. In my opinion, this certificate may be accepted and filed by you, as all insurance companies have the right, in my judgment, to avail themselves of the general provisions of the law respecting amendments to articles of incorporation. The fee to be charged by you for filing this certificate is the same as that to be charged for filing any other certificate of amendment.

The other certificate is perhaps sufficiently described above. It seeks to increase the authorized capital stock of the company from one hundred thousand

dollars to five hundred thousand dollars and to reduce the par value of each share from twenty-five dollars to one dollar and to increase the number of shares from four thousand to five hundred thousand, so that the capital stock of the company shall hereafter consist of five hundred thousand dollars, divided into five hundred thousand shares of one dollar each. This certificate shows compliance with the provisions of Section 8698 and those of Section 8700, which prescribe the procedure whereby an ordinary corporation may increase the authorized capital stock and the number of shares into which the same is divided, and may reduce the par value of the shares of stock respectively.

Your letter of January 11th, which sets forth the purpose clause of the articles of incorporation of "THE OHIO BURIAL INSURANCE COMPANY," shows the company was organized as a legal reserve life insurance company, under Section 9340, General Code. That section provides in full as follows:

> "Such persons shall file in the office of the secretary of state articles of incorporation, signed by them, setting forth their intention to form a company for the purposes named in this chapter, which articles shall comprise a copy of the charter they propose to adopt. The charter shall set forth the name of the company, which shall not be the corporate name or title used to designate any fire, life, marine, or other insurance company existing under the laws of this state, the place where it is to be located, the kind of business to be undertaken, the manner in which its corporate powers are to be exercised, the number of directors or trustees, the manner of electing them and other officers, a majority of whom shall be citizens of this state, the time of such election, the manner of filling vacancies, the amount of capital to be employed and such other particulars as are necessary to explain and make manifest the objects and purposes of the company, and the manner in which it is to be conducted. Such directors and trustees must be stockholders or members, and the number thereof may be increased at the will of the stockholders representing a majority of the stock, or of a majority of the members, to not more than twenty-one."

This striking fact is to be noted in connection with the provisions of this section: The par value and number of shares of capital stock is not required to be set forth in the charter of the company. In this respect, articles of incorporation filed under this section are different from those of any other class of corporations which I can, at the present time, call to mind. In fact, this section is the only section which provides in complete detail for the formation of a corporation for profit by a method different from that by which ordinary corporations are to be organized.

The failure of the general assembly to provide that the charter of a legal reserve life insurance company should set forth the number of shares and the par value of each share of stock of the proposed corporation does not seem to be accidental. In Section 9342, General Code, which prescribes the duties of the incorporators of such a company, it is provided that, upon the closing of the books for subscription to the capital stock thereof, they shall

> "Distribute the stock among the subscribers, if more than the necessary amount is subscribed."

If the incorporators were bound to allot to each subscriber a definite number of shares having a certain par value each, this provision can not be effective.

I am, therefore of the opinion that it is at least not required that the charter of a legal reserve life insurance company state the par value and the number of shares of capital stock thereof. I have ascertained by examining the records of your office that the articles of incorporation of "THE OHIO BURIAL INSURANCE COMPANY" do contain a statement of this sort. Such statement is not improper. Section 9340, above quoted, provides that the charter shall set forth, among other things,

> "Such other particulars as are necessary to explain and make manifest the objects and purposes of the company and the manner in which it is to be conducted."

Therefore, the recital in the articles of incorporation of this company as to the par value and the number of shares of its capital stock is to be regarded as properly a part of its charter. It is not, however, to be regarded as a part of the provision regarding the

> "amount of capital to be employed."

Section 9345, General Code, authorizes a legal reserve life insurance company to increase the amount of its capital stock in the manner therein provided. I have heretofore advised you in other opinions that this statute is to be regarded as exclusive and that its effect is to deny to legal reserve life insurance companies the benefits of Section 8698 to 8700, inclusive, General Code, applicable to ordinary corporations, and providing for changes in the capital stock thereof. Accordingly, in my judgment, a legal reserve life insurance company is not authorized to use the procedure outlined in this section for the accomplishment of any result not there in contemplated. Said Section 9345 provides in full as follows:

> "When in the opinion of the board of directors thereof, a company organized under any law of this state, requires a larger amount of capital than that fixed by its articles of incorporation, if authorized by the holders of two-thirds of the stock, they shall file with the secretary of state a certificate setting forth the amount of the desired increase, and thereafter the company shall be entitled to have the increased amount of capital fixed by the certificate, which shall be invested as required by the preceding two sections."

It will be observed that the section does not authorize an increase in the number of shares in which the capital stock is divided, nor does it authorize a reduction in the par value of each share.

Because of the fact that stipulations regarding the par value and the number of shares of capital stock of legal reserve life insurance companies are not to be regarded as illegal when found in the charter of such companies, but are to be regarded as properly a part of the articles of incorporation, I have come to the conclusion that while changes in the par value and in the number of shares may not be made either under Section 9345, General Code, or under Sections 8698 to 8700, inclusive, General Code, they may be made by amendment to the articles of incorporation. I have already stated my opinion that the provisions of the general amendment statutes are available in proper cases to insurance companies. The fourth paragraph of Section 8719, General Code, provides that amendments may be made

> "So as to add to the articles of incorporation anything omitted from, or which lawfully might have been provided for originally, in such

articles. But the capital stock of a corporation shall not be increased or diminished by such amendment, * * * ."

Paragraph 3 of the same section authorizes amendments to be made:

"So as to modify * * * the objects or purposes for which it was formed."

While the question is not free from doubt, I am of the opinion that this section authorizes a life insurance company to change, in unessential particulars, any recital of the charter of the company not made therein as a part of the recital respecting the amount of capital to be employed.

I am, therefore, of the opinion that you may lawfully receive and file the certificate "increase of capital stock" of THE OHIO BURIAL INSURANCE COMPANY, as an increase in the total authorized capital stock. The remaining part of the certificate is to be regarded as mere surplusage and does not confer upon the corporation power to change the par value of its shares or the number thereof. This must be done by amendment.

My opinion in this case must not be confused with that of The Republic Accident Insurance Company. That corporation was organized under Section 9510, General Code, and accordingly none of the reasoning above expressed applies to it.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

79.

AMENDMENT OF THE ARTICLES OF INCORPORATION OF THE EAST UNION FIRE INSURANCE ASSOCIATION.

Resolution is legal and may be filed.

COLUMBUS, OHIO, January 24, 1912.

HON. CHARLES H .GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Acknowledging receipt of your letter of January 15th, and its enclosures, I beg to state that in my opinion the resolution of the EAST UNION FIRE INSURANCE ASSOCIATION, amending its articles of incorporation (which said resolution is enclosed in your letter) is in all respects legal and may be filed and recorded by you as an amendment to the articles of incorporation of the said association.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

89.

CERTIFICATE OF REDUCTION OF STOCK OF THE BANKERS SURETY COMPANY—ILLEGALITY—INSURANCE COMPANY OTHER THAN LIFE.

An Insurance Company other than Life organized under Section 9510, *General Code, is wholly without authority to reduce the amount of its authorized capital stock.*

COLUMBUS, OHIO, January 30, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Acknowledging receipt of your letter of January 23d, in which you enclose proposed certificate of reduction of the capital stock of THE BANKERS SURETY COMPANY and request my opinion as to whether it is the duty of the Secretary of State to file and record such certificate, I beg to state, in my opinion, it is not the duty of the Secretary of State so to do. Assuming from the name of this company that it is an insurance company, other than life, organized under Section 9510, General Code, it follows at once that in accordance with opinions previously rendered by me to your department the company is wholly without authority to reduce the amount of its authorized capital stock.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

126.

COLLECTION OF FEE FOR COMMISSION OF COMMISSIONER OF STATE OF OHIO—DUTY OF GOVERNOR'S OFFICE.

The statutory duty of collecting the fee of three dollars for the commission of a Commissioner of the State of Ohio provided for by Section 137, *General Code, rests upon the office of the Governor and not upon the Secretary of State.*

COLUMBUS, OHIO, February 8, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of December 12, 1911, in which you inquire as follows:

> "Please submit an opinion in writing to this Department on the question as to whether it is the duty of the Secretary of State to collect the fee of $3.00 for a commission of a commissioner of the State of Ohio, provided for in Section 137 of the General Code of Ohio."

Section 137, General Code, provides as follows:

> "There shall be paid by each person receiving a commission as notary public, a fee of one dollar; and by each person receiving a commission as commissioner of the state of Ohio, a fee of three dollars."

Section 138, General Code, provides for the issuance of commissions to

judges of courts of record, state and county officers, militia and justices of the peace, by the governor.

Section 139, General Code, provides that each of the officers named in Section 138 shall pay a fee to the secretary of state for the making, recording and forwarding of their commissions.

Section 132, General Code, provides for the appointment by the governor of commissioners of the state of Ohio. Section 132 et seq provide for their duties; and Section 137, above quoted, provides the fee to be paid for their commissions.

Sections 138 and 139, General Code, were formerly part of Section 83, Revised Statutes. Section 137, General Code, was formerly Section 126, Revised Statutes. Sections 138 and 139, General Code, formerly Section 83, Revised Statutes, especially provided that the Secretary of State should receive a fee of five dollars for the making out, recording and forwarding of all commissions of the offices enumerated in said section, commissions for the commissioners of the State of Ohio not being mentioned therein. Section 132, General Code, formerly Section 124, Revised Statutes, provided for the appointment of commissioners of the State of Ohio. Section 126, Revised Statutes, required a fee of one dollar to be paid by each person receiving a commission as notary, but by each person receiving a commission as commissioner of the State of Ohio, a fee of three dollars; and the statute was silent as to whom fees were to be paid.

Section 1288, Revised Statutes, repealed by implication by the enactment of Section 1284d, Revised Statutes, now Section 2249, General Code, provided that the Secretary of the Governor should be entitled to all fees paid into the office of the governor; and prior to the enactment of Section 1284b and 1284d, Revised Statutes, providing the salary for the secretary to the governor, the fees provided by Section 126, Revised Statutes, now Section 137, General Code, were paid to the governor's office and went to the secretary to the governor as perquisities of his office. While Section 160, General Code, makes it the duty of the secretary of state to keep a register of commissions issued, specific name of each person commissioned, office conferred, date and term of commission, except those of notaries public, yet, the secretary of state is only authorized by statute to accept only such fees for commissions as are enumerated in Section 139, General Code. While it is unimportant as to whose duty it is to collect the three dollars for the commission of a commissioner of state, it being a mere question of bookkeeping, both the governor and the secretary of state being required to turn over the fee to the treasurer of state, and account therefor; and since it has been the custom to pay such fees to the governor's office, I believe, under Section 126, Revised Statutes, now Section 137, General Code, it is the statutory duty of the Governor's office to collect such fee. I therefore hold that it is not the duty of the secretary of state to collect the fee of three dollars for the commission of a commissioner of the State of Ohio, provided by Section 137, General Code; but that such duty rests with the office of the Governor of Ohio.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

143.

ARTICLES OF INCORPORATION—CORPORATIONS "NOT FOR PROFIT" —WOMAN'S BUILDING AND REST ROOM ASSOCIATION—NO PECUNIARY GAIN TO MEMBERS—TWO DOLLAR FEE OF SECRETARY OF STATE FOR FILING.

Inasmuch as the Articles of Incorporation of the "Women's Building and Rest Room Association" expressly provided that the members of the proposed corporation shall receive no pecuniary gain therefrom and that all accumulations shall be devoted to the specific charitable aims of the corporation, its Articles may be filed by the Secretary of State who shall be entitled to a fee of two dollars for filing the same.

COLUMBUS, OHIO, February 14, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 3d, enclosing the proposed articles of incorporation of the WOMEN'S BUILDING AND REST ROOM ASSOCIATION, and requesting my opinion as to the legality thereof. You also ask me to state the legal distinction between corporations for profit, and those not for profit, and in case the particular articles submitted are in proper form, what is the proper fee to be exacted by the Secretary of State for filing and recording same.

The purpose clause of the articles of incorporation is as follows:

> "The purpose for which said corporation is formed is to establish and maintain rooms for the use, entertainment and instruction of girls and women and their clubs, societies and organizations, and for social functions and amusements; to employ teachers and instruct classes of girls and women in cookery, domestic science, sewing, dress-making, manual training, physical culture, arts and crafts; to prepare and serve to the public for pay, refreshments, lunches, meals and banquets, as a means of raising revenue for said purposes; and by lease, purchase or otherwise, to acquire and hold title to real estate, and erect, lease, purchase or otherwise acquire, and maintain, buildings suitable for said purposes, and furnish them with proper and suitable kitchen, diningroom and parlor furniture, fixtures, fittings and decorations; to receive, accept and apply to said purposes any endowments, gifts, donations, devises and bequests that may be made to said corporation; to dispose of any surplus fund that may thus accumulate, to such charitable and benevolent objects as said corporation, by vote of its members, may from time to time designate as beneficiaries thereof; *but said fund shall not, nor shall any part thereof, be distributed as profits to the members of said corporation, or to any of them;* and, pending final disposition thereof, to loan its funds at interest, upon real estate or other securities; and to do and perform any and all lawful acts and things in furtherance of the aforesaid purposes."

The corporation is designated as one "not for profit." Lexicographers define two meanings of the word "profit": (1) the original or primary meaning of the word in which sense it denotes any advantage or accession of good; (2) the derivative or commercial use of the word, in which sense it denotes "the advantage

or gain resulting to the owner of capital from its employment in any undertaking; * * * acquisition beyond expenditure; pecuniary gain in any action or occupation; * * *." (Century Dictionary.)

I think it is obvious that in the statute pertaining to corporations the word "profit" is used in its derivative or commercial sense. Obviously it could not have been used in its original sense, for it is to be presumed that persons would not go to the trouble of incorporating companies unless some good or advantage were expected to accrue from their action.

The distinction between the two classes of corporations is recognized by the laws of many states. Those of other states, however, use in many instances the term "pecuniary profit" instead of simply "profit." In my opinion, however, the two terms are synonomous.

Whose pecuniary profit, then, is it, for the purpose of securing which a corporation of that class is to be formed? Does the reaping, or intended reaping, of a profit by the corporation for the accomplishment or purpose of the incorporation constitute the company one "for profit" of itself? Clearly not. No enterprise is capable of successful accomplishment without the use of money. The most familiar instance of a corporation for profit,—a church—has current expenses to meet, and for this purpose collects revenues from its members. So, also, an educational institution may charge tuition and may thus be able at the end of a year to show a balance in its favor, without altering the essential character of the corporation.

The test, in my opinion, is found in the right, in expectancy, of the members or stockholders of the corporation. If, under the charter or articles of incorporation, such members or stockholders are to have the right to participate individually in the pecuniary profits derived from the use of the funds or other assets of the corporation itself, the latter is organized "for profit." If, however, the corporation itself, while to be conducted in such a way as, if possible, to secure accretions to the fund which constitutes its capital, is to devote such accretions otherwise than to the pecuniary advantage of the members or stockholders, then the corporation is one "not for profit." In other words, if the profits *of the corporation* are to be distributed among the members or stockholders by way of dividends or otherwise, then the corporation is for profit; if, on the other hand, there are to be no dividends and no distribution of the surplus profits of the corporation while it remains a going concern, then the corporation is one "not for profit," especially when such surplus profits are by the express terms of the charter to be distributed to some charitable or eleemosynary object or end.

The exact question has never arisen in Ohio, and seldom under the laws of any other state. Authority for the foregoing distinction, however is found in the case of Saint Clara Female Academy vs. Sullivan, 116 Ill., 375. In this case it was held that an incorporated academy which declares no dividends and pays no money to its members, but is conducted solely for educational and charitable purposes, is not a corporation for "pecuniary profit" although it may charge fees for tution. (See Snyder vs. Chamber of Commerce, 53 O. S., 1-11; State ex rel, vs. Home Co-operative Union, 63 O. S., 547.

Applying these principles to the articles of incorporation now under consideration, it is clear, I think, that the incorporators of the WOMEN'S BUILDING AND REST ROOM ASSOCIATION have properly characterized the same as a corporation "not for profit." It is expressly provided, in the purpose clause of these articles, that any surplus fund that may be accumulated shall never be disturbed as profits to the members of the corporation or to any of them and that the revenues to be derived from the ordinary activities of the corporation are to be devoted to the furtherance of the principal purposes thereof, which are "to establish and maintain rooms for the use, entertainment and instruction of girls and women,

and their clubs, societies and organizations, and for social functions and amusements; to employ teachers and instruct classes of girls and women in cookery, etc."

Nowhere in the articles of incorporation is authority sought for the conduct of a business which will be productive of dividends or profits to the *members* of the corporation, in the pecuniary sense. Accordingly, on the principles, above stated, it is my opinion that you may lawfully receive and file the said articles of incorporation, inasmuch, further, as the subsidiary purposes of the association are all ancillary, in my judgment, to the principal purpose thereof, which is single.

With respect to the fee to be charged, this corporation differs in no particular from other corporations not for profit. The Secretary of State is authorized to charge and collect the sum of two dollars for filing and recording these articles of incorporation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

149.

ARTICLES OF INCORPORATION OF THE REFORM MEDICAL INSTITUTE AND AID COMPANY—PURPOSE CLAUSE—CORPORATION CONDUCTING PROFESSIONAL BUSINESS THROUGH AGENTS.

A purpose clause which discloses the object of providing medical services for its subscribers, in reality would effect a corporation formed for the purpose of conducting a professional business carried on through the medium of professional Agents.

COLUMBUS, OHIO, February 23, 1912.

HON. CHAS. H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 12th, enclosing the proposed Articles of Incorporation of The Reform Medical Institute and Aid Company, requesting my opinion as to the legality of the purpose clause thereof, which is as follows:

> "The purpose for which said corporation is formed is to engage in the business of contracting with applicants and subscribers at regular rates, to furnish them, the said subscribers, with the services of regularly admitted practicing physicians, to be paid as to their services by this company, who will hire such physicians as its servants for the use and benefit of its subscribers. And further to assist the poor, the improvident in maintaining such service for their benefit by reason of moderate subscription fees under their control to enable them to be taken care of in illness; this corporation by itself, however, not engaging in the practice of medicine or in any profession, being simply a purely business corporation to contract with its subscribers for the furnishing of medical services of physicians to them the said subscribers."

In the case of State, ex rel, Physicians' Defense Company, vs. Laylin, 73 O. S. 90, the Supreme Court of this state placed a construction upon the implied prohibition, found in Section 8623, General Code, upon the formation of corporations

for the purpose of conducting a professional business. The court had before it the articles of incorporation of the plaintiff company (a foreign corporation) the purpose clause of which was as follows:

> "To aid and protect the medical profession in the practice of medicine and surgery by the defense of physicians and surgeons against civil prosecutions for malpractice."

and the proposed plan of conducting its business, as stated in its charter, which was in part as follows:

> "The association shall issue to physicians and surgeons, for stated and agreed compensation, contracts by which it will undertake and agree to defend the holder of the contract at its own expense against any action brought against him for damages for alleged malpractice * * * ."

Analyzing this clause and the proposed plan of business the court held, first (page 99) that "the plaintiff company is not on insurance company, nor the contract it issues an insurance contract."

This conclusion led the court to the following question, also stated on page 99 of the opinion: "Is the business in which the Physicians' Defense Company proposes to engage, if admitted to this state, professional business?" This question, the court answered in the affirmative, upon reasoning, of which the following quotation is fully illustrative:

> "The services necessary to be rendered by the company in the carrying out and performance of its said contract, being such, as in this state, may only be performed by a member of the legal profession, an attorney at law, who shall have been first duly authorized and licensed to perform the same, are professional services, and a business which in its conduct or transaction, requires and permits only that character of service, is essentially and certainly, a professional business. But it is said by counsel for plaintiff in error, that The Physicians' Defense Company, being a corporation, and impersonal entity, cannot and does not itself, engage in the practice of law * * * but in what it does, or obligates itself to do, it undertakes only 'to act as the agent of the contract holder in retaining legal counsel and in managing and maintaining the defense of the suit.' How else, we may ask, could the corporation, being an impersonal entity, discharge its contractual obligation, other than by the employment of natural persons as its authorized agents to carry out and perform its said contract.
>
> "The agents to be employed, are and must be, attorneys at law, and by the express terms of its contract they are to be employed and paid by the corporation. While, therefore, the services rendered by the persons thus employed are rendered to, and in defense of, the contract holder, they nevertheless are rendered for, and in legal contemplation are performed by, the corporation itself. If this be not the engaging in or carrying on of professional business, then it would be difficult to conceive how professional business could be engaged in or carried on by a corporation. We are of the opinion that the business proposed is professional business, and may not therefore be transacted or carried on by a corporation in the state of Ohio * * * *."

The reasoning of the Supreme Court, as above quoted, applies aptly to the purpose clause of The Reform Medical Institute and Aid Company. It is frankly stated therein that the company is to employ physicians as its servants and to furnish their services to its contract holders. This being the case, it is vain for the incorporators to disclaim that the corporation itself is not to engage in the practice of medicine, or of any profession. It is, of course, indisputable that the practice of medicine constitutes a profession within the meaning of that word, and its derivative, as used in Section 8623, General Code.

I am, therefore, of the opinion that the business proposed to be conducted by those who seek to incorporate The Reform Medical Institute and Aid Company is professional in its nature, and that, therefore, the articles of incorporation presented to you, and which are returned herewith, cannot lawfully be filed.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

151.

ARTICLES OF INCORPORATION OF THE CENTRAL STORAGE COMPANY—PURPOSE CLAUSE—MULTIFARIOUS BUSINESS—STATEMENT OF POWER TO ACQUIRE STOCK OF KINDRED AND NON-COMPETING COMPANIES.

Inasmuch as all corporations in Ohio have the power to acquire stock in kindred but non-competing companies and as the setting out of such clause seems to authorize the dealing in stocks as an independent object, the power should not be set out in articles of incorporation.

A statement of a purpose "to do any and all other acts and things and to exercise any and all other powers which a co-partnership or natural person could do and exercise" is objectionable in that it seems to authorize a multifarious business.

COLUMBUS, OHIO, February 23, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 12th, submitting for my consideration and opinion thereon the proposed Articles of Incorporation of The Central Storage Company. The purpose clause of these articles is as follows:

> "Said corporation is formed for the purpose of establishing and maintaining one or more warehouses for the storage of all kinds of property, obtaining insurance on the same and making advances when for the interest of the company, and purchasing and dealing in same if necessary to protect the company from loss, and also leasing lands or other premises to obtain storage for property which cannot be conveniently stored in the building; and said company will also issue negotiable warehouse receipts for any property in its possession or under its control. To acquire by purchase, exchange or otherwise and to hold and dispose of only such real estate as may be necessary and incidental to the conduct of the storage business. To acquire by purchase, exchange, subscription or otherwise and to hold and dispose of stocks, bonds or any other obligations, in other kindred but not competing private corporation, either domestic or foreign, but this shall not authorize the formation of any trust

> or combination for the purpose of restricting trade or competition. To hold for investment or otherwise, to use, sell or dispose of any stock, bonds, or other obligations of any such other corporations; to aid in any manner any corporation whose stocks, bonds or other obligations are held or are in any manner guaranteed by the company, and to do any other acts or things for the preservation, protection, improvement or enhancement of the value of any such stocks bonds or other obligations, or to do any acts or things designed for any such purpose; and while owner of any such stocks, bonds or other obligations to exercise all the rights, powers and privileges of ownership thereof, and to exercise any and all voting powers thereon. Without in any particular limiting any of the objects and powers of the corporation it is hereby expressly declared and provided that the corporation shall have power to issue bonds, stocks and other obligations in payment of real estate or personal property purchased or acquired by it, or for any other object in or about its business; to mortgage or pledge any stocks, bonds or other obligations, or any real or other property which may be acquired by it, to secure any bonds or other obligations by it issued or incurred; to guarantee any dividend or bond, or contracts or other obligations; to make and perform contracts of any kind and description and in carrying on its business or for the purpose of attaining or furthering any of its objects, to do any and all other acts and things, and to exercise any and all other powers which a co-partnership or natural person could do and exercise, and which now and thereafter may be authorized by law."

These articles are subject to criticism for redundency, inasmuch as all of the powers which the incorporators of the company seek to have confered upon it would have existed by a mere recital to the effect that the corporation is formed for the purpose of establishing and maintaining warehouses, and engaging in the warehouse business. Having been empowered so to do, the corporation might, lawfully, have issued negotiable receipts under favor of Section 8457 et seq., General Code; might have purchased and dealt in the goods stored by it, if necessary to protect the company from loss; might have obtained insurance on goods and made advances when for the interest of the company etc.; all as incidental to the business of a warehouseman. The other recitals in the articles are all expressly made as incidental to the principal purpose, excepting those relating to the acquisition of stock of other kindred but not competing private corporations. Notwithstanding the restrictions placed upon this power, in the articles of incorporation it is stated as an independent one. There is no necessity for such statement. The power exists in all corporations, without express recital, under favor of Section 8683, General Code; and to state it as a separate purpose would seem to authorize a corporation to embark independently in the business of dealing in stocks, a thing forbidden by the rule of singleness of purpose, applied to Section 2683, General Code, by the decision of State v. Taylor, 55 O. S. 67.

I therefore recommend that that portion of the purpose clause commencing with the words, "To acquire by purchase, exchange, etc." and ending with the words "and to exercise any and all voting powers thereon" be stricken from the articles before they are filed and recorded by you.

Again, the last phrase of the purpose clause, namely:

> "to do any and all other acts and things, and to exercise any and all other powers which a co-partnership or natural person could do and exercise, and which now and thereafter may be authorized by law."

is objectionable, as it seems to embody an attempt to secure authority to engage in multifarious business, prohibited by the rule of State vs. Taylor, supra.

In connection with these articles of incorporation, I beg to point out that under Section 10210, General Code, there are certain restrictions as to the internal management of corporations formed for the purpose of constructing warehouses, and with respect to the right of such corporations to acquire real estate. With these provisions, of course, the state has nothing to do, unless the articles of incorporation are in conflict with them. Inasmuch, however, as the power to acquire real estate is expressly declared to be limited to that which is "necessary and incidental to the conduct of the storage business," I am of the opinion that this portion of the purpose clause is not objectionable.

For the reason above stated I beg to advise that the Articles of Incorporation of The Central Storage Company be not filed and recorded by you until modified as aforesaid.

Said Articles of Incorporation are herewith returned.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

184.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE OF THE DAYTON MOTION PICTURE EXHIBITORS LEAGUE—CORPORATION NOT FOR PROFIT—EVIDENCE OF PECUNIARY MOTIVE AND RESTRAINT OF COMPETITION.

The purpose clause of a contemplated corporation not for profit, which provides for promoting the "interests" of motion picture exhibitors and for furthering the welfare of that business, should be amended so as to make clear the absence of any pecuniary motives and to clearly negative any scheme of combination in restraint and competition.

COLUMBUS, OHIO, March 8, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 21, requesting my opinion as to the legality of the purpose clause of the proposed articles of incorporation of THE DAYTON MOTION-PICTURE EXHIBITORS LEAGUE, enclosed therewith.

Said purpose clause is as follows:

> "The purpose for which said corporation is formed is for the promoting and furthering of the interests of motion picture exhibitors within the City of Dayton and vicinity.
>
> "(*b*) To provide such methods and ways as may be necessary for the welfare and elevation of the business of such exhibitors.
>
> "(*c*) And to protect this particular branch of exhibitors from imposters and others whose work may degenerate the business of legitimate motion-picture exhibitors.
>
> '(*d*) And for the purpose of creating a friendly and congenial sentiment between the members and their families of such motion-picture exhibitors."

In my opinion you should not file or record these articles of incorporation without amendment so as to more clearly define the nature of the business or corporate activities proposed to be conducted. The corporation is formed not for profit; yet, it is expressly declared that it proposes to engage in the "promoting and furthering of the interests of motion-picture exhibitors within the city of Dayton and vicinity." I suppose the presumption would be that the "interests" to be promoted and furthered would be some interests other than the pecuniary interests of such exhibitors. Nevertheless, to obviate the ambiguity which seems to arise here, I think it ought to be required that the nature of the interest to be furthered, and the manner of furthering the same, be more explicitly set forth in the purpose clause of the articles.

Again, the second paragraph of the purpose clause declares that the corporation is formed for the purpose of providing "methods and ways necessary for the welfare and elevation of the business of the exhibitors." A corporation, not for profit, may not, as I have already suggested, engage in the enterprise of promoting the pecuniary welfare of persons engaged in any particular business.

The word "welfare," therefore, should be qualified in such a way as to make it perfectly clear that it relates to the morale of the business from the standpoint of the public—a worthy object, or to some other matter quite disconnected from the pecuniary welfare of the business and those engaged therein.

The observations just made apply as well to sub-paragraph "(c)" of the purpose clause. Here, however, a very slight amplification of the phraseology would serve to make it clear, I think, that the purpose which the incorporators have in mind is the protection of the business from those who would by their acts degrade the business from the standpoint of the public. This, of course, would be entirely permissable.

No criticism whatever could be made as to the last sub-paragraph of the purpose clause.

In addition to the criticisms which I have already made respecting this purpose clause, it is open also to the objection that it does not clearly negative the idea of the formation of a combination in restraint of competition. In the making of the amendments suggested, the incorporators should be careful to avoid the use of language which might point to such a purpose on their part.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

220.

ELECTION, PRIMARY—CANDIDATE MAY NOT SERVE ON BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS.

By virtue of the provisions of Section 4967 which are declaratory of a well established principle of public policy, a candidate for nomination at a primary election cannot legally act as a Deputy State Supervisor at such election.

COLUMBUS, OHIO, March 25, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Under date of March 23, 1912, you ask an opinion of this department upon the following:

> "I wish to have your opinion on the question as to whether or not a person may lawfully be a candidate for the nomination of an office at

the primary election and at the same time serve as a deputy State Supervisor of Elections in the county wherein he is such candidate, and if when he was such candidate and did so serve he received the nomination for the office for which he was candidate, would such nomination be a lawful one?"

Section 5092, General Code, to which you refer, provides as follows:

"No person being a candidate for an office to be filled at an election shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. A person serving as deputy state supervisor or clerk thereof, judge or clerk of elections, contrary to this section shall be ineligible to any office to which he may be elected at such election."

Section 4967, General Code, referring to primary elections, provides:

"At all such elections the polls shall be opened between the hours of five-thirty o'clock forenoon and five-thirty o'clock afternoon. County boards of deputy state supervisors of elections shall have all the powers granted and perform all the duties imposed by the laws governing general elections, including furnishing materials and supplies, printing and distributing ballots, providing voting places, protecting electors, guarding the secrecy of the ballot, and making rules and regulations not inconsistent with law, for the guidance of election officiers. *All statutory provosions relating to general elections, including the requirement that part of such election day shall be a legal holiday, shall, so far as applicable, apply to and govern primary elections.*

The statute plainly provides that no candidate for office to be filled at any election can be a member of the board of deputy state supervisors of election. Any person acting as such member is ineligible to hold any office to which he may be elected at such election.

Section 4967, supra, makes the provisions for the governing of general elections applicable to primary elections. The board of deputy state supervisors has the same duties to perform in reference to a primary election that it has to perform at a general election. The same reasons that should prevent a candidate at a general election from acting as a deputy supervisor at such election, apply to primary elections and should prevent him from being both a candidate for nomination and a deputy supervisor.

It is my opinion that Section 4967, General Code, makes the provisions of Section 5092, General Code, applicable to primary elections and to candidates for nomination at such primary election. In any event it would be against public policy to permit a candidate for nomination at a primary election to canvass the returns; make an official count, and certify to his own nomination.

A candidate for nomination at a primary election cannot legally act as deputy state supervisor at such election. If a candidate so serves his nomination at such primary election would be illegal and void.

Respectfully,
TIMOTHY S. HOGAN.
Attorney General.

259.

ARTICLES OF INCORPORATION—TOLEDO BENEVOLENT LOAN ASSOCIATION—CORPORATIONS FOR PROFIT—LOANS TO MEMBERS WITHOUT INTEREST.

A corporation formed to make loans to Members without interest, though the Members derive no direct profit, nevertheless provides a pecuniary benefit to its Members and is, therefore, a corporation for profit.

April 1, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 21, submitting to me the proposed articles of Incorporation of THE TOLEDO BENEVOLENT LOAN ASSOCIATION, and requesting my opinion as to the legality of the same.

The articles of incorporation in question disclose that the proposed association is incorporated not for profit for the following purpose:

> "The purpose for which said corporation is formed is to provide and maintain a fund with which to make loans to members without interest and to do all things incident and appertaining thereto that may be lawfully done in carrying out such purpose."

These articles present a question somewhat different from any which you have heretofore referred to me. In this case the corporation itself evidently is not designed to engage in any profitable enterprise unless it should reap interest from an investment of its funds otherwise than in loans to its members. On the other hand, the members of the corporation are not to reap any direct profit, either pecuniary or otherwise. Nevertheless, the object of the corporation is in the full sense of the word a pecuniary one, and it is intended for the pecuniary benefit of its members. The old adage that "A penny saved is two pence earned" may be perhaps applied to this question.

While I have in a previous opinion advised you that the test of what constitutes a *corporation for profit* is the distribution of the increment of its funds among the members of the corporation by way of dividend or otherwise, I am disposed, in view of the question which has now arisen, to enlarge upon the former definition and to state that it should be broad enough to include all corporations the sole purpose of which is the direct or indirect pecuniary benefit of the members.

Measured by this definition, the purpose for which The Toledo Benevolent Loan Association is sought to be formed is one for profit and the articles are, therefore, not in proper form and should not be accepted by you.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

281.

ARTICLES OF INCORPORATION—WILCOXTON WATER COMPANY—PURPOSE CLAUSE INDEFINITE.

April 12, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 8th enclosing the proposed articles of incorporation of The Wilcoxton Water Company to be organized as a corporation not for profit for the following purpose:

> "acquiring, constructing, operating, maintaining and owning a water system; acquiring and holding real estate, rights of way, and all accessories and appliances, proper, necessary or incidental to carry out the purpose herein mentioned."

You request my opinion as to the legality of these articles of incorporation. In addition to the foregoing purpose clause the corporation is to have a capital stock divided into shares.

In accordance with previous opinion to you I beg to advise that you should not file or record these articles of incorporation, at least without full explanation of the real purpose of the incorporators. On the face of the articles the purpose of the company appears to be a business purpose in every sense of the word, and that being the case the corporation could not be organized except for profit.

Very truly yours,

TIMOTHY S. HOGAN.
Attorney General.

300.

ARTICLES OF INCORPORATION—CLEVELAND FACE BRICK ASSOCIATION—CORPORATIONS NOT FOR PROFIT—SINGLE PURPOSE—PECUNIARY ADVANTAGE—COMBINATIONS IN RESTRAINT OF TRADE.

April 17, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In accordance with the request in your favor of April 11th, I have considered the legality of the purpose clause of the Articles of Incorporation of The Cleveland Face Brick Association, a proposed corporation not for profit. Said purpose clause is as follows:

> "Said corporation is formed for the purpose of educating the public in the uses of face brick; acquiring and disseminating reliable information in relation to the building trades, among its members and others; to protect its members from unjust exactions and demands; to correct such abuses in the business as may be advisable; to promote uniformity in the customs and usages of the trade; to co-operate for mutual advantage with architects, builders, and other associations or persons for the

purpose of increasing the use of face brick; for co-operation among its members and, by publicity and otherwise, advocating the use of face brick; and to promote the general welfare of the face brick business."

In my opinion the foregoing purpose, while variously stated, is in reality single, being the co-operation of persons engaged in the face brick business for the general uplift of that business; the purpose is legal; the idea of combination in restrain of trade, being, I think, sufficiently negated by the language used; the purpose is one which may lawfully be pursued by a corporation not for profit, as no direct pecuniary advantage to the members of the association seems to be contemplated. In this connection I beg to advise that in my opinion the reaping of such incidental and indirect pecuniary advantages as might accrue to the members of a corporation formed for the purpose of elevating and improving the conditions of a given business, trade or employment is not sufficient to characterize the corporation as one formed for profit.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

316.

CORPORATIONS NOT FOR PROFIT—WILCOXTON WATER COMPANY PURPOSE OF ACCEPTING RIGHTS TO SPRING WATER FLOW TO SUPPLY PUBLIC AT COST—CHARITABLE TRUST.

A corporation, found solely for the purpose of carrying out a charitable trust, whose purpose clause expresses the object of accepting a donated right to certain spring water flows for the purpose of supplying water therefrom for public purposes at a charge not to exceed actual expenses, is a corporation not for profit. The Articles of The Wilcoxton Water Company may therefore, be filed by the Secretary of State.

April 22, 1912.

HON. CHAS. H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 18th, enclosing redrafted articles of incorporation of The Wilcoxton Water Company, a proposed corporation not for profit, the purpose clause of which is as follows:

"Third. The purpose for which said corporation is formed is to meet the conditions of a gift of Celestia E. Wilcox of Twinsburg Township, Summit County, Ohio, under date of October 4th, 1911, by the terms whereof it is provided that, upon the formation of a corporation with a subscribed capital of not less than $2,000.00, having for its purpose the supplying of water to the people in and about the center of said township, said Celestia E. Wilcox agrees to grant and convey to such corporation a perpetual right in and to the water flowing from a large spring issuing from certain of her lands in said township situate, upon the conditions following to-wit:

"1. Sufficient water shall be left flowing from said spring to meet all requirements for watering farm animals in pasture on said 70 acres of land.

"2. Water shall be furnished to the dwelling houses now on said 70 acre tract and on the 10 acre tract now owned by me on the west side of the highway opposite said 70 acre tract and the watering trough in front thereof, in sufficient quantities for all domestic purposes, but not less than is now flowing at said places.

"3. The water taken from said spring shall be delivered and kept continually available for use at the Public Square and School House lot at said Twinsburg Center.

"4. As a condition precedent to the making of said grant and conveyance, the Board of Trustees and the Board of Education of said Township shall, respectively, by resolution, agree to provide and furnish within one year from the date of said grant and conveyance, suitable drinking founts at said locations.

"5. So much of the water as is not required for the purposes aforesaid may be used by the people living in and about said Center, upon such terms and conditions and subject to such rules, regulations and restrictions as may be fixed and imposed by said Water Company.

"6. Said grant and conveyance shall carry with it the right to said Water Company at any time to enter upon so much of said 70 acre tract as may be necessary to properly improve, safeguard and protect said spring, and to build and construct suitable reservoirs and housings, to lay and maintain water pipe lines from said spring to the said highway and to do all things incident thereto—provided that in the laying of such pipe lines, the same shall be placed at such depth as will not interfere with cultivation of the land.

"7. Said grant and conveyance shall also contain a provision that upon the incorporation of the territory in and about said center into a village, such village shall at any time have the right to acquire, take over and enjoy all the rights in said spring passing under said grant and all property of said Water Company, upon paying to such Water Company a sum equal to the value of all the property and improvements then owned by said Water Company, exclusive of the rights in said spring, and an agreement on the part of said village to furnish water to all persons then receiving water from said Water Company at the same rentals as will be charged by such village generally for like services.

"And for the purpose of doing only such things as are necessary or incidental to meet and carry out the purposes of said gift, with power to make regulations for the government of said corporation, and to make and enforce terms, rules and conditions for the use of said water,—said terms, rules and conditions to be such as to enable said corporation to be self-sustaining, to make repayment to its stockholders of its paid up capital and the payment of any indebtedness incurred by it,—but the utilities of said corporation shall not be operated for profit, nor shall any officer, director or stockholder at any time receive any compensation or profit from said corporation, or from the operation of said utilities."

As may be inferred from some of the foregoing provisions, the corporation is to have a capital stock, as further evidenced by the following clause of the proposed articles:

"The capital stock of said corporation shall be Five Thousand Dollars ($5,000.00), divided into fifty (50) shares of One Hundred Dollars ($100.00) each."

You request my opinion as to your duty to file and record these proposed articles.

It appears from the recitals of the purpose clause, as above quoted, that the sole purpose of the formation of this corporation is to carry into effect a gift, in the nature of a public grant or easement, in and to the water flowing from a certain spring on private property. Such water is to be supplied by the proposed corporation, first, to occupants of certain designated dwelling houses without charge; second, to the public square and school house lot at a certain community center; and third, to the people living in and about the center. The right to charge for the furnishing of water is limited to the individuals of this last named class. It is also expressly stipulated that the company shall make no greater charge than may be sufficient to reimburse its capital account and make it self-sustaining; and it may be at least broadly inferred from the articles that the purpose of the incorporators is simply to provide an organization for the development of the water rights for the benefit of the community until such time as the community may become incorporated as a village, at which time the property of the company is to be sold to the village and the company wound up.

These articles present a question of some technical difficulty. It is apparent that the incorporators do not desire to engage generally in the business of a water works company; the numerous restrictions upon the activities of the company are such as clearly to negative such an idea. Furthermore, the manifest object of the incorporators is to carry into effect a gift which is in no sense a private one, but rather a public one. In a broad sense at least, therefore, if not indeed in an exact sense, this corporation is formed for the purpose of carrying into effect a charitable trust; that being the case the mere fact that, in order to provide for the expense of its operation, it is authorized to promulgate rules and, presumably, to make and collect charges for services rendered, and the mere fact also that it has a capital stock and reserves the right to reimburse those who have invested in it for their outlay therein, are both alike immaterial. The broad and controlling purpose of the incorporators determines the propriety of its formation as a corporation not for profit.

Because, then, the corporation is to be formed for the purpose of carrying into effect a charitable trust, and acting as the trustee thereof, I am of the opinion that it may be regarded as a corporation not for profit, and that the articles tendered you may be accepted and filed by you.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

378.

ELECTION ON BOND ISSUE FOR PARK IMPROVEMENTS—FAILURE TO PUBLISH NOTICE—DUTY OF BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS.

When notice of election on bond issue for park improveemnts has not been made, the question of the effect of the omission is one with which the Board of Elections has no concern and said board cannot refuse to proceed with the election, after it has received the certificate of the resolution from the council.

May 18, 1912.

HON. C. H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—At your request I have considered a question submitted by the

Board of Deputy State Supervisors of Elections of Springfield, Ohio, under date of May 15, 1912, wherein it is stated:

> "The city of Springfield is to vote on Tuesday next, on the issuing of bonds for park improvements. The resolution passed by council covering the same was duly certified to this board, who, in turn, complied with the requirements of law, advertised for bids on ballots, etc., and have made all arrangements to have the question submitted at the primary election to be held Tuesday, May 21, 1912. It now transpires that the provision relating to the publishing of a notice of same intention for four consecutive weeks, in two newspapers, has not been complied with. What action shall this board (Board of Elections) take; shall they submit or refuse to submit the question to a vote under the aforesaid circumstances?"

Without quoting the various statutes that might bear upon the subject, suffice it to say in all of the laws in reference to bond issues, submitted to a vote of the people, the usual provision of the particular law requires that the body authorized to make the bond issue shall cause a resolution to be duly ceritfied to the Board of Deputy State Supervisors of Elections, and thereupon it becomes the duty of the said board to prepare the necessary supplies for the election on said bond issue. This certificate is the authority to the Board of Elections for its action, and no duty devolves upon the board to investigate and determine whether or not all of the necessary regular steps leading up to the election have been complied with.

I am of the opinion, therefore, that a board of elections, under the state of facts set forth above, has no power to refuse to submit the question to a vote, but that it is its duty to have prepared the necessary ballots and other supplies for the conduct of the election. The question of whether or not some prior necessary step has been taken is one with which the election board has no concern.

Very truly yours,

TIMOTHY S. HOGAN
Attorney General.

391.

CORPORATIONS—ARTICLES OF INCORPORATION OF LIBBY, McNEILL AND LIBBY, A FOREIGN CORPORATION—WAIVERS OF PROVISIONS CONTRARY TO OHIO LAW.

A foreign corporation licensed to perform certain acts which are not permissible in Ohio, must waive such privileges before it will be permitted to do business in Ohio.

Without such waiver, therefore, Articles of Incorporation of a foreign corporation which authorize ownership of stock in other companies, and severalty of purpose contrary to the laws of Ohio, may not be filed until these provisions are waived.

May 25, 1912.

HON. CHAS. H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 6th, which is as follows:

> "I am in receipt of a sworn copy of the articles of incorporation of Libby, McNeill & Libby, a foreign corporation organized and exist-

ing under the laws of the state of West Virginia, together with the statement of said corporation under Section 179 et seq G. C. Two paragraphs of the purpose clause of said corporation are as follows:

"'Par. 6. To purchase or otherwise acquire, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock, bonds, debentures or other evidences of indebtedness of any other corporation or corporations and while owning the same to exercise all the rights and privileges of ownership, including the right to vote thereon.

"'Par. 7. To carry on any other business whatsoever which the corporation may deem proper or convenient to be carried on in connection with any of the foregoing purposes, or calculated directly or indirectly, to promote the interests of the corporation or to enhance the value of its property; and to acquire, own, lease, operate and dispose of any and all property, real and personal, necessary or convenient for the furtherance thereof.'

"Is it lawful for me as Secretary of State to file such sworn copy of charter and such statement and issue the certificate authorized by Section 178 et seq. G. C.?"

Section 178, General Code, provides in part as follows:

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

Section 179 provides as follows:

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

I am of the opinion that under Section 178 of the General Code a foreign corporation applying for certificate of admission may waive or relinquish any corporate franchise which it may possess under the laws of its parent state, which could not lawfully be exercised in Ohio. That is to say, a corporation having, under its charter, powers not recognized as lawful by the laws of Ohio, may state that it does not propose to exercise such powers in this state and may be licensed to exercise its remaining powers only.

In my opinion the corporation in question may not lawfully be licensed to transact business in Ohio without waiving, in the manner already suggested, its power to exercise full ownership of the stock of other corporations. You are aware of the well settled rule in this jurisdiction, to the effect that a corporation may not be organized for the principal purpose of owning the stock of other corporations and may not own such stock in the exercise of the powers incidental to another lawful purpose, excepting to the extent that it may acquire and hold the stock of other kindred but not competing corporations. I have already discussed the decisions and statutes establishing these principles, in other opinions addressed to your department.

Paragraph 7 of the articles of incorporation above quoted should either be waived by the applicant company or the statement should be made that no business will be carried on in Ohio and no right of ownership exercised thereunder, inconsistent with the laws of Ohio.

Section 178 of the General Code, as above quoted, authorizes foreign corporations to be admitted to do any business which might lawfully be done by more than one corporation organized under laws of Ohio. The effect of this provision is to reverse, as to foreign corporations, the rule of singleness of purpose which is imposed upon domestic corporations under Section 8636, General Code, as construed in State ex rel vs. Taylor, 55 O. S. 67. The mere fact, therefore, that paragraph 7 is general and authorizes the doing of any and all kinds of business deemed proper and convenient in connection with its other purposes, by its managers, would not render the whole of paragraph 7 objectionable if the same were qualified as above stated; if no such qualifying statement were made in the application, however, the same should be refused by you.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

395.

FOREIGN CORPORATION—ARTICLES OF INCORPORATION OF KATARNO COMPANY—OWNERSHIP OF STOCK OF OTHER COMPANIES —WAIVER.

A foreign corporation whose articles of incorporation include the right to own stock in other kindred and non-competing companies, cannot do business in Ohio without a waiver of this provision.

May 25, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Answering your letter of May 13th, submitting the application of the Katarno Company, a corporation of the State of New York, for a license to do business in Ohio, and calling my attention to certain paragraphs of the Articles of Incorporation of said company, found on pages two and three thereof, I beg to state that in my opinion you should not issue the certificate for which supplication is made unless the corporation disclaims and waives the exercise of the powers therein referred to, in the State of Ohio. Said paragraphs are as follows:

> "To acquire by subscription, purchase or otherwise, hold, deal in and with, lease, grant, exchange, sell, pledge, mortgage, hypothecate or otherwise dispose of or turn to account the property, good will, *stock,* bonds or other obligations or evidences of indebtedness of any other corporation

or association, domestic or foreign, and to issue in exchange therefor the property, good will, stock, bonds or other obligations or evidences of indebtedness of this corporation.

"To aid in any manner any corporation or association of which any stock, bonds, securities, or other evidence of indebtedness are held by the corporation; and to do any acts or things designed to protect, preserve, improve or enhance the value of any such stock, bonds, securities or other evidences of indebtedness."

Under the settled common law of Ohio the power of one corporation to acquire and own, on its own behalf, the shares of stock of other corporations is limited to those of kindred but not competing companies. I need not cite to you the decisions of our supreme court and the statutory provisions which establish this well understood rule. The powers enumerated in the above quoted paragraph are not objectionable, however, excepting in so far as they relate to the acquisition and control of the stock of other corporations.

I herewith return papers submitted to me.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

401.

LICENSE OF LOAN BUSINESS—LOANING ON SALARIES AND LOANING ON CHATTELS ARE DISTINCT BUSINESSES.

The business of loaning on salaries, and of loaning on chattels, are treated disjunctively in the relative statutes and it is evidently the intent that a separate license be required for each business.

May 31, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of May 8th, requesting my opinion upon the following question:

"May the Secretary of State issue a single license authorizing an applicant to engage in the 'business of making loans upon chattels or personal property' and 'of purchasing or making loans upon salaries or wage earnings,' or if a person wishing to engage in both of such kinds of business would it be necessary for him to procure two separate licenses?"

designated as Sections 6346-1 and 6346-7, inclusive:

I quote the following sections of the Act of June 7, 1911, 102 O. L. 469, therein

"Section 6346-1. No person, firm or corporation except banks and building and loan associations shall engage or continue in the business of making loans upon chattels or personal property of any kind whatsoever or of purchasing or making loans upon salaries or wage earnings without first having obtained a license so to do from the secretary of state. * * * *

Section 6346-2. Application for license to conduct such business must be made in writing to the secretary of state and shall contain the full

names and addresses of applicants, if natural person, and in case of firms or incorporated companies, the full names and addresses of the officers and directors thereof and under law or laws incorporated, the kind of business which is to be conducted, whether chattel mortgage or salary loan; the place where such business is to be conducted and such other information as the secretary of state may require. The fee to be charged for said license shall be ten dollars per annum and such amount must accompany the application. Each license granted shall date from the first of the month in which it is issued and shall be granted for the period of one year, subject to revocation, as provided in this act, and such license shall be kept conspicuously displayed in the place of business of the license."

I find nothing in the remaining sections of the act in any way negativing the inference which I have drawn from the above quoted provisions.

In my opinion the legislative intention embodied in the act from which quotation has been made is that separate licenses shall be issued for the business of making chattel loans, and for that of making salary or wage loans. The language relating to the two classes of business is phrased disjuntively wherever it is used in the act, and it clearly appears from Section 2, above quoted, that the license in question covers only one kind of business; otherwise, the words "or both" would have been inserted therein after the phrase "the kind of business which is to be conducted whether chattel mortgage or salary loan."

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

403.

CORPORATION WHOSE ARTICLES OR CERTIFICATE OF AUTHORITY HAVE BEEN CANCELLED, STILL "EXISTS" FOR TWO YEARS—NEW CORPORATION CANNOT HAVE SIMILAR NAME.

Under Section 5511, *General Code, a corporation whose articles of incorporation or certificate of authority have been cancelled by the Secretary of State for non-payment of fees or failure to report, still has two years within which it may be reinstated and pending such time, such corporation must be deemed to be existing within the intendment of Section* 8628, *General Code, prohibiting the filing of Articles of Incorporation whose name is similar to that of an existing corporation.*

May 31, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 6th, requesting my opinion upon the following question:

"In view of the provisions of Section 5511, General Code, found on page 252, Volume 102, Ohio Laws, should the secretary of state file articles of incorporation wherein the name of the proposed corporation is that of one of the corporations whose articles of incrporation or cer-

tificate of authority has been cancelled by the secretary of state, according to the provisions of said Section 5509, General Code, before the expiration of two years after such cancellation?"

The following provisions of the General Code are involved in your query:

"Section 8628. The secretary of state shall not file or record any articles of incorporation wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes, nor if such name is that of an existing corporation, or so similar thereto as to be likely to mislead the public, unless the written consent of the existing corporation, signed by its president and secretary, be filed with such articles.

Section 5509, being Section 120 in the Act of June 2, 1911, 102 O. L. 251, provides:

"corporation * * * * * * fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the commission shall certify such fact to the secretary. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state * * * * or cancel the certificate of authority of any such foreign corporation to do business in this state * * * *. *Thereupon all the powers, privileges and franchises conferred upon such corporations, by such articles of incorporation or by such certificate of authority shall cease and determine.* The secretary of state shall immediately notify such domestic or foreign corporation of the action taken by him."

Section 5511, being Section 122 of the same act, provides:

"Any corporation whose articles of incorporation or certificate of authority * * * has been cancelled by the secretary of state * * * upon the filing within two years after such cancellation, with the secretary of state, of a certificate from the commission that it has complied with all the requirements of this act and paid all taxes, fees or penalties due from it, and upon the payment to the secretary of state of an additional penalty of one hundred dollars, shall be entitled again to exercise its rights, privileges and fanchises in this state, and the secretary of state shall cancel the entry made by him under the provisions of section one hundred and twenty of this act, and shall issue his certificate entitling such corporation to exercise its rights, privileges and franchises."

There are no other statutes relating to the subject matter in question. There is no provision requiring the modification of any of the provisions of the articles of incorporation of a company whose corporate authority has been revoked, upon the requalification of such corporation, under Section 5511 supra. That is to say, it is not provided that if within the two years another corporation acquires the use of the name of the moribund corporation, the latter, upon its resurrection, so to speak, must amend its articles of incorporation so as to change its name.

The act of 1911, then, lacks definite provisions which might shed light upon

the question. Section 8628, naturally enough, is equally silent, that section having been enacted at a time when the proceeding outlined in Section 5509 and 5511 was unknown.

It is obvious, therefore, that the answer to your question must be furnished by implication. Section 8628 preserves the right of "an existing corporation" to its corporate name. Primarily, of course, a corporation does not "exist" when it has no right to exercise any corporate privileges, franchises and powers. This is the situation apparently with respect to a corporation whose articles of incorporation have been cancelled under Section 5509, which said section expressly provides that "thereupon the powers, privileges and franchises conferred upon such corporation * * * shall cease and determine."

I am of the opinion, however, that the statutory provision last above quoted is not strictly accurate. It is not true that *all* the privileges conferred upon a corporation by its articles of incorporation are taken away when they are cancelled under Section 5509; there still remains the privilege of recreating the corporation under Section 5511. This is a corporate privilege to be exercised by the corporation as such, and not by individuals, as is clear from an examination of Section 5511. Manifestly, then, if this privilege exists, and if it is to be exercised by the corporation as such, the corporation must continue to exist; if this be not the case the words of Section 5511 have no meaning; that section expressly provides that the corporation may file the certificate and receive from the secretary of state his certificate entitling it to exercise its rights, privileges and franchises.

From all the foregoing, then, I think it is apparent that a corporation whose articles of incorporation have been cancelled under Section 5509 by the secretary of state continues in existence, but, so to speak, in a state of suspended animation.

The only remaining question is as to whether the existence of the corporation, under these circumstances, is such an existence as is contemplated in Section 8628. I am of the opinion that it is. The last named section is primarily intended for the protection of the public, although the provision respecting the securing of the consent of the officers of the existing corporation to the use of its name by a proposed corporation shows that the purpose of the section embraces also the protection of the rights of the existing corporation. It is from the standpoint of the public interest, therefore, that I think the solution of this question ought to be worked out.

I have already adverted to the fact that there is no method provided for a compulsory change of name on the part of a reviving corporation in case its name has been assumed by another corporation, formed within the two year period referred to in Section 5511. I do not think that such a provision can be implied; the statute being silent, I am of the opinion that the secretary of state could not require a dormant corporation, upon restoration to its full privileges, to select another name for that reason. That being the case, if after the cancellation of its articles by the secretary of state, under Section 5509, the name of an existing corporation is chosen by the promoters of a new corporation, and articles of incorporation are issued to them by the secretary of state, authorizing the use of such name, and if, further, upon the filing of the certificate prescribed by Section 5511 by the original corporation, and the payment of the penalty therein provided for, it would be the duty of the secretary of state to issue a certificate entitling the original corporation to the exercise of all its rights, privileges and franchises, including the right to the name it formerly had, then, and in that event, the very evil aimed at by Section 8628 would come into existence. There would then be two corporations having the same name, and the public injury which might, and doubtless would, result would be just as great as in the case of the formation of a new corporation having the name of a corporation existing in the full sense of the word.

For the reasons above set forth, then, I am of the opinion that until the two years, referred to in Section 5511, General Code, have expired, the corporation whose articles of incorporation have been cancelled by the secretary of state, under Section 5509, continues to be an "existing corporation" within the meaning of Section 8628, General Code, and that the secretary of state is without power to file or record the articles of incorporation of another corporation having the same name.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

405.

CORPORATIONS ORGANIZED FOR ENTERTAINMENT, RECREATION AND SOCIAL BETTERMENT OF ITS MEMBERS—ARTICLES OF INCORPORATION—"MUTUAL CORPORATIONS"—"BENEVOLENT AND CHARTIABLE PURPOSES."

A corporation organized for the "entertainment, recreation and social betterment of its members and all others" is not a corporation organized strictly for benevolent and chartitable purposes, within the meaning of paragraph 4, *Section* 176, *General Code, providing for a fee of* $25 *for mutual corporations so organized.*

Inasmuch as Insurance companies cannot constitute "benevolent and charitable enterprises" as the term is generally used in the statutes, it is therefore not clear that all mutual corporations must be Insurance corporations.

A corporation, however, formed for the purpose of the entertainment, recreation, and social betterment of its members alone, is for no better reason, a mutual corporation than is a corporation formed for the financial betterment of its members alone wherein the members do not bear the losses. Such a corporation, therefore, must be deemed "not organized for profit and not mutual in its character" and the fee chargeable therefore, is $2.00 *in accordance with paragraph* 5, *Section* 176, *General Code.*

May 31, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 8th in which you request my opinion upon the following questions:

> "The purpose clause of the Articles of Incorporation of a corporation not for profit is as follows:
>
> * * *"Said corporation is formed for the purpose of 'the entertain ment, recreation and social betterment of its members and all others, in providing club rooms, camping locations, and all the necessary accoutrements and furnishings of the same, which would tend to the entertainment, amusement, recreation and social betterments of its said members *and others.*'
>
> "I would be pleased to have your opinion as to what the lawful fee is for filing Articles of Incorporation with the purpose clause so written."

Paragraph 4 of Section 176 of the General Code provides that the fee for filing Articles of Incorporation of "a mutual corporation not organized strictly for benevolent or charitable purposes" shall be $25.00.

The purpose clause which you quote to me shows that the corporation is organized partly for benevolent and charitable purposes. It is not, however, organized *strictly* for such purposes. So long as its capital and funds are devoted in part to the entertainment, recreation and social betterment of members, it is not organized "strictly" for benevolent or charitable purposes.

Paragraph 5 of the same section above quoted provides that the fee for filing the articles of incorporation of "corporations not organized for profit, and not mutual in their character" shall be $2.00. The question which arises, then, is as to whether this corporation, measured by its purpose clause, as above quoted, is "a mutual corporation."

Although the words and phrases above referred to have been in the statute ever since its original enactment, and although, also, they must have been given a practical interpretation by your department from time to time, I confess that the distinctions which they imply seem to me to be somewhat difficult to grasp from the purely legal standpoint.

Permit me, in this connection, to point out certain inferences which naturally arise from the language employed in the statute. Paragraph 4 of Section 176 is in full as follows:

> "4. For filing articles of incorporation of a mutual life insurance corporation having no capital stock, or of other mutual corporations not organized strictly for benevolent or charitable purposes and having no capital stock, twenty-five dollors, except as hereinafter provided."

From this peculiar language but two conclusions logically follow: 1. Not all mutual corporations are life insurance corporations. 2. Some mutual corporations are corporations organized solely for benevolent or charitable purposes.

In the same connection I beg leave to point out an inference which does *not* arise from this language: Some mutual corporations are not insurance corporations. That is to say, at first blush it would appear from the language employed in paragraph 4 that the general assembly had in mind the existence of mutual corporations other than insurance corporations. Such is not necessarily the case. It is inferable that the legislature had in mind other mutual companies other than mutual life insurance companies, but not that the reference is to other mutual companies than any kind of insurance companies.

A contrary inference, however, arises from the second primary inference above referred to. That is to say, if some mutual companies are companies organized strictly for benevolent or charitable purposes, then some mutual corporations are not insurance corporations, unless we assume that the legislature did not use the words "benevolent and charitable" in the exact sense in which they are used in taxation statutes, for example. That is to say, the doing of an insurance business is not a benevolent or charitable enterprise in the strict sense of the words. Of course, there is a large class of societies, such as fraternal beneficiary societies, and the insurance branches of fraternal orders, the purposes of which are commonly referred to as benevolent and charitable. Most of these societies are conducted upon what is technically known in insurance law as "the mutual plan" yet, the "benevolent" and the "charitable" features which such societies promote are confined to a field so restricted as not to come within the definition of the word "charity" as formulated in the principles of equity, or in the laws relating to exemption from taxation.

I fear that further analysis of these statutes but tends to confusion. Therefore I do not dwell upon the significance of the phrase "except as hereinafter provided" as used in paragraph 4, but turn at once to a simple analysis of paragraph 5 of Section 176, which, in full, is as follows:

"For filing articles of incorporation formed for religious, benevolent or literary purposes; or of corporations not organized for profit and not mutual in their character, or of religious or secret societies: or societies or associations composed exclusively of any class of mechanics, express, telegraph, railroad or other employes, and formed exclusively for the mutual protection and relief of members thereof and their families, two dollars."

From this paragraph it logically follows that there are corporations not for profit which are not mutual in their character, other than those formed for religious, benevolent or literary purposes, or religious or secret societies, or mutual aid societies composed of employes of certain establishments. In view of the foregoing anaylsis, the problem of the practical application of the two paragraphs of Section 176, above quoted, consists of an effort to identify and point out the characteristics of two classes which are evidently different and distinct in the minds of the legislature, namely:

1. Mutual corporations other than life insurance corporations, not organized strictly for benevolent and charitable purposes, and having no capital stock.

2. Corporations not for profit and not mutual in their character, other than those otherwise referred to in paragraph 5, supra.

I have searched diligently in the lexicons and in the law books for a definition of the term "mutual corporations." I have found no such definition, except in the Law of Insurance. The ordinary meaning of the term "mutual" imports reciprocal acts, conduct or promises as among two or more persons. Thus, in the law of contracts, those promises or obligations are "mutual" which, being made as between two parties, constitute each a consideration for the other. In this sense every corporation, whether having a capital stock or not, is "mutual." The consideration upon which one subscribes for the capital stock of a business corporation is the like subscription made by others to the same enterprise. It will not do, therefore, to apply this broad definition to the word "mutual' as used in connection with the word "corporation" in the section above quoted.

A secondary meaning given by lexicographers to the word "mutual" and by them described as an improper use of the term, is defined as follows:

"Possessed, experienced or done by two or more persons or things at the same time; common; joint; as, mutual happiness; a mutual effort. (Webster's International Dictionary.)"

This definition cannot be accepted here. In the first place I am unable to find that it has ever been accepted in law. In the second place it is a term which like the same word in the other sense just discussed, might be indiscriminately applied to all corporations.

I think it is perfectly apparent that the word "mutual" as used in these statutes, refers to a class of corporation less extensive than the whole. Therefore it will not do to say that the legislature had in mind any corporation in which the capital of the different members or stockholders is to be contributed to the end that all may share in the benefit derived from its use, for that is characteristic of all corporations. Therefore, if a corporation be formed for the purpose of the entertainment, recreation and social betterment of its members alone, it does not follow that it is for that reason a mutual corporation, anymore than a business corporation, formed for the purpose of the financial betterment of its stockholders would be a mutual corporation.

The legislature must be presumed to have used the phrase under discussion

in some accurate and definable sense. It will not be supposed that the General Assembly used terms losely, or employed words in a fee section like Section 176, not capable of definition from examination of other sections enacted by it. I believe, therefore, that, in search of a definition for the phrase "mutual corporation" we ought to turn first to other sections of the General Code.

Section 8666 of the General Code provides as follows:

> "The trustees of a corporation created for a purpose other than profit, shall be personally liable for all debts of the corporation by them contracted."

This section alone is conclusive of the question which you ask. An ordinary corporation not for profit lacks one essential element of mutuality. Its members are not mutually liable for its debts. These, by statute, are cast upon its trustees, although the benefits which the corporation aims to secure are to be shared in common by all the members, whether they are trustees or not, yet the detriment which may ensue is not to be so shared. Therefore, an ordinary corporation not for profit is not a corporation "mutual" in character.

Section 9593 of the General Code provides as follows:

> "Any number of persons of lawful age, not less than ten in number, residents of this state, or an adjoining state and owing insurable property in this state, may associate themselves together for the purpose of insuring each other against loss by fire and lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, on property in this state, and also assess upon and collect from each other such sums of money, from time to time, as are necessary to pay losses which occur by fire and lightning, cyclones, tornadoes, wind storms, hail storms and explosions from gas to any member of such association. The assessment and collection of such sums of money shall be regulated by the constitution and by-laws of the association."

Here is a corporation other than a mutual life insurance corporation, which is strictly "mutual in character." Not only are the profits which may be reaped, and the benefits arising under the contracts entered into by the corporation, to be apportioned among the members, but the losses and the expenses are to be likewise so apportioned. The mutuality is complete.

Section 9608 of the General Code provides as follows:

> "Any number of persons of lawful age, residents of this state, not less than five, may associate themselves together for the purpose of becoming a body corporate, and insure themselves, and any person becoming a member of such corporation, in accordance with the rules and regulations thereof, against loss from death of domestic animals, and assess upon and collect from each other, such sums of money, from time to time, as are necessary to pay losses which occur from the death of such animals to any member of the corporation, and incidental expenses. The assessments and collections of such sums of money shall be regulated by the constitution and by-laws of the corporation."

This section affords another perfect example of a "mutual corporation" other than a life insurance corporation.

I have pointed out what seems to me sufficient reasons for denying that any

corporation, the expenses of operating which are not legally chargeable against the members, is a corporation "mutual in character" within the meaning of paragraphs 4 and 5 above quoted. I have also pointed out at least two instances or illustrations of corporations which are mutual in character and are not otherwise provided for in paragraphs 4 and 5. In view of the difficulty of the question, I hesitate to embark upon the formulation of the exact definition of these mooted terms. I am clearly of the opinion, however, that the corporation the purpose clause of which you quote in your letter is not a corporation "mutual in character," within the meaning of paragraphs 4 and 5 of Section 176, General Code, and that the element of mutuality is not lacking because of the insertion of the words "and all others" and "others," but even with these words eliminated, the corporation would not be a "mutual corporation."

I am, therefore, of the opinion that the fee for filing the Articles of Incorporation of a corporation having a purpose clause like that which you submit, and of all other simple corporations not for profit, the laws relating to which do not impose upon the members thereof mutual obligations, is $2.00, that prescribed by paragraph 5 of Section 176.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

427.

CORPORATIONS—USE OF MISLEADING NAME—DETECTIVE ORGANIZATIONS AS "POLICE" AND "SPECIAL POLICE"—DISCRETION OF SECRETARY OF STATE.

Whether or not the use of the word "police" or "special police," in the name of corporation organized for detective work, under Sections 10199 *and* 10200, *General Code would be likely to mislead the public in contravention to Section* 8628, *General Code, is a question which rests with the discretion of the Secretary of State.*

June 11,1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of May 2d, in which you submit the following question for my opinion:

> "This department is frequently in receipt of proposed articles of incorporation containing a name in which the words 'Police' and 'Special Police' are used, the purpose of which is to engage in private and special police, etc.
>
> "In view of the fact that the word 'Police' might imply some connection with or power under the civil authorities, and in view of the further fact that Sections 10199 and 10200 of the General Code authorize the organization of corporate bodies for the detection and conviction of criminals, is it proper for the secretary of state to file and record articles of incorporation of the kind above mentioned, but which are not drawn under the authority of said Sections 10199 and 10200 of the General Code?"

It will not be necessary to quote the two sections of the General Code to which you refer. Suffice it to say that the first section relates to the organization

of a corporation for the mutual protection of the property of its members from the depredations of horse thieves and other criminals; while the other section relates to the incorporation of a company for the purpose generally of apprehending and convicting persons accused of felonies or misdeameanors. The later section is the first of a series of sections which disclose that the purpose of the authority granted in it is to enable a group of persons to associate themselves together for the purpose of protecting each other against criminals, a purpose somewhat similar to that authorized in Section 10199 of the General Code.

Neither of these acts authorizes the incorporation of a business company to be conducted for the purpose of pecuniary profit; both authorize enterprises mutual in their character,—the main idea being that of community protection.

It would not be misleading, therefore, in my judgment, (although for reasons which I shall hereafter state, I do not so hold as a matter of law) for a corporation, such as mentioned by you, to use the word "Police" as a part of its name.

A more serious question arises as to the propriety of the use of the word "Police" or the phrase "Special Police," in view of the fact that in the proper sense these terms are applied only to those appointed by public authority; that is to members of the executive branch of the government or its political subdivisions. It would seem that by reason of the use of the word "Police" as a part of the name of a corporation, unsuspecting parties might be deceived into the belief that operatives employed by the corporation really had powers and privileges as public officers.

No statute expressly prohibits the use of the word or phrase in question in the name of a corporation formed for the lawful purpose of engaging in the watchman or detective business. The only provision of law, then, which in any way bears on the question is Section 8628 of the General Code, which provides as follows:

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

As I have heretofore advised you, it is for the secretary of state in the exercise of the executive discretion given him, to reasonably and not arbitrarily determine what corporate names are likely to mislead the public as to the nature or purpose of a business. If the secretary is of the opinion, upon careful consideration, that the public is likely to be mislead by the use of the word "Police" as a part of the corporate name of a company organized for any lawful purpose into the belief that the company sustains some official relations to the civil authorities, or that it is created under one of the sections of the General Code cited by you, then it is his duty to refuse to file or record the articles of incorporation. Further than this I cannot, as a matter of law, advise you.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

456.

INSURANCE CORPORATIONS—ORGANIZATION UNDER SPECIAL STATUTES—PURPOSES OF PAYMENT OF FUNERAL EXPENSES AND OF SICK BENEFITS—ARTICLES OF INCORPORATION OF ERSTER RADANTZ.

Inasmuch as there are special statutory provisions governing the organization of corporations for the specific purposes of paying the funeral expenses of its members and of paying benefits to sick and deceased members, a corporation may not be organized for these purposes, under the general laws, within the meaning of Section 8623, General Code.

June 23, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 7th, as to the legality of the purpose clause of the proposed Article of Incorporation of "THE ERSTER RADANTZ," a proposed corporation not for profit, which said purpose clause is as follows:

> "The purpose for which said corporation is formed is to assist in paying the funeral expenses of its deceased members; and to pay weekly benefits to its members who may be sick or disabled."

In State vs. The Pioneer Live Stock Company, 38 O. S., 347, it was held that the general language of Section 8623, to the effect that corporations may be formed under the general laws of the state for any purpose for which natural persons lawfully may associate themselves, is subject to the implied qualification that where express provision is made elsewhere in the statutes for the organization of corporations for specific purposes, such corporation may only be organized under such special statutes, and not under the general law. This is particularly true of corporations organized for the purpose of doing business which substantially amounts to insurance, and that is the point directly involved in the case cited.

I am of the opinion that the above quoted purpose clause defines a business which substantially amounts to insurance, and by virtue of the principle just stated, as well as by virtue of the express provisions of Section 665 of the General Code, which is to the effect that no company shall engage either directly or indirectly in this state in the business of insurance, unless it is expressly authorized by the laws of this state, this corporation may not be granted the authority it seeks unless its articles comply with the provisions of the law relating to insurance companies.

Our statutes authorize the formation of the following kinds of insurance companies:

1. Legal Reserve Life Insurance Companies (Sections 9339 et seq. of the General Code.)

2. Mutual Protective Life and Accident Companies (Sections 9427 et seq. of the General Code.)

3. Fraternal Beneficiary Associations, (Sections 9462 et seq., General Code.)

4. Health, Accident and Casualty Insurance Companies, (Sections 9510 et seq. of the General Code.)

The articles of incorporation submitted to me attempt to authorize the doing of a Health Insurance Business on the mutual plan, and as such must conform to the statutes specifically authorizing the formation of such associations.

As to the clause which attempts to confer authority to assist in paying the funeral expenses of deceased members, this business also is specifically recognized as a kind of insurance by Section 666 of the General Code, which provides as fol lows:

> "No company, corporation or association engaged in the business of providing for the payment of the funeral, burial or other expenses of deceased members, or certificate holders therein or engaged in the business of providing *any other kind of insurance* shall contract to pay or pay such insurance or its benefits or any part of either to any official undertaker or to any designated undertaker or undertaking concern or to any particular tradesman or business man, so as to deprive the representative or family of the deceased from, or in any way to control them in, procuring and purchasing such supplies and services in the open market with the advantages of competition, unless expressly authorized by the laws of this state and all laws regulating such insurance or applicable thereto have been complied with."

Formerly a special law found in 97 O. L., 61, therein designated as Section 3631-a Revised Statutes, authorized the formation of associations for the exclusive purpose of providing for the payment of funeral expenses of members, but this act was itself repealed in 1908, so that now there is no authority whatever for the formation of corporations for the purpose of paying the funeral expenses of deceased members; on the contrary, the declared policy of the State, as evidenced by the history of this legislation, is against the formation of such corporations.

For the foregoing reasons I advise that you do not file or record the proposed articles of incorporation of the above named company.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

461.

TAXES AND TAXATION—CORPORATIONS—WILLIS FRANCHISE TAX LAW—"DOING BUSINESS" IN OHIO—EASTMAN KODAK COMPANY—CODIFICATION OF STATUTES.

Before the codification of the statutes, under Section 2 of the Willis Law, a foreign corporation was not liable for the Willis Franchise Tax in Ohio, unless it was "doing business" in this state, and owning or using a part of its capital or plant in this State, and unless furthermore it was also subject to Section 148c, *Revised Statutes.*

Since the corporate activity of the Eastman Kodack Company in Ohio has been confined solely to the making of sales to wholesalers and retailers through agents and through correspondence, it was not "doing business" in Ohio, within the meaning of the statutes. Nor, furthermore, did it own or use a part of its capital stock in Ohio, nor was it subject to compliance with Section 148c, *Revised Statutes, and it is therefore, not liable for the Willis Tax.*

The mere fact that the said corporation had voluntarily complied with Section 148d, *Revised Statutes, did not make it subject to* 148c, *R. S. through estoppel or otherwise, for the reason that liability to* 148d *did not necessarily imply liability to Section* 148c, *General Code.*

Section 2, of the Willis Law as codified, now appears as Section 5499, *General Code, and the requirement therein that corporations shall be "subject to compliance with all other provisions of law" is an embodiment of the former provision of Section 2, of the Willis Law, requiring corporations so liable, to be subject to Section* 148c, *Revised Statutes; the reason being that a corporation subject to Section* 148c *was necessarily subject to "all other provisions of law."*

June 23, 1912.

Hon. Chas. H. Graves, Secretary of State, Columbus, Ohio.

Dear Sir:—One of the corporations certified to me by your predecessor as delinquent for franchise taxes for the years 1902 to 1910, inclusive, is Eastman Kodack Company, a corporation of the state of New York. The file number of this corporation is F-11844.

Upon investigation of the records in your office, and conferences with local counsel representing the corporation, I find that this case presents the following statement of facts:

> "Eastman Kodack Company owns no property in the State of Ohio and has none of its capital invested here. Its corporate activities in this state are confined to the making of sales to retailers and wholesalers in the line of goods which it manufactures, through traveling agents and correspondence."

It is apparent, therefore, that this corporation is not a foreign corporation "doing business in this state and owning or using a part or all of its capital or plant in this state," within the language of the original Willis Law (95 O. L., 125), or within the meaning of any of the revisions or codifications of that act, including that now in force, being Section 110 of the act in 102 Ohio Laws, 224-249, therein designated as Section 5499, General Code, so far, at least, as the above quoted portion of such statutes is concerned.

I need not dwell upon the technical meaning of the phrase "doing business,"

as used in this state. This phrase now has a well understood meaning, which excludes the solicitation of sales by traveling agents or through the mails. (See Judson on Taxation, Section 183)

Original Section 2 of the Willis Law, however, and succeeding revisions of the same, adopted prior to the adoption of the General Code of 1910, contained in addition to the foregoing language, the following:

> "and subject to compliance with the provisions of Section 148*c*, of the Revised Statutes of Ohio, shall in addition to the statements required by Sections 148*c* and 148*d*, Revised Statutes of Ohio, make a report in writing to the secretary of state," etc.

Inasmuch as during all but one of the years for which Eastman Kodack Company is supposed to be delinquent the statute, as I have just quoted it, was in force, it is proper, at the outset in this case, to analyze the provisions of orignal Section 2 of the Willis Law. Such analysis readily discloses the following facts:

1. Only such foreign corporations as "do business" in Ohio were liable for reports and fees. Therefore, if a foreign corporation exercised, in Ohio, corporate activities not amounting to the doing of business as such phrase has been julicially defined, it was not liable under the Willis Law.

2. Only such foreign corporations as, in addition to doing business in the state, owned and used a part or all of their capital or plant in Ohio were liable under the Willis Law. This distinction is perhaps not of great practical importance, inasmuch as the use of capital in action in a state probably constitutes the technical "doing of business."

It would not be profitable to enter into a detailed analysis of these principles. Suffice it to say that a foreign corporation may own property in Ohio without being liable for the Willis fee, but may not do business in Ohio without becoming liable therefor.

The facts respecting Eastman Kodack Company show that this corporation did not own any property in Ohio, nor did it use its capital in Ohio save to the extent before described, which, as already stated, does not constitute the doing of business.

3. In addition to doing business in Ohio, and in addition to owning or using a part or all of its capital or plant in Ohio, a foreign corporation, to be liable for Willis Law taxes, must have been subject to compliance with Section 148*c*, Revised Statutes.

In order fully to understand the meaning of the phrase "subject to compliance with the provisions of Section 148*c*" in connection with the phrase "in addition to the statements required by Sections 148*c* and 148*d*, Revised Statutes of Ohio," it is necessary to examine into said Sections 148*c* and 148*d*, Revised Statutes.

Section 148*c*, Revised Statutes, provides as follows:

> "Every foreign corporation, incorporated for purposes of profit, now or hereafter doing business in this state, and owning or using a part or all of its capital or plant in this state, shall * * * * before it proceeds to do any business in this state, * * * file with the secretary of state, a statement * * * *.
>
> "From the facts thus reported, and any other facts coming to his knowledge bearing upon the question, the secretary of state shall determine the proportion of the capital stock of the company represented by its property and business in Ohio, and shall charge and collect from the

company, for the privilege of exercising its franchise in Ohio, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation, represented by property owned and used and business transacted in Ohio * * *. Upon the payment of the said amount the secretary of state shall issue to the foreign corporation a certificate that such corporation has complied with the laws of Ohio and is authorized to do business therein.

"Provided, this section shall not apply to * * * foreign corporations entirely non-resident, soliciting business, or making sales, in this state by correspondence or by traveling salesmen. * * * *."

Section 148*d*, Revised Statutes, provides as follows:

"No foreign stock corporation, other than (certain corporations therein enumerated) * * * shall do business in this state without first having procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as can lawfully be carried on by a corporation incorporated under the laws of this state for such or similar business * * * or by two or more corporations so incorporated for such kinds of business exclusively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of the laws of this state. No such foreign stock corporations doing business in this state without such a certificate, shall maintain any action in this state upon any contract made by it in this state, until it shall have procured such certificate. Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement * * * setting forth a place within this state which is to be its principal place of business, and designating * * * * a person upon whom process against such corporation may be served within this state * * * *. For each certificate thus issued by the secretary of state he shall be entitled to receive and shall be paid fees according to the amount of capital stock of each such corporation."

In Toledo Commercial Company vs. Glen Mf'g Company, 55 O. S., 217, it was held, that being the sole question at issue, that Section 148*d*, as above quoted, did not apply to foreign corporations soliciting business in this state through traveling salesmen or by corespondence, in spite of the fact that this express exception, made in Section 148*c*, was not contained in Section 148*d*. This holding is upon the principle above set forth respecting the definition of the phrase "doing business."

It thus appears that upon the facts submitted, Eastman Kodak Company was never liable to comply either with Section 148*c* or Section 148*d*, Revised Statutes. I find, however, upon examination of your records, that this company actually complied with Section 148*d*, doubtless, upon a misunderstanding and prior to the decision in Toledo Commercial Company vs. Glen Mf'g Co. A further question is therefore raised as to the effect of such compliance, inasmuch as with respect to the question under consideration, both Section 148*c* and Section 148*d* are of like application or non-application—i.e., neither properly applies to corporations engaged in business in Ohio in the manner in which Eastman Kodak Company has always conducted its affairs in this state. It might be urged that the company has estopped itself by complying with Section 148*d*, from denying that it is liable

to comply with Section 148*c*, and further, from denying that it is liable to make annual reports and pay fees thereon as required by the Willis Law.

I do not think, however, that the company's compliance with Section 148*d* has any such effect. Sections 148*c* and 148*d*, obviously, do not apply to the same corporations, although, in this instance, they are both, properly speaking, inapplicable to Eastman Kodak Company. It does not necessarily follow, therefore, that because Eastman Kodak Company has voluntarily and erroneously complied with Section 148*d* it is liable to comply with Section 148*c*. It does not own or use any part of its capital in Ohio; so that, whether or not it has estopped itself from denying that it does business in Ohio, it may still he heard as to the additional facts involved in Section. 148*c*.

As a general proposition, then, Section 148*d* may and does apply to some foreign corporations to which Section 148*c* does not apply. There are other instances of the application of this proposition than the one afforded by the case of Eastman Kodak Company. It is sufficient, however, to point out now that whereas Section 148*d* applied to all corporations doing business in Ohio, Section 148*c* applied to such corporations only as, in addition to doing business in Ohio, owned or used all or a part of their capital or plant in this state. On the other hand, however, *no corporation could be liable to comply with Section* 148*c without also being subject to compliance with Section* 148*d*. The provisions of those two sections which I have already quoted, perhaps, do not disclose this fact fully. It is apparent, however, upon a careful examination of both sections and the express exceptions therein.

With the foregoing principles in mind, the exact meaning of the clause, "subject to compliance with the provisions of Section 148*c* of the Revised Statutes of Ohio" and "in addition to the statements required by Sections 148*c* and 148*d*, Revised Statutes of Ohio" becomes apparent. Taken in connection with what precedes in original Section 2 of the Willis Law, this phrase merely refers to and makes clear a fact already deducible from such previous provisions, namely: That the Willis Law is intended to apply to such foreign corporations as are liable to comply with Section 148*c*, and not to those liable for compliance with Section 148*d* *only*. This fact is rendered even more apparent by consideration of the case of Southern Gum Company vs. Laylin, 66 O. S., 578, wherein, in defining the nature of the exaction made by the Willis Law, Burket, J., uses the following language:

> "(Certain) provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. Ashley vs. Ryan, 49 Ohio St., 504 (and other cases) are examples of taxing the continued value of the existing privilege or franchise * * * *."

The privilege taxed in Ashley vs. Ryan was that of original incorporation and it was measured by a fee based upon the amount of the authorized capital stock. The privilege taxed by Section 148*c*, Revised Statutes, was likewise measured as to its value, by the proportion of the authorized capital stock of the corporation; and it is expressly recited in that section that this fee is "the same fee required to be paid by corporations formed under the laws of Ohio." It seems clear, therefore, that whatever be the nature of the privilege created by compliance with Section 148*d*, that created by Section 148*c* is the same as that taxed under the Willis Law.

For all the foregoing reasons, then, a corporation which has complied with Section 148*d* is not necessarily liable to compliance with Section 148*c*; a corpora-

tion which has complied with Section 148*d*, but is not liable to comply with Section 148*c*, is not liable for the Willis Tax; and Eastman Kodak Company, not being liable to comply with either Section 148*c* or Section 148*d*, but having voluntarily complied with the latter, is liable neither for compliance with Section 147*c* nor for annual reports and fees under the original Willis Law.

The foregoing deduction relates to the case of the company in question under the law as it existed prior to the adoption of the General Code. When the General Code was adopted the language of Section 2 of the Willis Law was changed so as to read as follows:

> "Every foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state, and *subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report, etc.*"

So that instead of referring to Section 148*c*, reference was to "all other provisions of law," and instead of referring to compliance with Sections 148*c* and 148*d*, reference is to "all other statements required by law." (Section 5525, General Code)

The same verbal changes are carried into the tax commission acts of 1910 and 1911, respectively. In my opinion these verbal changes did not effect any change in the meaning of the law. A corporation is not "subject to compliance with all other provisions of law" unless it is subject to compliance with what was, originally Section 148*c* and what was, originally, 148*d*. As I have already pointed out, a corporation could not be subject to Section 148c without being subject to Section 148*d*. If, however, a corporation were subject to compliance with Section 148*d* and not subject to compliance with Section 148*c*, it would not be "subject to compliance with all other provisions of law." In any event, Section 5525, not being completely intelligible upon its face—referring as it does, vaguely, to "all other provisions of law"—is to be construed by reference to the corresponding provisions of the pre-existing law, upon the well established principle that verbal changes in a statute, made in process of codification, merely, are not presumed to be made for the purpose of changing the meaning of the law; the presumption being that the legislature did not intend to change the meaning thereof. If Section 5525 of the General Code, and its successors in the acts of 1910 and 1911, are to be thus construed, it is at once apparent that the phrase "subject to compliance with all other provisions of law" in reality amounts to "subject to compliance with Section 183, General Code," (which is the present form of Section 148*c*, Revised Statutes).

For all the foregoing reasons I find that the State has no claim against Eastman Kodak Company. I have set forth my reasons with such fullness because I apprehended, from the fact that this company and perhaps others of the same class have been certified to me by your department, that it has been your view that all foreign corporations on the books of the secretary of state are liable for Willis taxes. This is not necessarily the case, as I have already pointed out, either under the original Willis Law or under the present statute.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

507.-18.-155.

ADVERTISEMENT AND BIDS—PRINTING BY BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—PLANS AND SPECIFICATIONS AND CONTRACT PRICE CANNOT BE VARIED AFTER ACCEPTANCE.

After specifications for printing have been submitted by the Board of Elections and advertisement and bids published therefor and the successful bidder selected, the specifications cannot later be departed from and further compensation allowed for further work notwithstanding a misunderstanding by the contracting firm as to the requirements of the specifications.

July 12, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—On February 23, 1912, you submitted to this department a certain resolution of the Board of Deputy State Supervisors and Inspectors of Elections of Cuyahoga County, wherein is requested my opinion as to the legal right of said board to allow extra compensation to the Britton Printing Company, of Cleveland, Ohio. From said resolution it appears as follows

On the 1st day of September, 1911, The Britton Printing Company of Cleveland, Ohio, made a proposition to the Board of Deputy State Supervisors and Inspectors of Elections of the City of Cleveland, Ohio, as follows:

> "We should be pleased to furnish you with your registration lists as per your specifications for the sum of $17.95 per thousand names."

The board has advertised for bids for the necessary registration blanks and lists of names of electors in various precincts in the City of Cleveland, Ohio, and had set forth in their advertisement for bids,

> "SPECIFICATIONS FOR ALPHABETICAL LISTS.
>
> "The price to be paid to include the cost of composition and presswork, stock and binding and all work provided herein on both sheets and pamphlets, as follows:
>
> "1. For each election precinct in the City of Cleveland ten (10) copies of the list of registered voters in said precinct, printed in small pica type with headings and footings, on sheets 22x28 inches, the paper to be used to be white book paper eighty (80) pounds to the ream.
>
> "2. For each election precinct in the City of Cleveland seventy-five (75) lists of registered voters in said precinct, in small pica type with headings and footings, in pamphlet form 9x5⅞ inches, on number two (2) book paper, fifty (50) pounds to the ream of a sheet 25x38 inches.
>
> "Copy will be furnished by the Clerk of the Board on or before the last registration for the fall of 1911, and the printed sheets provided for in (1) above to be delivered at the Rooms of the Board before 8 o'clock A. M., October 25th, 1911, and the pamphlets provided for in (2) above to be delivered at the Rooms of the Board not later than 8 o'clock A. M., November 1, 1911.
>
> "Copy for the first days of registration to be furnished at 10 A. M. of the morning after the first day of registration being October 6, 1911.

"Copy for the second days registration to be furnished at 10 A. M. of the morning after the second day of registration being October 13th. the Printer's Copy Book for the last two days of registration must be furnished by the successful bidder.

"Two proof copies of the first and second days and two proof copies of the last two days must be furnished as soon as possible after receiving copy.

DAYS OF REGISTRATION: Oct. 5th, 12th, 20th and 21st."

Upon this advertisement for bids and the specifications for alphabetical lists, The Britton Company made their proposition, which proposition was by the Board declared to be the lowest and best proposal and accepted the same.

On Oct. 10, 1911, The Britton Company wrote the following letter:

"DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS, *City Hall, Cleveland.*

"DEAR SIRS:—We herewith give you the dates on which we can deliver registration names. They are as follows:

"First day, Wednesday the 11th, 12:00 Noon

"Second day, Tuesday the 17th, 12:00 Noon

"Third day, Wednesday the 25th, 12:00 Noon.

"We also call your attention to the fact we did not figure on furnishing lists in this manner, and we respectfully call your attention to your specifications and our letter of September 1st.

"Yours very truly,

"THE BRITTON PRINTING CO."

After the completion of the work, The Britton Company presented a claim to this Board for extra compensation—can the Board legally pay the same?

The Board of Deputy State Supervisors and Inspectors of Elections in Cuyahoga County, Ohio, having advertised for bids for work, giving specifications therefor as required by law, and The Britton Company having bid therefor, under the specifications, they must comply with the specifications and cannot be heard to say they did not understand the specifications, nor the law governing them. The Board of Elections cannot likewise advertise for bids under specifications and then allow the bidder to add additional compensation for carrying out the specifications and thus defeat the very object of the law.

Section 4917, G. C., requires certain things to be done and the specifications say what the Board want. The specifications seems clear as to what the Board want; if The Britton Company did not understand them it was their duty to inform themselves. The Board has no authority to pay out money except in the ordinary way provided by law.

The specifications and the bids thereunder are matters of record, and I find no law to authorize the board to pay more than the amount of the bid, because to comply with the specifications and the law might entail loss to somebody.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

251.

ARTICLES OF INCORPORATION—MOTION PICTURE EXHIBITORS' LEAGUE OF AMERICA—CORPORATION FOR PROFIT—COMBINATION IN RESTRAINT OF TRADE

April 9, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am of the opinion that the Articles of Incorporation of THE MOTION PICTURE EXHIBITORS' LEAGUE OF AMERICA, submitted to me, ought not to be filed by you.

My reasons for reaching this general conclusion have been set forth in a previous opinion. The following phrases of the purpose clause of these particular articles are especially objectionable:

> "* * * to collect, preserve and circulate valuable business information and statistics, to preserve and adjust controversies and misunderstandings between persons engaged in the moving picture business in all its branches; to procure and establish fair and equitable prices for services furnished, and required by said business; and to promote, protect and advance the interests of the owners and patrons of moving picture theaters; * * *."

These are clearly business purposes and in furthering them the association would be promoting the pecuniary advantages of its members and would thus be an undertaking for profit. Furthermore, the above language comes dangerously near to defining a combination in restraint of trade and competition, if it does not indeed frankly avow the intention to enter into such a combination.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

587.

ARTICLES OF INCORPORATION—THE DIME SAVINGS SOCIETY—SAVINGS SOCIETIES NOT CORPORATIONS "NOT FOR PROFIT."

A corporation whose articles disclose the purpose of inaugurating a mutual money savings system cannot be organized as a corporation "not for profit."

The laws formerly providing for the organization of savings societies as corporations not for profit have been repealed.

May 6, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 26th, forwarding to me the proposed Articles of Incorporation of "THE DIME SAVINGS SOCIETY," and requesting my opinion as to the legality of the purpose clause thereof, in view of the fact that the proposed articles are for a corporation *not for profit.*

Said purpose clause is as follows:

> "Said corporation is formed for the purpose of inaugurating a mutual money saving system."

I should be inclined to hold this purpose clause to be too vague and indefinite,

regardless of the propriety of forming such corporation not for profit. What a "Mutual money saving system" is, and what part the corporation would play in "inaugurating" such a system, I cannot imagine.

However that may be, it is clear that the purpose for which the corporation is formed is the pecuniary advantage of its members. That being the case, it should be organized, of course, as a corporation for profit, unless some statute expressly authorizes the form of organization chosen by the incorporators.

My reasons for this conclusion have been fully stated in previous opinions addressed to your department.

From the name of the proposed corporation, as well as from the language used in the purpose clause of the articles, I have supposed that the incorporators are seeking to organize the type of corporation known as a "savings society." There was at one time an act of the General Assembly of this state under which corporations might be organized, having the form of corporations not for profit, for the purpose of conducting a savings society. I refer you to Swan and Saylor's Revised Statutes of Ohio, page 188. Subsequently, however, this statute was repealed, 70 O. L., 40-46. The corporate power of such savings societies as had been organized under the prior law were preserved by the repealing act, which was itself an act to provide for the organization of savings and loan associations. There are several of these "savings societies" still in existence in Ohio, but, no subsequent legislation having changed the law as it existed after the passage of the act last above cited, there is no longer any authority for the incorporation of such savings society, at least as a corporation not for profit, with the powers and privileges conferred by the now repealed law upon such savings society.

For all the above reasons, I am of the opinion that you should not file or record the proposed Articles of Incorporation of "THE DIME SAVINGS SOCIETY."

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

588.

DISSOLUTION OF CORPORATIONS—DIFFERENT METHODS—CERTIFICATE OF CORPORATION AND OF COURT—CERTIFICATE OF TAX COMMISSION—FILING WITH SECRETARY OF STATE—NECESSITY FOR REPORTS FOR MONTH OF MAY WHEN DISSOLUTION OCCURS PRIOR THERETO—CODIFICATION OF STATUTES.

When an action is brought by petition to Court under Section 11938 *of the General Code to dissolve a corporation, and, prior to the month of May, a final judgment is entered by the court dissolving the corporation and appointing a receiver to wind up its affairs; and where, after the* 31*st day of May of the same year, a certificate of dissolution issued by the clerk of court under Section* 11975 *of the General Code, is tendered to the Secretary of State—*

HELD:

1. *By virtue of Section* 5521 *of the General Code the secretary of state may not lawfully receive the certificate of dissolution without having the certificate of the Tax Commission provided for in Section* 5521 *of the General Code to the effect that the corporation has made all reports required by law to be made to the Commission and paid all taxes, fees and penalties thereon.*

2. *The Tax Commission may issue the said certificate provided for by Section* 5521 *of the General Code without having received the report as to capital stock, etc., provided for by Section* 5495 *of the General Code.*

From the history of the statutes and particularly from the evident meaning of Section 8 of the original Willis Law, the codifying commission has clearly made a mistake in drawing Section 11978 of the General Code, which is an exact duplication of Section 5520 of the General Code, when it carried into these sections the provisions to the effect that a corporation would not be exempt from the requirements to make reports and pay fees without filing the certificate of dissolution provided for in Section 11975 of the General Code, when such dissolution is effected by a decree of court.

It is intended by the statutes, as amended in 1902, that no dissolution shall be complete until a record thereof has been made by the secretary of state through the certificates of dissolution required to be filed with him. From the evident meaning of said Sections 5520 and 11978 of the General Code, however, when a dissolution is made by order of court, the corporation shall be absolved from obligations to file said reports from the date of the judgment, and when the judgment occurs prior to May and the certificate of dissolution is filed subsequent to that month, the dissolution dates back to the date of judgment, as regards the obligation to make such reports.

August 15, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 10th, submitting for my opinion thereon the question disclosed by correspondence between your department and counsel for the J. W. Gorrell Coal Company enclosed therein. The question is as follows:

> "An action is brought under Sections 11938, etc., General Code, to dissolve a corporation. In said action, prior to the month of May in a given year, final judgment is entered by the court, dissolving the corporation and appointing a receiver to wind up its affairs; after the 31st of May of the same year a certificate of dissolution, issued by the Clerk of Court under authority of Section 11975, General Code, is tendered to the Secretary of State."

Two questions of law arises under these facts, as follows:

> "1. May the Secretary of State lawfully receive and file a certificate tendered under such circumstances without having the certificate of the Tax Commission provided for by Section 5521, General Code, to the effect that the corporation has made all reports required by law to be made to the Commission and paid all taxes, fees or penalties thereon?
>
> "2. Is the Tax Commission authorized to issue the said certificate provided for by Section 5521, General Code, if no report to the Tax Commission has been made by the corporation during the month of May, as provided by Section 5495, etc., General Code?"

I have received a similar inquiry from the Tax Commission which has before it the cases of the Keever Stone Company and the Patent Wood Keg Company. I shall endeavor so to frame this opinion as to cover all the questions suggested in the letter of the Tax Commission as well as that suggested in your letter.

I beg to quote the following provisions of the General Code, the application and effect of which are involved in these questions:

> "Section 11941. Upon such petition * * * * being filed, an order shall be entered requiring all persons interested in the corporation to

show cause, if any they have, why it should not be dissolved, before some referee or master commissioner appointed by the court, and to be named in the order * * * *.

"Section 11943. When the report is made, if it appears to the court that the corporation is insolvent, or that its dissolution will be beneficial to the stockholders, and not injurious to the public interest, or that the objects of the corporation have wholly failed, or been entirely abandoned, or that it is impracticable to accomplish such objects, a judgment shall be entered dissolving the corporation, and appointing one or more receivers of its estate and effects. The corporation shall thereupon be dissolved and cease.

"Section 11945. Such receiver shall be vested with all the estate, real or personal, of the corporation, from the time of his filing the security required by law, be trustee of such estate for the benefit of the creditors of the corporation and its stoskholders, and have all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors.

"Section 11974. In case of dissolution or revocation of its charter, every domestic corporation shall file with the secretary of state a certificate thereof. If the dissolution is by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation.

"Section 11975. In case of dissolution or revocation of charter by action of a competent court, or the winding up of a corporation either domestic or foreign, by proceedings in assignment or bankruptcy, such certificate shall be signed by the clerk of the court in which such proceedings were had. The fees for making and filing it, shall be taxed as costs in the proceeding as other costs.

"Section 11978. The mere retirement from business or voluntary dissolution of a domestic or foreign corporation without filing the certificate provided for in section 11974, eleven thousand nine hundred and seventy-five, and eleven thousand nine hundred and seventy-six, shall not exempt it from the requirements to make reports and pay fees in accordance with the provisions of the next four preceding sections." (I shall hereinafter point out this section is erroneously placed where it is found in the General Code, and belongs in connection with the corporation franchise tax statutes where, as section 5520, General Code, the subject matter thereof may also be found. Said section 5520 will be next quoted).

"Section 5520. The mere retirement from business or voluntary dissolution of a domestic or foreign corporation, without filing the certificate, as provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five, and eleven thousand nine hundred and seventy-six of the General Code, shall not exempt it from the requirements to make reports and pay fees for taxes in accordance with the provisions of this act." (Section 131 of the Tax Commission Act of 1911, 102 O. L., 204).

"Section 5521. In case of dissolution or revocation of its charter, on the part of a domestic corporation, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports, required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid.

"Section 5695. Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each corporation, organized under the laws of this state, for profit, shall make report, in writing, to the commission, in such form as the commission may prescribe.

"Section 5496. Such report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary or general manager of the corporation, and forwarded to the commission.

"Section 5497. Such report shall contain:

"1. The name of the corporation.

"2. The location of its principal office.

"3. The names of the president, secretary, treasurer and members of the board of directors, with the post office address of each.

"4. The date of the annual election of officers.

"5. The amount of authorized capital stock and the par value of each share.

"6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

"7. The nature and kind of business in which the corporation is engaged and its place or places of business.

"8. The change or changes, if any, in the above particulars made since the last annual report.

"Section 5498. Upon the filing of the report, provided for in the last preceding sections, the commission after finding such report to be correct, shall, on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall verify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following October."

The first question which is suggested to me by the correspondence submitted and which I have above stated, is, it seems to me, sufficiently answered by the explicit provisions of Section 5521, supra. That section is plainly applicable to the filing of a certificate of dissolution, resulting from an involuntary proceeding. Indeed, it not only applies to the dissolution of a corporation, but to the "revocation of its charter" as well. There can be no question, therefore, that the secretary of state is not authorized to file a certificate of dissolution, signed by a clerk of courts upon an entry in a proceeding brought under Sections 11938, etc., General Code, as before quoted unless the Tax Commission should first certify that all reports required to be made to it have been filed by the corporation in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid.

This, of itself, answers the question which you present. The contentions of the various counsel interested in these cases, however, are really directed to the second question, as I have stated it, and that question is the only one concerning which there can be any serious doubt.

May, then, the Tax Commission lawfully issue a certificate such as that provided in Section 5521, General Code, in the case of a corporation as to which an entry of dissolution, under Section 11943, General Code, has been made by a court,

when the certificate required by Section 11975, General Code, has not been filed prior to the month of May?

Two subsidiary questions have been suggested by counsel in connection with the main question here, as follows:

> "1. What is the effect of an entry of dissolution under Section 11943?
>
> "2. What is the effect of Section 5520, General Code, as tending to disclose the legislative intent as to the application of the Willis law?"

In seeking for an answer to the first of these two suggested subsidary questions I have found it necessary to go into the legislative history of the various sections which I have quoted.

Section 11938 is a very old section, having been originally enacted in 64 O. L., 153. The procedure outlined in this and succeeding sections is, as suggested by counsel for the Patent Wood Keg Company, adverse in its nature, in that it applies to corporations having debts and the rights of creditors are involved therein. It was one of three different methods, then or thereafter provided, for the dissolution of domestic corporations; the others are found in Sections 8738 to 8743, inclusive, General Code, and in Sections 11972 and 11973, General Code, respectively. Of these two other methods the first is available only to corporations having no debts, while the other apparently can not be completed until the debts of the corporation are satisfied, although this does not already appear. I shall not quote from or fully discuss the provisions of the sections to which I have just referred, suffice it to say that they are correctly referred to by counsel as voluntary in their nature.

In addition to these three proceedings for dissolution of a domestic corporation there are other methods by which a corporate franchise may be terminated. I refer, of course, to proceedings in Quo Warranto under Section 12304 and to similar proceedings under other sections of the General Code.

All of these methods or means of terminating the franchise to be a corporation were in existence prior to the year 1902, although in that year what are now Sections 8740 and 8741, General Code, were enacted as supplementary to what was then Section 5674, Revised Statutes. (See 95 O. L., 208).

The amendment referred to deserves special mention here. Prior to 1902, Section 5674, Revised Statutes, proivdes as follows:

> "When a majority of the directors, trustees, or other officers having the management of the concerns of any corporation, become satisfied that the objects of the corporation can not be accomplished, and no installment of the capital stock of the corporation has been paid, and no investments have been made, and no debts incurred which are unpaid, they, or the president of the board of directors, trustees, or other officers, may call a meeting of the stockholders of the corporation, at such time and place as he or they may designate, by publication in some newspaper of general circulation in the county wherein the principal office of the corporation is located; and if a majority in amount of stockholders present at such meeting, in person or by proxy, decide that the objects of the corporation can not be accomplished, the corporation shall thereupon be dissolved and shall cease."

By the amendment in question Section 5674 was changed and supplemented so as to read as Section 8741, General Code, now reads as follows:

> "If all the stockholders present at such meeting in person or by

> proxy decide to surrender and abandon its corporate authority the corporation shall be abandoned and dissolved upon the filing of a certificate of the abandonment or dissolution with the secretary of state in the manner provided by law."

It is clear, however, that prior to the amendment of 1902 it was possible to dissolve a corporation either by a decree of court or by voluntary action of the members of the corporation, and to forfeit and annul the corporate franchise of a corporation in proceedings in Quo Warranto without filing any certificate in the office of the secretary of state. The typical language found in all the sections is that with which original Section 5674, supra, terminates, namely, "the corporation shall thereupon be dissolved and shall cease." (See Section 11943, General Code, supra, as Section 5656, Revised Statutes; Section 12323, General Code, as Section 6780, Revised Statutes, etc.)

Now, as to one of the methods which I have been discussing the Legislature changed the statutes itself, providing for such method in the manner already pointed out, so that instead of the proceeding being complete with the adoption of a resolution by the directors and stockholders of a corporation it was not complete until a certificate was filed "with the secretary of state in the manner provided by law." As to the other methods, however, and the sections providing for them, no such change was made. On this point might be constructed an inference to the effect that it was not intended that the filing of a certificate with the secretary of state should be necessary in a case of dissolution or revocation of a corporate charter otherwise than under what was formerly Section 5674*a*, Revised Statutes.

Such an inference, however, can not be supported. While Section 5674*a*, now Section 8741, General Code, provides that the dissolution should be effected "upon the filing of a certificate of the abandonment or dissolution with the secretary of state, in the manner provided by law" this section itself does not contain the "provision" of which it speaks. It is necessary to look elsewhere for the requirement that any certificate be filed with the secretary of state.

Obviously, the reference here is to Sections 11974, etc., General Code, originally enacted in 95 O. L., 127. I take the liberty of quoting the exact language of that act which, significantly enough, is the "Willis Law," so-called. The provisions in question are found in Section 8 of the act, which is as follows:

> "Every domestic corporation, in case of dissolution, revocation of charter or abandonment of its corporate purposes, shall file with the secretary of state a certificate of such dissolution, revocation of charter or abandonment; in case of dissolution or abandonment by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation; in case of dissolution, or revocation of charter by action of a competent court, such certificate shall be signed by the clerk of the court entering the decree of dissolution or revocation. The fees for making and filing such certificate with the secretary of state shall be taxed in the cost in favor of the party paying the same and shall have the same priority as other costs in the dissolution proceedings.
>
> * * * * * * * *
>
> "The mere retirement from business or voluntary dissolution of a domestic or foreign corporation without having filed the certificate provided for in this section, shall not exempt it from the requirements to make reports and pay fees in accordance with the provisions of this act."

It will be observed that the provisions of present Section 5520 are substantially the same as the last paragraph of this section.

This section was subsequently amended in immaterial particulars in 97 O. L., 383.

The significance of the provisions now found in Sections 11974, etc., becomes at once apparent when the legislative history already detailed is investigated These provisions were a part of the Willis Law itself. By other provisions of the same original law it was made the duty of the secretary of state to exact from each corporation organized under the laws of this state an annual report and an annual fee thereon; which said fee, in the case of Southern Gum Co. vs. Laylin, 66 O. S., 578, was held to be an annual tax on the continuing annual value of the franchise to be a corporation. It was provided that the secretary of state might request the Attorney General to bring certain actions to enforce compliance with the provisions of the act. By virtue of other statutes the secretary of state had in his office a complete record of corporations organized under the laws of Ohio, but *no record whatever* of the dissolution, abandonment or ouster of any such corporations. Accordingly, it would be impossible for him, in the administration of the Willis Law, to know what corporations of those found on his records were liable for the annual and fees unless some method was provided by which he might have a record of dissolutions and revocations. The General Assembly intended to afford such a method as a part of the scheme of taxation embodied in the Willis Law by enacting Section 8 thereof, now Section 11974, General Code.

What, then, was the effect of the enactment of Section 8 of the Willis Law upon the statutes providing for the various methods of the termination of a franchise to be a corporation other than formerly embodied in Section 5674, Revised Statutes, and now found in Sections 8740 and 8741, General Code? In my opinion, there can be but one answer to this question. *A domestic corporation could not be effectually dissolved either by the court in a proceeding in dissolution or Quo Warranto, or by the voluntary action of the members of the corporation, after April* 11, 1902, *unless a certificate was filed with the secretary of state.*

The reason for this conclusion is found in the very explicit language of Section 8 itself. In the first place, that section in its original form, as well as in its form in Sections 11974 and 11975, General Code, applies not only to the "dissolution" of corporations but to the "revocation of charter" as well. Furthermore, the method of causing the certificate to be filed in case of dissolution or revocation by action of a competent court, was expressly provided for. I am not now speaking of the time when the dissolution becomes effective as against the state. I assert, merely, that no court, after the passage of Section 8 of the original Willis Law, could completely exercise its power to dissolve or oust a corporation without causing a certificate to be filed with the secretary of state.

Now, the fact that Section 8 was a part of the Willis Law has further significance than that already dwelt upon. Because it was manifestly the purpose of the legislature in incorporating Section 8 into the act to afford to the secretary of state a means of knowing what corporations were in existence to be given here, for the purpose of charging them with the Willis tax, it seems to follow that as to all corporations, the record of the incorporation of which is found on the record books of the secretary of state and no record of the dissolution or revocation of which is there found, the liability for Willis Law reports and fees exists. That is to say, it is *presumably true*—or was under the original Willis law—that all domestic corporations not dissolved on the books of the secretary of state are in existence for Willis Law purposes and are required to make the annual reports and pay the fees thereon. I have said that *presumably* a corporation not dissolved on the records of the secretary of state is in existence and liable to fees under the Willis Law. It does not necessarily follow, however, that a certificate of dissolution, when filed by the secretary of state, does not relate back and terminate the life of a corporation as of some other date. Other things being equal, of course,

it is true, that the requirements of Sections 11974 and 11975 being a part of the machinery of dissolution, and the dissolution itself not being complete until these requirements are complied with, the corporation would remain in existence until a certificate is filed with the secretary of state; and particularly would it seem that a corporation would continue in existence for the purpose of the Willis Law because the requirement as to the filing of the certificate was enacted as a part of that law.

It is contended, however, that other things are not equal because Section 5520 provides that "the mere retirement from business or voluntary dissolution of a domestic corporation, without filing a certificate * * * shall not exempt it from the requirements to make reports and pay fees or taxes in accordance with the provisions of this act." It is pointed out that this section enumerates *voluntary* dissolution, among other things, and does not mention dissolution by decree of court or revocation of charter. The rule of enumeration and exclusion is relied upon to sustain the inference that if a corporation be dissolved by decree of court such dissolution, of itself, without the filing of a certificate, is sufficient to exempt the corporation from making reports and paying fees.

Strength is lent to this contention by the fact that Section 5521 certainly in pari materi with Section 5520 expressly mentions "revocation of charter" and refers to "dissolution," as already pointed out, in such a way that dissolution by decree of court was meant thereby as well as voluntary dissolution. It could be argued here that the obvious difference between the language of Sections 5520 and 5521, as I have pointed it out, establishes the conclusion that the former is of much narrower application than the latter. Opposed to his contention is the fact that in Section 5520, as in Section 11978, the "certificate" referred to is expressly designated as "the certificate provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five, and eleven thousand nine hundred and seventy-six of the General Code." Now, Section 11975 provides for the filing of a certificate "in case of dissolution or revocation of charter by action of a competent court;" so that the mention of the certificate provided for in Section 5520 would seem to extend the scope of that section to dissolutions by decree of court and revocations of charter, and virtually to make such section to read as follows: "No dissolution of a domestic corporation, without filing the certificate provided for by law, shall exempt it from the requirements to make reports, etc."

At the most, however, I think that the specific mention of Section 11975 in Section 5520, taken in connection with the language, "The mere retirement from business or voluntary dissolution," creates a doubt as to the exact scope of the section. It is here that the legislative history already referred to and partly described becomes of service in ascertaining the true meaning of Section 5520.

I have already pointed out that Section 5520, while enacted as Section 131 of the Act of 1911, is, in reality, a transposition of the subject matter of Section 11978 to its proper place in the General Code. The language of the two sections is practically identical. Section 11978 is a codification of Section 8 of the Willis Law as amended in 97 O. L., 383. Said Section 11978 contains the same contradictory provisions already described in connection with Section 5520. It is a familiar and often applied principle of statutory interpretation that if there is ambiguity apparent upon the face of a codified statute, such ambiguity may be resolved by construing the meaning of the original act. The theory of this rule is that changes made in the process of codification are presumed not to be made with the intention of changing the meaning of the law. I need not cite authorities upon this well settled point.

Section 8 of the original act must then be referred to as indicating the meaning of Section 5520, General Code. At the risk of repetition let me quote certain portions of said Section 8 which, I think, throw a great deal of light upon the question now under consideration:

"In case of dissolution or abandonment by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation; in case of dissolution or revocation of charter by action of a competent court, such certificate shall be signed by the clerk of the court * * *.

"The mere retirement from business or voluntary dissolution of a domestic * * * corporation, without having filed the certificate provided for in this section, shall not exempt it from the requirements to make reports, etc."

Substantially the same language as that above quoted is now found in Sections 11974, 11975 and 5520, above quoted, *except that* the codifiers assumed that the phrase "the certificate provided for in this section" as used in original Section 8, referred to the certificate to be signed by the clerk of court as well as that to be signed by the president and secretary of a corporation. I do not think that this assumption was correct. Section 8 defines what constitutes "dissolution by voluntary action of a corporation." That is treated as a species of dissolution, separate and distinct from dissolution or revocation by action of a competent court. When, therefore, later in the same section the phrase "the mere retirement from business or voluntary dissolution of a domestic * * *corporation" is used I can not escape the conclusion that it was not intended that said phrase should include, within the scope of its meaning, the dissolution or revocation of the charter of a corporation by action of a competent court.

I am satisfied, therefore, that when the General Assembly in codifying said Section 8 as Section 11978, General Code, referred to "the certificate provided for in Section 11975" it was guilty of a mistake. If this language be eliminated from Section 11978 and from Section 5520, General Code, which is patterned after that section, there could be no doubt as to the meaning of these sections, which would then be free from ambiguity.

It follows then that Section 5520 is to be construed strictly so as to mean that the mere *voluntary* dissolution of a domestic corporation, without filing a certificate, shall not exempt it from the requirements to make reports and pay fees. Does it then follow that any other kind of dissolution, without filing the certificate provided by law, does exempt the corporation from these requirements? Upon a careful consideration I am of the opinion that this conclusion follows.

Two reasons have induced me to adopt this view: In the first place, if the subject matter of present Section 5520 had not been incorporated expressly in Section 8 of the original Willis Law it might have been argued that by necessary inference the dissolution of a corporation, whether by decree of court or otherwise, was not complete, for the purposes of the Willis Law, until the certificate is filed. I have already considered the argument on this point, but when the General Assembly took it upon itself to qualify the section by interposing the language under consideration especially in connection with the other language showing the distinction in the mind of the Legislature between "voluntary dissolution" and "dissolution by action of a competent court," I think it must be presumed that it was not intended that in cases of dissolution by action of a court the liability for Willis Law reports and fees should continue until the certificate was filed.

In the second place, as I have already pointed out, what was originally Section 5674, Revised Statutes, was so amended and supplemented at the same session of the General Assembly at which the Willis Law was passed, and only a few days thereafter, as to leave no doubt about the question of legislative intent. The original statute just mentioned provided that "if the majority in amount of stockholders present at such meeting * * * decides that the objects of the corporation can not be accomplished, the corporation shall thereupon be dissolved and shall

cease." The Legislature so changed this language in the act found in 95 O. L., 208, as to provide that "if all the stockholders present at such meeting * * * decide to surrender and abandon its corporate authority, the corporation shall be abandoned and dissolved upon the filing of *a certificate of such abandonment or dissolution with the secretary of state in the manner provided by law.*"

Of course, the General Assembly had in mind the provisions of Section 8 of the Willis Law when it passed this act. It saw fit then expressly to amend the provisions as to *voluntary* dissolutions in order to conform to the Willis Law. *No such amendment was made in and to the statutes of quo warranto or the sections providing for the dissolution of a corporation by action of a competent court.* I cannot believe that the express amendment of the one group of statutes and the omission to amend the provisions as to other methods of terminating the corporate franchises were accidental, especially in view of the language of Section 8 of the Willis Law as already analyzed. I think it is clear, therefore, that the Legislature in enacting the Willis Law and the other statutes passed as a part of the same scheme of legislation, did not intend that the liability of a corporation whose charter is taken away from it by decree of a competent court should continue under the Willis Law until the certificate is filed with the secretary of state.

I am, for the foregoing reasons, of the opinion that when an order of dissolution has been made in a proceeding brought under Section 11938, etc., General Code, prior to or during the month of May in any year, such a decree terminates the existence of the corporation for Willis Law purposes and no report need be made for that year, although technically perhaps the dissolution may not be complete until the certificate has been filed with the secretary of state.

I am accordingly of the opinion that if it is made to appear to the Tax Commission that a corporation not yet dissolved on the records of the secretary of state has, nevertheless, prior to or during the month of May in any year, been dissolved by action of a competent court, or that its charter has been revoked in quo warranto proceedings during the same period of time, the Commission may and should if the corporation is not delinquent for other reports, certify to the secretary of state that all reports required to be made to it have been filed in pursuance of law and that all fees and penalties thereon due from such corporation have been paid.

I shall send a copy of this opinion to the Tax Commission.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

673.

ARTICLES OF INCORPORATION—THE NORWOOD RETAIL GROCERS' AND BUTCHERS' ASSOCIATION—INDEFINITENESS.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In compliance with the request of your favor of October 4, 1912, I have considered the legality of the purpose clause of The Norwood Retail Grocers' and Butchers' Association, a proposed corporation not for profit, which purpose clause is as follows:

> "The purpose for which said corporation is formed is for the mutual benefit of its members."

In my opinion this statement lacks the definiteness which is required by the statute. It does not define any purpose whatever. Every corporation is, in a sense, formed for the mutual benefit of its members. If the incorporators of this en-

terprise desire to obtain permission to be a corporation they must specifically set forth and describe the kind of activity which they desire authority to undertake under corporate organization. Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

682.

MUTUAL INSURANCE CORPORATIONS—ARTICLES OF INCORPORATION OF THE FIRST GREEK CATHOLIC RUSSIAN UNION OF ST. GEORGE IN THE STATE OF OHIO NOT APPROVED BECAUSE BENEFIT UNCERTAIN AND ASSESSMENT CERTAIN.

The statutes do not authorize the transaction of a mutual insurance business upon a plan that leaves uncertain the amount of the death benefit and makes certain the amount of the assessment.

The articles of the First Greek Catholic Russian Union of St. George in the State of Ohio therefore which state the purpose of paying a sick benefit of $5.00 *per week and of assessing the sum of* $1.00 *each in case of a member's death, and paying the total amount to the wife or estate of the deceased, cannot be approved.*

October 26, 1912.

HONORABLE CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 24th, transmitting the proposed Articles of Incorporation of THE FIRST GREEK CATHOLIC RUSSIAN UNION OF ST. GEORGE IN THE STATE OF OHIO, a proposed corporation "not for profit," formed for the purpose of,

> "To pay a sick benefit of $5.00 per week also members will be levied the sum of $1.00 each in case of a member's death, this amount to be paid to his wife or estate."

The articles were transmitted to me for my consideration. I find myself unable to approve them for the reasons suggested in my opinion to you under date of June 23, 1912, in the matter of "The Erster Radantz." In that opinion I stated upon the authority of State vs. The Pioneer Live Stock Company, 38 O. S., 347, that in order that an insurance company might lawfully be formed under the statutes of this state, its purpose must conform to one of the statutes authorizing the formation of insurance companies. I also called attention to the express provisions of Section 665 of the General Code in this connection.

These principles being accepted it is obvious, I think, that the Articles of Incorporation in question can be accepted by you, if at all, only as those of a "mutual protective association" formed under Section 9427 of the General Code, which provides in part as follows:

> "A company or association may be organized to transact the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of the deceased members of such company or association, as the member may direct, in the manner provided in the by-laws. * * * *"

The purpose clause in question, though brief, so explicitly states the proposed method of doing business by the corporation to be formed as to make it clear that it is not in conformity with the above quoted section in that it is not proposed to

provide "for the payment of stipulated sums of money" to the wives or estates of the deceased members, but merely an indefinite sum consisting of $1.00 from each member of the association as the membership may be constituted at the time of a given death. The evident intention of the statute being that the sum shall be stipulated in advance, and the evident intention of the incorporators being that the association shall not agree to pay any definite sum, I am constrained to hold that the latter does not conform to the law in this respect.

Indeed, I am not certain that the payment of $1.00 a member to be assessed against the members in case of death constitutes the transaction of the business of life insurance "on the assessment plan" as provided in the statute. As I understand the meaning of the phrase "assessment plan" as used herein, it is that which is described by Bradbury, J., in delivering the opinion in State ex rel., vs. Life Insurance Company, 58 O. S., 1-29, as follows:

> "The amount of the call is uncertain and depends upon the will of the managing body of the concern, its board of trustees."

In short, the statutes of this state does not seem to authorize the transaction of a mutual insurance business upon a plan that leaves uncertain the amount of the death benefit and certain the amount of the assessment.

For the foregoing reason, I am obliged to return herewith, without by approval, the proposed Articles of Incorporation of The First Greek Catholic Russian Union of St. George in the State of Ohio.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

733.

ARTICLES OF INCORPORATION OF THE NORTH BLOOMFIELD GAME PROTECTIVE ASSOCIATION—CORPORATION NOT FOR PROFIT—FEE—PURPOSE OF ASSISTING GOVERNMENTAL FUNCTIONS.

Corporations may not be formed for the purpose of discharging governmental functions, though they may be formed for the purpose of assisting officers of the law in the performance of their duties in a legitimate way. ---- ---- ---- ---- --

Under this limitation, therefore, the Articles of the North Bloomfield Game Protective Association, stating the purpose of "the protection of game and the enforcement of the game laws of the State of Ohio," may be filed, and the fee of $2.00 *for filing Articles of Corporations not for profit should be exacted.*

November 19, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 12th enclosing proposed articles of incorporation of The North Bloomfield Game Protective Association, a corporation not for profit, for the purpose of "the protection of game and the enforcement of the game laws of the State of Ohio."

You request my opinion as to your duty, as secretary of state, to file these proposed articles of incorporation and also as to the lawful filing fee therefor.

It is evidently not intended that this corporation be organized under Section 10200, General Code, which provides that:

> "Any number of persons, not less than fifteen, a majority of whom must be residents of this state, may become incorporated for the purpose of apprehending and convicting any person or persons accused of either a felony or misdemeanor."

This is apparent because the articles of incorporation are subscribed by five individuals only. I do not believe that Sections 10199 (not quoted) and 10200 are to be regarded as exhaustive, in the sense that no corporation, not for profit, may be formed to promote the enforcement of law save under one or the other of these sections. Both of these sections confer special powers upon the corporations organized thereunder in addition to the general powers of a corporation not for profit. The purpose of protecting game and enforcing the game laws of the State of Ohio is, in my opinion, one for which "individuals lawfully may associate themselves" within the meaning of Section 8623, General Code, in spite of the fact that these functions are governmental in their nature and are expressly vested by statute in the wardens and deputies of the State Fish and Game Commission. Strictly speaking, of course, the language chosen by the incorporators is unfortunate in that individuals clearly may not associate themselves for the purpose of discharging any governmental function. Giving the articles a liberal construction, however, which I apprehend more accurately expresses the exact intention of the incorporators, it would seem that the purpose defined is rather that of assisting the officers of the law in the discharge of their duties in a legitimate way. This is a purpose which is not unlawful and in my opinion the articles of incorporation in question may be properly received and filed by you.

I know of no feature of these articles which in any way distinguishes the proposed corporation from an ordinary corporation not for profit. That being the case, the filing fee provided by Section 176, General Code, paragraph 5, should be exacted for filing these articles. That fee is $2.00.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

734.

ARTICLES OF INCORPORATION OF FIRST GREEK CATHOLIC RUSSIAN UNION OF SAINT GEORGE—NOT TO BE FILED AS MUTUAL PROTECTIVE ASSOCIATION FOR INSURANCE ASSESSMENT PLAN.

The purpose defined in the proposed articles of incorporation of The First Greek Catholic Russsian Union of Saint George, as being "to pay a sick benefit of five dollars ($5.00) per week," does not sufficiently state an intention to organize under Section 9427, General Code, as a "mutual protective association," nor is there any thing in the purpose clause to indicate that the plan of pensioners is the "Assessment plan" as required by the statutes.

September 18, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 12th enclosing proposed articles of incorporation of the First Greek Catholic Russian Union of St. George in the State of Ohio, a corporation not for profit, for the purpose of "to pay a sick benefit of five dollars per week."

You request my opinion as to your duty to file and record these articles of incorporation, and also as to the lawful filing fee therefor.

These articles of incorporation have heretofore been submitted to me in another form. At that time I advised you that the business proposed to be done by this company was one substantially amounting to insurance, so that in order that it might properly be organized its charter must conform to some of the statutes providing for the organization of insurance companies. I advised you further that if this society could be regarded as coming within any of the classes of in-

surance companies provided for by statute it would have to be regarded as a "mutual protective association," the organization of which is covered by Section 9427, General Code. That section provides in part as follows:

> "A company or association may be organized to transact the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs executors, administrators, or assigns of the deceased members of such company or association, as the member may direct, in the manner provided in the by-laws. * * *"

Upon careful consideration I am of the opinion that the purpose defined being "to pay a sick benefit of five dollars per week" does not sufficiently state an intention to organize under Section 9427 as above quoted. There is nothing in the foregoing purpose clause to indicate that the plan of business is the "assessment plan" as required by the statute.

For this reason I am of the opinion that you may not lawfully file the proposed articles of incorporation of the First Greek Catholic Russian Union of St. George.

This conclusion makes it unnecessary for me to consider the further question submitted by you.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

743.

SECRETARY OF STATE MAY NOT MAINTAIN OFFICES OUTSIDE OF COLUMBUS FOR ISSUING AUTOMOBILE LICENSES.

The statutes are positive and clear in their direction that the office of the secretary of state shall be located in Columbus and that applications for automobile licenses must be filed in said office.

The secretary of state is not authorized, therefore, to maintain an office outside of Columbus for the purpose of receiving applications of automobile owners and doing other work incidental thereto.

December 7, 1912.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In your letter of December 5, 1912, you request my opinion as follows:

> "Will it be lawful for me, as Secretary of State, to maintain an office outside of the City of Columbus, for the purpose of receiving applications of automobile owners for registration of automobiles, the issuing of certificates of registration, the delivery of automobile tags and the receiving of the fee therefor?"

Section 6294 of the General Code of Ohio provides as follows:

> "Every owner of a motor vehicle or vehicles operated or driven upon the public roads or highways of this state, annually before the first day of January of each year, for each motor vehicle owned or acquired, except as otherwise provided in this chapter, shall cause to be filed by mail or otherwise, together with the payment of a registration fee of five dollars for each gasoline or steam motor vehicle and a registration fee of three dollars for each electric motor vehicle, in the office of the Secretary of

State, an application for registration, for the following year beginning the first day of January of such year, containing a brief description of the vehicle to be registered, including the name of the manufacturer, the manufacturer's number of the motor vehicle, if number there be, the character of the motor power, the amount of such motor power stated in figures of horse power, the name and address of the owner of such motor vehicle, and the name of the county of the state in which he resides."

Under the Constitution of Ohio of 1802 ARTICLE VII, Section 4, Chillicothe was established as the seat of government until the year 1808, and by act of the General Assembly thereafter was changed to the town of Columbus, and by the subsequent act of the General Assembly and the Constitution of 1851 (Constitution of Ohio 1851, ARTICLE XV, Section 1) Columbus was established as the seat of government until otherwise provided by law and has so continued.

The General Assembly of Ohio on February 17, 1816, passed the following act, which is now Section 14225 of the General Code (Appendix to General Code, pages 156-7):

"That the auditor, treasurer, and *secretary of state,* shall in the month of October next remove or cause to be removed, the books, maps and papers in their respective *offices,* to the offices prepared and designated for them severally, in the town of Columbus * * * *and the said public officers shall there attend and keep their offices respectively from and after that time, any law to the contrary notwithstanding."*

The law making power of our state has in*positive* terms fixed Columbus as the seat of our government and just as positively provided under the above quoted act where you as secretary of state must keep and maintain your office and the records thereof.

Section 6294 of the General Code enjoins upon the owner of a motor vehicle making application for a tax or certificate of registration the duty of filing his application *"in the office of the secretary of state"* by mail, or otherwise, and Section 6299 of the General Code enjoins upon the secretary of state the duty of filing such application in his office, and register such motor vehicle with the name and address of the owner thereof and the facts stated in such application *in a book or index kept for that purpose* under the distinctive number and identification mark assigned to such motor vehicle by the secretary of state, and provides further that:

"Such book or index shall be kept in the office of secretary of state and be open to the inspection of any person during reasonable business hours, etc."

I have carefully considered your inquiry and investigated all the constitutional and statutory provisions of our state on the subject of your office and the duties relating to the matter of records pertaining to motor vehicles and have reached the following legal opinion:

(*a*) That you can have no office outside of the City of Columbus, the seat of our state government.

(*b*) That under the law you must receive the application of owners of motor vehicles at *your office* by mail or otherwise and that the record provided for under Section 6299 must be kept at your said office the same being open to any person at all reasonable hours.

The laws on the subject above referred to are so positive in their provisions and the intent of the Legislature in relation to where your office shall be and the

purpose of the record being kept therein that I can reach no other conclusions than those above stated.

Respectfully yours,
TIMOTHY S. HOGAN,
Attorney General.

745.

ARTICLES OF INCORPORATION OF INSURANCE CORPORATION MUST BE FILED UNDER SPECIAL STATUTES—CEDAR GROVE SMOKING AND BENEFICIAL ASSOCIATION.

Articles of incorporation which disclose the purpose of conducting a form of insurance must be formed under the special statutes providing for insurance corporations, and such may not be filed as a corporation not for profit.

HONORABLE CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 25th, transmitting for my consideration the proposed articles of incorporation of "THE CEDAR GROVE SMOKING AND BENEFICIAL ASSOCIATION," a proposed incorporation not for profit, the purpose of which is:

> "to promote sociability among fellow workmen, to assist its members in sickness or distress, and aid the families of deceased members by voluntary contributions under rules, regulations and by-laws to be adopted."

This purpose clause seems to disclose an intention on the part of the incorporators to form a company for purposes substantially amounting to the transaction of an insurance business. That being the case, I am of the opinion, as I have frequently advised you, that its articles of incorporation must conform to someone of the special provisions under the favor of which corporations may be organized for such purposes. The foregoing articles do not conform to any of the statutory provisions. I deem it unnecessary to discuss the failure of the articles to conform to the different provisions in question in detail, but content myself with the statement that there is no statutory provision authorizing the formation of a corporation for the purpose of carrying on any enterprise such as is described in these articles.

I, therefore, advise that you do not file or record them.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Auditor of State)

61.

STATE BOARD OF AGRICULTURE—TRANSFER OF SHOW LICENSE FUNDS TO AGRICULTURAL FUND—DUTIES OF AUDITOR OF STATE—LEGISLATIVE DEPARTURE FROM STATUTORY PROVISIONS—ESTABLISHED LEGISLATIVE CUSTOM—CONSTITUTIONAL LAW.

The Auditor of State should not transfer from the General Revenue fund to the State Agricultural fund or any other fund, an amount equal to the receipts from show licenses from the year 1882 *to the year* 1910 *or from the year* 1846 *to the year* 1910, *or any other like period of time.*

The statutes specificially prescribe for the transfer to the agricultural fund of receipts derived from show licenses and other sources, but the departure from these provisions by the legislature for a period of sixty years for supportable reasons, and an adoption of a different custom, is entitled to "almost conclusive weight."

COLUMBUS, OHIO, January 17, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 3d, requesting a reconsideration of an opinion rendered by me to the Secretary of the State Board of Agriculture, under date of June 29, 1911, respecting the duty of the Auditor of State to transfer the collections of show licenses from the years 1883 to 1910 from the general revenue fund to the agricultural fund.

The request for a reconsideration is based upon an additional statement of facts in your letter to the effect that prior to the year 1910, when the law reorganizing the State Board of Agriculture and constituting it a department of the State Government went into effect, there was no "Agricultural Fund" in the treasury of the State; that from 1883 to 1910, the show licenses, or rather the State's portion thereof, paid into the state treasury had been placed to the credit of the general revenue fund, and moneys had been appropriated from the general revenue fund for the support of the Ohio State Board of Agriculture during all these years in excess of the amount of such show license money.

As throwing light upon your statement that prior to the reorganization of the State Board of Agriculture, there had been no State Agricultural fund, I have consulted the Revised Statutes and find that what was known as the "State Agricultural Fund" is mentioned but three times therein, as follows:

1. In connection with the show license law it was mentioned, as pointed out in the letter of the Secretary of the State Board of Agriculture to me, in Section 4418, R. S., this section provided in part that "Half of the moneys collected by the several county treasurers under that law should be credited to the "State Agricultural Fund."

2. In connection with the fertilizer law, the "Agricultural Fund" is mentioned in Section 4446*e* of the Revised Statutes, which required the Secretary of the State Board of Agriculture to pay into the fund any surplus arising from license permits issued under that law; and in the same chapter of the Revised Statutes, in connection with the commercial feedstuffs law, it was required by Section 4446*s* that any surplus arising from issuance of licenses for the sale of commercial feed stuffs should be placed to the credit of the Agricultural Fund.

3. By Section 4185, R. S., it was provided that a certain part of the proceeds of the sale of escheated lands should be paid into the State Agricultural Fund.

These, then, were the source of the State Agricultural Fund. The use to which such fund was intended to be devoted was prescribed in Section 3695 R. S., which was as follows:

> "The State Agricultural Fund shall be at the disposal of the (state) board (of agriculture) for the improvement of the agricultural interests of the state; * * * *."

In like manner, Section 3694, R. S., authorized the State Board of Agriculture to,

> "audit and pay its ordinary expenses * * * out of any fund in its possession or out of the State Agricultural Fund, * * * *."

The act creating and incorporating the original State Board of Agriculture was passed in 1846, 44 O. L., 70. At the next session of the General Assembly, in 1847, there was passed an act entitled, "An act to create a permanent agricultural fund in the state of Ohio, and for other purposes, 45 O. L., 43." The first section of that act provided as follows:

> "There shall be created, from the several sources hereinafter mentioned, a fund, which shall be known as the 'State Agricultural Fund.'"

The sources of which this section speaks, as are apparent from the remaining sections of the act, are as follows:

1. Show license moneys (Sections 2 of the act.)
2. Escheated lands (Sections 3 of the act.)

Between the years 1847 and 1898, these constituted the only sources of the fund known as the "State Agricultural Fund." In 1898 the section above referred to of the fertilizer law was passed, and in 1904 the commercial feed stuffs act became a law. Section 6 of the act of 1847 became Section 3695 R. S., above quoted.

My information is that prior to the reorganization of the State Board of Agriculture, no such fund as the "State Agricultural Fund" was maintained in the state treasury, but that all appropriations for the use of the State Board of Agriculture were made from the general revenue fund. I have taken the liberty to verify this statement and have found it to be absolutely correct. From the statements above made by me, you will observe that no change in the law took place in the year 1882, as assumed in your letter and in that of the Secretary of the State Board of Agriculture to me. The date at which the State Agricultural Fund was created and at which the obligation on the part of the fiscal officers of the state to credit payments of show license moneys to such a fund came into existence was, as I have already pointed out, the year 1847. I have examined at random several volumes of the session laws between the year 1847 and the year 1882, and have found that all appropriations for the use of the State Board of Agriculture were made from the general revenue fund. For example, in the year 1859, the legislature, in its general appropriation bill, enacted the following item:

> "For the State Board of Agriculture, being proceeds of show licenses, and escheated lands, the sum of two thousand nine hundred and ninety-nine dollars and forty-one cents." (56 O. L., 221.)

This appropriation was made from the general revenue fund, and it shows, not only the custom of appropriating for the use of the State Board of Agriculture from that fund, but also a belief on the part of the legislature, at any rate, that the proceeds of show licenses and escheated lands which were in the state treasury belonged in the general revenue fund. I find upon investigation, as aforesaid, that this custom of appropriating the exact amount of the proceeds of show licenses and of escheated lands continued for a time, when the legislature began to appropriate, as you yourself state, sums greater than the amount in the treasury from such sources, and eventually came to disregard such amounts altogether.

Why this practice should have arisen seems on the face of matters to require some explanation, in view of the express language of the act of 1847, above quoted. An explanation has occurred to me, which is entirely conjectural, but I venture to suggest the same as tending to throw some light upon what may have taken place.

The act of 1847 purports to create a fund which is to be at the exclusive disposal of the State Board of Agriculture. The evident intention was to make a permanent and continuing appropriation of the moneys arising from two sources referred to in the act to the State Board of Agriculture. This was possible under the constitution of 1802, then in force, which provided, in Section 21 of Article 1 thereof that,

> "No money shall be drawn from the treasury, but in consequence of appropriations made by law."

In 1851, four years after the passage of the act creating the State Agricultural fund and appropriating it to the use of the State Board of Agriculture, the present constitution was adopted. Section 22 of Article II thereof provides that,

> "No money shall be drawn from the treasury, except in pursuance of a *specific* appropriation, made by law; and no appropriation shall be made *for a longer period than two years.*"

It may have been the view of the fiscal officers of the state and of the legislatures, as evinced by the policy above referred to, that this change in phraseology as between the Constitution of 1851 and that of 1802 effected a repeal of the whole act providing for the creation of the state agricultural fund as a separate fund not subject to appropriation by the general assembly. It may have been the view that the intention of the act of 1847 was not to create a "fund" in the technical sense but merely a sub-division of the general revenue fund. The policy of the state, as above described, is consistent with either of these two theories.

At any rate, it is clear that the full effect could not be given to the provisions of the act of 1847 under the Constitution of 1851. What was done was evidently an effort to observe the spirit of the act of 1847, by making appropriations from the general revenue fund equal to or greater than the amounts received from show licenses and escheats, without keeping such moneys in the treasury as a separate fund.

It is possible also that doubt may have been felt as to the constitutionality of the act of 1847 on the ground that the old State Board of Agriculture was a private corporation. At any rate, we are confronted by a policy of legislation and administration of more than sixty years' standing, under which the Sate Board of Agriculture has received the equivalent, at least, of what was intended for it under the act of 1847.

A policy of such standing is entitled to almost conclusive weight. It is my opinion, therefore, in view of all the foregoing, that the Auditor of State should

not transfer from the general revenue fund to the State Agricultural fund or any other fund an amount equal to the receipts from show licenses from the year 1882 to the year 1910, or from the year 1847 to the year 1910, or for any other like period of time. My previous opinion to the Secretary of the State Board of Agriculture was based upon the face of the statute to which he called attention, and I am indebted to you for calling my attention to the history connected with the matter.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

87.

POLICE OFFICERS—MARSHALS, CONSTABLES AND CHIEFS OF POLICE—ALLOWANCE EXPENSES BY MAGISTRATE—AUTOMOBILE HIRE—TRANSPORTING, PURSUING AND SUSTAINING PRISONERS.

A Magistrate is not authorized by statute to make allowances to Constables, Marshals or Chiefs of Police for expenses incurred in pursuing prisoners and therefore, an item alowed by a magistrate for automobile hire as an expense incurred in the performance of such duty is illegal.

Such officers however, may be reimbursed for expenses incurred in transporting and sustaining prisoners.

COLUMBUS, OHIO, January 30, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of November 28, 1911, you ask an opinion of this department upon the folowing:

> "Since automobiles have come into general use, it appears from cost bills presented to this department that police officers and constables find it very convenient in almost any form of case to hire automobiles at an expense of from ten to twenty-five dollars. So far, we have been disallowing these items.
>
> I herewith present two cost bills from Athens County, in which you will note that the police officer in each case, has charged ten dollars for automobile service.
>
> "Question: Is a charge for automobile service made by a police officer, a legal charge against the State, and should the same be paid as other costs?"

The offenses charged in the cases for which cost bills are presented are felonies and the accused has been convicted and sentenced to the Ohio Penitentiary.

The fees to be allowed constables is provided for in section 3347, General Code, which provides:

> "For services rendered, duly elected and qualified constables shall be entitled to receive the following fees: For service and return of copies, orders of arrest, warrant, attachment, garnishee, writ of replevin, or mittimus, forty cents, each, for each person named in the writ; service and return of subpoena, twenty-five cents for one person, service on each additional person named in subpoena, ten cents; service of execution on goods or body, forty cents; on all money made on execution, four per

cent.; on each day's attendance before justice of the peace, or jury trial, one dollar; each day's attendance before a justice of the peace on criminal trial, one dollar; on each day's attendance before justice of the peace in forcible detainer, without jury, one dollar; summoning jury, one dollar; mileage, twenty cents for the first mile, and five cents per mile for each additional mile; assistants in criminal causes, one dollar and fifty cents per day, each; *Transporting and sustaining prisoners, allowance made by the magistrate, and paid on his certificate;* serving all other writs or notices not herein named, forty cents, and mileage as in other cases; copies of all writs, notices, orders or affidavits served, twenty-five cents; summoning and swearing appraisers in case of replevin and attachment, one dollar in each case; advertising property for sale on execution, forty cents; taking bond in replevin, and other cases, fifty cents; each day's attendance on the grand jury, two dollars."

Section 4387, General Code, provides for the fees of a marshal as follows:

"In the discharge of his proper duties, he shall have like powers, be subject to like responsibilities *and shall receive the same fees as sheriffs and constables in similar cases, for services actually performed by himself or his deputies* and such additional compensation as the council prescribes. In no case shall he receive any fees or compensation for services rendered by any watchman or any other officer, nor shall he receive for guarding, safekeeping or conducting into the mayor's or police court any person arrested by himself or deputies or by any other officer a greater compensation than twenty cents."

Section 4534, General Code, 102 Ohio Laws, 476, provides for the fees of chiefs of police, as follows:

"In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace. The chief of police shall execute and return all writs and process to him directed by the mayor, and shall by himself or deputy attend on the sittings of such court, to execute the orders and process thereof and to preserve order therein, and his jurisdiction and that of his deputies in the execution of such writs and process, and in criminal cases, and in cases of violations or ordinances of the corporation, shall be co-extensive with the county, and in civil cases shall be co-extensive with the jurisdiction of the mayor therein. The fees of the mayor in all cases, excepting those arising out of violations of ordinances, shall be the same as those allowed justices of the peace for similar services *and the fees of the chief of police or his deputies in all cases, excepting those arising out of violations of ordinances shall be the same as those allowed sheriffs and constables in similar cases.*"

Section 2997, General Code, 102 Ohio Laws, 93 provides:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by *law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses,* in conveying and

> transferring persons to and from any state hospital for the insane, the institution for feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

The fees in question, as shown in the cost bills, purport to have been allowed by the magistrate, although no certificate to that effect is presented. The only authority of a magistrate to make an allowance of fees is found in the clause in Section 3347, General Code, which is "transporting and sustaining prisoners, allowance made by the magistrate, and paid on his certificate." This allowance is for "transporting and sustaining prisoners." One of the costs bills charges for pursuing prisoners. There is a difference between pursuing and transporting prisoners which is recognized in Section 2997, General Code, when it provides: "for his actual and necessary expenses incurred and expended in *pursuing or transporting* persons accused or convicted of crimes and offenses." By virtue of Section 3347, General Code, the magistrate can only allow for transporting and sustaining prisoners and not for pursuing prisoners.

While Sections 4534 and 4386, General Code, allow marshals and chiefs of police the same fees as sheriffs and constables in similar cases, yet there is no authority of statute extending the provisions of Section 2997, General Code, to constables, marshals, or chiefs of police, so as to give the county commissioners a right to allow them their expenses in pursuing persons accused or convicted of crimes.

Section 3015, General Code, provides:

> "The county commissioners may allow and pay the necessary expenses incurred by an officer in the pursuit of a person charged with felony, who has fled the country."

By this section the county commissioners are authorized to allow the necessary expenses of an officer incurred in the pursuit of a person charged with a felony, who has fled the country.

Section 3016, General Code, provides:

> "In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasurer and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

The cases in question come within the provisions of this latter section.

It is my conclusion, therefore, that any allowance made by a magistrate to a constable, marshal, or chief of police as his expenses incurred in the pursuit of a person charged or convicted of a felony is unauthorized and cannot be paid from the state treasury as part of the costs.

An allowance made by the magistrate to such officers for transporting and sustaining prisoners would be a proper item of cost in such cases.

The allowance made by the county commissioners to an officer as his necessary expenses in pursuing a person charged or convicted of a felony, who has fled the country, would be a proper charge in the cost bill of such case.

The items for automobiles in the two cases presented should be disallowed.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

157.

STATE AID FOR SCHOOLS—EFFECT OF SMITH LAW—MAXIMUM LEVY—DUTY OF AUDITOR OF STATE—REPEALS BY IMPLICATION.

Since repeals by implication are not admitted unless the latter act is clearly inconsistent with the former, and since both constitutional and legislative provision is made for "thorough and efficient schools," the State Aid law for week school districts has not been repealed by the Smith Law, and the Auditor is still authorized under the proper circumstances to issue his warrant for State Aid as provided in Section 7959 General Code.

Such warrant shall only be issued when the maximum levy for school board purposes, (three-fourths of which has been made for tuition purposes) is insufficient to enable the Board to pay $40 per month for its teachers for eight months of the year.

The "maximum levy" provided for in the State Aid law which was formerly restricted by the twelve mill limitation, is now, by reason of the Smith Law, subject to the four limitations provided for therein. It therefore, follows that what the Budget Commission determines to be the "maximum legal school levy for the district" shall be the maximum levy for the purpose of the State Aid Law.

When, therefore, the Board has properly certified a sufficient sum to the Auditor to provide sufficiently for payment of its teachers, and the Budget Commission has reduced the allowance to such an extent that teachers cannot be paid $40 per month for eight months in the year under the restrictions of Section 7959 General Code and three-fourths of such allowance is made for tuition purposes, the State Auditor may issue his State Aid Warrant.

COLUMBUS, OHIO, January 17, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a letter from you under date of November 14th stating a certain question so succinctly that I am constrained to quote the same in full:

> "In view of the many perplexing questions relative to what is known as 'State Aid for Weak School Districts' having been presented

to this department, and with the end in view of clearing some of the conflicting provisions relative thereto I request your opinion on the following:

"Section 7595, General Code. 'No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not sufficient money to pay its teachers forty dollars per month for eight months of the year, after the board of education of such district has made the maximum legal school levy, three-fourths of which shall be for the tuition fund, then such school district shall receive from the state treasurer sufficient money to make up the deficiency."

"Section 5649-3*a* (O. L., 102, page 270). 'On or before the first Monday in June, each year * * * each board of education * * * shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for each month thereof. * * * *'

"Section 5649-3*c* (O. L. 102, 271) 'The county auditor shall lay before the budget commissioners the annual budgets submitted to him * *. The budget commissioners shall examine such budgets and estimates prepared by the county auditor * * * *. In making such adjustments the budget commissioners may review and change the annual estimate contained in such budgets, and may reduce any or all the items in any such budget * * * *.'

"The maximum levy for school purposes to be made by a board of education prior to June 2, 1911, was 12 mills, and the maximum levy for school purposes to be determined by the budget commissioners under the Act passed May 31st, 1911, and approved June 2, 1911, is 5 mills.

"Section 7595, General Code. '* * * * after the board of education of such school district has made the maximum legal school levy.'

"The former law provided for a maximum levy of 12 mills, to be made by the board of education.

The present law provides for a maximum levy of 5 mills to be determined by the budget commission.

"Question: Under the existing law, is the Auditor of State authorized to issue his warrant for State Aid provided in Section 7959, General Code?

"Question: If under the existing laws the Auditor of State is authorized to issue his warrant for State Aid provided in Section 7595, General Code, what is the maximum levy (three-fourths of which shall be for tuition purposes) necessary to qualify a school district to receive State Aid?

"Question: Is the school district in which the budget commissioners have determined the school levy to be 5 mills qualified to receive state aid, having entered into contracts with the teachers for $40.00, $50.00 and $60.00 per month respectively if after the teachers have performed services under the contracts for a period of six weeks it rescinds former contracts and enters into new contracts at the uniform salary of $40.00 per month, providing any deficiency in excess of an average of $40.00 per month for eight months is paid from outside sources other than tax collections?"

Your first query raises the question as to whether or not the State Aid Law is repealed by the act of June 1, 1911, 102 O. L., 270 popularly known as the "Smith one per cent. law."

You have yourself quoted enough of the provisions of the two acts involved in this question to illustrate the scope of each. As affecting the present question it need only be added that the Smith law does not expressly repeal the State Aid law or any part thereof, nor does it expressly amend any provision of the State Aid Law. Whatever influence the enactment of the Smith Law had upon the effect and operation of the State Aid Law must, therefore, be ascertained by implication. The present question is as to whether or not the Smith Law repeals the State Aid Law. It is a maxim of statutory construction that implied repeals are not favored. The question being as to whether a prior statute is repealed by one of subsequent enactment, a court will look to the controlling intent of both for the purpose of ascertaining whether or not the one can be reconciled with the other. If the essential intention of the earlier statute is imcompatible with that of the later one, no course is open to the court but to hold that an implied repeal has been effected. If, however, the later statute can be given full effect—and it must at all events be given full effect—without impairing the essential idea of the earlier statute, the earlier statute will be regarded as still in force, though perhaps modified to some degree by the provisions of the later one.

Applying this test to the two statutes under consideration the conclusion is reached that there has been no implied repeal. The essential idea and purpose of the whole state and thus to carry more completely into effect the mandate of Article 6, Section 2 of the Constitution which provides that,
of the weak school district law is to further equality of opportunity to the youth

> "The general assembly shall make such provision by taxation, or otherwise, as, that the income arising from the school fund, will *secure a thorough and efficient system of common schools throughout the state* * * * * *."

The full intent of the framers of this constitutional provision was not realized so long as boards of education of the more wealthy districts of the state were able to pay their teachers such compensation as would attract the ablest members of the profession, while those of the poorer districts found themselves unable to pay compensation that would attract any competent teacher. Under such conditions the youth of the poorer districts did not receive the same school advantages as those of the more wealthy districts, and thus the common school system of the state was not equal "thorough and efficient throughout the state." In point of fact, as is well known, this was the actual condition of affairs under the scheme of legislation which provided merely for the levy of the state common school fund and its redistribution on the basis of enumerated pupils. It is quite apparent, therefore, that the obviation of this condition and the closest possible approximation of the constitutional idea must have been the legislative motive evinced in the enactment of the State Aid Law. If there were any doubt about this point the same would be removed by consideration of the very first sentence of the act which is as follows:

> "No person shall be employed to teach in any public school in Ohio for less than $40.00 a month."

To provide funds necessary to accomplish this purpose the legislature in the same act proceeded to pledge the support of the state to such districts as might not have "sufficient money to pay their teachers $40.00 per month for eight months of the year."

The money which any school district would have under the scheme of legis-

lation in force at the time of the passage of the State Aid Law would have been derived from two sources, viz, the state common school fund, and the proceeds of local levies for school purposes. It was the intent of the act, as manifested by the further provisions thereof, that the ability of a school district to pay its teachers the minimum wage therein prescribed should be measured by the maximum revenue that could be made available to the district from these two sources. Such a test was absolutely necessary from a practical standpoint. It required that each board of education make the "maximum legal school levy, three-fourths of which shall be for the tuition fund," as a measure of the ability of the district to raise sufficient money to pay its teachers $40.00 a month for eight months.

It thus appears that the full and complete essential legislative intent embodied in the State Aid Law was that State aid should be offorded to such school districts as were unable from the limits of taxation applicable to local school levies to pay their teachers $40.00 per month for eight months in the year, so that this minimum wage could at all events be paid by every school district in the state.

The foregoing, I believe to be the true construction of the State Aid Law. That is, I understand the phrase "the maximum legal school levy" as therein used to mean "the maximum levy for local school purposes which may be made within the limitations upon the taxing power prescribed by the state." It was clearly not the intent of the general assembly to adopt by reference the existing limitations of the taxing power for this purpose and to make them a part of the State Aid act for all time so that a change in the degree or method of limiting the taxing power for local school purposes would work an implied repeal of the State Aid act. The phrase seems to have been purposely adopted with a view to permitting its adjustment, so to speak, to any changes made by the legislature in the taxing statutes.

Now at the time the State Aid Law was passed the sole and only limitation upon the taxing power for local school purposes was that of twelve mills which restrained the authority of the board of education in making its local levies. If the legislature had chosen in the meantime simply to raise or to lower this limitation of mills there would have been no question, I think, but that the new rate would have been the "maximum levy for school purposes" within the meaning of Section 7595, and that such legislation would not in any way have impaired the continuing effect of the weak school district law, although it might have had the practical effect of rendering a larger number of school districts eligible to state aid than had been eligible under the previous legislation.

So much then for the construction of the state Aid Law, and the determination of the controlling intent thereof. Nowhere in that law can there be found an intention to make any specific limitation or any specific kind of limitation or test of ability of a local school district to levy locally for tuition fund purposes. But even if such an intent could be found in the State Aid Law it would have been a minor and unessential element of that law not to be preserved, in my judgment, at the hazard of thwarting the essential and principal purpose of the act by and through some subsequent legislation changing the manner of ascertaining the limits of taxation. In either view of the case such a change would not repeal the State Aid Law by implication.

Now the Smith one per cent law applies principally to limitations on the taxing power and its essential intent has to do with such limitations although there are minor provisions of the act which relate to the expenditure of moneys raised by taxation. It would not be profitable in this opinion to go into details of the operation of the law. These are lucidly explained by the supreme court in the journey entry in the case of State ex rel vs. Sanzenbacher incompletely reported in the 84th Ohio State, and in paragraph 4 thereof as subsequently modified.

Broadly speaking, the law provides that in no taxing district shall a greater amount of taxes be levied in 1911 or in any year thereafter than was levied therein for all purposes in the year 1910; that in no taxing district shall a greater amount of taxes be levied for all purposes in the year 1911 or thereafter than will necessitate a rate exceeding ten mills exclusive of levies for interest and sinking fund purposes; that in no case shall all levies exclusive of emergency levies and inclusive of interest and sinking fund levies in the aggregate require a rate in any taxing district exceeding fifteen mills; that local levies for school purposes, for example, shall be limited to five mills; that the enforcement of the several limitations of the act shall be effected by and through the agency of what is known as the budget commission, the sole duty of which body is to see that in no taxing district any of the limitations of the act are exceeded.

The interposition of the budget commission has, so to speak, a reviewing authority as to tax levies, creates a check upon the levying power of the board of education. No longer is that power untrammeled save by the single limitation of twelve mills or by any other single limitation. Now levies of a board of education must, so to speak share with other local levies applicable in the same territory in the fund to be derived from the maximum levy for all purposes as prescribed by the Smith Law. It is the duty of the budget commission to determine the proportion in which the school district shall thus share in the gross fund, but in the exercise of this power the budget commission is itself limited by the construction of the act as enunciated by the supreme court in the case above cited, and must observe as far as possible the proportions of five mills, three mills and two mills etc., prescribed by Section 5649-3*a* of the law.

The ultimate conclusion then is that in the Smith Law the legislature has provided four limitations above enumerated upon the power to levy for local school purposes instead of one as formerly. The enforcement of all of these limitations is left to an administrative board created for that purpose; but the limitations themselves are none the less limitations prescribed by the law of the state just as the former limit of twelve mills was a limitation imposed by the law of the state. There is, therefore, nothing essentially different in the Smith Law with respect to the purpose and intent of the State Aid Law from the provisions in force at the time the State Aid Law was adopted.

It follows from all that has been said that whether or not the particular method of applying the State's limitation upon the taxing power of the board of education which was in force at the time of the enactment of the State Aid Law be regarded as having been in the mind of the General Assembly when the law was passed, and whether or not levies under the Smith Law be regarded as being made by the board of education or by the budget commission, the Smith one per cent. law merely changes the method of determining what the maximum levy for school purposes under the law of the state, which may in a given instance be applicable to a particular school district, is; that, therefore, it does not seem to be inconsistent with any of the provisions of the State Aid Law and certainly not with the controlling and essential provisions thereof; and that for these reasons the State Aid Law was not repealed when the Smith Law was enacted.

We come now to the question directly raised by your second inquiry,—a very practical one from your view point as to how the State Aid Law is to be applied under the Smith one per cent. law. This question may be answered by ascertaining what is the "maximum legal school levy" as referred to in Section 7595 and as fixed by the Smith Law.

If it be deemed essential to the legislative purpose in the enactment of the State Aid Law that the test in all events be applied to the *action of the board of education*, then this question must be approached from one end: if the personality,

so to speak, of the board of education be deemed an unessential provision of the State Aid Law then a different method must be adopted. In either event, however, the conclusion reached is the same. If the exact meaning of the State Aid Law be that a board of education is entitled to State aid for its district, if it has done all in its power under the law to raise the money by taxation and is unable to raise enough because of limitations on its power to pay its teachers $40.00 a month for eight months, then we need only to inquire as to what the power and duty *of the board of education* is under the law. It appears from Section 5649-3*a* of the Smith Law that it is incumbent upon the board of education to file annually with the county auditor an estimate setting forth in detail form the needs of the school district for the incoming year. When this is done the board of education, so to speak, drops out of the machinery of taxation entirely. It now devolves upon the budget commission to compare this estimate with the estimates from other taxing districts including the territory of the school district or part thereof for the purpose of ascertaining whether or not all the money estimated to be needed by the several taxing authorities can be levied in every part of the territory of the school district without exceeding any of the limitations of the Smith Law. If this can be done the budget commission simply certifies each estimate to the county auditor untouched by it, and the county auditor computes the rate of taxation necessary to produce the estimated amount on the duplicate of the district. If, however, it is ascertained that all the sums estimated as needed for the incoming year for the several taxing districts, if allowed, would require a rate or amount of taxation which would offend against one or more of the limitations of the Smith Law, then it is the duty of the budget commission to reduce the estimates submitted to it, and the several items thereof having due regard to proportions of which the several taxing authorities submitting estimates are permitted to levy taxes according to the internal limitations of Section 5649-3*a* by such amounts as will insure compliance with every limitation of the law.

It thus appears that the power of the board of education as such is exhausted when it has filed its estimate. In this view of the case, then, the maximum exercise of power which the board of education *itself* may make, is the filing of an estimate which shall include all of its needs for the incoming year. This method of reasoning leading to the conclusion above reached is open to objection however because it is at least questionable whether the intention of the General Assembly in the enactment of the State Aid Law was to refer to the exercise of power by the board of education. It seems more likely to me at least that the real intention was to refer to the maximum levy of taxes for the school district whether that levy be regarded as having been made in the full sense by the board of education or by some other body, such as the budget commission. That is to say, if instead of the Smith one per cent. law the General Assembly had enacted a law providing that the county commissioners should determine the rate of taxation for local school purposes, I do not think such legislation would have impaired the State Aid Law despite the mention in that law of the "board of education." So, whether or not it is now the board of education which determines the amount or rate to be levied for school purposes the real intention of the State Aid Law applies to the taxing officer or board which does ultimately determine the rate of taxation for local school purposes; or more accurately, the real intention of the State Aid law is to impose its test upon the making of the maximum legal school levy whatever that may be, and by whatever agency it may be effected.

Now the budget commission in a philosophical sense is not the levying authority. It is not so designated in the law nor was it so regarded by the supreme court, as is evident from the language of that court employed in its decision in the case above cited. The Smith Law imposes certain limitations; these must be en-

forced by some administrative authority; the budget commission is created for this purpose; it is simply the agency of the state whereby the will of the legislature is carried into effect; its determinations have the force and effect of legal limitations upon the taxing power just as if they were regarded as acts of the General Assembly. There is not one limitation upon the school levy, but as I have said there are four such limitations. The action of the budget commission is simply the application of these limitations. It follows, as a matter of course, that *what the budget commission determines to be the maximum amount which may be levied for a school district for local school purposes is "the maximum legal school levy for that district."* This definition of the term satisfies every requirement of Section 7595.

I have already pointed out that the legislature did not necessarily have in mind a single limitation on the taxing power in enacting the State Aid Law, but certainly did have in mind any and all limitations which might at a given time curb the power of taxing for local school purposes.

It follows from what has been said that it is erroneous to regard the five mill limitation of Section 5649-3*a* which applies expressly to levies for local school purposes as being the "maximum legal levy for school purposes," or at least as being the only maximum levy for such purpose under the Smith Law. In a given instance other limitations of the Smith Law may interfere and prevent this limitation of five mills from operating at all. Thus if the needs of a school district which are to be determined by the board of education without reference to the duplicate, and without computing the number of mills necessary to produce sufficient revenue therefor, are found by the budget commission to involve a levy of four mills on the duplicate of the district, and the needs of other taxing districts levying in the same territory, as reported to the budget commission, are such that this levy of four mills together with the others would produce an aggregate levy which would violate the ten mill limitation of the Smith Law of the fifteen mill limitation thereof, or the limitation measured by the amount of taxes levied in the year 1910, then it would devolve upon the budget commission to reduce the estimate of the board of education together with those of other taxing authorities so as to enforce the limitations of the law. If the effect of such reduction would be to make it impossible for the school district to pay its teachers $40.00 a month for eight months, then such district would be in the position of being without sufficient funds to comply with the Weak School District Law under its power of levying for local school purposes. It would be a weak school district in every sense of the word as contemplated in the State Aid Law, and in my opinion if qualified in other respects should be given State Aid.

The only manner in which the five mill limitation of the Smith Law could be practically applied as the "maximum levy for school purposes" within the meaning of the State Aid Law in a case like that above described would be by holding that if the budget commission reduce the estimate for local school purposes below that which is certified to it, it does so at the peril of disqualifying the district for State aid; or rather my holding that a school district which does not need five mills in order to pay its teachers $40.00 a month can never receive State aid, and that, therefore, the budget commission ought never to reduce the estimate of such school district because its action would result in a deficiency which could not be supplied by the state.

Such a holding is impossible under the language of the Smith law. The budget commission is not supposed to be advised as to the number of teachers employed by a board of education nor as to the amount of compensation to be paid to each. The Smith Law does not provide that the commission shall take into consideration any such matters in making its reductions, and the supreme court

has expressly provided that reduction shall be made with due regard to the proportions of which the various taxing districts, including the same territory, are permitted to levy by Section 5649-3*a*. Therefore, it cannot be held that the budget commission is obliged, practically or otherwise, to investigate and determine for itself the necessity of a school district under the Weak School District Law so as to guide it in its action in reducing the budget. Such a holding would also result in producing a lack of uniformity in the operation of the Smith Law as effecting all taxing districts excepting school districts. If the Smith Law was amended so as to provide that an estimate filed by a board of education as prescribed by Section 5649-3*a* should set forth the various facts required as a condition precedent to qualification as a weak school district by Section 7595, General Code, and that such estimate should not be reduced below five mills, if the effect of such reduction would be to make it impossible for the district to pay its teachers $40.00 a month for eight months, then it would have to be held that the five mill limitation of the Smith one per cent. law, *which would then be the only limitation applicable to local school levies so far as the tuition fund was concerned* would be the maximum levy within the meaning of Section 7595. In the absence of such express language in the section the opposite conclusion which I have already expressed must necessarily follow.

A construction of the two statutes which would regard the five mill limitation as the maximum legal school levy within the meaning of the state aid law would, therefore, result in denying state aid to school districts unable, because of the operation of the law of the State to pay their teachers $40.00 per month for eight months. Such a holding would defeat the purpose of the State Aid Law in its entirety. If this be the meaning of the Smith Law, then, in my judgment, it has worked an implied repeal of the State Aid Law, and for that very reason this construction is not to be favored.

On the other hand, I am aware that the opinion which I have expressed, and the construction which I have approved, are likely to result in an abuse of power by the budget commission, and certainly will result, with or without abuse of power, in causing many more school districts to come with in the classification of weak school districts than have heretofore been found therein. Perhaps it is fair to say that the construction which I have adopted will render school districts weak which have heretofore never been able or willing to qualify as such. I am frank to say that at the time I made up my mind as to the true meaning of the two statutes I was impressed with the idea that that meaning would result in a condition which would seriously embarrass the treasury of the state by either exhausting the state common school fund from which appropriations for state aid have heretofore been made and necessitating the distribution of said fund generally in a lesser amount per enumerated pupil than has heretofore been the practice; or, on the other hand, would result in necessitating appropriations for state aid from the general revenue fund, which seems to be already taxed to its full capacity.

I have given due weight to this consideration although, it being a mere argument of inconvenience, it is not entitled to great weight in determining what the law is. It simply amounts to an objection that the construction which I have formulated would render the State Aid Law too expensive to the state, and would render its operation subject to abuse in favor of the school districts and against the state. It is a sufficient answer to these objections to say, as to the first, that the matter of expense is entirely conjectural, and, as to the second, that, having regard to the essential intent and purpose of the state aid law, a construction which might be open to abuse as against the state is at all events to be preferred to one which would certainly lead to a denial of the benefits of the State Aid Act to any school district, and would thus defeat the essential purpose of that act,

and that it must be presumed in law that the budget commission will not abuse the powers entrusted to it.

From all the foregoing I am of the opinion, in answer to your first question, that the auditor of State is authorized to issue his warrant for state aid as provided in Section 7595, General Code, despite the passage of the Smith one per cent law, so-called.

In answer to your second question, I beg to state that in my opinion the maximum levy necessary to qualify a school district to receive state aid in any levy, or rather any estimate of amount made by the board of education of a school district and filed with the county auditor as represented the total amount necessary for all local school purposes for the incoming year, three-fourths thereof being for tuition purposes, if only said estimate is reduced in such manner as to leave undisturbed the proportion which the tuition fund bears to the total school levy, by the action of the budget commission; that is to say, a practical rule for the guidance of the auditor of state in discharging his duty under Section 7596, General Code, and under the Smith one per cent. law is as follows:

The auditor of state must require from the county auditor a certified statement of the following facts:

1. The amount estimated by the board of education for its budget as necessary for tuition fund purposes.

2. The amount so certified as necessary for all other local purposes.

The auditor of state must ascertain in whether the amount certified for tuition purposes is less than three-fourths of the total amount estimated to be necessary for all purposes exclusive of sinking fund, and if so he need investigate no further and must refuse to issue his warrant.

3. The amount of the estimate for the several purposes as reduced by the budget commission. The auditor of state must then ascertain whether the tuition fund estimate as reduced still constitutes three-fourths of the total amount estimated for all purposes exclusive of sinking fund as reduced. If the proper proportion still exists the district is thus far qualified; if not the auditor need investigate no further and must refuse to issue his warrant.

4. The amount of money paid over to the board of education by the county treasurer at the February and August settlements to the credit of the tuition fund for local school purposes.

5. The number of teachers employed in the school district; the salaries contracted for, and the number of persons of school age in the district.

These facts are to be used in determining the qualifications of a school district the same as they have heretofore been used for that purpose.

6. The deficiency for the relief of which state aid is asked.

The deficiency for which a state aid voucher may be issued by the auditor of state may not exceed the difference between the amount of revenue paid to the board of education at the two semi-annual settlements (Item 4 above), and the amount estimated by the board of education as constituting its needs for the incoming year (Item 1 above), unless the amount estimated was not cut down by the budget commission, as shown by comparison of items 1 and 3 above. If the amount estimated has not been reduced by the budget commission the board of education would, therefore, be itself responsible for the deficit, in that it did not exercise the degree of care required by the letter and the spirit of the Smith Law in providing for its expenditures for the incoming year, and then, in my judgment, the board has failed to qualify. If, on the other hand, as already indicated, the board's estimate was reduced by the budget commission, and yet the amount of the deficiency added to the amount of revenue paid over by the county treasurer at the semi-annual settlement exceeds the amount of the estimate, then the board

of education is not disqualified, but is not permitted to have state aid for the entire deficiency, but only for that part which equals the difference between the revenues actually collected and the amount of its estimate.

As I have enumerated the various items which I think ought to be set forth by the county auditor in his certificate to the auditor of state I have tried to indicate the rules that are to guide the auditor of state in acting thereon.

I realize that this method of procedure is quite different from that heretofore in vogue, and seems, at first blush, to distroy the old distinction between a weak school district and one which is not weak. In reality there is no such change of status. The method above suggested simply provides the relief necessary to enable a school district to pay teachers $40.00 per month for eight months in the year when the inability to pay such sum for such time is due to the operation of the limitations of the taxing power to be exerted for local school purposes, which limitations are created by the law of the state. This is precisely what the original state aid act is. If more school districts become weak than have been weak in the past under this ruling, this is but a natural result of the imposition by the Smith law of four limitations upon the taxing power in place of one. At the same time the procedure above outlined discourages carelessness and niggardliness in estimating expenses for the incoming year, and will operate in furtherance of the intention of the Smith Law in this particular.

With respect to your third question I beg to state that I have under advisement another question submitted by you which is closely related thereto. I would prefer with your consent, to consider these two questions together and to pass upon them at the same time. I, therefore, ask your indulgence in permitting me to withhold my opinion at this time upon that question and to incorporate its answer in the other opinion referred to.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

158.

STATE AID TO SCHOOLS—PAYMENT OF SUPERINTENDENT AND INSTITUTE EXPENSES NOT INCLUDED WITHIN LIMITATIONS—TUITION FUND—TEACHERS' SALARIES.

A Board of Education is not to be denied State Aid by reason of the fact that is pays authorized expenses other than teachers' salaries out of the tuition fund, such as Superintendent's salary and institute fees.

The amount of State Aid allowed, however, shall not exceed such sum as is necessary to make teachers' salaries equal to $40.00 *per month.*

COLUMBUS, OHIO, February 26, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of September 19th you have requested my written opinion as follows:

> "Under the Act to provide for State Aid for weak school districts, is the district entitled to State Aid which has employed a Superintendent in excess of forty dollars per month? Does the employment of a Superintendent or a teacher in excess of forty dollars per month, disqualify a school district to receive State Aid?"

In answering the above question I assume that the Board of Education of such weak school districts made the maximum levy of twelve mills, three-fourths of which was used for tuition purposes, but that the total amount received for tuition purposes for the school year ending August 31, 1911, was insufficient, and therefore a deficit was created. I also assume that the question is asked in reference to the law prior to the passage of the Smith one per cent. law passed by the last legislature.

Section 7595 of the General Code provides:

> "No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not sufficient money to pay its teachers forty dollars per month for eight months of the year, after the board of education of such district has made a maximum legal school levy, three-fourths of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficiency."

The fund from which the school teachers are paid is the tuition fund of such district and is made up from two sources.

1. From the amount received from the State of Ohio from what is designated the "State common school fund" and the "common school fund," which under the provisions of Section 7603, General Code is to be expended only in the payment of salaries of superintendent and teachers.

2. From three-fourths of the taxes raised by the maximum school levy.

The salaries of school teachers are to be paid monthly.

Section 7595, General Code provides that no person shall be employed to teach in any public school in Ohio for less than forty dollars per month.

While the Supreme Court in the unreported case of Layne, Administrator vs. Board of Education, No. 11428 on the docket of the supreme Court, seems to have held that a board of education may contract with a teacher for less than forty dollars per month notwithstanding the provisions of Section 7595, General Code that no teacher shall be employed for less than forty dollars per month, yet as the provision that no teacher shall be employed for less than forty dollars a month is contained in the same section as the provision for State Aid, I think it clearly to be the intent of the legislature that in order for a school district to receive State Aid all the teachers thereof shall be employed at a salary of at least forty dollars per month, being the minimum salary provided in such section, and that if a board of education does not pay each and every teacher at least forty dollars a month, the minimum salary provided in such section, such school district shall not be entitled to receive State Aid.

The section further provides that when a school district has not sufficient money to pay its teachers forty dollars per month for eight months in the year after the board of education of such district has made the maximum school levy, three-fourths of which shall be for tuition fund, then such school district may receive from the State treasury sufficient money to make up the deficit.

The tuition fund of a school district is the fund from which various payments shall be made other than to teachers. For instance, Section 7702, General Code provides that a city board of education shall appoint a suitable person to act as superintendent of the public schools. It would seem that the appointment of such a superintendent was mandatory upon the city school district.

Section 7690, General Code provides that each board of education may appoint a superintendent of the public schools and it would seem to me that such provision although not mandatory was permissive.

Under the provisions of Sections 7735 and 7736 General Code a board of education is required by law to pay the tuition of elementary pupils either from the tuition or contingent fund.

By the provisions of Section 7751, General Code a board of education is required to pay the tuition of pupils of a high school from either the tuition or contingent fund providing no further levy has been made under said section.

By the provision of Section 7870, General Code a board of education is required to pay in addition to the regular salary the amount due the teachers for attendance at teachers' institutes.

It would, therefore, appear that while the tuition fund is primarily for the payment of teachers' salaries at forty dollars per month, yet there are certain obligations fixed upon the board of education by law to pay from such tuition fund obligations other than the salaries of teachers. In other words, the institute fees are to be paid in addition to the teachers' salaries, the superintendent's salary is to be paid in addition to the teachers' salaries and the tuition fees of elementary pupils and high school pupils are to be paid either from the tuition or contingent fund, and therefore, should the contingent fund be insufficient the liability is placed against the tuition fund.

It will, therefore, be seen that it is not contemplated by the legislature that the tuition fund of a school district shall be used solely for the payment of salaries of teachers thereof, but that the same shall also be used for other purposes.

As I view the provisions of Section 7595, General Code it means simply if the school district does not receive into its tuition fund a sum which would be sufficient to pay its teachers forty dollars a month for eight months, such school district is entitled to receive enough money to make up the amount which would be necessary to pay its teachers such minimum salary. It does not mean, as it seems to me, that the board of education cannot pay other obligations which are placed either primarily or secondarily upon the tuition fund from such tuition fund, nor does it mean that it is restricted to the payment of the minimum salary to the various teachers of the school district, but merely that the state will only pay to such school district the difference between the total amount of the tuition fund received and the amount which would have been necessary to pay its teachers the minimum salary.

I am, therefore, of the opinion that a board of education may use the tuition fund for the payment of obligations in excess of forty dollars a month for teachers, but that in applying for State Aid such board of education shall only be entitled to an amount which would equal a sum necessary to pay the requisite number of teachers a salary of forty dollars a month after deducting the total amount of the tuition fund actually received.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

198.

APPROPRIATION FOR MAINTENANCE OF OHIO NATIONAL GUARD—"DRILL PAY" INCURRED PRIOR TO FEBRUARY 11, 1911, BUT PAYABLE MARCH 1, 1911.

The appropriation bill passed for "Maintenance Ohio National Guard" has not been made as strict legality requires, from the State Military fund. The amount appropriated however, is in strict conformity with the law relating thereto, and the departure is founded in an established custom, which there is no occasion to question.

Said appropriation bill expressly provides that the funds provided for shall not be used to pay liabilities incurred prior to February 10, 1912, *yet, inasmuch as the liability for "Drill Pay," although originating at the time the soldier performs the duties, is not due and payable until reports are properly made to the Adjutant General, i. e. March 1st, no liability can be said to exist as far as the state is concerned, until then.. Therefore, "Drill Pay" must have been intended by the Legislature to be met by the appropriation extending from February* 11, 1911 *to February* 11, 1912.

COLUMBUS, OHIO, March 12, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 23d, requesting my opinion as follows:

> "Out of the appropriation made to the Ohio National Guard for the years 1911 and 1912, is paid the "Drill Pay" of the enlisted men of the Guard. In 1910, the Adjutant General exhausted his appropriation for other purposes, and did not have enough money to complete the drill pay. The Legislature in 1911 made an appropriation to meet this deficiency out of amount allotted to them under the law for 1911. They are now confronted with the same proposition for their obligations for drill pay for the year 1911. Their appropriation for Maintenance Ohio National Guard is exhausted, and they have some liabilities for drill pay. Section 2 of the General Appropriation Bill for 1912, provides that the moneys appropriated shall be available to pay liabilities incurred on and after February 16, 1912, but shall not in any way be expended to pay liabilities or deficiencies existing prior to February 16, 1912. This provision will not permit of my allowing the vouchers issued for drill pay in 1911 out of the appropriation for Maintenance of Ohio National Guard for the year 1912, unless it is construed that this is a continuing appropriation. If this view is taken, there should be some point where the liability against succeeding years' appropriations should cease, and it is contended by the Adjutant General that this should be at the close of the two year period, February 16, 1912.
>
> "I would be pleased to have your view of the situation, and advise as to whether or not I can pay liabilities incurred for drill pay prior to February 16, 1912, out of the appropriation for Maintenance Ohio National Guard," made in the appropriation bill for 1912."

The following sections of the General Code must be considered in connection with the question which you ask:

"Section 5265. The auditor of state shall credit to the 'state military fund' from the general revenues of the state, a sum equal to ten cents for each person who was a resident of the state, as shown by each last preceding federal census. Such fund shall be a continuous fund and available only for the support of the organized militia. It shall not be diverted to any other fund or used for any other purpose.

"Section 5266. The general assembly shall appropriate annually, and divide into two funds, the amount authorized by the preceding section. Such funds shall be respectively known as the 'state armory fund' and 'maintenance Ohio national guard fund.'

"Section 5267. From the 'maintenance Ohio national guard fund,' the adjutant general shall pay the per diem, transportation, subsistence and incidental expenses of militia companies, inspections and incidental expenses of camp, including horse hire, fuel, lumber, forage of horses, and medical supplies.

"Section 5268. From the 'state armory fund,' the board shall provide armories by leasing, purchasing or constructing as provided in this chapter."

I presume that the auditor of state has performed the duty devolving upon him by Section 5265, and that there is in the state treasury a fund known as the "state military fund," which is a continuous fund and available only for the support of the organized militia, not to be diverted to any other fund or used for any other purpose. If that is the case I am convinced by considerations that seem to me to be obvious that such a fund, so set apart, is not to be regarded as a subdivision of the general revenue fund of the state. If it were a subdivision of the general revenue fund of the state any general assembly might appropriate any portion of it for any uses and purposes whatever.

The history of appropriations to which you refer generally in your letter is perhaps best disclosed by quotation from the bills passed by the last session of the General Assembly.

On February 22, 1911 there was passed, and on February 28th there was approved, an Act, being House Bill 117, entitled "An Act to make partial appropriations for the last three-quarters of the fiscal year ending November 15, 1911, and the first quarter of the fiscal year ending February 15, 1912." Section 1 of that act provided in part as follows:

"That the following sums, for the purposes hereinafter specified, be, and the same are hereby, appropriated out of any moneys in the state treasury *to the credit of the general revenue fund,* not otherwise appropriated, to-wit:

* * * * * * * *

OHIO NATIONAL GUARD

Maintenance Ohio National Guard.....$50,000.00"

Section 2 of that act provided as follows:

"The moneys appropriated in the preceding section shall not be in any way expended to pay liabilities or deficiencies existing prior to February 15, 1911, nor shall they be used or paid out for purposes other than those for which said sums are specifically appropriated as aforesaid." (102 O. L. 14-27)

On April 26, 1911 the General Assembly passed an Act, approved April 28, 1911, of which the following is a complete copy:

> "An Act to make appropriations for the maintenance of the Ohio national guard.
>
> "WHEREAS, At the session of the general assembly in 1909, an act was passed entitled 'An act to provide the carrying into effect the provisions of article 9, of the Constitution of Ohio,' and,
>
> "WHEREAS, By reason of the carrying into effect the provisions of this act in the appropriations of the moneys for the maintenance of the Ohio national guard various liabilities than outstanding and since incurred for transportation and other items making up the maintenance account could not be ascertained or known by the state until after February 15, 1910, or February 15, 1911, and then the amounts could not be paid from either of the appropriations for the years beginning February 16, 1910, or February 16, 1911, and are, therefore now outstanding and unpaid for the want of authority only on the part of the state to pay these liabilities, existing prior to the above named dates, from the funds set aside on January 1, 1910, or January 1, 1911, for the maintenance of the Ohio national guard, such liabilities now aggregating twenty thousand seven hundred six dollars and eighty cents ($20,706.80); therefore,
>
> "Be it enacted by the General Assembly of the State of Ohio:
>
> "Section 1. That there be and is hereby appropriated from any moneys raised, set aside or coming into the state treasury for the maintenance of the Ohio national guard for the year ending December 31, 1911, to pay liabilities outstanding and unpaid prior to February 15, 1911, the sum of twenty thousand seven hundred six dollars and eighty cents ($20,706.80)."

On May 31, 1911 the General Assembly passed an act entitled "An Act to make general appropriations," which was approved June 14, 1911. (102 O. L. 373). The first section of this act provided in part:

> "That the following sums, for the purposes hereinafter specified, be and the same are hereby appropriated out of any moneys in the state treasury to the credit of the *general revenue fund,* not otherwise appropriated, to-wit:
>
> * * * * * * * *
>
> OHIO NATIONAL GUARD
>
> State armory fund ---------- $200,000.00
> Maintenance Ohio national guard ---------- $206,005.80"

Section 2 of said act provided as follows:

> "That the moneys appropriated in the preceding section shall be available to pay liabilities incurred on and after February 16, 1911, but shall not in any way be expended to pay liabilities or deficiencies existing prior to February 16, 1911, nor shall they be used or paid out for purposes other than those for which said sums are specifically appropriated as aforesaid."

Another act, passed and approved on the same respective dates as the act just mentioned, and similarly entitled, provided as follows: (102 O. L. 393)

"Section 1. That the following sums, for the purposes hereinafter specified, be and the same are hereby appropriated out of any moneys in the state treasury to the credit of the *general revenue fund, not* otherwise appropriated, to-wit:

* * * * * * * *

OHIO NATIONAL GUARD

State armory fund.....$200,000.00
Maintenance Ohio national guard..... 276,712.10"

* * * * * * * *

"Section 2. That the moneys appropriated in the preceding section shall be available to pay liabilities incurred on and after February 16, 1912, but shall not in any way be expended to pay liabilities or deficiencies existing prior to February 16, 1912, nor shall they be used or paid out for purposes other than those for which said sums are specifically appropriated as aforesaid * * * * *."

The Act of April 28, 1911 is quite ambiguous because it appropriates neither from the general revenue fund nor from the state military fund, but from "any moneys raised, set aside or coming into the state treasury for the maintenance of the Ohio national guard for the year ending December 31, 1911." I take it, however, that rather than to hold this act invalid for ambiguity a court would regard it as aptly describing "the state military fund." It is to be observed that the act of April 28, 1911 is the only act which appropriates any money from the "state military fund." Yet, I am led to believe, from the statements in your letter, that the sum of $476,712.10, being the amount appropriated for the year 1912 for the state armory fund and the maintenance of the Ohio national guard, equals the amount which would be produced by setting aside ten cents for each person in the state as shown by the last preceding federal census; that is to say, the population of the State of Ohio, as shown by the census of 1910 was 4,767,121.

This amount should be designated as a separate fund and the general assembly virtually ignored Section 5265 et seq. when it appropriated for the year 1912, for example, for the maintenance of the Ohio national guard, and for the state armory board, from the general revenue fund. However, I am aware that this is a practice in accordance with the custom of many years standing, in pursuance of which many funds, designated in the statutes as separate from the general revenue fund, are treated in the appropriation bills as subdivisions thereof. With the propriety of this custom I have nothing to do.

By process of addition it will at once be ascertained that the $50,000 appropriated from the general revenue fund by the partial appropriation bill, the $20,706.80 appropriated from the state military fund by the act of April 28, 1911, the $206,005.30 appropriated from the general revenue fund by the general appropriation bill for 1911, and the $200,000.00 appropriated for armory purposes by the general bill of 1911 from the general revenue fund, in the aggregate, equal the amount of $476,712.10, which, I have already stated, appears to be the amount of the state military fund.

It appears, therefore, that although the legislature has erroneously and inadvertently appropriated from two separate sources for the maintenance of the Ohio national guard and for state armory purposes, it has, in the aggregate, appropriated the exact amount of the state military funds. I have taken the liberty to consult the books of your office as to the manner of handling the four appropriations for the year 1911 and find that credit has been given to the Ohio

national guard for the entire sum of $476,712.10. I mention this fact because I had drawn from your letter the erroneous conclusion that the $20,706.80 appropriated by the act of April 28, 1911 had been charged against the partial or the general appropriation for the same purpose. This is not so, as I have already stated; and the Ohio National Guard has received credit for and has expended all but a small part of the total amount of what would have been the "state military fund," if the legislature had properly designated the source of its appropriations for this purpose.

In fact, the legislature appropriated more than the amount of the state military fund; for purposes designated in Section 5267 as within the general description of "maintenance Ohio national guard" the sum of $5,500 for transportation deficiency was carried in the unauthorized deficiency bill of the year 1911, and appropriated out of the general revenue fund. (102 O. L. 367) I presume, however, that this item is more properly a part of the extraordinary expenses incident to the riot service of the national guard and should be considered together with the appropriation of $180,000 for this purpose, found on page 3 of 102 O. L., rather than considered as an addition to the amount appropriated for current needs of the national guard.

Confusing, then, as is the language used by the general assembly in its appropriation bills, the arithmetical coincidence above referred to leads me to conclude that its intention was that the amount of what would be the "state military fund," ascertainable on January 1, 1911, exclusive of that appropriated for armory purposes, should be expended for the payment of liabilities incurred in maintaining the Ohio national guard from February 15, 1911 to February 15, 1912, and for paying liabilities incurred for transportation and other miscellaneous items appertaining to the maintenance of the Ohio national guard, existing on and incurred prior to February 15, 1911.

It is perfectly clear, I think, that the intention of the legislature was that the amount of this fund, ascertainable on January 1, 1912, should be divided between the purposes of the state armory board for the fiscal year beginning February 15, 1912 and to pay liabilities incurred in maintaining the Ohio national guard from and after February 15, 1912.

The state military fund is a continuing fund, but the appropriations made therefrom are not and could not be "continuing appropriations," as you say the adjutant general has suggested to you. The express language of Section 2 of the partial and general appropriation bills, above quoted, preclude any such conclusion, at least any conclusion that either of these appropriations may be used to pay liabilities incurred or deficiencies existing prior to the date named in the section. In the sense that these appropriations may be used to pay liabilities incurred at any time after the expiration of a year from the date named in Section 2 of each bill, the appropriations may be said to be continuing; that is to say, it is provided in the 1911 bill, for example, that the money therein appropriated shall not be used to pay deficiencies incurred prior to a certain date, but it is not provided therein that such appropriations shall not be used to pay liabilities incurred after any given date. In other words, the legislature has not defined the posterior date beyond which liabilities may not be incurred and paid for out of the appropriation. Inasmuch, however, as the legislature is presumed to have obeyed the constitution, there is an implied limitation of this sort, to-wit: two years from the date of passage of the bill(not two years from the date at which liabilities might first be incurred and paid out of the appropriation, as you erroneously state).

It therefore follows that the moneys appropriated in the partial bill for 1911 are available to pay liabilities incurred in maintaining the Ohio national guard between February 15, 1911 and February 28, 1913; those appropriated by the act

of April 28, 1911 are available to pay only those liabilities and deficiencies expressly mentioned therein but may be expended at any time up to April 28, 1913; those appropriated in what I have designated as the general bill for 1911 may be expended to pay any liability incurred between February 16, 1911 and June 14, 1913; and those appropriated in what I have termed the general bill for 1912 may be used to pay liabilities incurred between February 16, 1912 and June 14, 1913.

I have thus tried to define the exact life and meaning of these various appropriations. The use of such general words as "continuing appropriation," "appropriation for the year 1912" etc. is really meaningless, unless these terms are accurately defined.

Much of the foregoing discussion is, of course, of little value in connection with this question because the first three of the four appropriations above mentioned have now been, as you state, almost, if not completely, exhausted; so that the only money now appropriated and not expended for the maintenance of the Ohio national guard is that appropriated from what I have termed the 1912 bill. The sole question, therefore, is as to when an obligation for drill pay is "incurred" within the meaning of Section 2 of that act.

The subject of drill pay is regulated by Section 5288 of the General Code, which provides as follows:

> "Each regularly enlisted man in the organized militia of this state shall be paid twenty-five cents for each regular weekly drill attended, not to exceed forty-eight weeks in one year, to be paid *quarterly* upon the presentation of the proper certified muster and pay-roll to the adjutant general. Upon his approval, the state auditor shall issue his warrant upon the treasurer for the amount certified to as above provided in favor of the officer making the certificate as hereafter provided."

I am informed by the Adjutant General that by the regulations of the Ohio national guard which, by virtue of Sections 5240 and 5291, General Code, have the force and effect of law, if not inconsistent with the statutes, the dates for the quarterly payment are so fixed that one of them is March first; that is to say, on the first of March of a given year the adjutant general will have presented to him for his approval a properly certified muster and pay-roll showing the amount of drill pay due to the officers and enlisted men of the Ohio national guard for the preceding three months. At this time, also, the state auditor will have presented to him the pay-roll so approved, upon which he is required, if there be money in the treasury appropriated for that purpose, to issue the warrant upon the treasurer.

Section 5289 provides as follows:

> "The commanding officer of each company, troop, battery, hospital corps or band, at a stated hour during the regular weekly drill, shall call the roll of his command and keep a record of the members present and the absentees. From this record he shall make intriplicate muster and pay-rolls at the end of each quarter, to which he shall attach his certificate, and forward to the adjutant general."

If this section stood alone it would be clear that so far as the statutes are concerned the adjutant general would not be in a position to know what obligations for drill pay had been incurred until each commanding officer had forwarded to him the muster and pay-roll of his particular command duly certified. It is true that Section 5291 provides that,

> "The adjutant general shall make such regulations, require such bonds and reports, and furnish such blanks as may be necessary to carry out the provisions of the preceding three sections."

and that by virtue of this section the adjutant general seems to have power to require reports other than those required to be made by Section 5289 itself. However, it is my judgment that the only method of paying the pay-roll is that outlined in Section 5288 and Section 5289, above quoted: therefore, although the adjutant general has the means of advising himself as to the amount of drill pay due for drills held between December 1st and February 15th, for example, he has no power to issue separate vouchers nor to certify to the auditor of state that portion of a pay-roll separately from that reported by drills held between February 15th and March 1st.

This fact must, in my judgment, be taken into account in determining what the legislature's intention was in the use of language like that quoted from the second section of the 1912 appropriation bill. While, in the strict sense of the word, the liability for drill pay is incurred when an enlisted man, for example, reports for drill pay upon a specified date, yet, from the standpoint of the State, there can be no liability, until the various steps have been gone through with and properly certified pay-rolls have been presented to the adjutant general and approved by him. Furthermore, the indivisibility of the quarterly pay-roll resulting from the express terms of Section 5288 indicates, to me at least, that the legislature could not have intended a part of any pay-roll, and especially that falling due on March 1st, to be paid, part from one appropriation and another part from another.

Now, it might be urged that because the 1911 appropriations are available to pay the entire pay-roll falling due on March 1st if a sufficient balance remained in the account thereby created, therefore, it can not be said that the general assembly intended that this pay-roll should be met out of the 1912 appropriation, so-called. This, however, does not necessarily follow, because of the peculiar nature of the "state military fund," as I have already described. On the face of the statutes defining that fund it appears to be the intention of the general assembly that each calander year shall take care of itself, so to speak, in the maintenance of the Ohio national guard. We are, therefore, to regard the appropriations, presumably made in pursuance of these statutes, as being primarily intended to meet the charges against the state treasury on account of the maintenance of the militia for a given year. This, I believe to be the controlling intention of the legislature and to shed light upon the meaning of Section 2 of the appropriation act.

From all the foregoing considerations I am of the opinion that no part of the pay roll presented on March 1, 1912 is a liability incurred prior to February 15, 1912, and that the entire pay roll then coming due may lawfully be paid out of the appropriation for the year 1912.

This holding might seem to be inconsistent with the act of April 28, 1911, above quoted; upon careful examination of that act, however, it will be ascertained that the deficiency then existing and therein recognized as having been created and incurred prior to February 15, 1910 and February 15, 1911, respectively, are described as items of transportation and other miscellaneous items; drill pay is not expressly mentioned; it may have been a matter of fact that a part of these deficiencies consisted of drill pay; however, the legislative intent is manifested in the language used, and if there was any drill pay discharged out of this twenty thousand dollar appropriation that feature of the matter would not come to the attention of the average member of the general assembly in voting for the bill. Therefore, I cannot believe that it can be held that the general assembly has, by

passing the act of April 28, 1911, construed its ordinary appropriation acts, and the language customarily used by it in the second section thereof with reference to the time when a quarterly pay roll is incurred.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

216

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—STATE AID FOR SCHOOLS—"MAXIMUM LEVY" BY BOARD OF EDUCATION—SHRINKAGE IN TAX COLLECTIONS—FORMER OPINION MODIFIED.

The maximum levy necessary to qualify a school district to receive State Aid is any estimate of amount ¾ of which are for tuition purposes made by the Board of Education to the County Audtor as representing the total amount necessary for all school purposes for the coming year, regardless of reductions made by the Budget Commission, providing such reductions are made so as to preserve undisturbed the ¾ proportion for tuition purposes. If a board of education fails to estimate an amount sufficiently large to pay its teachers forty dollars per month, it is not entitled to State Aid. This rule must be qualified however, to the extent that a Board is not disqualified by reason of a mere shrinkage in tax collections.

The statement, therefore of a former opinion to the effect that a Board of Education whose estimate had been reduced by the Budget Commission, would be entitled to State Aid to the extent of a difference between the amount allowd by the Budget Commission, and the amount estimated must be overruled.

March 18, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—At your request I have reviewed and reconsidered a portion of my opinion to you under date of January 17th, respecting the effect of the Smith One Per Cent. Law, so-called, upon the law which provides State Aid for weak school districts.

In that opinion, I undertook to set forth a detailed set of tests for the use of the Auditor of State in determining whether or not a given school district would be entitled to State aid. You now call my attention to a hypothetical state of facts as to which the application of the tests suggested by me seems difficult, and in the light of which some of the statements in my opinion seem mutually inconsistent. That state of facts is as follows:

> "A board of education filed an estimate with the county auditor under the Smith Law, which said estimate is in point of fact too low—that is, not sufficient in amount to supply the needs of the district under the State Aid Law for the ensuing fiscal year. The Budget Commission, in the discharge of its duties under the Smith Law, reduced the estimate thus made and filed with the county auditor by the board of education."

The question is, of course, as to whether or not, under my previous opinion, or under the law as I now see it, the school district under such circumstance, would be entitled to state aid.

An answer to this question is found in the following paragraph of my former opinion.

"6. The deficiency for the relief of which state aid is asked.

"The deficiency for which a state aid voucher may be issued by the auditor of state may not exceed the difference between the amount of revenue paid to the board of education at the two semi-annual settlements (Item 4 above), and the amount estimated by the board of education as constituting its needs for the incoming year (Item 1 above), unless the amount estimated was not cut down by the budget commission, as shown by comparison of items 1 and 3 above. If the amount estimated has not been reduced by the budget commission the board of education would, therefore, be itself responsible for the deficit, in that it did not exercise the degree of care required by the letter and the spirit of the Smith Law in providing for its expenditures for the incoming year, and then, in my judgment, the board has failed to qualify. If, on the other hand, as already indicated, the board's estimate was reduced by the budget commission, and yet the amount of the deficiency added to the amount of revenue paid over by the county treasurer at the semi-annual settlement exceeds the amount of the estimate, then the board of education is not disqualified, but is not permitted to have state aid for the entire deficiency, but only for that part which equals the difference between the revenues actually collected and the amount of its estimate."

The language here used by me is consistent with the language of a previous paragraph of the opinion which I also quote:

"In answer to your second question, I beg to state that in my opinion the maximum levy necessary to qualify a school district to receive state aid is any levy, or rather any estimate of amount made by the board of education of a school district and filed with the county auditor as representing the total amount necessary for all local school purposes for the incoming year, three-fourths thereof being for tuition purposes, if only said estimate is reduced in such manner as to leave undisturbed the proportion which the tuition fund bears to the total school levy, by the action of the budget commission; that is to say, a practical rule for the guidance of the auditor of state in discharging his duty under Section 7596, General Code, and under the Smith One Per Cent Law is as follows:"

Upon a careful reconsideration of these two paragraphs of my former opinion, I am of the present opinion that they are inconsistent with the reasoning that preceds them. This inconsistency is partly disclosed by language used in the first of the two paragraphs quoted above, that is to say, if the amount estimated by the board of education has not been reduced by the budget commission, and yet the returns from taxation are insufficient to carry into effect the purpose of the State Aid Law, then the responsibility for the deficiency rests upon the board of education and not upon the Budget Commission; this is equivalent to saying that the deficiency is not created by the limits of taxation, but by the voluntary act of the board of education itself. The case then would virtually be the same as one under the old law, in which the board of education had levied ten mills, say, under the erroneous belief that such a levy would enable it to pay its teachers forty dollars a month.

It now seems obvious to me that if a board of education fails to estimate the levy needed by it for the incoming year at an amount sufficiently large to enable

it to pay its teachers forty dollars per month, it is not entitled to any state aid whatever, regardless of whether or not the budget commission reduces its estimate below that amount originally certified by the board.

I recall that I had in mind at the time of the preparation of the former opinion, the fact that the income from taxation is invariably less than the total amount levied. There are certain fees of the county auditor and county treasurer which must be deducted from the gross levy, and certain shrinkages due to delinquencies of tax payers which experience had demonstrated to be inevitable. I had thought that it was incumbent upon the board of education merely to consider its actual needs in making up the budget, without regard to these shrinkages, and I have thought also that the intention of the two laws under consideration, read together, is that the State shall supply deficiencies arising from such shrinkages. On the reconsideration that I have given to the matter, I have not changed my opinion in this respect. I am still of the opinion that an innocent mistake on the part of the board of education as to the shrinkage due to delinquent taxes and the fees of county officers, ought not to disqualify the board. I see, however, that my consideration of this point has lead me to formulate conclusions, in the former opinion, that were to broad. To make the matter short, and at the same time to furnish you with a complete rule of action, I beg to set forth, without further discussion, my exact views relative to the manner in which a situation like that above described should be handled.

If the board's estimate has not been reduced by the Budget Commission, and yet there is a deficiency, the Auditor of State, from the facts before him, as set forth in the former opinion, must ascertain whether or not the amount of the deficiency, added to the returns from taxation, exceed the estimate of the board. If it does, then it is obvious that the board's estimate was too low, and the board is disqualified; if it does not, then it is equally obvious that the difference between the returns from taxation and the estimate of the board is due solely to the shrinkages from tax delinquencies and officials' fees. Under such circumstances, the school district would be qualified for state aid, and, of course, would secure the entire amount of the deficiency asked for.

If, on the other hand, the estimate of the board has been reduced by the Budget Commission, and yet the deficiency asked for, added to the returns from taxation, exceed the estimate of the board, it is obvious that the deficiency is not entirely due to shrinkages in revenues, nor to the action of the Budget Commission, but in part at least, to the failure of the board of education to make a careful and complete estimate of its needs. This being the case, the district is disqualified, not only to the extent of the difference between the amount of the estimate and the sum of the deficiency asked for and the revenues received, as suggested in the former opinion, but also for any state aid whatever.

In the light of the discussion which has preceded, I think it will be entirely clear to you, if I state, as my final conclusion on the matter, that a board of education is disqualified from receiving for the district state aid if it fails to estimate the needs of the district under law which requires the payment of forty dollars per month for all the teachers therein, regardless of whether or not the Budget Commission has reduced its estimate; but that in making its estimate under the Smith Law, a board of education, in order to qualify for state aid, is not required to assume the risk of shrinkages in tax collections, and if its estimate is for an amount, which if received from taxation would enable the schools to run for eight months and the teachers to be paid forty dollars per month, then state aid may be received to cover the shrinkages in revenues even though the budget commission has not reduced the board's estimate.

I trust that I have made myself clear. All portions of the former opinion inconsistent with this opinion are to be regarded as overruled.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

217.

TRAVELING EXPENSES CHARGEABLE BY PUBLIC OFFICIAL AGAINST STATE—TIPS—PORTER'S FEES— LONG DISTANCE TELEPHONE MESSAGES—MESSAGES TO FAMILY.

March 22, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 14, wherein you state:

> "In the examination of the financial transactions of the department of Adjutant General of Ohio, the examiners of this department find items in the expense accounts of officers and employes of the department for tips, porters and telephone messages.
>
> "Being in doubt as to the legality of charges for tips and porters, your opinion is respectfully requested for our guidance in auditing such accounts.
>
> "It has been held that the official residence of a state official is at Columbus and not where he resided at the time of his election or appointment.
>
> "If such officials elect to maintain their families at their home instead of at Columbus, are charges for long distance telephone messages to them, legal items of expense chargeable to the state?
>
> If a state official or a national guard officer on duty be continued away from home longer than expected, whether a resident of Columbus or elsewhere in the state and he telephones or telegraphs his family that he will not be home when expected, is such expense personal or can he charge same to the state?"

and in reply I beg to say that a "tip" is defined as a gift or gratuity and the Century Dictionary defines it as a donation to one for some service or pretended service while in the employ of another and for which the employer makes payment. In any light it is a gratuity or donation to one who is ready and willing to receive but who confessedly has no right to demand, and therefore cannot be considered as an expense chargeable to the State as other expenses may be.

Money paid to a porter may or may not be a legal expense, depending upon the character of service rendered and whether the doing of that for which money was given was, or was not, a part of his duties under his employment.

Long distance messages to members of an official's family who maintains his home outside of Columbus cannot be considered as an expense incident to an office.

Telegraph or telephone messages by an official when absent on duty advising his family of an unlooked for detention may be considered as an official expense where the railroad fare, hotel bills and the like are properly chargeable to the State. This is regarded as somewhat doubtful and is based not so much upon the strict legality of the charge as it is upon the fact that a state official has the same

duty to perform toward his family as an individual. An individual should and would go to that expense, and the state should not object to the same as long as it was kept within reason.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

293.

ABSTRACT OF TITLE—SITE FOR WOMEN'S REFORMATORY SITUATED IN UNION COUNTY, PARIS TOWNSHIP—DEFECTS AND OMISSIONS.

April 10, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—In response to your verbal request of recent date I have examined the abstract of title to the site for the proposed Womans' Reformatory described as follows:

> "The following real estate situate in the State of Ohio, County of Union and Township of Paris, being part of surveys Nos. 3,354 and 4,069, and bounded and described as follows:
>
> "Beginning at a stake in the west line of survey No. 3,354 and in the center of the Collins Gravel Road; thence with the center of said road north 82° east 175 40/100 poles to a stake in the center of said road (witness an iron pipe S. 2¼° E. 20 feet) northwest corner to lands owned by Samuel F. Barr; thence with the west line of said lands south 2° 15' east 162 33/100 poles to an iron pipe in the northerly line of the right of way of the C. C. C. & St. L. Railway Company; thence with said line south 42° west 231 3/100 poles to a stake in the west line of survey No. 4,069; thence with said line north 7° 15' west 149 35/100 poles to a stone northwest corner of said survey No. 4,069 and southwest corner of said survey No. 3,354; thence with the west line of said survey No. 3,354 north 2° 15' west 16 15/100 poles to the place of beginning containing 257 80/100 acres be the same more or less."

The following, in my judgment, require correction:

A statement is made at Section No. 20 that Catherine A. Hickey is the same person as Catherine A. Barry, who was a party to the title. Her remarriage should be proved by a certified copy of the probate records of the proper county or by affidavit if the latter can be obtained. The pleadings in a partition suit at No. 19 may disclose this fact and if so, a copy therefrom would be sufficient.

The agreement of parties to a division of survey No. 4,069, as stated in Section No. 53, should be copied in full.

The alleged affidavit as to the death of John S. Fulton, the names of his surviving heirs, etc., is not sworn to by anyone. This should be corrected by an affidavit in proper form.

It appears from an examination of Section No. 80 that part of the above described property was conveyed by John Cratty, executor, to the Springfield & Mansfield Railroad Company, and the succeeding section of the abstract shows what purports to be a deed for the same premises from the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company to John W. Robinson. No evidence

is adduced to show that the name of the Springfield & Mansfield Railroad was changed to the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company as alleged by the abstractor. It seems to have been taken for granted that the latter company sold said real estate to Robinson, as the alleged deed therefor does not appear to have been signed or recorded. Affidavits of disinterested persons having knowledge of these facts should be procured.

The will of James W. Robinson, Section 82, is not abstracted so as to show that it was properly witnessed as required by the laws of Ohio, and the statement that Section 83 should be embodied in an affidavit.

The warranty deed shown at Section 88 recites that the grantee assumes a mortgage of $4,500.00, but there is nothing to show by or to whom said mortgage was given, the date thereof, or whether the same has been released.

The foreclosure proceedings referred to in Section 128 should be abstracted so as to show how they affected the chain of title.

The mortgage given by J. W. Robinson and wife to Ester E. Caryl as shown at Section 131, appears to have been released by the alleged heirs of the mortgagee, her estate not having been settled through the probate court. There is nothing to indicate that the parties signing such release were the heirs of said Ester E. Caryl except their own statement. No power of attorney or other evidence of the legal authority of A. L. Caryl and William Caryl to execute such release as attorneys for Clifton Caryl has been presented. The agreement of said alleged heirs appointing two of their number to settle the estate should be abstracted verbatim so as to show the signatures of all the parties. Affidavits should be obtained from persons acquainted with the facts as to the time of the death of Ester E. Caryl, the names, ages and relationship of her surviving heirs and as to the payment of her legal debts.

Certificates of the clerk of the United States District Court for the Southern District of Ohio, Eastern Division, as to the pendency of suits and judgments in said court against the persons making deeds to the State of Ohio should be attached to the abstract.

The following liens are outstanding against said property:

The general taxes due June 20, 1912, on the Samuel F. Barr tract of 174 acres (Marysville School District), $49.49.

The general taxes due June 20, 1912, on the Lincoln Baker tract of 106 acres, $25.77.

The general taxes due June 20, 1912, on the Hiram and Jane E. Crottinger tract of 78¼ acres, $24.82.

Mortgage for $3,200 from Lincoln Baker and wife to the Aetna Life Insurance Company shown at exhibit No. 138.

Mortgage from Lincoln Baker and wife to the Commercial Savings Bank, of Marysville, for $800, shown at exhibit 139.

Mortgage from Lincoln Baker and wife to J. Walter Kennedy duly transferred and now held by the Commercial Savings Bank of Marysville for $2,400, as shown by exhibit No. 140.

The taxes mentioned above should be paid and the mortgages duly released before the deeds pass to the State of Ohio.

The deeds from Samuel Barr and wife, Lincoln Baker and wife, Jane Eliza Crottinger and Hiram Crottinger, husband and wife, to the State of Ohio for the various parcels of land that go to make up the whole tract described in the caption are in legal form, and upon the correction of the abstract and the pay-

ment of mortgages and taxes as above indicated will be sufficient to convey to the State of Ohio a good and sufficient title in fee simple.

I herewith return the abstract and deeds.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

386.

BRIBERY—MEMBER OF GENERAL ASSEMBLY CANNOT RECEIVE PAY AFTER CONVICTION FOR—EFFECT OF APPEAL.

A member of the General Assembly who is convicted of receiving a bribe is disqualified from holding public office and from the date of his conviction, vouchers due to him as such member must be denied.

Pending an appeal from such conviction, however, the status quo of the payments accruing should be preserved.

May 24, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You inquire verbally through your deputy, Hon. A. W. Beatty, as to whether or not voucher should be issued to L. R. Andrews, formerly a member of the General Assembly, to-wit: A member of the State Senate of Ohio from the Eighth Senatorial District, for services as such member of the General Assembly. In reply thereto I beg to advise that Section 12823 of the General Code provides, among other things, that,

> "* * * whoever, being a member of the General Assembly, or a state or other officer, public trustee, agent or employe of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, solicits or accepts any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him, shall be fined not more than five hundred dollars or imprisoned in the penitentiary not more than five years, or both."

Senator L. R. Andrews was convicted of offending against this section, and sentenced by the Common Pleas Court of Franklin county, Ohio, on the twenty-seventh day of April, 1912, to the Ohio penitentiary for a period of nine months. The foregoing section was amended by an act of the last General Assembly, but Senator Andrews was convicted under the section quoted.

Section 12824 of the General Code provides as follows:

> "A person convicted under the next preceding section is disqualified from holding any public office or appointment under this state, and, if not a state officer, shall be removed from office or employment by order of the court."

It will thus appear that since April 27, 1912, Senator Andrews has been legally disqualified from holding any public office under this state, his conviction and sentence ipso facto disqualifies him, and will continue so to do until and unless the judgment of conviction be reversed.

Therefore, it is my opinion that you would not be warranted in issuing to him any voucher for salary claimed, since the date of his conviction. However, inasmuch as an appeal in his case is pending, the appropriation from which his salary would be paid if he were entitled to it should not lapse as to him, but the status quo preserved pending the determination of his said appeal.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

402.

CONSTITUTIONAL CONVENTION—RIGHT OF MEMBERS AND EMPLOYES TO MILEAGE TO AND FROM CHILLICOTHE—SEAT OF GOVERNMENT.

Under Section 50, General Code, members of the Constitutional Convention are entitled to receive mileage to and from the seat of government, and for this purpose the seat of government is any place to which the convention may adjourn, by authority of Section 3 of the act of 102 O. L., p. 298.

The members are, therefore, entitled to their mileage to and from Chillicothe during the period of their adjournment to that place.

As it is the duty of the employes to go where directed, they should, therefore, be reimbursed for their transportation expenses, to and from Chillicothe.

May, 29, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 25th, in which you make the following request for my opinion:

> "I am requested by Mr. C. B. Galbraith, Secretary of the Constitutional Convention, to request an opinion from you on the right of the state to pay members of the convention their mileage from the city of Columbus to Chillicothe and return on the occasion of the adjourned meeting of the convention while at Chillicothe on May 9th.
>
> "Your opinion is also desired as to the right of the state to pay the expenses of transporting the employes of the convention to and from Chillicothe on account of such meeting. I am enclosing herewith copy of the resolution passed by the convention directing the employes of the convention to go to Chillicothe."

Section 20 of the act providing for the Constitutional Convention, 102 O. L., 298, provides:

> "* * * the delegates of the convention shall be entitled to the same compensation and mileage for their services as is allowed by law to members of the General Assembly for one year, and the officers and employes of the convention, as far as practicable, shall be entitled to the same compensation for their services as is allowed by law for similar services to officers and employes of the General Assembly. * * *"

Section 50 of the General Code, after providing that each member of the General Assembly shall receive a salary of one thousand dollars, provides:

"* * * each member shall receive two cents per mile each way for mileage once a week during the session from and to his place of residence by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session. * * *"

Section 54 of the General Code is as follows:

"The president of the senate, and speaker of the house of representatives, shall ascertain the number of days' attendance of each member and officer of the respective houses, during the session, the number of miles of travel of each member to and from the seat of government and certify such attendance and mileage, and the amount due therefor, to the auditor of state."

Section 3 of an act to provide for the election to, and assembling of a convention to revise, alter, or amend the constitution of the State of Ohio, found in the Ohio Laws, volume 102, at page 298, provides as follows:

"That the delegates so elected shall assemble in the hall of the house of representatives, in the city of Columbus, on the second Tuesday of January, A. D., 1912, at ten o'clock a. m., *with authority to adjourn to any place or places within this state for holding of the convention;* and may, for the purpose of a temporary organization, be called to order by the oldest member present. They shall be entitled to the privileges of senators and representatives, named in Section 12, Article II, of the constitution."

It will be seen that it expressly appears that the delegates to the Constitutional Convention are authorized to adjourn to any place or perhaps within this state for the holding of their convention. The seat of government, so far as the Constitutional Convention is concerned, was Chillicothe on the day on which they held their session there. The intention to give members mileage to the seat of government from some place is expressed, and inasmuch as the delegates were assembled at Columbus, it appears only reasonable that the mileage of delegates should be calculated from Columbus to Chillicothe.

In my mind, both the letter and spirit of the law, and plain principles of justice require that the delegates should receive their mileage, and no reason suggests itself to my mind to the contrary. I am, therefore, clearly of the opinion that the delegates to the present Constitutional Convention have the right to receive mileage from the city of Columbus to Chillicothe and return on the occasion of the adjourned meeting of the convention while at Chillicothe on May 9.

Now, coming to your second question, the employes are subject to the control of the convention, and when ordered to go to Chillicothe by the convention, which order was made in the form of a motion, duly adopted by the convention, it seems to me they had no choice in the matter, but it was their duty to go where they were directed; and, therefore, the transportation expenses incurred by the said employes in making said journey should be allowed, and paid out of the fund provided for by law for the uses and purposes of the Constitutional Convention.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

413.

AUDITOR OF STATE—DUTY TO ISSUE WARRANT FOR PAYMENT OF COMMISSIONERS FOR TAKING DEPOSITIONS AS ALLOWED BY COMMON PLEAS COURT, UPON REQUEST, OF A DEFENDANT IN A CRIMINAL CASE.

When a bill of costs in a criminal case, certified to the Auditor of State, contains or has attached thereto, a certificate or copy thereof, showing the payment from the county treasury of an allowance made by the Court of Common Pleas to Commissioners appointed to take depositions, upon request of the defendant as provided in Sections 13668 *and* 13669, *General Code, the auditor should issue his warrant for the same, under provisions of Section* 13726, *General Code,*

June 3, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your communication, dated May 4, 1912, enclosing two certified criminal cost bills, one being the case of State vs. John Kocyanic, No. 1266, Common Pleas Court of Trumbull County, and the other being the case of State vs. Pietro Petito, No. 2635, Common Pleas Court, Ashtabula County, *both containing items of charges for taking deposition,* was received, and you request my opinion as to the legality of the charges in the said cost bills for taking depositions. In reply I desire to say that Section 13668 of the General Code provides:

> "When an issue of fact is joined upon an indictment and a material witness for the defendant resides out of the state, or, residing within the state is sick or infirn, or about to the state or in confined in prison, such defentand may apply, writing to the court or the judge thereof in vacation, for a commission to examine such witness upon interrogatories thereto annexed. The court or judge may grant such commission and make an order stating in what manner and for what length of time, notice shall be given to the prosecuting attorney before such witness shall be examined."

Section 13669 of the General Code provides:

> "The examination of such witness shall be taken and certified, and the return thereof to the court made as for taking depositions in civil cases. The commissioners so appointed shall receive such compensation as the court of common pleas shall direct to be paid out of the county treasury and taxed as part of the costs in the case."

Under the provisions of the above quoted sections, the defendant in any criminal case is given the privilege of taking depositions in his behalf of witnesses as therein specified, and such compensation shall be paid to the commissioners so appointed by the court under the provisions of said sections as the court of common pleas shall direct to be paid out of the county treasury, and taxed as part of the costs in the case, and that privilege is so plainly stated in the said sections above quoted that if the commissioners so appointed by the court to take depositions, as provided in said section, have been paid out of the county treasury upon the direction of the comon pleas court, and properly charged in a cost bill and a certificate properly attached to the sheriff's certified cost of bill to you as auditor

of state, there can be no question in my mind as to the legality of the same, and you should issue your warrant on the tresurer of state for the payment of the same, under the provisions of Section 13726 of the General Code.

In the case of the State vs. Pietro Potitio from Ashtabula County, the proper certificate or copy thereof of the court of common pleas showing the amount to be paid to the commissioners by the court of common pleas, and the payment thereof out of the county treasury as provided by Section 13669, is attached to the certified cost bill in the proper form, and therefore a warrant should be issued by you for the said amount to the county of Ashtabula. But in the case of John Kocyanic, from Trumbull County, the certified cost bill does *not* contain, nor has not attached thereto a certificate or copy thereof showing the allowance made by the common pleas court and the payment thereof from the county treasurer to the commissioners appointed by the court to take such deposition, and until such certificate is properly made by the clerk of the courts, and attached to the said certified cost bill, I am of the legal opinion that you should not issue a warrant to the treasurer of state for the payment of the said costs, and suggest that you direct the clerk of the courts of said county to attach such cerificate, as above stated.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

437.

EXPENSES, TRAVELING—BOARD OF CHARITIES MAY NOT ALLOW EXPENSES OF LADY VISITORS INCURRED ATTENDING CONFERENCE OUTSIDE OF STATE.

There being no statutory provision requiring these duties or authorizing payment for the same, members of the Board of Lady Visitors may not be allowed, by the Board of State Charities, expenses incurred in attending the National Conference of Charities and Correction at Buffalo, N. Y.

June 20, 1912.
(Attention of the Hon. A. W. Beatty)

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—On June 10th you submitted to this department a certain voucher, issued by the State Board of Charities to one Miss B. V. for traveling expenses from June 6 to July 2, 1909, to be paid from the appropriation for the Board of Lady Visitors.

You call our attention to the first two items of said bill, calling for $38.80 for expenses incurred in attending the National Conference of Charities and Correction at Buffalo, N. Y. and desire to know whether or not such item is a proper charge.

The law in force at the time the charges were made is found in 99 Ohio Laws, page 349. Said Act provides:

> "Section 1. The governor shall appoint; not later than May 1, 1908, and each year thereafter, a committee consisting of six women, to visit the benevolent, correctional and penal institutions of the state. The term of appointment shall be for one year.
>
> "Section 2. It shall be the duty of such committee to visit such benevolent, correctional and penal institutions as often and at such times

as they deem proper to ascertain whether the purposes of the institutions are being successfully carried out and whether the inmates are receiving reasonable care and attention, provided that such committee shall visit such institutions not less than twice during each year. They shall prepare a complete report in writing concerning their observations and conclusions and present the same to the board of state charities.

"Section 3. The members of said committee shall receive no compensation, but, upon presentation of properly certified and itemized statements of necessary expenses incurred in the performance of their duties, the board of state charities shall order the payment of the same from any money appropriated for this purpose.

"Section 4. That Sections 675*a*, 675*b*, 766 and 767 of the Revised Statutes be and the same hereby are repealed."

An examination of Section 3 of said act discloses that said committee, known as the board of lady visitors, are to receive no compensation for their services, but are to be allowed the "necessary expenses incurred in the performance of their duties."

There is no provision in said act for the payment of the expenses of said committee to any conference, state or national, nor can I conceive it to be a part of their duties to attend a national conference of charities and correction. The duties of such committee are those set forth in Section 2 of said act, and no other.

In comparing said act with the provisions of the Revised Statutes, Section 633-15, relating to the board of county visitors, it is to be noted that said board of county visitors is allowed not only the actual expenses incurred in the discharge of its duties, but also the actual necessary expenses incurred "in visiting any other charitable or correctional institution for the purpose of information and in attendance upon any convention or meeting held within the State of Ohio in the interest of, and to deliberate upon charitable or correctional methods or work to an amount not exceeding $100.00 per annum."

Furthermore, the legislature has seen fit to provide that the trustees of children's homes shall not receive compensation for their services "but the said trustees and the superintendent shall be allowed their necessary expenses while on duty, including expenses as duly accredited delegates to state and national conferences devoted to child saving and other correctional and charitable work"—99 O. L. 185 (now Section 3087, General Code).

It will, therefore, be seen that the legislature, in enacting the law in reference to trustees of children's homes, had in mind the advisibility of such trustees attending state and national conferences.

The duties of the committee under the act in the 99 O. L. hereinbefore set forth in full, having been fully set forth in Section 2 thereof, and Section 3 thereof permitting payment for necessary expenses incurred in the performance of their duties, and there being no provision for the allowance of expenses for attendance at a national conference of charities and correction. I am of the opinion that such a charge can not be allowed and paid from the appropriation made by the legislature for the board of lady visitors.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

464.

STATE AID FOR SCHOOLS NOT BARRED WHEN EIGHT MONTHS SESSION PREVENTED BY FIRE.

It is the intent of Sections 7644 and 7595, General Code, that a Board of Education shall maintain a school session of not less than thirty-two weeks in each year as a condition precedent to obtaining State Aid.

It is not the intent to demand the impossible, however, and when, through destruction of the school building by fire, compliance is absolutely prevented, failure to maintain an eight months' session will not preclude the right to State Aid.

June 26, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of June 21st you request our opinion on the following:

"In B, Township School district, there are nine sub-districts. At the beginning of the year the Township Board of Education employed nine teachers at $40.00 per month for the period of eight months. After the teachers employed in District No. 6 had taught 114 days, the school house burned down, and from the peculiar location of the district, it was impossible to secure a building in which to continue the school, and the Township Board of Education had no funds from which they could construct a new school building. From further information developed in the case, we find that there were enumerated in this sub-district only 13 school youth, and that the average attendance during the 114 days was only 5 pupils, and because of the busy season among the farmers, it is thought that if the school had been continued there would possibly not have been an average attendance of over two pupils. B. Township will be an applicant for State Aid at the close of the school year, August 31, 1912.

"Question: B. Township, being the unit, will the failure to have school the full eight months, for reasons beyond the control of the Board of Education disqualify B. Township from receiving State Aid, providing all other conditions and requirements under the State Aid Act have been complied with?"

Section 7644, General Code provides as follows:

"Each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof. Every elementary day school so established shall continue not less than thirty-two nor more than forty weeks in each school year. All the elementary schools within the same school district shall be so continued."

Section 7595, General Code provides as follows:

"No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not suf-

ficient money to pay its teachers forty dollars per month for eight months of the year, after the board of education of such district has made the maximum legal school levy, three-fourths of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficiency."

It will be seen from the above sections:

First:—That it is the duty of the Board of Education to have at least eight months school, and also that the State will, upon the board contracting with the teachers at $40.00 per month, make up to such board of education a sum necessary to meet the salaries of such teachers, providing said board has not sufficient money to pay said sum for eight months. While it is true that the State Aid Law, as I construe it, requires that the board of education shall provide eight months of schooling in order to entitle it to state aid yet in the instance you have cited, a school house has burned down in one of the sub-districts and it is impossible to secure a building in which to continue the schools. I do not believe that it was the intention of the legislature to require the impossible in order to entitle a school district to state aid. The said district having complied with all the requirements of the law to entitle it to state aid, and through no fault of theirs not being able to continue the school for the time required by law, I am of the opinion that under the facts stated in your inquiry the said Board of Education would not be debarred from state aid. To hold otherwise would be to hold that circumstances over which the board has no control would prevent it from receiving the benefit of the statute in relation to state aid although said board has done all in its power to entitle it thereto. This I do not believe was the intention of the legislature. I, therefore, hold that the failure of the board to have school in one of the districts thereof for the full eight months for reasons entirely beyond the control of said board would not disqualify it from receiving state aid, providing all other conditions and requirements under the state aid act have been fully complied with.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

520.

DOW AIKEN TAX—PENALTY FOR NONPAYMENT OF ONE HALF TAX ON JUNE 20—DUTY OF ASSESSOR.

There is no statutory provision requiring a dealer in intoxicating liquors to voluntarily give notice to the tax authorities of that fact. Each dealer is bound under penalty however, to pay one half of the Dow Aiken Tax on or before June 20th, and December 20th, respectively of each year and when having started in business in April he fails to pay one half of said tax on or before June 20th, he is liable for said amount with 20 per cent. penalty.

July 10, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Answering your letter of June 21, 1912, wherein you state:

"A certain county was voted wet several months since. On the 17th day of June, 1912, the County Auditor discovered that Mr. "A" had been engaged in the sale of intoxicating liquors from the 13th day of April,

1912, without making any report to the Auditor or paying the Aiken tax, as required by law, and from evidence secured, he was attempting to evade the law requiring such payment. The liquor tax year beginning on the Fourth Monday of May, the Auditor required Mr. 'A' to pay the full amount of tax from April 13th to the Fourth Monday of May, together with 20 per cent. penalty.

"QUESTION:—Is Mr. 'A' liable (because of his failure to comply with the law in giving proper notice) for One Thousand Dollars, and 20 per cent penalty, for the liquor tax year beginning the Fourth Monday of May, 1912?"

Section 6071 of the General Code provides for the tax on the business of trafficking in intoxicating liquors.

Section 6072 of the General Code provides:

"Such assessment, with any penalty thereon, shall attach and operate as a lien upon the real property on and in which such business is conducted, as of the fourth Monday of May each year, and shall be paid at the times provided for by law for the payment of taxes on real or personal property within this state, to-wit: one-half on or before the twentieth day of June, and one-half on or before the twentieth day of December of each year."

Section 6073 of the General Code provides what tax is assessable for a part of the year.

Section 6081 of the General Code provides:

"Each assessor shall return to the county auditor, with his other returns, upon a blank to be furnished by the auditor for that purpose, a statement, as to each place within his jurisdiction where such business is conducted, showing the name of the person, corporation or co-partnership engaged therein, a brief and accurate description of the premises where it is conducted, and by whom owned. Such statement shall be signed and verified before the assessor by such person, corporation, or co-partnership."

Section 6082 of the General Code provides:

"If such person, corporation or co-partnership, on demand, refuses to furnish the requisite information for the statement, or to sign or verify it, such fact shall be returned by the assessor, and thereupon the assessment on said business shall be fifteen hundred dollars. If such assessment is not paid when due, there shall be added a penalty thereto of twenty per cent. which shall be collected therewith."

An examination of the liquor statutes discloses that there is no provision of law requiring a liquor dealer to give notice of his going into the business of trafficking in intoxicating liquors. Under Section 6081, supra, the duty of securing or attempting to secure the statement therein provided for devolves upon the assessor.

When a person goes into the business of trafficking in intoxicating liquors upon the first day of the Aiken tax year, he may pay the first half of the assessment on or before June 20th. June 20th is the last day, and if payment is not made by that date, the penalty prescribed by law attaches.

In the case of Mr. "A," I do not think the fact that he was derelict in the payment for the period from April 13th to the fourth Monday in May, and for which time he became chargeable with both the tax and the penalty, renders him liable to make payment for the next half year (he still remaining in the business) before the time fixed by law, to-wit: on or before June 20th, and if he would make payment of the half year's tax on June 20th, it is my opinion that there would be no authority of law for placing any penalty thereon.

As stated in Section 6082, supra, if the assessment is not paid *when due,* the penalty attaches, and the tax for the first half of 1912 would not be finally due until June 20th.

It is, therefore, my opinion that the auditor properly charged Mr. "A" with the full amount of the tax from April 13th to the fourth Monday of May, together with 20 per cent. penalty, but that he would not be authorized on June 17, 1912, to place Mr. "A" on the duplicate for the $1,000.00 tax and 20 per cent penalty.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

540.

EXPENSES—DUE OF STATE OFFICIALS IN NATIONAL ASSOCIATION MAY NOT BE PAID BY THE STATE.

Members of the state departments are not authorized to become members of national organizations and as there is no legal provision therefor, the dues of such association may not be made chargeable against the state.

July 23, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter of July 17th, wherein you state that you desire an opinion from this department, at your earliest convenience, upon the following request:

> "There are a number of National Associations of state officials, such as Commissioners of Insurance, Commissioners of Common Schools, Superintendents of Banks and Banking, Fire Marshall and other departments.
>
> "These organizations are for the purpose of discussing matters of importance to State Departments.
>
> "At least a part of these associations publish the minutes of their proceedings and debates and distribute them among the officials interested.
>
> "In view of the above facts and conditions, and for the guidance of this department, your official opinion is respectfully requested on the following question:
>
> "'Are the annual dues, which are for the purpose of defraying the expenses of such organizations, chargeable to the state and payable from the contingent fund of such departments?'"

In reply to your inquiry, I desire to say that the annual dues, which are for the purpose of defraying the expenses of such organizations as are mentioned in your inquiry, do not constitute legal expenses of any of the mentioned departments. This is by virtue of the fact that there is no statutory authority re-

quiring any of the heads of such departments to become members of any such national associations, as referred to in your inquiry. Furthermore, I find no statutory authority for the payment of such dues. The heads of state departments, such as the Commissioner of Insurance, Commissioner of Common Schools, Superintendent of Bank and Banking, Fire Marshal and other heads of departments, are governed entirely by specific statutory provisions and cannot in any case exceed their statutory authority.

Therefore, in direct answer to your inquiry, I am of the opinion, that annual dues, which are for the purpose of defraying the expenses of such organizations, cannot be charged to the state and cannot legally be paid out of the contingent funds of such departments.

I am,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

627.

COMPENSATION—MEMBERS OF STATE DENTAL BOARD PAID FOR DAYS ACTUALLY EMPLOYED ONLY.

Under 1317, *General Code, the members of the State Dental Board are entitled to ten dollars for "each day actually employed in the discharge of his official duties" and his necessary expenses incurred," and no additional payment can be allowed for the days required to come to and return from the place where the meetings of the board are held.*

September 5, 1912.

HON. E. M. FULLINGTON, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your favor of July 17, 1912, is received, in which you state:

> "I submit herewith copy of letter from R. H. V., D. D. S., and would kindly request your opinion on the questions he proposes, the most important of which you will note is, Can he legally charge more than one per diem in every 24 hours? Can he legally charge per diem on Sunday? Can he legally charge per diem for one-half day?"

In the letter enclosed, the facts are stated as follows:

> "In April, I was called to Cincinnati for two days, April 22d and April 23d. The work required that I be in Cincinnati at 8 a. m., on the 22d, and that I stay there until about 5 or 6 p. m., on the 23d. To do this, I had to leave Toledo the evening of the 21st, and did not get back to Toledo until the morning of the 24th.
>
> "In case number two we had a meeting in Columbus on the 13th, which was called at 9 o'clock a. m. This necessitated leaving Toledo the day previous, and we were in session really from 9 a. m. until 10:00 or 10:30 p. m. This necessitated my staying in Columbus all night Saturday, and did not reach Toledo until Sunday afternoon.
>
> "What I want to know is whether in the case of my Cincinnati trip, I should be allowed for three days' allowance or two days', and in the

case of my Columbus trip, whether or not I am entitled to one or two days' allowance?"

The person who makes the above inquiries is a member of the State Dental Board and the compensation to be paid is for services as a member of said board.

Section 1317, General Code, prescribes the compensation of the members of the dental board as follows:

> "Each member of the state dental board shall receive ten dollars for each day actually employed in the discharge of his official duties, and his necessary expenses incurred. The secretary shall receive an annual salary to be fixed by the board, and his necessary expenses incurred in the discharge of his official duties. The compensation and expenses of the secretary and members and the expenses of the board, shall be paid from moneys received under this chapter, upon the approval of the president and secretary."

The compensation is fixed upon a per diem basis, that is, the member is paid for each day actually employed in the discharge of his duties. The statute does not specify the number of hours that will constitute a day for which the compensation is to be paid.

In the first case submitted it does not appear whether the services were performed in attendance at a board meeting, or otherwise. It does appear, however, that the member performed services only upon two days, to-wit, April 22d and 23d. Parts of other days were consumed in going to and returning from Cincinnati. In the second case there was a meeting of the board which was in session upon only one day, although it appears that the session was a lengthy one. Parts of other days were also consumed in traveling to and from the place of meeting.

The question is, whether or not a member of the state dental board is entitled to his per diem for the days required of him to get to and to return from the place of meeting, when in fact no business is transacted or actual services performed on such days.

In the case of Stevens vs. United States, 38 Court of Claims (U. S.), 452, it is held:

> "The question involved here is one of statutory construction, whether certain examiners of Indian lands are entitled to their per diem while work is suspended, they at the same time being required to hold themselves in readiness to resume work.
>
> "I. The act of 14th January, 1889 (25 Stat. L., 642), authorizes the appointment of certain examiners by the Secretary of the Interior; the compensation in no event to exceed six dollars per day. They are not entitled to the compensation during a period of suspended work.
>
> "II. A per diem compensation is generally intended for days of actual service."

While this case is not directly in point, it shows that when compensation is paid upon a per diem basis, the compensation is usually paid only for the days of actual work.

In the statute now under consideration, a member of the dental board is paid a per diem "for each day actually employed in the discharge of his official duties."

A board can only act as a body. The board itself is composed of individuals, but the official acts of the board are not the acts of the individuals, but are the

acts of the board as a body. The time a member of a board would be "actually employed in the discharge of his official duties," when the services are performed in connection with a meeting of the board, would be the time that the board was in session.

If it were held that a member of a board was entitled to pay for days used in traveling to and from the place of meeting, we would have the situation of one member of the board receiving more pay than another member for the same services, to-wit: attendance at the board meeting.

Again, if the members of the dental board were entitled to a per diem for days used in coming to a meeting, they would also be entitled to their per diem for the days necessary to return from said meeting place. In other words, in the first case submitted, the members would be entitled to four days, and in the second to three days pay.

It is my conclusion that the per diem provided as compensation for the members of the state dental board by Section 1317, General Code, is paid for the days actually employed in the discharge of the duties of such member, and not for the days required to come to and to return from the place where the meetings of the board are held.

In the first case submitted, the member is entitled to his per diem for two days only, to-wit: for April 22d and 23d.

In the second case, he is entitled to compensation for one day only, to-wit, the thirteenth of the month in question.

With this view of the situation it is not necessary to pass upon the specific questions asked in your inquiry.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

(To the Bureau)

13.

COMPENSATION OF CHIEFS OF POLICE—MARSHALLS AND CONSTABLES—ALLOWANCE OF COSTS BY COUNTY COMMISSIONERS —MISDEMEANOR CASES.

The County Commissioners have no authority to allow Chiefs of Police, Marshalls or Constables their expenses in pursuing, arresting and transporting persons accused of misdemeanors, except that by reason of Section 3019, General Code, they may make an allowance in place of fees in cases of misdemeanor wherein the defendant proves insolvent.

COLUMBUS, OHIO, January 4, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMAN:—Under favor of November 10, 1911, you ask an opinion of this department upon the following:

> "Section 3347, G. C., authorizes magistrates to make allowances to constables for the transportation and sustenance of prisoners.
>
> "Section 4387, G. C., provides that marshalls of villages shall receive the same fees as sheriffs and constables in similar cases.
>
> "Section 4534, G. C., as amended 102 O. L. 476, provides that the fees of chiefs of police shall be the same as those of sheriffs and constables in similar cases.
>
> "Section 2997, as amended 102 O. L., 93, provides that county commissioners shall make alowances to sheriffs for actual and necessary expenses incurred in pursuing and transporting persons accused or convicted of crimes and offenses.
>
> "Quarere: May the commissioners allow chiefs of police, marshals and constables expenses in pursuing, arresting and transporting persons accused of misdemeanors?"

The sections of the General Code, referred to by you, provide as follows: Section 3347, General Code, provides:

> "For services rendered, duly elected and qualified *constables shall be entitled to receive the following fees:* For service and return of copies, orders of arrest, warrant, attachment, garnishee, writ of replevin or mittimus, forty cents, each, for each person named in the writ; service and return of summons, twenty-five cents for each person named in the writ; service and return of subpoena, twenty-five cents for one person, service on each additional person named in subpoena, ten cents; serivce of execution on goods or body, forty cents; on all money made on execution, four per cent.; on each day's attendance before justice of the peace, or jury trial, one dollar; each day's attendance before justice of the peace in forcible detainer, without jury, one dollar; summoning jury, one dollar; mileage, twenty cents for the first mile, and five cents per mile for each additional mile; assistants in criminal causes, one dollar and fifty cents per day, each; *transporting and sustaining prisoners, allowance made by the magistrate, and paid on his certificate;*

serving all other writs or notices not herein named, forty cents, and mileage as in other cases; copies of all writs, notices, orders or affidavits served , twenty-five cents; summoning and swearing appraisers in case of replevin and attachment, one dollar in each case; advertising property for sale on execution, forty cents; taking bond in replevin, and all other cases, fifty cents; each day's attendance on the grand jury, two dollars."

Section 4387, General Code, provides:

."In the discharge of his proper duties, he shall have like powers, be subject to like responsibilities and *shall receive the same fees as sheriffs and constables in similar cases,* for services actually performed by himself or his deputies and such additional compensation as the council prescribes. In no case shall he receive any fees or compensation for services rendered by any watchman or any other officer, nor shall he receive for guarding, safekeeping or conducting into the mayor's or police court any person arrested by him or deputies or by any other officer a greater compensation than twenty cents." .

Section 4534, General Code, as amended 102 Ohio Laws, 476, provides:

"In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace. The chief of police shall execute and return all writs and process to him directed by the mayor, and shall by himself or deputy attend on the sittings of such court, to execute the orders and process thereof and to preserve order therein, and his jurisdiction and that of his deputies in the execution of such writs and process, and in criminal cases, and in cases of violations of ordinances of the corporation, shall be co-extensive with the county, and in civil cases shall be co-extensive with the jurisdiction of the mayor therein. The fees of the mayor in all cases, excepting those arising out of violation of ordinances, shall be the same as those allowed justices of the peace for similar services and *the fees of the chief of police or his deputies in all cases, excepting those arising out of violations or ordinances shall be the same as those allowed sheriffs and constables in similar cases.*

Section 2997, General Code, 102 Ohio Laws, 93 provides:

"In addition to the compensation and salary herein provided, *the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expending in pursuing or transporting persons accused or convicted of crimes and offenses,* in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended

in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

Section 3347, General Code, prescribes the fees to which constables shall be entitled to receive, but does not purport to determine as to who shall pay such fees. The magistrate is authorized to make allowances to constables for transporting and sustaining prisoners, but does not authorize payment from any public fund. Section 4387, General Code, likewise prescribes the fees to which a marshal shall be entitled and that they shall be the same as those received by sheriffs and constables in similar cases, but does not authorize their payment from a public fund. The same is true of Section 4538, General Code, which fixes the fees of chiefs of police.

Section 2097, General Code, authorizes the county commissioners to make an allowance quarterly to sheriffs for keeping and feeding prisoners and for his actual and necessary expenses incurred in pursuing or transporting persons accused or convicted of crimes. There is no provision of statute extending this authority so as to affect the expenses of constables, chiefs of police and marshals.

The authority of the county commissioners to make allowances in the pursuit and prosecution of persons accused of crimes is found in the following sections:

Section 3015, General Code, provides:

"The county commissioners may allow and pay the necessary expenses incurred by an officer in the pursuit of a person charged with felony, who has fled the country."

Section 3016, General Code, provides:

"In felonies, when the defendant is convicted the costs of the justices of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgement of conviction, so that such costs may be paid to the county from the state treasury. In all cases when recognizance are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

Section 3017, General Code, provides:

"In no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police, or constable."

Section 3019, General Code, provides:

"In felonies where in the state fails, and in misdemeanors where in the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but

in any year the aggregate allowance to such officers shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

Sections 3015, 3016 and 3017, cover cases in which a person is charged with the commission of a felony and do not cover your question.

Section 3019, General Code, authorizes an allowance in place of fees, in felonies where the State fails, and in misdemeanors where in the defendant proves insolvent.

None of the above statutes, except Section 3019 as above stated, authorize the county commissioners to make allowances to chiefs of police, marshals and constables. Nor do I find any other statute granting them such power. The commissioners have limited jurisdiction. They have only such powers as are given them by statute. In the absence of statutory authority they cannot make payment of fees or expenses out of any county fund.

It is my conclusion, therefore, that the county commissioners have no authority to allow chiefs of police, marshals or constables their expenses in pursuing, arresting and transporting persons accused of misdemeanors. As provided in Section 3019, General Code, supra, they may make such an allowance in place of fees in misdemeanors wherein the defendant proves insolvent.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

14.

VILLAGE COUNCIL OF POMEROY—ILLEGAL CONTRACTS—POMEROY AND MASON CITY FERRY COMPANY—PUBLIC IMPROVEMENTS —STATUTORY REQUIREMENTS.

A contract between a village council and a ferry company wherein the latter agrees to construct a roadway in consideration of freedom from the payment of license fees, is an attempt to contract for a public improvement without fulfilling the statutory requirements and is therefore, illegal.

It is the settled policy of the courts of this State to aid neither party to an illegal contract and therefore, the village cannot recover the license fees, which, in accordance with the terms of an illegal contract, were not collected.

The unaccrued license fee, however, may be collected.

No recovery can be had against any official of the contract was made in good faith and without collusion.

COLUMBUS, OHIO, December 29, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under favor of October 24, 1911, you ask an opinion upon the following:

"In 1898, the council of the village of Pomeroy entered into an agreement with a ferry company to remit the license fees fixed by ordinances of said village for a period of fifteen years as consideration to said company for the construction of a vitrified brick roadway at the public landing in said village, said ferry company being engaged in operating a ferry across the Ohio river at said point. Said agreement has two

years to run, and the department is requested to pass upon the validity of the same and whether it is binding agreement upon the present village council. If said agreement is held to be illegal, what, if any, finding for recovery should be made and against whom? If no finding for recovery can be maintained, what, if any, recommendation is proper in the premises."

From the report of the examiner attached I take the following statements of fact:

"In 1898 the council of the village of Pomeroy, Ohio, entered into an agreement with the Pomeroy and Mason City Ferry Company to remit the license fees for a period of fifteen years, the consideration being that said company would construct a vitrified brick roadway from Front Street to low water mark, or, as near thereto as is possible to do so; said roadway to be the property of the village at the expiration of the agreement.

"In accordance with the agreement the ferry company immediately constructed the roadway and have enjoyed the same ever since.

"The agreement has run for a full period of twelve years and had the village received the license required by the ordinance they would have received the sum of $1,800.00. The fifteen years would be $2,250.00 for which said village is to receive the improvement as constructed and maintained by the said ferry company at an approximate cost of $1,000.

"The following is an abstract of the council journal of said village relative to the agreement with the said ferry company. Being the only legislation therefor.

"September 5, 1898:—'Mayor Baily of Mason City was present and submitted a proposition on behalf of the Ferry Company to pave a roadway up the ferry landing and keep in repair for twenty years providing the council would remit their license for that period; referred to committee.'

"September 12, 1898:—'The committee appointed to confer with the ferry company reported that they had offered to contract the levee in accordance with their first proposition; provided council would remit their license for a term of 16 years. Report accepted.'

"'A motion that the chair appoint a committee of four to confer with the ferry people and be given power to act, providing the ferry company will make said improvement upon council remitting their license for a period not to exceed 15 years; motion carried.'

"October 11, 1898:—'Mr. Jenkinson reported that the committee which had been appointed by council to confer with the ferry company had made arrangements with them to improve the levee in accordance with the agreement previously made and in accordance with the contract made by said committee.'"

Several legal questions arise from the situation which you present.

First: Is the contract illegal?

Second: If illegal, can recovery be had against the ferry company?

Third: If illegal, what, if any, official is responsible for the loss to the city?

In order to determine the illegality of this contract, it will be necessary to examine the statutes as in force in 1898 at the time the contract was entered into.

Section 2303, Bates Rev. Stat. 1900, provided:

"When the corporation makes an improvement or repair provided for in this chapter, the cost of which will exceed five hundred dollars it shall proceed as follows:

"First: It shall advertise for bids for the period of two weeks, or if the estimated cost exceed five thousand dollars, four weeks, in two newspapers published in the corporation, or one newspaper, if only one is published therein; or by posting advertisements in three public places in the corporation, if no newspaper is published therein.

"Second: The bids shall be filed with the clerk of the board of public improvements or board of public works (city commissioners) as the case may be, sealed up, by 12 o'clock at noon on the last day, as stated in the advertisement."

There are other provisions of this section which state how the bids shall be opened, the contract let, and how the contract shall be made.

Section 2304, Bates Rev. Stat., 1900, provided:

"When it is deemed necessary by a city or village to make a public improvement, the council shall declare by resolution the necessity of such improvement, and shall give twenty days written notice of its passage to the owners of the property abutting upon the improvement, or to the persons in whose names it may be assessed for taxation upon the tax duplicate, who may be residents of the county, which notice shall be served by a person designated by the council upon such person in the manner provided by law for the service of summons in a civil action, and publish the resolution for not less than two nor more than four consecutive weeks in some newspaper published and of general circulation in the corporation; * * * * *"

Section 2702, Bates Rev. Stat., 1900, provided:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor of the corporation, and if there is no auditor, the clerk thereof, shall first certify that the money required for the contract, agreement or obligation, or to pay the appropriation or expenditure is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded; and the sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force; and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed contrary to the provisions of this section shall be void;"

The requirements of the foregoing statutes have not been complied with in the making of the contract under consideration. The contract was for a public improvement, whether of a street or of a public levee does not appear. I take it, however, that the improvement was upon ground dedicated to public use, or owned by the public. The improvement was at a cost in excess of five hundred

dollars, and therefore, should have been let at competitive bidding as provided in Section 2303, supra. Failure to comply with this statute goes to the legality of the contract.

In Upington et al, vs. Oviatt, 24 O. S. 232, the fourth syllabus reads:

> "The provisions of Section 562, prescribing the time and manner of advertising for bids for doing the work and furnishing the materials for the proposed improvement, were designed for the protection of the tax-payer, and are peremptory. A failure, substantially, to comply with those provisions, is a defect which goes to the legality of the contract and of the subsequent assessment."

In the case of McCloud vs. City of Columbus, 54 O. S., 439, the syllabus is as follows:

> "Where a municipal corporation, acting under chapter 4, division 7, of Title XII, Revised Statutes, improves a public street, the provisions of section 2305, prescribing the mode and time of advertising for bids, are mandatory, the compliance with which is a condition precedent to the power of the municipality to enter into a valid agreement in respect thereof."

The preliminary resolution provided for in Section 2304, Bates was not passed. There are other requirements which have not been followed, but these are sufficient to show that the plain provisions of the statutes were ignored and that the contract in question was not properly entered into and is illegal and void.

The next question to be considered is, can recovery be had against the ferry company?

In case of Buchanan Bridge Co., vs. Campbell, 60 O. S., 406, the syllabus reads:

> "A contract made by county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on that subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party."

In case of State vs. Fronizer, 77 O. S., 7 it is held:

> "Section 1277, Revised Statutes, which authorizes a prosecuting attorney to bring action to recover back money of the county which has been misapplied, or illegally drawn from the county treasury, does not authorize the recovery back of money paid on a county commissioners' bridge contract fully executed but rendered void by force of section 2834*b*, because of the lack, through inadvertence, of a certificate by the county auditor that the money is in the treasury to the credit of the fund, or has been levied and is in process of collection, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of such contract for such work, nor any claim of effort to put the contractor in statu quo by a return of the bridge or otherwise, the same having been accepted by the board of commissioners and incorporated as part of the public highway."

These decisions settle the policy of the courts in this State as to these illegal contracts. As between the parties to the illegal contract, the courts will aid neither and will leave them just as it finds them.

In this case the village has the public improvement and the ferry company has had its license fees remitted for twelve or thirteen years. The recital in the agreement that the village is to have the improvement at the end of fifteen years does not affect the situation. If it is made upon public land or a street dedicated to public use the village has the improvement for all practical purposes. What has been done the courts will not undo. The contract however, has two or three years to run. The license fees have been remitted year by year by authority of this contract which was not binding upon the city. The city officials are not required to remit the license fees and may, and should, proceed at once to collect them from the ferry company for future use of the wharf. Under the ruling in the above cases the license fees which have been remitted cannot now be collected.

We now come to the liability of the officers.

The rule of recovery is laid down as follows in the fifth syllabus of case of McAlexander vs. Haviland Village School, 7 N. P. N. S., 590, as follows:

> "Public funds paid out on a contract, completed in good faith and free from fraud and conclusion, can not be recovered back at the instance of a tax-payer, notwithstanding the contract was illegal and void."

This was an action, among other things, to recover from the members of the board of education and from the contractor, the amount of money paid out upon an illegal contract for the construction of a school house.

On page 600, Cameron, J., says:

> "While the court finds that the contract for the building and construction of said school house was illegal and void, yet the court further finds that said contract has been fully executed, and the building built, completed and paid for, in good faith, free from fraud or collusion on the part of said board, the members thereof, or the contractor.
>
> "It is, therefore, the further order and judgment of the court that the mandatory injunctions prayed for, should be and are refused, as is also the prayer for a finding of the amount of money claimed to be illegally paid out by said board of education on account of said proposed school buildings and judgment therefor."

If the improvement was made in good faith, and there was no fraud or collusion, the officers who participated in the illegal contract are not liable for the license fees remitted. The officer or officers who have remitted these license fees from year to year in good faith and without fraud or collusion, cannot be held liable therefor.

In conclusion:

The contract entered into in 1898 is illegal and void.

No recovery can be had against the ferry company for license fees which have been remitted.

No recovery can be had against any official if the contract was entered into in good faith, and without fraud or collusion.

The ferry company should be required to pay the necessary license fee for the future, or be denied the priveleges of the public wharf or landing.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

25.

CITY'S LIABILITY TO COUNTY FOR JAILING—PRISONERS IN STATE CASES—MAYOR'S COURT—COUNTY JAIL.

The city is not liable to reimburse the county for money paid for keeping prisoners in jail in cases wherein defendants have been committed to jail from a mayor's court for violation of state laws.

The county should pay for the maintenance of prisoners confined in the county jail pending a trial before a mayor's court for an offence committed or charged in violation of a state law.

COLUMBUS, OHIO, January 15, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of December 19, 1911, is received, in which you ask an opinion of this department upon the following:

> "Should the city reimburse the county for amount paid to sheriff for keeping prisoners in jail in cases wherein the defendant has been *committed* to the county jail from the mayor's court (there being no police court) for violation of state laws? If defendants in state cases are remanded to the county jail *pending* a trial before the mayor's court, should the city or the county pay for maintenance?"

Section 13507, General Code, authorizes a magistrate to commit a person accused of crime to county jail pending trial, as follows:

> "If it is necessary, for just cause, to adjourn the examination of the accused, the magistrate may order such adjournment and *commit him to the jail of the county*, until such cause of delay is removed, but the entire time of such confinement in jail shall not exceed four days. The officer having custody of such person, by the written order of the magistrate may detain him in custody in a secure and convenient place other than the jail, to be designated by such magistrate in his order, not exceeding four days. The officer in whose custody any person is detained shall provide for the sustenance of such prisoner while in custody."

Section 13494, General Code, grants power to a mayor to issue warrants, as follows:

> "Justices of the peace, police judges and mayors of cities and villages may issue process for the apprehension of a person charged with an offense and execute the powers conferred and duties enjoined in this title."

Section 13716, General Code, provides:

> "When a person convicted of an offense is sentenced to imprisonment in jail, the court or magistrate shall order him into the custody of the sheriff or constable, who shall deliver him, with the record of his

conviction, to the jailor, in whose custody he shall remain, in the jail of the county, until the term of his imprisonment expires or he is otherwise legally discharged."

Section 13717, General Code, 101 Ohio Laws, 41, provides:

"When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of sixty cents per day for each day's imprisonment."

The above statutes grant authority to sentence persons convicted or accused of crime to imprisonment in the county jail. The penalty of each offense must be looked to to determine the extent of the imprisonment which may be imposed.

Section 2997, General Code, 102 Ohio Laws 93, authorizes the county commissioners to make allowances to the sheriff for keeping and feeding prisoners, as follows:

"In addition to the compensation and salary herein provided, *the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law,* for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble minded yourth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoening witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

Section 12384, General Code, provides:

"The commissioners of a county ,or the council of a municipality, wherein there is no workhouse, may agree with the city council, or other authority having control of the workhouse of a city in any other county, or with the board of district workhouses having a workhouse, upon what terms and conditions persons convicted of misdemeanors, or of violation of an ordinance of such municipality having no workhouse, may be received into such workhouse under sentence thereto. The county commissioners, or the council of a municipality, are authorized to pay the ex-

penses incurred under such agrement out of the general fund of the county or municipality, upon the certificate of the proper officer of such workhouse."

The above section applies to the workhouses and not to jails.

Section 4564, General Code, prescribes that the city may have the use of the jail for imprisonment under ordinances, but that such use shall be at the expense of the city, as follows:

"Imprisonment under the ordinances of a municipal corporation shall be in the workhouse or other jail thereof, if the corporation is provided with such workhouse or a jail. Any corporation not provided with a workhouse, or other jail, shall be allowed, for the purpose of imprisonment, the use of the jail of the county, at the expense of corporation, until it is provided with a prison, house of correction, or workhouse. Persons, so imprisoned in the county jail shall be under the charge of the sheriff of the county, who shall receive and hold such persons in the manner prescribed by the ordinances of the corporation, until discharged by due course of law."

This section applies in cases of violations of ordinances and not to violations of state laws.

Section 4125, General Code, provides:

"The marshal or chief of police shall provide all persons confined in prison or station houses with necessary food during such confinement, and see that such places of confinement are kept clean and made comfortable for the inmates thereof."

Section 4126, General Code, provides:

"Council shall provide by ordinance, for sustaining all persons sentenced to or confined in such prison or station house, at the expense of the corporation. On the presentation of bills for food, sustenance, and necessary supplies, to the proper officer, certified by such person as the council may designate, such officer shall audit them, under such rules and regulations as the council prescribes, and draw his order on the treasurer of the corporation in favor of the officer presenting such bill, but the amount shall not exceed forty cents a day for any person so confined."

These two latter sections apply to prisons and station houses of the city and not to jails, of the county.

Section 4128, General Code, provides:

"When a person over sixteen years of age is convicted of an offense under the law of the state or an ordinance of a municipal corporation, and the tribunal before which the conviction is had is authorized by law to commit the offender to the county jail or corporation prison, the court, mayor, or justice of the peace, as the case may be, may sentence the offender to the workhouse, if there is such house in the country. *When a committment is made from a city, village, or township in the county, other than in the municipality containing such work-*

house, the council of such city or village, or the trustees of such township, shall transmit with the mittimus a sum of money equal to forty cents per day for the time of the commitment, to be placed in the hands of the superintendent of the workhouse for the care and maintenance of the prisoner."

This latter section was passed upon by the circuit court in the case of Cleveland vs. Commissioners, 10 Cir. Court, N. S., the syllabi of which case are as follows:

"The liability of county commissioners for maintenance of prisoners, sentenced by the common pleas court to a city work house, is not essentially contractural, but is based rather on the mandatory requirements of Section 1536-369 Revised Statutes.

"Section 1536-369 is comprehensive, and excludes the interpolation of any supposed but unexpressed policy of the state as reflected by past legislation with reference to the distribution of the expense of maintaining prisoners offending against state statutes and city ordinances respectively."

Henry, J., in stating the case, says on page 278, as follows:

"* * * * *The action below was brought by the city to recover from the county the agreed price for maintenance in the city workhouse of prisoners committed thereto for violation of state statutes. The theory of the city is that the county is ultimately liable for such maintenance in all cases where the offense is statutory, and that the city's ultimate liability for such maintenance is confined to cases of violation of city ordinances."

He further says, on page 280:

"If it be contended that a literal enforcement of Section 1536-369, Revised Statutes, would saddle the city with expense of maintaining some prisoners convicted by its own police court, or before justices of the peace elected and sitting within its boundaries, of state offienses committed outside its corporate limits, it may be answered that such tribunals are presumed to be clothed with and to exercise their extramunicipal jurisdiction for the benefit of the community within and for which they act, just as similar tribunals in outlying townships of the same county may in certain like cases, and with equal propriety charge their own communities in respect of offenses committed in such city. Concerning the possibility of a trifling over-lapping of benefits or expenses as between the taxpayers of a city and the tax payers of outlying municipalities and townships in the same county, the maxim de minimus non curat lex is peculiarly applicable."

The situation presented by the case in hand is the opposite of the one adjudicated in 10 C. C. N. S. 277, supra.

In that case the city was asking for compensation from the county for keeping prisoners convicted of state offenses in its own workhouse. In the present case the county would be asking compensation from the city for keeping prisoners, convicted of state offenses, who are confined in the county jail.

Both the city and the county are important factors in the government of the State. The city has jurisdiction of local affairs while the county has more general duties and performs more of the functions of the State.

The statutes do not charge the city with liability for keeping prisoners in the county jail who have been charged or convicted of offenses in violation of state laws. The county, as the representative of the State, pays for the keeping of these prisoners in the first instance and without statutory authority the county cannot place the liability therefor upon the city.

The city, therefore, is not liable to reimburse the county for money paid for keeping prisoners in jail in cases wherein defendants have been committed to jail from a mayor's court for violation of state laws.

The county should pay for the maintenance of persons confined in the county jail pending a trial before a mayor's court for an offense committed or charged in violation of a state law.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

28.

MAGISTRATES—FEES—SITTING IN TRIAL—FINAL JURISDICTION—FINAL DISPOSITION—MISDEMEANOR.

A magistrate is not entitled to the statutory fee of $1.00 *for "sitting in trial" of a cause, unless he has final jurisdiction therein, and makes a final disposition of the same.*

A magistrate, in cases of misdemeanor where the defendant pleads guilty, can render final judgment only where the complaint is made by the party injured.

COLUMBUS, OHIO, November 27, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of October 26th, in which you state:

> "Under date of June 10, we made inquiry of you as to your opinion in regard to the jurisdiction of justices of the peace in certain cases and fees of the magistrate and constable. That inquiry, we meant to refer only to general offenses other than these coming within the special jurisdiction of magistrates under the provisions of Section 2718*c*, Revised Statutes, now Section 13423, General Code. With that understanding, we desire your opinion in answer to the folowing questions:
>
> "Are the magistrate and constable, or either of them, entitled to $1.00 for sitting in or attending trial, respectively, under the following circumstances:
>
> "1. When a person is brought before a justice of the peace or mayor of a village or of a city not having a police court, charged with a misdemeanor under the laws of the state and pleads guilty, and the magistrate renders final judgment without a written waiver by the accused of his right to a trial by jury. This primarily involves another question: *'Can the magistrate render final judgment under such conditions?'*

"2. When the person so charged with a misdemeanor waives examination and is bound over to court.

"3. When such person so charged pleads guilty and is sentenced by the magistrate, either with or without a waiver of a jury."

In reply to your first question I desire to say that Section 13510 of the General Code provides as follows:

"When a person charged with a misdemeanor is brought before a magistrate on complaint of the party injured and pleads guilty thereto, such magistrate shall sentence him to such punishment as he may deem proper, according to law, and order the payment of costs. If the complaint is not made by the party injured, and the accused pleads guilty, the magistrate shall require the accused to enter into a recognizance to appear at the proper court as is provided when there is no plea of guilty."

Under the section just quoted, when a person is charged with a misdemeanor on complaint of the party injured, such magistrate has final jurisdiction without a written waiver by the accused of his right to trial by jury; but if the complaint is filed by any person other than the one injured, said magistrate has not final jurisdiction and must recognizance the accused to the proper court of the county in which the crime was committed.

Section 13511 of the General Code provides as follows:

"When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance at the proper time and before the proper court; otherwise he shall discharge him from custody. If the offense charged is a misdemeanor and the accused, in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

The section prescribing the fees of a justice of the peace is Section 1746, General Code, and provides in part:

"* * * * * justices of the peace, for the services named when rendered, may receive the following fees: * * * *sitting in the trial of a cause, civil or criminal, where a defense is interposed, whether tried to the justice or to a jury, one dollar; * * * * *."

Section 3347, General Code, provides as to fees of constables. It is in part:

"For services rendered, * * * constables shall be entitled to receive the following fees: * * * * each day's attendance before justice of the peace on criminal trial, one dollar, * * * *."

Now, in order to properly answer your questions, it is necessary to decide what is a trial. The Supreme Court of Ohio in the case of Palmer vs. State, 42

O. S. 596, held that a trial is a judicial examination of the issues, whether of law or of facts, in an action or proceeding. The United States Court, in the case of United States vs. Winslow Curtis, 4 Mason's Reports, at page 232, held that:

"A trial means the trying of a cause and not the arraignment and pleading preparatory to such trial."

I am, therefore, of the opinion that a preliminary hearing is not a trial, and that in order to entitle a magistrate or constable to the fees provided by the sections above quoted, for attending a trial, the magistrate having jurisdiction of said case must have final jurisdiction therein.

In answer to your first question, therefore, I am of the opinion that a magistrate, under the circumstances set forth therein, could not render final judgment in any case other than those specifically provided by statute, where the defendant pleads guilty and does not waive the right to trial by jury, unless the complaint was filed by the party injured, as provided by the section above quoted.

In answer to your second question I am of the opinion that where a person charged with a misdemeanor waives examination and is bound over to the proper court by the magistrate, there has been no trial, under the definition and rule above quoted, and the magistrate and constable, therefore, would not be entitled to the fee of $1.00 under said statutes.

Replying to your third question—when a person charged with a misdemeanor pleads guilty and is sentenced by the magistrate according to the rules above set forth, either with or without a waiver of a jury, where that may be done under the statute, and the magistrate makes final disposition of the case, I am of the opinion that the magistrate and constable are entitled to the fee of $1.00 for each day's attendance at said trial.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

33.

OFFICES INCOMPATIBLE—CITY AUDITOR AND CLERK OF COUNCIL, CLERK TO DIRECTOR OF SAFETY, CLERK TO DIRECTOR OF SERVICE, CLERK TO THE BOARD OF CONTROL, AND SECRETARY OF THE SINKING FUND TRUSTEES OR COLLECTOR OF WATER RENTS.

The office of city auditor serves as a check upon and is therefore incompatible with those of clerk of council, clerk to director of safety, clerk to the board of control, or collector of water rentals.—Salary.

By Section 4509 of the General Code, city auditor may however, act as clerk of the sinking fund trustees, where no other clerk is legally provided for and he may receive the salary provided for that position.

COLUMBUS, OHIO, December, 19, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I herewith acknowledge receipt of your communication of November 20th wherein you submit for consideration and opinion the following:

"Is it legal for the city auditor to serve as clerk of council, clerk to the director of safety, clerk to the director of service, clerk to the board of control, (secretary of the sinking fund trustees,) or collector of water rentals if said city auditor has been selected or appointed to said position by the proper authority? And, if so appointed, is he entitled to the compensation fixed by council for each of said positions in addition to his salary as city auditor?"

In reply thereto section 4284 of the General Code provides for the duties of the city auditor as follows:

"At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof. Upon the death, designation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the indebtedness."

Section 4286 of the General Code provides as follows:

"On the first Monday of each month, detailed statements of the receipts and expenditures of the several officers and departments for the preceding month shall be made to the auditor by the heads thereof. The auditor shall countersign each receipt given by the treasurer before it is delivered to the person entitled to receive it, and shall charge the treasurer with the amount thereof. If the auditor approves any voucher contrary to the provisions of this title, he and his sureties shall be individually liable for the amount thereof."

The General Code is silent as to whether a city auditor can legally serve as such auditor and at the same time serve as clerk of council, or clerk to the director of service, or clerk to the board of control, or clerk to the director of safety, or as collector of water rentals. Under the common-law rule, offices are held incompatible when one office is subordinate to or in any way a check upon the other office.

Section 4284, quoted above, makes it the duty of the auditor to examine and audit the accounts of all officers and departments of municipalities.

Section 4286, quoted above, makes it the duty of the several officers and departments of municipal government to make a detailed statement monthly to the city auditor.

It follows, therefore, that the office of city auditor acts as a check upon the various officers and departments above enumerated. Therefore, it is not legal for a city auditor to serve as a clerk of the council, or as clerk to the director of safety, or as clerk to the director of service or as clerk to the board of control, or as collector of water rentals. It necessarily follows that such city auditor would not be entitled to the compensation fixed by council for each of the above enumerated positions in addition to his salary as city auditor.

The above reasoning and conclusion likewise applies to the city auditor

serving as such officer and at the same time serving as secretary of the sinking fund trustees, except in the case where Section 4509 of the General Code intervenes. Said Section 4509 of the General Code provides as follows:

> "The trustees of the sinking fund, immediately after their appointment and qualification, shall elect one of their number as president and another as vice-president, who, in the absence or disability of the president, shall perform his duties and exercise his powers, and such secretary, clerks or employes as council may provide by an ordinance which shall fix their duties, bonds and compensation. Where no clerks or secretary is authorized, the auditor of the city or clerk of the village shall act as secretary of the board."

Therefore, by virtue of the last cited statute, where there is no clerk of the sinking fund trustees, then the city auditor shall act as such clerk and when so acting as such clerk under and by virtue of said section, it is my opinion that the city auditor would not be legally entitled to the compensation provided by the city council for the clerk of the sinking fund trustees in addition to his regular salary as city auditor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

34.

PUBLIC IMPROVEMENTS—STATUTORY REQUIREMENTS AS TO CONTRACTS—POWERS OF DEPARTMENT OF PUBLIC SERVICE—COMPETITIVE BIDDING AND ADVERTISEMENTS.

The Department of Public Service of a city is not authorized to purchase material at competitive bidding for the improvement of a street and to hire laborers and teams to do the work of constructing such improvement and to pay such laborers and teams by the day.

An assessment for the cost of such labor against the abutting property would be illegal and void.

COLUMBUS, OHIO, December 22,, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of December 8, 1911, you ask an opinion upon the following:

> 'Is it legal for the department of public service of a city to purchase the necessary material for the paving of a street at competitive bid and employ labor and teams by the day to construct the improvement at the wage fixed by council for laborers and teams, and assess the total cost of the improvement (less city's portion) against abutting property by special assessments?"

Section 3833, General Code, prescribes the manner in which the contract for the improvement of a street shall be let as follows:

> "The contract for any such improvement shall be let by the director

of public service, in the same manner as other contracts, and in case all bids be rejected such director in cities and the council in villages may order a readvertisement for bids."

Section 4328, General Code, prescribes how public contracts shall be let as follows:

"The director of public service may make any contract or purchase supplies or materials or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. *When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city.*"

The above sections provide that contracts for improvements of streets, when they exceed five hundred dollars, shall be let at competitive bidding, upon publication. If the city were to employ persons as laborers and hire teams to do the work, after purchasing the material at competitive bidding, that much of the improvement would not be made in compliance with the above sections.

In case of Upington, et al, vs. Oviatt, 24 O. S., 232, the fourth syllabus reads:

"The provisions of section 562, prescribing the time and manner of advertising for bids for doing the work and furnishing the materials for the proposed improvement, were designed for the protection of the tax payer, and are peremtory. A failure, substantially, to comply with those provisions, is a defect which goes to the legality of the contract and of the subsequent assessment."

In case of McCloud vs. City of Columbus, 54 O. S., 439, the syllabus is as follows:

"Where a municipal corporation, acting under chapter 4, division 7, of Title XII, Revised Statutes, improves a public street, the provisions of section 2303, prescribing the mode and time of advertising for bids, are mandatory, the compliance with which is a condition precedent to the power of the municipality to enter into a valid agreement in respect thereof."

The statutes have provided the manner in which a contract for the improvement of a street shall be made and the provisions thereof are mandatory and must be complied with. Not only the contract but the assessment levied against the abutting property would be void upon failure to substantially comply with the provisions of the statutes.

Sections 3833 and 4328, General Code, supra, require that a contract for the labor and material shall be let at competitive bidding. Failure to do so will make the contract and special assessment void.

The department of public service of a city is not authorized to purchase material at competitive bidding for the improvement of a street and to hire laborers

and teams to do the work of constructing such improvement, and to pay such laborers and teams by the day. An assessment for the cost of such labor against the abutting property would be illegal and void.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

37.

COUNTY SURVEYOR—COMPENSATION—EXPENSES WHEN EMPLOYED BY DAY—FOOD, LODGING AND HORSE FEED.

A county surveyor when employed by the day may under Section 2822, General Code, be allowed such expenses as meals and lodging for himself and feed for his horses.

January 16, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of November 23d, you stated that you desired my opinion whether Section 2822, General Code, authorizes the payment of such expenses as meals and lodging for the surveyor and feed for his horse when employed by the day on county work.

Section 2822 of the General Code in part provides:

> "When employed by the day, the surveyor shall receive five dollars for each day and his necessary actual expenses."

As the statute is so broad in its language, I am of the opinion that it would cover all amounts necessarily and actually expended by the county surveyor in pursuance of his duties as such surveyor, and would include meals and lodging for himself and feed for his horses necessarily and actually incurred while in the performance of his duty, and I am, therefore, in full accord with the opinion of Hon. Wade E. Ellis, rendered by him as Attorney General, on May 31, 1906.

It will be noted that Section 2822 supra contains no provision therein for mileage for the county surveyor when employed by the day.

This, as I view it, clearly distinguishes this case from the case of Richardson vs. State, 66 O. S. 108, wherein the Supreme Court considered the question of reasonable and necessary expenses actually paid to be charged by county commissioners. In that case the court held that mileage allowed a commissioner was intended to compensate him for all traveling expenses while traveling on official business. Therefore, the reasonable and necessary expenses provided in addition to the compensation and mileage of a commissioner meant solely official expenses as distinguished from those which pertained to his personal comfort and necessity.

As Section 2822, General Code, does not provide mileage for the surveyor when employed by the day on county work, I am of the opinion that such case does not apply to the question submitted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

51.

VILLAGE OF FINDLAY, OHIO—CLASSIFICATION OF CITIES—EFFECT OF UNCONSTITUTIONALITY, ON POWERS OF COUNCIL—POWERS TO CREATE AND REMOVE POLICE JUDGES AND CLERKS OF COURTS.

In 1902 the Council of the Village of Findlay passed an ordinance establishing a police court, and in 1910 passed an ordinance repealing the ordinance providing for a police judge.

Neither ordinance was authorized by a valid existing statute, and, therefore, the appointment of both police judge and clerk of courts, thereunder, was null and void and there is no vacancy at the present time to be filled by the Governor.

COLUMBUS, OHIO, December, 11, 1911.

Bureau of Inspection and Supervision of Public Officers, Jos, T. Tracy, Deputy, Columbus, Ohio.

DEAR SIR:—Under favor of May 27, 1911, you ask an opinion of the following:

> "You will note by ordinance of December 22, 1902, a police court was established in the City of Findlay, Ohio. The police judge was elected for a term of four years and a police clerk was appointed for a term of two years. A subsequent ordinance of date October 24, 1910, repealed the ordinance providing for a police judge.
>
> "Quaere: Is said repealing ordinance sufficient to abolish the position of police judge and that of police clerk, or should the Governor be notified to fill the vacancy?
>
> "Does the repealing ordinance abolish the position of clerk, or may said clerk continue in office, serving as clerk to the mayor who has discharged the duties of police judge since the abolishment of the court?"

The first question to be considered is the right of council to abolish the position of police judge.

The ordinance of October 24, 1910, seeking to abolish the office of police judge purports that it was passed by authority granted in Section 1785 of the Revised Statutes, said Section 1785, Revised Statutes, was carried into Bates Statutes of 1904, as Section 1536-797, and has not been repealed or amended by the General Code. It is now carried into the appendix of the General Code.

Said Section 1536-797, Rev. Statutes, provides:

> "In cities of the first class, and in cities of the third grade, third grade a, and third grade c, of the second class, there shall be a court, held by the police judge, which court shall be styled the police court, and be a court of record. Provided that in cities of the third grade c, the city council by a two-thirds vote may abolish the office of police judge and vest the mayor of said city with all the powers of a police judge as provided by the Revised Statutes of the State of Ohio; and when such office of police judge has been so abolished, it shall not be again re-established except by a like vote of council, but no action of council shall extend or curtail the term of office of a mayor or police judge who may be serving at the time the change may be made by council."

This statute was passed when the method of classifying cities was in vogue, and carries such classification into its provisions. The classification of cities was

declared unconstitutional by decision rendered June 26, 1902, in case of State vs. Jones, 66 O. S., 453.

The classification of cities was provided for in Sections 1546 to 1552 of the Revised Statutes (Bates, 1902). The Municipal Code, passed October 22, 1902, repealed Sections 1546 to 1552 (see 96 Ohio Laws, 97). Said act as to repeals did not become effective until May 4, 1903. Thereafter the classification of cities was abolished.

Section 231 of the Municipal Code provided for its taking effect as follows:

> "For the purpose of carrying into effect the powers and duties conferred and imposed upon present councils, boards of legislation, or other legislative bodies, by the provisions of this act, and for the purpose of conducting the first election to be held in every municipality hereunder, and of preparing for the change in the organization of municipalities herein provided for, this act shall take effect from and after the fifteenth day of November, 1902; *and for all other purposes this act, and every portion of the same, including the repeal of existing laws, shall take effect on the first Monday in May,* 1903, and the following sections of the Revised Statutes of Ohio, are hereby repealed:"

Said Section 1536-797, Revised Statutes, authorized the council of cities of the third grade c, of the second class, to abolish the position of police judge. On October 24, 1910, the time when the city council of Findlay attempted to abolish the office of police judge, there was no city of the second class, third grade c, as the statute making much classification had been repealed. Even though the classification of cities had not been abolished, Findlay would not come within the second class, third grade c. Applying the previous Section 1548, Bates Revised Statutes, 1902, we find that in accordance with the population of Findlay in 1890, it was a city of the third grade, second class, by the population of 1900, it was a city of the third grade b, and by the census of 1910, would have been a city of the second class, third grade, as it was in 1890.

The Secretary of State's report of the population of the municipalities of Ohio, shows that in 1890, Findlay had a population of 18,553; in 1900 a population of 17,613, and in 1910, a population of 14,858. Section 1548, Revised Statutes (Bates, 1902), provided that cities having a population of not more than 20,000, and not less than 10,000, as found by the federal census should be known as cities of the second class, third grade; and that those having a population of not less than 16,000 and not more than 18,000 should be known as the second class, third grade b. The other classifications do not fit the population of Findlay.

The provision of Section 1536-797, granting authority to abolish the office of police judge could not apply to the City of Findlay.

A municipality can only exercise the powers granted it by statute. In October, 1910, the council of cities were not authorized by statute or otherwise to abolish the position of police judge.

The action of the council of Findlay in passing the ordinance attempting to abolish the office of police judge was unauthorized in law and is null and void.

The next question is, should the governor be notified to fill the vacancy?

This inquiry calls into question the legality of the establishment of the police court of Findlay.

It appears that on December 22, 1902, the city council passed an ordinance purporting to establish a police court.

The first section of said ordinance provides:

> "That a police court of and for the City of Findlay, be and the

same hereby is created and established, the same being deemed expedient and required by law. That the officers of said court shall consist of a police judge, a prosecuting attorney and a clerk."

Section 2 provides for the election of the police judge, the appointment of the clerk by the police judge, and that the city solicitor shall act as prosecuting attorney.

Section 3 provides for the bond of the police judge and clerk, and Section 4 fixes the salaries of said officers.

This ordinance was passed during the interim between the passage of the Municipal Code abolishing the classification of cities, and the time the repealing clause of said act became effective.

Section 1785 of the General Statutes of 1880, (Bates 1536-797, supra), established police courts in cities of the first class only. In 1887, as shown in 84 Ohio Laws, 26, this section was amended so as to include cities of the third grade of the second class. In 88 Ohio Laws 160, cities of third grade, a second class, were included, and in 93 Ohio Laws, 615, (April 21, 1898), said section was passed in its present form.

According to the census of 1890, it has been seen that Findlay was a city of the second class, third grade, and according to the census of 1900, it became a city of the second class, third grade b.

It appears therefore that as early as 1890, Findlay, being a city of the second class, third grade, was included in the cities in which the statute provided that a police court should be established. However, from the ordinance passed in 1902, purporting to establish a police court, I conclude that said City of Findlay had no police court prior thereto.

Section 4568, General Code, provides for the salary of the police judge as follows:

"The judge of the police court shall receive no fees or perquisites, but shall receive such annual compensation, not to exceed two thousand dollars, as the council prescribes, payable quarterly, from the city treasury, and such further compensation, payable from the county treasury, as the commissioners of the county deem proper. Nothing in this section shall prohibit the police judge from receiving the fees for or taking the acknowledgement of instruments, depositions, and affidavits which are allowed to justices of the peoce for like services."

This section was known as Section 1797, Revised Statutes, and is substantially the same as it was in 1902, when the council of Findlay, passed said ordinance.

Section 4592, General Code, authorizes the council to fix the salary and bond of the clerk of the police court.

While Section 1538-797, Revised Statutes, established a police court in cities of the second class, third grade, yet it was necessary that council should fix the compensation of the police judge and clerk. The ordinance of December 22, 1902, did not establish a police court, but fixed the bond and compensation of the police judge and the clerk thereof, thereby putting into operation the provision of the statute establishing a police court.

Section 1536-797, Revised Statutes has not been repealed and unless it is unconstitutional as being class legislation is still in force.

Special legislation establishing courts was held constitutional in case of State vs. Bloch, 65 Ohio State, 370, the syllabus of which case reads:

"The act "to establish a court of insolvency in counties containing a city of the second grade of the first class, and for the relief of the pro-

bate court in such counties" (92 O. L., 475), and the acts conferring additional and concurrent jurisdiction on such court (93 O. L., 464, and 94 O. L., 353), are constitutional and valid."

This decision is based upon the provisions of Article 1, Section 4, of the constitution of Ohio. The court on pages 390 and 391, by Williams, J., says:

> " * * * * But by section 1, of article 4, there is a special grant of legislative power upon a particular subject, which itself prescribes the rule for the government of the legislative body in the exercise of that power. It provides that: 'The judicial power of the state is vested in supreme court, circuit courts, courts of common pleas, courts of probate, justices of the peace, and such other courts inferior to the supreme court, as the general assembly may from time to time establish.' The power is here undoubtedly granted to the general assembly to create courts other than those enumerated in the section; and the material inquiry is what other course may be so created? the answer is found in the language of the section, which is, 'such' other courts 'as the general assembly may from time to time establish.' That language vests in that body full power to determine what other courts it will establish, local, if deemed proper, either for separate counties or districts, and to define their jurisdiction and powers. The only limitation placed upon the exercise of that power is that the courts so established shall be inferior to the supreme court, subject of course, to the further qualification that no legislation can alter the judicial system established by the constitution, nor interfere with the courts dessignated by that instrument as the recipients of the judicial power."

Police courts are inferior to the Supreme Court, and their establishment does not interfere with the courts established by the constitution. The legislature, therefore, has the power to establish such courts in any city or district they may deem that such court is required. The classification of cities for the purpose of establishing courts is recognized as constitutional by this decision. Section 1536-797. Revised Statutes, is therefore constitutional, and has not been repealed. However said section is not applicable to any city of Ohio at the present time, because cities are no longer divided into classes or grades of a class.

The council of Findlay did not act until after the municipal code, repealing the statutes providing for the classification of cities had been passed, but before the repealing clause became effective. However, the classification of cities was at that time still in force, at least for the purpose of establishing police courts. And if the City of Findlay came, at the time the ordinance was passed, within one of the grades of classes provided in Section 1536-797 Revised Statutes, the ordinance so far is it fixed the salary and bond and duties of the police judge, clerk and city solicitor, would be legal.

Section 1548, Bates Statutes, 1902, provided in part as follows:

> "Existing corporations, origanized as cities of the second class shall remain such until they become cities of the first class, and their grade and the grades of those which may be or may become cities of the second class shall be determined as follows: * * * * * those which, on the first day of July, A. D., 1890, had, and those which on the first day of July, in any year, have, when ascertained in the same way, more than ten thousand and less than twenty thousand, shall continue in the third grade: * * * * * those which on the first day of July, A. D., 1890, had more than sixteen thousand and less than eighteen thousand inhabitants,

shall, on and after the passage of this act, constitute and be, and those which, on the first day of July, in any year, have, when ascertained in the same way, more than sixteen thousand and less than eighteen thousand inhabitants, shall constitute and be the third grade b; * * * * *"

The manner of ascertaining the population is set forth in Section 1547, and is "according to an official report or abstract of the next preceding federal census."

It has been seen that in 1890, Findlay was a city of the third grade, second class, and that in 1900 it became a city of the third grade b, of the second class. From said Section 1548, supra, it is seen that the third grade b is a special grade made out of the more general grade of third grade, second class. An examination of Section 1536-797 discloses that cities of the third grade b, second class, are not included within its provisions.

During the decade of 1890-1900 Findlay, as a city of the third grade, second class, could have legally fixed the salary and bond of a police judge and clerk, and thereby called into operation the statute establishing a police court therein. Council did not act during that period, but waited until the City of Findlay had passed into third grade b, of the second class. At that time there was no statutory provision establishing a police court in cities of third grade b, second class.

While the population of Findlay in 1900 was between ten thousand and twenty thousand, as provided for cities of the third grade of the second class, yet the provision for third grade b, second class, was a creation of a special class within the third grade and the coming of the population of a city between said figures last above would take such city from the third grade and place it in the third grade b. It is in the nature of an exception to the general rule.

The council of Findlay had power, as stated above, to call into operation the statute establishing police courts, by fixing the salary of the police judge and clerk, during the period of 1890 to 1900, but the transition of the city in 1900 to third grade b, took away that power.

Council can only act by statutory authority. At the time the ordinance of December 22, 1902, was passed there was no statute establishing a police court in the City of Findlay.

It is my conclusion therefore that the ordinance of December 22, 1902, purporting to establish a police court was without warrant of law, and therefore null and void.

The appointment of a clerk of the police court by the police judge is null and void.

There is no vacancy to be filled by the Governor. Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

53.

NO RIGHT OF CITY TO SHARE OF FUND DERIVED BY TOWNSHIP LEVY FOR POOR RELIEF—EQUAL RIGHT OF CITY'S POOR TO RELIEF FROM SAID FUND.

The levy of taxes by township trustees for the purpose of relief of the poor is for township purposes and the money derived therefrom is township money. Such money or any part thereof cannot be transferred to a city treasury. The only claim which the city has to such fund is the right of the poor of the city to the right of relief therefrom equally with the poor of the township outside the boundaries of said city.

COLUMBUS, OHIO, January 17, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of December 23, 1911, you state as follows:

"We are in receipt of a letter from Mr. J. F. Welty, Auditor of Ashland County, Ohio, enclosing an opinion rendered to him by Maurice V. Sample, City Solicitor-Elect of Ashland (which village will be advanced to a city January 1, 1912), in which it is held that the poor fund levied by the infirmary directors upon the property within the City of Ashland shall be turned over to the city treasurer upon semi-annual distribution next February. We have written to the county auditor advising that he hold fast to the county funds until he receives further advice from this department, and we respectfully request your written opinion in regard to the matter.
"Copy of city solicitor's opinion is enclosed herewith."

Under date of December 29, 1911, you further state:

"Under date of December 23, we requested your written opinion in regard to the disposition of the money raised for the support of the poor in the City of Ashland, and enclosed a copy of the opinion of the city solicitor rendered to the auditor of said county. We are in receipt of a letter from said auditor under date of December 26 in which he says he did not refer to the money raised by the levy made by the infirmary directors, but the levy made by the township trustees for poor purposes and levied on all the property in the township, including the city. We call your attention to an opinion rendered to this department by you under date of May 3d, 1911, in regard to the relief of the poor in the township in which the City of Xenia is situated, and it would seem to us that the principle laid down there would govern the disposition of the poor funds levied by the township trustees."

The opinion of the city solicitor enclosed holds that a city is entitled to all funds levied in a city for the relief of the poor and that the director of public safety has sole control of such relief in such city. His contention is based upon Section 4089, General Code, which provides:

"The management of the affairs of corporation infirmaries and the care of the inmates thereof, the erection and enlargement of infirmary buildings and additions thereto, the repair and furnishing thereof, the improvement of the grounds therewith connected, *and the granting of outdoor relief to the poor, shall be vested in the director of public safety.*"

This section does not give the city or the director of public safety the funds which are raised by a levy of taxes by the trustees of a township in which such city is located, for the relief of the poor.

The opinion of May 3, 1911, given to your department in a matter arising in Xenia, fully covers the situation in Ashland.

In that opinion it was held that "where a municipal corporation lies entirely within a township, temporary relief to the poor within such municipal corporation should be afforded by the township trustees, unless the boundaries of the township and the municipal corporation are co-extensive. In the latter case there would of course be no township trustees."

In passing upon Sections 5646, 5647 and 5648, General Code, which authorize a levy of taxes by the township for the relief of the poor, it was stated, in the opinion of May 3d, referred to, that this levy was made upon all the property within the township though there may be within the boundaries of such township a city.

The levy of taxes is made by the township trustees; it is made for the relief

of the poor within the township including the poor in any municipality contained within the boundaries of such township. Relief from the fund so raised is to be granted by the township trustees. The funds so raised are levied for township purposes and is township money. There is no authority of law to transfer said money, or any part thereof, to the city treasury. The city has no claim to said fund, other than the poor of such city has an equal right of relief therefrom as the poor of the township outside the boundaries of said city.

The taxes levied by the township trustees for the relief of the poor should be paid to the township treasurer to be distributed therefrom as other township money.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

54.

SHERIFF—ALLOWANCE BY COUNTY COMMISSIONERS FOR BOARD OF PRISONER WHO VOLUNTARILY SUBMITS TO CONFINEMENT AND AGREES TO PAY BOARD.

When a constable refuses to serve a mittimus and the person committed voluntarily submits himself to the sheriff and promises to pay his board for the time of his confinement and a court of competent jurisdiction holds that confinement under such circumstances is legal, the county commissioners may make the usual allowance to the sheriff for the board of such prisoner.

Under the peculiar circumstances of the Lindsay case, however, the Bureau is recommended to make no findings, upon the right of the prisoner to receive the amount paid by him for board.

COLUMBUS, OHIO, January 6, 1911.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under favor of December 16, 1911, you submit the following to this department:

> "Herewith we submit a letter from one of the state examiners of this department as to a certain condition existing in the office of the sheriff of Sandusky County and respectfully request your opinion as to what finding, if any, should be reported by our state examiner."

The letter enclosed states as follows:

> "On May 20, 1911, the mayor of Lindsay, Sandusky County, fined J. T. and A. M. $500.00 and costs each for violation of the Rose county local option law, and he issued a mittimus committing them to jail until fines and costs were paid. They refused to pay the fine and costs, but the marshal of Lindsay failed to take them to jail upon the mittimus issued by the mayor. On May 23 the defendants, being of opinion that the failure of the officer to take them to jail meant that possibly they might be sentenced to a workhouse instead, voluntarily appeared at the jail, accompanied by their attorney, and asked to be imprisoned. The sheriff refused to accept them without a mittimus, telling them that unless they were legally committed to his custody that he could not collect board from the county for their keep. The attorney and the defendants then guaranteed him the board, and assured him that he would not be proceeded against for false imprisonment, whereupon he accepted them and kept them in jail until June 19, when their attorney appeared and informed the sheriff that from that day on they would pay

no more board. The sheriff, concluding that he did not have them legally in his custody, told them that if he would not be paid for their board they would have to get out, although the attorney advised the defendants, in the presence of the sheriff, not to go out unless the sheriff compelled them to go, whereupon the sheriff told them to get out, that he did not intend to board them if he could get no pay for same. The commissioners had refused to allow their board for the time they were in and the sheriff was paid by the parties. On November 16, 1911, owing to some other moves in the case, the marshal of Lindsay committed them to jail on the original mittimus that had been issued by the mayor, and on the 17th habeas corpus proceedings were instituted for their release. The court released them on the ground that their voluntary commitment in the first instance was legal, hence they could not be committed again upon the same charge. The court stated that he would not pass upon the question as to whether the sheriff's release of the prisoners at the time he told them to go, was legal or not.

"The sheriff says the parties now want their board money back from him, and he wants me to find in his favor for the board of the two prisoners for the time that they were in and that the commissioners refused to pay. I told him I would take the matter up with the bureau. I mentioned the matter to the prosecuting attorney and he was inclined to think that as the parties had made a voluntary payment to an official they might not be able to collect back from him, but the sheriff thinks that a mandamus suit will follow his refusal to pay, or if the com missioners refuse to pay him."

It is my opinion that the arrangement entered into between the sheriff and the voluntary prisoners for the payment of their board and the payment thereof to the sheriff was a private arrangement between the sheriff and the prisoners for the individual protection of the sheriff. It is a matter with which the public has no concern.

A question might be raised, however, as to the right of the commissioners to make an allowance to the sheriff for keeping these prisoners.

A court of competent jurisdiction, I take it from the letter, has passed upon the legality of the imprisonment in a habeas corpus proceeding. The court held the voluntary confinement in the jail to be legal and therefore the commissioners have the same right to make an allowance to the sheriff for keeping these persons as they would have to make an allowance for keeping other prisoners confined for similar offenses.

However, under the circumstances which have been presented I do not think a finding or recommendation of any kind should be made.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

55.

CHIEFS OF POLICE—NO FEES FOR SERVICE IN MAYOR'S COURT IN STATE CASES—NO RIGHT OF RECOVERY OF SAME WHEN PAID EXCEPT BY PARTIES PAYING—VOLUNTARY AND INVOLUNTARY PAYMENT BY CULPRIT.

Prior to the amendment to 4534, *General Code, of* 102 *O. L.,* 476, *there was no provision for taxing fees to the chief of police for process served by him in the mayor's court in state criminal cases.. When such fees are collected, therefore, the law will leave them where it finds them except as to the petition of parties against whom such fees were assessed, who paid the same involuntarily.*

COLUMBUS, OHIO, January 13, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of December 19, 1911, you ask an opinion of this department upon the following:

> "What disposition should be made of moneys collected by the mayor of a city not having a police court for fees taxed in the name of the chief of police prior to the amendment of June, 1911, said fees being collected of defendants prosecuted in said court for violation of state laws?"

The fees of the chief of police in a proceeding before the mayor's court are allowed by virtue of Section 4534, General Code, as amended in 102 Ohio Laws, 476, which section provides:

> "In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace. The chief of police shall execute and return all writs and processes to him directed by the mayor, and shall by himself or deputy attend on the sittings of such court, to execute the orders and process thereof and to preserve order therein, and his jurisdiction and that of his deputies in the execution of such writs and process, and in criminal cases, and in cases of violations of ordinances of the corporation, shall be co-extensive with the county, and in civil cases shall be co-extensive with the jurisdiction of the mayor therein. The fees of the mayor in all cases, excepting those arising out of violation of ordinances, shall be the same as those allowed justices of the peace for similar services and the fees of the chief of police or his deputies in all cases, excepting those arising out of violations of ordinances shall be the same as those allowed sheriffs and constables in similar cases."

Said Section 4534, General Code, before such amendment provided:

> "In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justice of the peace."

The syllabi in the cases of Portsmouth vs. Milstead, and Portsmouth vs. Baucus, 18 Cir. Dec., 384, are as follows:

> "The provisions of 96 O. L. 61, Section 126 (Rev. Stat. 1536-633; Lan. 3228) requiring 'that all fees pertaining to any office shall be paid

into the city treasury' has reference to municipal fees solely, or such fees as may be fixed by municipal authority.

"Said section does not authorize cities to interfere with the fees of mayors or chiefs of police in state criminal cases; whether such authority can be delegated to municipalities, quaere."

These were actions by the city to recover from the mayor and chief of police the fees which they had collected in state criminal cases in the mayor's court and which had been taxed for their services therein. The court held that the city had no right of recovery. The decision was affirmed without report in 76 O. S., 597.

In case of City of Delaware vs. Mathews, 13 C. C. N. S., 539, the syllabi reads:

"There is no provision of law for payment of a chief of police for service of process issued by a mayor in cases wherein the state of Ohio is plaintiff.

"Costs collected for services of such process by a chief of police issued by a mayor, *are not recoverable by the officer where they have been turned over to the city, or by the city if turned over to the officer.*"

On page 541, Taggart, J., says:

"So that this record presents this state of facts: Fees were taxed for the execution of processes issued to this chief of police, and collected and paid by the parties against whom the costs were assessed, and were deposited in the treasury of the City of Delaware.

"As this court views the case, *there was no right or authority for so taxing costs or collecting the same; and there was no right or authority for the plaintiff, as chief of police, receiving the same.* But, as these costs and fees are in the city treasury, *the plaintiff must recover by the strength of his right to the same, rather than by showing that the City of Delaware has no right to hold and retain the same.*"

This was an action in which the chief of police sought to recover from the city the fees which had been taxed for process served by him in state criminal cases in the mayor's court and which had been paid into the city treasury. This case was affirmed without report in 82 Ohio State, 423.

The foregoing decisions are decisive of the following propositions:

First: That prior to the amendment of Section 4534, General Code, in 102 Ohio Laws, 476, there was no authority for taxing fees to the chief of police for process served by him in the mayor's court in state criminal cases; and that where such fees were taxed and collected it was done without authority of law and was illegal.

Second: That when such fees are paid into the city treasury, the chief of police cannot recover the same from the city.

Third: That where such fees are paid to the chief of police the city cannot recover the same from him.

In other words, such fees were illegally taxed and collected and neither the city nor the chief of police have any right of recovery as against the other.

You ask what disposition should be done with such fees. You do not state, however, whether such fees are now in the hands of the mayor, the chief of police, or in the city treasury.

The decisions above cited do not determine what shall be done with these fees, but leaves the money just as it found it.

The defendants in the several actions in which such fees were collected, paid fees which were not properly chargeable against them.

The rule of recovery in such cases is set forth in 11 Cyc., 265, as follows:

> "Costs voluntarily paid cannot be recovered back, although the party paying them is not liable therefor. The rule is otherwise where the costs have not been voluntarily paid, or where costs are procured to be paid by the fraud of the opposite party."

Whether the costs were voluntarily or involuntarily paid will depend upon the particular circumstances of each case. If they were paid involuntarily they can be recovered by the party who paid them, either from the city or the chief of police, as the case may be. The one who has the money is the one from whom recovery could be had.

The statutes do not provide what shall be done with illegal fees, voluntarily paid, nor with illegal fees involuntarily paid and which have not been refunded.

It is a principle of law that in order for a party to maintain a right he must depend upon the strength of his claim, and not upon the weakness of the claim of his adversary. Where neither party has any claim to a fund, which is in the possession of one of the parties, the court will leave the fund where it finds it.

Neither the mayor, the chief of police, nor the city has any legal right to these fees. If such fees have been paid to them they hold them subject to the rights of the defendants who paid such fees.

There is no authority for making any other disposition of fees which were illegally taxed and collected. This is based upon legal principles. It is one of those situations in which legal principles appear to conflict with moral duty. The moral duty would be to refund such fees whether paid voluntarily or involuntarily.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

59.

BOARDS OF HEALTH, LOCAL—POWERS OF TO INCUR EXPENSE OF NEWS CLIPPINGS AS LEGAL CLAIMS AGAINST THE CITY.

Under the general powers of local boards of health, they may incur as a legal claim against the city the expense of procuring clippings from the Ohio News Bureau if such really affords them a valuable aid in the administration of their official duties.

COLUMBUS, OHIO, January 16, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 6, 1911, wherein you inquire as follows:

> "Is a claim approved by the board of health for the service rendered their department by the Ohio News Bureau in the way of clippings of newspapers a legal claim against their city? We refer this to your department at the suggestion of the city solicitor of Cleveland."

Replying thereto, I desire to state that under the general powers of local boards of health they may legally incur any expense which is an aid to them in the administration of the duties of their office. If the clippings referred to are of

such a nature as to afford valuable information to the health authorities of the city, such as items that would tend to show methods employed by other cities in dealing with matters which come within the province of a board of health, then, I am of the opinion that such clippings are a legal claim against a city.

This holding is in accord with the former opinion of this department, given to the Secretary of State, to the effect that the news clippings furnished by the Ohio News Bureau may be legally paid for from the contingent fund of the Secretary of State.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

69.

ROAD DISTRICTS—COMMISSIONERS OF, ARE NOT COUNTY OFFICIALS—MAY HIRE AND COMPENSATE COUNTY PROSECUTOR FOR LEGAL SERVICES.

The commissioners of road districts not being county officers, as they are not paid from nor subject to the control of the county and as they are given statutory authority to employ counsel, the prosecuting attorney is in no sense their legal adviser, and he may be compensated by the road commissioners when hired by them in addition to his salary as county prosecutor.

COLUMBUS, OHIO, December 30, 1911.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of December 5, 1911, wherein you inquire:

> "May the prosecuting attorney act as legal counsel for a road district under Section 7112 of the General Code, and be paid for his services in addition to his regular salary?"

Section 7095, General Code, provides as follows:

> "Not less than two nor more than four adjacent townships in any county, occupying contiguous and compact territory, may organize into road district. Such road districts shall be governed and controlled for the purpose of constructing pikes and improving roads, as hereinafter provided, by a road commission composed of one member from each township."

Section 7096, General Code, provides that the road commissioners shall be appointed by the county commissioners, but shall be nominated by the respective township trustees, and shall hold office for four years, or until their successors are appointed and qualified, etc.

Section 7101 of the General Code provides for the proceedings whereby is created a road district.

Section 7109 provides as follows:

> "The road commissioners may employ *counsel* and a clerk or bookkeeper, when necessary, * * * * *."

Section 7112 provides as follows:

> The compensation of the road commissioners, engineer, and assistants shall be allowed by the county commissioners, and, with counsel services and all other necessary expenses, shall be paid out of the road fund raised for the purpose of making such road improvement."

The road commissioners are appointed under authority of Section 7096 of the General Code by the county commissioners after they are nominated by the township trustees. Their duties are as prescribed by Section 7103 of the General Code, et seq. and are confined to road districts composed of not less than two nor more than four adjoining townships in any county occupying contiguous and compact territory. Their jurisdiction is confined to building roads in the road districts, the purchase of road rollers, machinery and appliances that they deem necessary in the improvements of the road under their charge. They may employ engineers and assistants to make maps and profiles of roads in such road districts, and they have authority, under Section 7123 of the General Code, to issue bonds of said district to provide money necessary to meet the expenses of improving roads in such road district, and the road commissioners shall, under authority of Section 7127 of the General Code, levy annually a certain amount of the taxes on each dollar of the valuation of all the taxable property of said road district and continue such levy from year to year until all the roads by the road commissioners designated for improvement have been improved as provided in Section 7095 et seq., and the bonds issued for that purpose, together with the interest thereon, have been paid.

All of the transactions of said board are confined to the road districts; all money raised by taxation to defray the expenses of the road district is levied on the property of the road district; no money is paid from the county fund. It is a special taxing district. The road commissioners are not county officers for the reason they perform none of the functions of county officers. They are not compensated by the county. They are not township officers, for the reason they represent a taxing district composed of the aggregation of townships and they are not paid from a township fund. If they were county or township officers, this act would be unconstitutional because the constitution requires that all township and county officers shall be elected. They are not a county board even though they are appointed by the county commissioners, and they perform no services for the county, and, as before stated, they are not paid by the county, nor from the county fund. They represent ONLY THE ROAD DISTRICT composed of two or more townships; they are merely agents of the road district. The Legislature seemed to have in mind that the road commissioners so appointed were not county officers nor township officers, nor a county board, because under Section 7109 of the General Code it gave them authority to employ counsel to advise them.

I, therefore, hold that the prosecuting attorney is not the legal adviser of the commissioners for the road districts, and that if he is employed by such commissioners he can be paid for his services in addition to his regular salary because he represents them, not as prosecuting attorney, but in a private capacity.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

78.

PROSECUTING ATTORNEY—EXPENSE OF SURETY BOND MUST BE PERSONALLY PAID.

The cost of a surety bond given by the prosecuting attorney under 102 *O. L.* 74 *is not an expense incurred in the performance of an "official duty" nor in the performance of an act done in the "furtherance of justice" and for these and other reasons, cannot be allowed as an expense item under this same statute.*

COLUMBUS, OHIO, January 25, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I have your inquiry of January 11, 1912, which is as follows:

"May the cost of a surety bond given by the prosecuting attorney under amended section 3004 (102 O. L., 74) be paid from the allowance for expenses under said section?"

Section 3004 of the General Code (102 O. L. 74) is as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the presecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

"Provided that *nothing* shall be paid under this section *until* the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him by law, and pay over, according to law, all moneys by him received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.

"The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury.

"Provided, that as to the year 1911, such fund shall be portioned to the part of the year remaining after this act shall have become a law."

You will note that this allowance is for the prosecuting attorney "to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for."

In my opinion the giving of the bond provided for by the second paragraph

of this act cannot be included as one of the official duties of the prosecuting attorney, nor can it be said that it is an act done by him in "furtherance of justice." It is not required by the act that the prosecuting attorney give a surety company bond; a bond signed by qualified personal sureties would undoubtedly be sufficient.

It is my opinion, therefore, that the cost of a surety company bond given by a prosecuting attorney under Section 3004 is not a proper item of expense to be paid from the fund allowed to him under said section.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

86.

CLERK OF PROBATE COURT— COMPENSATION CONTRARY TO SALARY LAW—COUNTY COMMISSIONERS—RULE OF RECOVERY.

Where a clerk of the probate court is employed by the county commissioners and also compensated by them contrary to the provisions of the Salary Law, the contract is void.

The question of recovery by the county is governed by the rule, applied in cases where services, voluntarily rendered, are given fair value without authority to so compensate, by the authorities who have received the benefit of such services.

COLUMBUS, OHIO, January 31, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You have submitted to this department for opinion thereon, certain additional facts in connection with the opinion of my predecessor under date of December 30, 1910. The gist of the holding of the opinion in question is, that if a probate judge employs a clerk, the compensation of such clerk is to be paid out of the allowance for clerk hire made by the commissioners under the county officers' salary law, and the appointment of the clerk is presumed to have been made under such salary law; that if the compensation of such clerk is in fact paid from some other fund, under such circumstances, the amount paid cannot be recovered from the clerk himself, but the officer responsible for the expenditure of money in this irregular way would be liable.

The additional facts submitted consist of a letter addressed by the probate judge to a personal friend, describing the transaction, and a copy of the original resolution of the county commissioners directing the probate judge to employ a person to do certain work at a certain compensation and appropriating in advance a certain sum from the general revenue fund of the county, with authority to create a deficiency in said appropriation account for that purpose.

I have examined the previous opinion of this department and concur generally in its holding. I call attention particularly to that portion of it in which the following language is found:

> "Unless it clearly appears then, that the employment of this clerk was made in such a way as to preclude any possibility of regarding her as having been employed under Section 3 of the county salary law, and

unless also the services which she rendered were not reasonably worth the amount paid to her * * * * no action could, in my judgment, be maintained against her to recover the sums paid to her."

The additional facts submitted fulfil the condition expressed in the first part of this sentence. That is to say, they establish the conclusion that the clerk was clearly intended to be employed outside of the salary law, so to speak. The irregularity, then, instead of attaching merely to the manner in which she was compensated, as assumed in the previous opinion, characterizes the whole transaction, including her original employment. The question is, therefore, somewhat different from that presented to my predecessor.

As to the general merits of the question under the amended statement of facts, I confess that I have serious doubt. As pointed out in the opinion of my predecessor, the clerk in question rendered services to the county at a rate which, while not authorized to be paid to clerks under the statute, was nevertheless fixed as the compensation of the probate judge under the fee system, and would probably be held for that reason to be a reasonable rate. The services thus rendered are of value to the county and the county has, so to speak, enriched itself through the labors of the clerk. The money has been paid to the clerk, and in order that a finding of the Bureau adverse to the clerk might be upheld, it would be necessary to recover such moneys from her. The rule of law which would be applicable to such an action has not been clearly defined by our courts. Without citing decisions with which I assume that you are familiar I can go only so far as to say that the question ought to be determined, and that the instance referred to in your inquiry would seem to offer an excellent opportunity for such determination. The unsettled question, in short, is, as to whether a person who renders services to a county as a mere volunteer (for the contract in question is absolutely void) and receives a reasonable compensation therefor, may be compelled to pay the amount so received back to the county in the light of the fact that the county has been benefited by the work done.

The letter of the probate judge above referred to hints at a state of facts which might take the case out of the operation of the doubtful rule above referred to. If it is true that the employment of the clerk was a mere subterfuge, and that the services in question were actually not performed by the clerk but were performed by the probate judge himself, the clerk drawing the pay, or, if this state of facts was true in part, then, of course, under any rule recovery could be had from the clerk of such amount of money as represents the amount of work for which she received compensation, but which was not done by herself.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

102.

SHERIFF'S FEE—DEDUCTION OF NOTARY EXPENSE FROM FEE FOR EXECUTION OF DEEDS—FEE FUND.

It is not the intention of the statutes that sheriffs should pay notary fees for the execution of deeds out of his own pocket and therefore out of the $2.00 *allowed the sheriff for executing deeds, he may deduct the forty cents notary expense and pay the balance into the fee fund.*

COLUMBUS, OHIO, February 7, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Under date of November 11, 1911, you inquired of me as follows:

> "Section 2845, G. C., as amended in 102 O. L., 285, provides a fee of $2.00 to the sheriff for making and executing a deed of land sold in execution, decree or order of court, to be paid by the purchaser. Before the amendment to said section the fee seems to have been merely for the making of the deed. Sheriffs usually have to pay a notarial fee of not over 40 cents for acknowledging the deed. Is the sheriff required to pay into his fee fund the $2.00 received for each deed, or the balance remaining after deducting the notary's fee?"

The provisions of the foregoing section pertinent to your inquiry having been quoted correctly, it is unnecessary for me to set the same out at length in this opinion.

The evident purpose of the amendment to Section 2845, General Code, was to clearly establish the fee of $2.00 that a sheriff might charge for the making and executing of deeds, excluding the possibility of his right to charge $2.00 for the making and put the purchaser to the additional expense of paying for the acknowledgement as would seem to have been possible under the wording of this statute prior to this amendment. Section 2997 of the General Code provides that the county commissioners may allow to the sheriff all his actual and necessary expenses in certain cases,—the present instance not being one of those cases. Section 2832 provides that office fixtures, blanks, etc., must be furnished to the sheriff at the expense of the county. It is not the purpose or the intendment of Section 2845, supra, that the sheriff should pay from his personal expenses the expense of acknowledgements of deeds made by him in his official capacity, and since no method has been provided by the statutes for the reimbursement of the sheriff in the event that he does pay such expense, I am of the opinion that the sheriff may deduct the notary fees and pay the balance into the county treasury to the credit of his fee fund.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

108.

TAXES AND TAXATION—SMITH ONE PER CENT LAW—APPROPRIATIONS LIMITED BY BUDGET COMMISSION—MONEYS DERIVED FROM TAXATION—"RECEIPTS AND BALANCES"—NO WARRANTS ON EXHAUSTED FUNDS—WARRANT AN EXPENDITURE.

Under the Smith one per cent. law, by the provisions of Section 5649-3a thereof, a county auditor may not issue his warrant upon a fund raised by taxation under the Smith law that has been exhausted nor against an appropriation made under the Smith law which has become exhausted, even though there be money to the credit of the original fund, raised by a particular levy, from which fund the exhausted appropriation was originally made.. Sections 2567, 2676 and 2677 of the General Code which formerly made such action possible, have been impliedly repealed.

An appropriation in excess of the amount fixed by the Budget Commission may not be paid so as to obtain for the appropriation a greater sum of the moneys "raised by taxation than allowed for such purpose by the Budget Commission. If there is in the fund, any moneys accruing thereto from revenues other than those collected by taxation, the appropriating authorities may use such as they see fit by reason of the authority given by the Smith law with respect to "Receipts and Balances."

The authorities may not make appropriation in excess of the amount in the treasury in anticipation of moneys estimated to come into the treasury within the six months next ensuing

COLUMBUS, OHIO, January 29, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 11th submitting for my opinion several questions arising under section 5649-3*d*, 102 O. L. 272, being a section of what is known as the "Smith one per cent. law."

> "1. May county auditor issue his warrant upon a fund that has been exhausted or against an appropriation that has been exhausted, even though there be money to the credit of the fund from which the appropriation was made?
>
> "2. May an appropriation in excess of the amount fixed by the budget committee be legally made?
>
> "3. May appropriations be made in excess of the amount actually in the treasury at the time of such action, i. e., may they include moneys estimated to come into the treasury during the six months next ensuing?
>
> "4. What are the meaning and application of the last five words of said section?"

Section 5649-3*d* in full is as follows:

> "At the beginning of each fiscal half year, the various boards mentioned in Section 5649-3*a* of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropria-

> tions and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners exclusive of receipts and balances."

This section is in its essential features a new thing in legislation, although much of its verbage is copied from the Municipal Code, Section 3797. There are, therefore, no precedents or decisions to be followed in its interpretation.

As applied to a county the idea of semi-annual appropriations is new in its entirely. Here, however, the methods of the Municipal Code, may be studied with advantage as throwing light upon the manner in which it is intended fit the procedure of Section 5649-3*d* into the county fiscal system.

In the main, however, Section 5649-3*d* must be studied in itself and in connection with the other provisions of the act in which it is found, and it is unsafe to rely upon the analysis of older sections in order to establish its meaning.

As I understand your first question, it supposes that an appropriation account created by the method required in the first sentence of section 5649-3*d* has become exhausted, but that there remains in the fund, i. e., the proceeds of a particular levy, a balance not appropriated for any other purpose. May then the county auditor issue his warrant upon the unappropriated balance for a purpose within the purview of the appropriation?

You seem to ask also as to whether or not the county auditor may issue his warrant for any class of claims against the county when there is no money whatever in the treasury to the credit of the fund or the appropriation on which it is drawn.

Section 2570 General Code provides in part that:

> "* * * * * He (the county auditor) shall not issue a warrant for the payment of any claim against the county, unless allowed by the county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal authorized by law to do so."

As a matter of fact, of course, most of the claims against the county which in the ordinary course of business would be presented to the auditor are those, the amount of which is fixed by law or by some authority other than the commissioners. Thus all vouchers for salaries of county officers under the county officers salary law are "law vouchers," the amount of which has been determined by the application of the rule of population adopted by the General Assembly itself. Again, certain compensation and expenses of boards of deputy state supervisors of elections, boards of review, election officers, etc., are to be honored by the issuance of the county auditor's warrant without any action of the county commissioners. In fact the number and amount of claims requiring the allowance of the county commissioners are relatively small.

Section 2675 General Code provides as follows:

> "When a warrant drawn on him as treasurer by the auditor of the county is presented for payment, if there is money in the treasury or depository to the credit of the fund on which it is drawn, and the warrant is endorsed by the payee thereof, the county treasurer shall redeem it by payment of cash or by check on the depository, and shall stamp on the face of such warrant, 'Redeemed,' and the date of redemption."

There can be no doubt whatever that this section is directly affected by

the enactment of Section 5649-3*d*, preserving, in deference to the rule against implied repeals as much of it as possible, it follows, I think, that the word "fund" in this section should now be read "appropriation account."

Sections 2676 and 2677 of the General Code provide as follows:

Section 2676:

"When a warrant is presented to the county treasurer for payment, and is not paid for want of money belonging to the particular fund on which it is drawn, the treasurer shall indorse the warrant, 'Not paid for want of funds,' with the date of its presentation, and sign his name thereto. Such warrant shall thereafter bear interest at the rate of six per cent. per annum. A memorandum of all such warrants shall be kept by the treasurer in a book for that purpose."

Section 2677:

"As soon as sufficient funds are in the treasury of the county to redeem the warrants drawn thereon, and on which interest is accruing, the treasurer shall give notice in a newspaper printed or circulating in his county, that he is ready to redeem such warrants, and from the date of the notice, the interest on such warrants shall cease."

These sections are of very ancient origin having passed in 1831, 29 O. L. 291, sections 9 and 10. They have remained unamended save in process of codification to the present time, and the fiscal affairs of the country have been conducted in pursuance of the plan thus outlined during all these years. That is to say, "law vouchers"—i. e., vouchers not requiring the approval or allowance of the county commissioners—have been honored by the issuance of warrants by the county auditor regardless of the presence or absence of moneys in the county treasury to the credit of the fund on which these warrants are drawn. Such a provision was a convenient part of the old scheme of things; it made it easy for the general assembly to provide that a certain claim should be paid out of the county treasury on the warrant of the county auditor without inviting the attention of any other officer of the county at all. In this manner the county treasury became a catchall, so to speak, for public expenditures. The State itself and other sub-divisions thereof had their fiscal affairs administered by one responsible legislature of administrative board; in every case save that of the county, the levying authority and the expending authority was lodged in the same tribunal. Thus the General Assembly possesses as to the State full revenue producing powers, and also full power over the funds produced by taxation. Not so in the county, however, under the scheme in vogue for so many years. The county commissioners had but a very limited control over the county treasury, although they with the infirmary directors constitute the sole levying authorities of the county. Thus it happened that in many counties of the state, the commissioners would not levy sufficient taxes to meet the needs of the county treasury, and the issuance of unpaid warrants grew to be a convenient way of borrowing money. In the meantime the fiscal affairs of the county were affected by the enactment of what was popularly known as the "Burns law," Section 5660 General Code. This section required in effect that before any contract or other obligation involving the expenditure of money from the county treasury be entered into a certificate of the auditor, that the money necessary to discharge the same was in the treasury or in process of collection and not appropriated for any other purpose, should be issued. However it applied only to the county commissioners. In reality it did not, therefore, in any way affect the duty of the county auditor

to issue warrants under Section 2570 General Code or the duty of the county treasurer under Section 2676. That is to say as to "law vouchers" and claims against the county fixed and allowed by some authority other than the commissioners, the Burns law did not prevent the issuance of warrants, regardless of the money in the treasury, and the exercise of the treasurer of his duty to stamp such warants when presented "Not paid for want of funds."

This then was the situation when Section 5649-3*d* was enacted as a part of the Smith one per cent. law. It expressly provides that "all expenditures within the following six months shall be made from and within such appropriations and balances thereof." Manifestly this Section and Sections 2570 and 2676 General Code cannot stand together except upon one of the following theories: (1) That Section 2676 may be regarded as merely modified as Section 2675 has been by me held to be modified, viz., by substituting the phrase "appropriation account" for the word "fund;" and that Section 2677 may be regarded as similarly modified by the insertion of the phrase "and appropriate" after the word "county." This solution of the problem would leave Section 2676 in practical force modified only by the requirement that the treasurer stamp warrants "Not paid" when there is no appropriation account out of which they may be paid, and that he not redeem such warrants until there is an appropriation specifically made for the purpose of redeeming unpaid warrants. Such a construction, however, is dependent upon the proposition, (2) that the word "expenditures" as used in Section 5649-3*d* refers to and means "withdrawals of money from the county treasury". Here then is the ultimate question upon which the exact application and effect of Section 5649-3*d* to and upon Sections 2570 and 2676 General Code must be determined.

Stated in another way, this question is as follows:
When is an "expenditure" within the meaning of Section 5649-3*d* made; when a contract is entered into; or when a warrant is drawn by the county auditor; or when a warrant is actually redeemed by the county treasurer?

Whatever may be the result in practice of the conclusion which I am about to reach, I am convinced that the answer to this question is found in the requirement of Section 5649-3*d* that "appropriations for each of the several objects for which money is to be provided" shall be made by the county commissioners. This language is not susceptible of the restricted meaning which would apply it only to matters of a contractual nature. The whole Smith law must be taken into consideration in determining the meaning of each phrase thereof upon familiar principles. The law as a whole deals with taxation and limits the rates of taxation in all the taxing districts of the State. As a necessary and proper corollary to this object the General Assembly intends that moneys raised by taxation shall be expended only after periodical appropriations, so that each fiscal year of a taxing district shall take care of itself, and each such district shall be placed ultimately upon what is familiarly known as a "cash basis". This intention is evidenced in Section 5649-3*d*; and when that Section speaks of "each of the several objects for which money has to be provided," I think it clearly follows that it refers to every object requiring the levy of taxes for this achievement.

This particular meaning of the first clause of Section 5649-3*d* then indicates clearly that an expenditure within the meaning of the phrase now under consideration may be any consumption of the public revenues, and that the word is not limited merely to the creation or satisfaction of contractual obligations.

From this then it follows that a "law voucher" may not be ultimately paid, at least unless there is an appropriation from which it may be paid. May then such voucher be honored by the issuance of a warrant? Here is a very doubtful question. Is there an "expenditure" within the meaning of Section 5649-3*d* when the auditor has honored a voucher by the issuance of a warrant? In my opinion

the mere issuance of a warrant does constitute an expenditure. The accounts of a county are kept in the office of the auditor. When he has issued a warrant it is his duty under Section 2568 General Code, and the first sentence of Section 2570 General Code (not quoted above) to enter the amount thereof against the fund upon which it is drawn. When he has done this the legal effect is just the same as if the county had parted with its money for the holder of the warrant has then a complete and enforceable claim against the county for the money and the warrant which he holds may pass from hand to hand like currency, and if not paid for want of funds draws interest like any negotiable instrument.

Upon reason then the word "expenditure" as used in Section 5649-3*d* must be held to apply to and signify the issuance of warrants by the county auditor. There is lack of weighty authority upon this point, but there are decisions of certain courts of Nisi Prius which are of interest here.

As I have already pointed out Section 5649-3*d* is in the main a paraphrase of Section 3797 General Code which formerly applied to municipal corporations. This Section was Section 43 M. C., adopted in 1902. In turn Section 43 M. C., was modeled after Section 1693 R. S., and Section 2690 h R. S., applicable wholly to the city of Cincinnati. Under these sections last above named the superior court of Cincinnati in the case of Ampt vs. Cincinnati 8 O. D., 475, 5 N. P. 98 and Stem vs. Cincinnati 9 O. D. 45, 6 N. P. 15 rendered opinions in which it was held that every provision thereof must be regarded as mandatory and that the broadest effect must be given to each and every phrase thereof. About the time these decisions were rendered there was in effect in Hamilton county a law very much like the Smith law in many particulars. This was the act which provided a board of control for that county and it consisted in part of Sections 1005 to 1009 R. S., repealed in 1904. These sections provided a method of annual estimates, levies and appropriations essentially similar to and possibly more explicit and workable than those of the Smith law. Under this law the case of State ex rel vs. Lewis 6 N. P. 198 was decided. In that case the plaintiff sought to enjoin a county auditor from issuing a warrant for a monthly installment of salary to be fixed by the common pleas judge—a case clearly within the rule of Sections 2570 and 2676 General Code then in force if they applied to Hamilton county. The court overruled the demurrer to the petition, in favor of which it had been argued that claims, the amount of which was fixed or determined by law or some authority other than the county commissioners, constitute an implied exception to the general rule that all expenditures must be made from and within the semi-annual appropriations. Jackson J., delivering the opinion of the court used the following language:

> "Nor are we prepared to say that even if the salaries were absolutely fixed by law, * * * the commissioners would be relieved from making detailed and specified appropriation covering the same. Section 1006 provides that the board of county commissioners and the board of control shall meet ten days after the first day of April in each year and determine (from the estimate furnished by the auditor) the total tax levy they deem necessary for that year; consequently, such estimates would be statistical, and necessary for an intelligent tax levy and for an appropriation. It is also worthy of notice that Section 1007 makes it the duty of the county commissioners to provide in their appropriations for every legitimate county expenditure. Consequently, if they refuse or fail to make the appropriation for the salary of an officer fixed by law, they could be compelled to do so by mandamus. Even if the salaries were absolutely fixed by

> law, we think the reasoning of the court in the case of Ampt vs. City and Stem vs. City * * * that detailed and specific appropriations are necessary for the purpose of advising the public and inviting public criticism, applies with full force here."

Unfortunately the court did not in its opinion deal with the question as to whether or not the section which authorized the auditor to issue warrants and the treasurer to stamp them "Not paid for want of funds" applied. Obviously, however if these sections did apply the decision would have had to be opposite from that reached by the court. That is to say, if these sections applied to Hamilton county at the time, it would have been lawful for the county auditor to issue his warrant in spite of the lack of appropriation, and he would not have been enjoined from so doing. The eminence of counsel who represented the auditor in this case induce me to believe that either the question as to the application of the sections now under consideration was presented to the court and simply ignored by the court in its opinion, or that in the opinion of these eminent counsel themselves it was not worth presenting to the court. This case then in spite of its silence upon the exact point and is in the nature of authority for the conclusion already reached by me that the word "expenditure" as used in Section 5649-3*d* applies at least to the issuance of a warrant by the auditor.

From all the foregoing it necessarily follows that if the meaning of the word "expenditure" be that which I have given to it, this portion of Section 5649-3*d* is wholly inconsistent with those portions of Sections 2570 and 2676 General Code which authorize the issuance of warrants against exhausted funds. These sections and parts of sections are therefore to be regarded as impliedly repealed inasmuch as both of the constructions above suggested by which they may be reconciled with Section 5649-3*d* must be rejected and inasmuch further as there is no other construction by which such a reconciliation can be effected.

In my opinion, therefore, the county auditor will after appropriations are made under the Smith law be without authority to issue warrants in the absence of funds in the treasury appropriated for the purpose of paying such warrants. The effect of Section 5649-3*d* upon Section 2676 may be regarded as an academic question inasmuch as the commissioners would undoubtedly have authority to provide, with or without the provisions of this section, modified as above suggested, by appropriation for the payment of outstanding warrants stamped "Not paid for want of funds".

My answer then as to your first question is that the language of Section 5649-3*d* to the effect that "all expenditures within the following six months shall be made from and within such appropriations and balances thereof," is a limitation upon the power of the county auditor to issue warrants, and that such warrants may be issued only when there is money in the treasury to the credit of the fund, and lawfully appropriated by the county commissioners in their semi-annual appropriation resolution for the purpose for which the expenditure is to be made.

I recall that I have given to Hon. Sholto M. Douglas, Prosecuting Attorney of Pike County an opinion in which I advised that Sections 2676 and 2570 General Code are in effect. This opinion was rendered without consideration of the Smith law and was correct, in my judgement, when it was given, for the reason that at that time, the time for making the first semi-annual appropriation required by Section 5649-3*d* to be made had not yet arrived.

Such a holding does not make any allowance for unforeseen emergencies; but by adopting the procedure which is expressly authorized in the Municipal Code as to municipal councils, the commissioners may avoid financial embarrasment on account of the occurence of any such emergency; that is to say, by

providing a contingent appropriation, the purpose of which shall be to supply deficiencies in any of the detailed appropriations caused by the happening of unforeseen emergencies and possible contingencies which ought to be properly cared for.

Your second and fourth questions may properly be considered together. I shall, therefore, take up your third question before dealing with your second question.

Here, the answer to your inquiry is made clear by comparing Section 5649-3*d* with Section 3797 General Code which is repealed by implication. In Section 3797 is found the following language:

> "The council shall make appropriations * * * from the moneys known to be in the treasury, or *estimated to come into it during the six months next ensuing* from the collection of taxes and all other sources of revenue."

By comparison it at once appears that the italicized portion of the above quoted provision has been left out of Section 5649-3*d* although the remainder of this portion of the section is almost verbatim quoted from section 3797. In making this verbal change the legislature could not have intended anything excepting that moneys estimated to come into the treasury during the six months next ensuing should not be available for appropriation. The clear intent of Section 5649-3*d* is, therefore, that no money shall be appropriated which is not in the treasury at the time the appropriating resolution (of the county commissioners) is adopted.

Considering your second and fourth questions it may be well to repeat the quotation of the last phrase of the section which is as follows:

> "but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, *exclusive of receipts and balances.*"

At the outset permit me to state that the above quoted portion of the section is grammatically separate from all that precedes. That is to say, so far as the sense of the section is concerned this portion thereof might have constituted a separate sentence, or, indeed, an entirely distinct section. I mention this because from the order in which you state your questions, it occurs to me that perhaps you may have suspected that the last five words of the section modify or qualify the provisions respecting the limitation of expenditures to the appropriations and balances thereof, immediately preceding the beginning of the quotation above made. This is not the case for the reason just stated.

Further analyzing the last clause of the section, it becomes apparent, I think, that it is to be divided into two parts, having regard to its meaning and arrangement. The first of these parts relates to the purpose for which an appropriation shall be made, and the second relates to the amount of the appropriation. In connection with your second question then, some of the language of the last phrase of the section may be omitted from consideration and the same read as follows:

> "No appropriation shall be made * * * for a greater amount for such purpose (set forth in the annual budget) than the total amount fixed by the budget commissioners exclusive of receipts and balances."

I think it is quite clear upon the analysis of the section which I have tried to make that the phrase "exclusive of receipts and balances" modifies something in the language above quoted and nothing else in the section. Having regard now to the syntax of the clause it appears that the participle "exclusive" must modify one of four nouns in the quotation, viz, "appropriation," "amount," "purpose" and "amount" again. It is obvious that the noun "appropriation" is not the one limited by this phrase. This follows because the first clause of the section provides that appropriation shall be made from "moneys arising from the collection of taxes and *all other sources of revenue*". It is clear, therefore, that the appropriation cannot be "exclusive of receipts and balances" but must include receipts and balances with all other sources of revenue. For similar reasons the phrase cannot be regarded as modifying the noun "purpose". As already indicated the noun "amount" occurs twice in the sentence. The *amount* of the appropriation is not to be greater than the *amount* fixed by the budget commission. It really is of no great importance as to which of these two identical words the phrase now under consideration modifies. For the sake of accuracy, however, the exact grammatical construction of the sentence ought to be ascertained.

A clue to the meaning of this provision is to be found, if anywhere, in the provisions of the same act which defines the powers and duties of the budget commission. For, manifestly, if it should be ascertained that the budget commission has anything to do whatever with the receipts and balances as the term is used in Section 5649-3*d*, then it would necessarily follow that the phrase "exclusive of receipts and balances" must have been used as modifying the first word "amount."

The duties of the commission are defined in Section 5649-3*c* but certain provisions of Section 5649-3*a* must be taken into consideration in connection with this question. I quote the provisions of these two sections which are apposite here.

Section 5649-3*a*.

"* * * Such annual budgets shall specifically set forth:

(1) The *amount to be raised* for each and every purpose allowed by law for which it is desired to raise money for the incoming year.

* * * * * * * *

(6) The amount of money received from any other source and available for any purpose in each of the last five fiscal years, together with an estimate of the probable amount that may be received during the incoming year, from such source or sources." * * *

Section 5649-3*c*.

"The auditor shall lay before the budget commissioners the annual budgets submitted to him * * *. The budget commissioners shall examine such budgets * * * * * and ascertain the *total amount proposed to be raised* in each taxing district * * *. If the budget commissioners find that the total amount of the *tax to be raised* therein does not exceed the amount authorized to be raised in any * * * taxing district * * * the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any * * * taxing district * * * the budget commissioners shall adjust the various *amounts to be raised* so that the total amount thereof shall not exceed in any taxing district the sum authorized *to be levied*. In making such adjustments the budget commissioners may revise and change the *annual estimates* contained in such budgets, * * *. The

budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each taxing district within the limits provided by law. * * *"

It seems clear to me that the *action* of the budget commissioners is intended and in the nature of the case could only have been intended to affect the amount estimated as necessary to be produced by taxation. With sources of revenue other than taxation the budget commissioners have nothing whatever to do excepting in so far as the probable amount of income from other sources may be used by them in determining the necessity of the taxing district from the standpoint of taxation. That is to say, the estimated revenues from other sources are required to be reported to the budget commission, and the commission must use such information for the purpose of determining the amount which it will be necessary to raise by taxation for the purpose for which such revenues are available in case the limitations of the act have to be enforced in a particular district.

It follows from this that the budget commissioners do not fix the amount which may be *expended* by the authorities of a taxing district for a given purpose, but only the amount which may be *levied* for and raised by taxation. It would therefore be misnomer to say that the budget commissioners fix the amount of an appropriation.

From what has been said it follows that the exact meaning of the last clause of the section is that the appropriating authorities, who must at all events confine their appropriations to the amounts in the treasury, may, nevertheless, and in the case of every fund derived in part from sources of revenue other than taxation, would have to exceed the amount fixed by the budget commissioners as being the amount to be raised by taxation for such purposes. For example, a municipal electric light plant, at the current rates, might fail to be self-supporting, thus necessitating a levy each year on the grand duplicate for the purpose of the general expense of the plant. The budget commissioners have authority to fix the amount of this levy. I cannot find, however, in any of the sections of the Smith law authority on the part of the budget commissioners to fix the amount which the municipality may expend on the plant, having regard to the fact that most of the money to be expended in the operation of the plant is to be derived from revenues from the sale of current.

The limitation which we are now discussing then operates practically in this in this way: At the beginning of a half yearly period the amount of money in the treasury to the credit of a certain fund is definitely ascertained. The receipts from tax settlements can also be definitely ascertained. In case the amount in the treasury is greater than the receipts from the tax collection the difference consists of "receipts and balances" of which the statute speaks. Now the fund may have been levied to provide for several distinct purposes. The budget commission has fixed the amount to be raised by taxation for each of these specific purposes. The appropriating authorities cannot appropriate a greater amount from the moneys raised by taxation for one of these purposes than that fixed by the budget commission at the expense of appropriating a lesser amount for one of the other objects to be provided for out of the same fund. If, however, there are "balances" the appropriating officers may do as they please with such balances within the purposes mentioned in the budget. Heretofore I have spoken of the phrase "receipts and balances" as if it referred exclusively to revenues derived otherwise than from taxation. This is not the entire meaning of the word as is evident from Section 5648-3*e* which provides in effect that an unexpected appropriation

or balance of appropriations remaining at the end of the year shall revert to the general fund and shall then be available for such purpose as the authorities may see fit to apply them to.

A further difficulty arises from the use of the word "receipts". It would seem that in using this word the general assembly has expressed an intention inconsistent with that embodied in the provision that appropriations shall be made "from the moneys known to be in the treasury from * * * all * * * sources of revenue". The primary meaning of the phrase "receipts and balances", as a whole, refers to an indefinite amount which is to come into the treasury from miscellaneous sources during a certain period of time. It has become customary for the general assembly in appropriating moneys paid into the general revenue fund of the state, and required by statute to be applied to the support of some particular board or officer, such as, for example, the public service commission, to appropriate "receipts and balances" for the biennial or annual period. In so doing it is understood that the legislature sets aside no specific amount but simply the amount that will go into the treasury during the period from the source of revenue at the command of the recipient of the appropriation plus the balance remaining unexpended at the date of making the appropriation. If the legislature intended to use the phrase in this sense in Section 5649-3*d* then of course there is a flat inconsistency between this last phrase and the phrase above referred to. I do not think, however, that this was the intention of the legislature. I think the word "receipts" is intended to refer to amounts which have come into the treasury from sources other than taxation; and the word "balances" is intended to refer to the amount in the treasury to the credit of the fund at the beginning of a half yearly period, in excess of the amount raised by taxation for that period. So to hold does no violence to the primary meaning of either of these words and is inconsistent only with the technical meaning that has become attached to the phrase "receipts and balances" as used in the appropriation laws of the state; on the contrary this holding harmonizes all parts of the section and furnishes a definite guide to the taxing officers of the state in the administration of their affairs under the Smith one per cent. law.

Coming now to the specific questions embodied in your second and fourth questions, I beg to state that an appropriation in excess of the amount fixed by the budget commission may legally be made if the excess consists of balances in the treasury at the beginning of the half yearly period or of revenues therein derived otherwise than from taxation. The meaning of the phrase "exclusive of receipts and balances" is that the appropriating authorities may appropriate of the proceeds of taxation, so much only for a definite purpose as has been fixed by the budget commission, and that from revenues in the treasury at the time of the appropriation derived otherwise than from taxation and from balances remaining on hand and unexpended during the last half yearly period, the authorities may appropriate any amount whatever for any purpose set forth in the budget.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

111.

MAYOR'S COURT—FEES ILLEGALLY TAXED FOR CHIEF OF POLICE IN STATE CASES—CANNOT BE PAID INTO CITY OR COUNTY TREASURY.

Illegal fees payable to a chief of police taxed by a mayor, in state cases, under a misunderstanding by that official as to his right to do so under the statute, cannot be paid by the mayor into the city or county treasury. They must remain in the hands of the mayor until claimed by the parties who have the legal right to their possession, namely: The parties against whom the fees were assessed.

COLUMBUS, OHIO, February 7, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under favor of February 2, 1912, you ask further in the matter of the opinion of January 13, 1912, rendered to your department, as follows:

> "Under date of January 13, 1912, an opinion was rendered by you advising as to the disposition of moneys collected by the mayor of a city not having a police court for fees taxed in the name of the chief of police prior to the amendment of June, 1911, said fees being collected of defendants prosecuted in said court for violation of state laws. We simply desire to ask if due consideration has been given to the fact that the mayor of said city, in the exercise of a judicial function, construed the law so as to assess and collect fees in state cases taxed in the name of the chief of police and that, having collected such fees in his official capacity under color of his office, whether or not he would not be required to pay the same into the county treasury (or city treasury) monthly at the time other moneys are so deposited (see Section 4270, G. C.)."

The levy and collections of the fees referred to and which were held illegal in the opinion of January 13, 1912, no doubt was due in almost all cases to a misconstruction of the statute and under the belief that they were legally chargeable.

Section 4270, General Code, referred to by you, provides as follows:

> "All fines and forfeitures collected by the mayor, or which in any manner comes into his hands, *and all moneys received by him in his official capacity, other than his fees of office, shall be by him paid* into the treasury of the corporation weekly. At the first regular meeting of the council in each and every month, he shall submit a full statement of all such moneys received, from whom and for what purpose received, and when paid over. All fines, penalties, and forfeitures collected by him in state cases shall be by him paid over to the county treasurer monthly."

The above section was known as Section 1536-643, Rev. Stat. and was in force in almost precisely its present form when the decision cited in support of the opinion of January 13, 1912, were rendered. This section was not directly passed upon in these cases. However, in Portsmouth vs. Milstead and Baucus 18 Cir. Dec. 384, cited in the former opinion, a similar section as to payment of fees

into the city treasurer, to wit, Section 1536-633, Rev. Stat., was passed upon. The part of said section construed is now found in Section 4213, General Code, which provides as follows:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, *all fees pertaining to any office shall be paid into the city treasury.*"

The decision of Portsmouth vs. Milstead and Baucus, supra, holds that the city has no right to such fees as against the chief of police, and the rule would be the same as against the mayor. The decision in City of Delaware vs. Mathews, 13, Cir. Ct. N. S., 539, holds that the chief of police has no right to them as against the city, and the rule would be the same as against the mayor. As held in that case, the claimant must stand upon the strength of his right, and not upon the weakness of that of his adversary.

We cannot presume that the courts, in passing upon this question, have not taken into consideration said Section 4270, General Code. The presumption is that they have taken into consideration all the statutory law bearing upon the case.

Said Section 4270, General Code, pertains to legal fees and not to illegal fees. It does not authorize the payment into the city treasury of fees illegally charged and collected by a mayor in state criminal cases, nor does it authorize such payment into the county treasury. The mayor is required to pay "all fines, epnalties and forfeitures" into the county treasury if they arise out of state cases. Nothing is said as to costs and fees.

Illegal costs charged and collected by a mayor, remain in the possession of the person who has such costs, until claimed by a person or corporation that can show a superior right thereto.

There is no reason to modify the opinion of January 13, 1912, as to the disposition of said costs.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

148.

MORTGAGE AND SALARY LOAN BROKERS—LICENSE BY STATE AND BY MUNICIPAL CORPORATIONS—CONSISTENCY OF STATUTES —STATE POLICY.

The act of 102 *O. L. providing for the regulation and license of chattel mortgage and salary loan brokers by the state is not inconsistent with nor does it repeal by implication, Section* 3470 *General Code delegating to municipal corporations the right to regulate and license such business. Municipal corporations in exercising such powers however, must keep within the policy adopted by the state.*

COLUMBUS, OHIO, February 16, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under favor of January 20, 1912, you ask an opinion of this department upon the following:

> "May a city, by its council, under powers granted in Section 3670 of the General Code, regulate and license chattel mortgage and salary

loan brokers by charging a license fee against those engaged in such business?

"This question arises by reason of the enactment of a state regulation of such businesses under 102 O. L., pages 469-471, which law provides a license fee of $10.00 to be paid to the Secretary of State."

Section 3670, General Code, as amended in 101 Ohio Laws, page 232, provides as follows:

"To regulate and license manufacturers and dealers in explosives, pawnbrokers, *chattel mortgage and salary, loan brokers, peddlers,* public ballrooms, scavengers, intelligence offices, billiard rooms, bowling alleys, livery, sale and boarding stables, dancing or riding academies or schools, race courses, ball grounds, street musicians, second hand dealers, junk shops and all persons engaged in the trade, business or profession of manicuring, massaging or chiropody. *In the granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient.*"

The first paragraph of Section 6346-1, General Code, 102 Ohio Laws, 469, reads:

"No person, firm or corporation except banks and building and loan associations shall engage or continue in the business of making loans upon chattels or personal property of any kind whatsoever or of purchasing or making loans upon salaries or wage earnings without first having obtained a license so to do from the Secretary of State."

Section 6346-2, General Code, 102 Ohio Laws, 469, provides:

"Application for license to conduct such business must be made in writing to the Secretary of State and shall contain the full name and addresses of applicants, if natural person, and in case of firms or incorporated companies, the full names and addresses of the officers and directors thereof and under what law or laws incorporated, the kind of business which is to be conducted, whether chattel mortage or salary loan; the place where such business is to be conducted and such other information as the Secretary of State may require. The fee to be charged for said license shall be ten dollars ($10.00) per annum and such amount must accompany the application. Each license granted shall date from the first of the month in which it is issued and shall be granted for the period of one year, subject to revocation, as provided in this act, and such license shall be kept conspicuously displayed in the place of business of the licensee."

Section 6346-6, General Code, provides as set forth in 102 Ohio Laws, 470:

"Any person, firm or corporation, or any agent, officer, or employe thereof, violating any provision of this act, or that carries on the business of making loans upon chattels or personal property of any kind whatsoever, or of purchasing or making loans upon salaries or wage earnings without first obtaining a license as provided in this act shall for the first offense, be fined not less than fifty dollars ($50.00) nor more than two hundred dollars (200.00); and for a second offense not less than

two hundred dollars ($200.00); and for a second offense not less than ($500.00), and it shall thereupon become the duty of the Secretary of State upon such second conviction to revoke any license theretofore issued to such person, firm or corporation."

The provisions of Section 3670, General Code, were passed upon by the Supreme Court of Ohio in two decisions reported in the 81st Ohio State reports.

The first syllabus in case of Sanning vs. City of Cincinnati, 81 Ohio St., 142, reads:

"The state may, in the exercise of the police power, license and regulate chattel mortgage and salary loan brokers; and it may delegate authority to do so to municipal corporations."

In cases of French vs. City of Toledo and Beck vs. City of Toledo, 81 Ohio St., 160, Summers, J., says at page 166:

"The statute paragraph 30 of Section 1536-100, Revised Statutes, authorizes municipal corporations to regulate and license 'chattel mortgage and salary loan brokers'."

Section 3670, General Code, authorizes municipal corporations to regulate and license chattel mortgage and salary loan brokers, and the provisions of said section have been held valid by the Supreme Court of Ohio.

Since the passage of said section the act in 102 Ohio Laws 469, has been enacted, by which act the state has exercised its power to license chattel mortgage and salary loan brokers. This latter act does not in any way refer to the right of a municipal corporation to also license such chattel mortgage and salary loan brokers. The question arises, does the act requiring a state license repeal, by implication, the authority granted to municipalities to also license such brokers? Or, in other words, will the securing of a state license exempt the holder thereof from liability to secure a municipal license, if such license is required by such municipality in which the broker carries on his business?

In the case of Canton vs. Nist, 9 Ohio St., 439, Scott, J., says at page 440:

"But the powers here conferred are expressly limited, in the preceding part of the same section to such ordinances as are not inconsistent with the laws of this state.' And this limitation, even if not expressed, must, doubtless, be regarded as implied in all such general grants of power; for it must be presumed that the legislature would not intend to give a corporation the power of contravening and defeating state policy by ordinances inconsistent with the laws of the state. Is, then, the second section of this ordinance consistent with the policy of the the state as indicated by her legislation?"

In case of State vs. Pendergast, 6 Cir. Dec. 807, Smith, J., says at page 810:

"* * * But when it is attempted, as it seems to us, is done here by this regulation, to prevent persons, who, under the laws of the state are authorized to practice their professions (even if they cannot recover for their services), without liability under any of the criminal laws, from doing so in Cincinnati, unless with the sanction and approval of one or more officers of the corporation, and make them liable to fine

and imprisonment if they do attempt to practice without being so registered, that this is going beyond the power conferred upon municipal corporations by the state, and that such regulations cannot stand. *The general assembly itself having assumed to legislate upon the subject, and by general law made provision as to persons who are authorized to practice medicine in the state, unless specific and express power has been conferred upon the municipal corporation to impose additional restrictions upon, and deprive them of the right to do so, unless with the consent and approval of an officer of the city, to be enforced by fine and imprisonment, such regulations cannot be upheld, and we think no such power has been conferred.*"

In the case under consideration express authority has been granted municipal corporations to license and regulate chattel mortgage and salary loan brokers. The right of the state to grant to municipal corporations the power to make additional restrictions upon a subject matter upon which the state has itself acted, is recognized in State vs. Pendergast, supra.

As stated in Canton vs. Nist, supra, the ordinance of council must be consistent with the policy of the state.

In the following cases requirements that the same person or firm shall secure a license from both the state and the municipal corporation have been upheld.

In Ex parte L. Siebenhauer, 14 Nev. 365, the syllabus, reads:

"The city of Virginia, under its charter may require a license for carrying on any trade, business or profession, although an act of the legislature also requires a license to be taken out for carrying on the same trade, business or profession within the county, and can enforce a penalty in case of a refusal to take out such license.

Hawley, J., says on page 371:

"The city of Virginia, authority therefor being given in its charter, may require a license for conducting or carrying on trade, business, or profession within the corporate limits, although an act of the legislature also requires a license to be taken out for conducting or carrying on the same trade, business or profession within the county, and can enforce a penalty in case of refusal to take out such license. (1 Dillon on Municipal Corporation 53; Simpson vs. Savage, 1 Mo. 359; Ambrose vs. State 6 Ind. 351)."

The syllabus in case of Simpson vs. Savage, 1 Mo. 359, reads:

"An auctioneer, in the City of St. Louis, is compelled to take a license from the state, as well as the corporation, or be liable to a penalty."

On Page 360, McGirk, Ch. J., says:

"This act of incorporation may well stand, without infringing on the act respecting the state revenue. And it is a rule of law that where there are several statutes on the same subject they are to be taken as one act. In this case these two acts, so far as they respect auctions, are one act, and may well stand together. *Viewing the statutes*

in this light, the consequence is, that the legislature have provided and required two licenses to be taken by auctioneers, if the corporation thinks fit to ordain it necessary on their part.

"The corporation may ordain a penalty for vending at auction without their license: This they have the power to do; yet auctioneers must look in the statute book for other penalties, and if he vend at auction, without complying with the revenue law also on the subject, he incurs another penalty, so that the 12th section of the act of incorporation does not repeal the act of 1820, on this subject; nor is it inconsistent; they both stand together.

"The auctioneer, to protect himself completely, must have a license from corporation, and also from the state collector."

If the state legislature had enacted the law requiring a state license, and afterwards granted authority to municipalities to also require licenses for the same trade or business, there would be no question as to the authority of the municipality. Is the rule different when the law requiring a state license was passed later than the act granting such authority.

Repeals by implication are not favored. There is nothing in the act of 102 Ohio Laws, 469, to show that the authority of the municipality to require licenses from the class of brokers under consideration has been taken away. If the two provisions are consistent they must stand together. That they are not inconsistent is shown by the holding in 14 Nev. 365, and 1 Mo. 359, supra. The fact that the failure to secure any license may subject the offender to a penalty under both the state and the municipal regulations, does not make them inconsistent, nor does it subject the offender to two punishments for the same offense. In one case he would be subject to a penalty for the violation of a state law and in the other for a violation of the municipal ordinance. That the same act may subject the offender to penalties for the violation of more than one law is recognized by the courts.

On page 70, in the case of D. T. I. Railway Co., vs, State, 82 Ohio St., 60, Summers, C. J., says:

"The same act or series of acts may constitute an offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each government." Cross vs. North Carolina, 132 U. S., 131.

The authority granted to municipal corporations by Section 3670, General Code, to license and regulate chattel mortgage and salary loan brokers, has not been specifically taken away by the act of 102 Ohio Laws 469, requiring such brokers to take out a state license. A requirement that such brokers shall take out both a state and a municipal license is not against any policy of the state as shown by any legislative enactment. The state law and the municipal ordinance may stand together and both be complied with. They are not inconsistent but are additional requirements.

A municipal corporation may require a license from chattel mortgage and salary loan brokers who carry on such business in such municipality.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

152.

OFFICES COMPATIBLE—MEMBER OF BOARD OF REVIEW AND EXAMINER OF COUNTY TREASURY—"BUSINESS OR EMPLOYMENT".

So long as the duties of examiner of the county treasury provided for in Section 2704, do not cause interference with the duties or office hours of the position of member of the board of review, the positions of both offices may be filled and their compensation received by the same individual.

COLUMBUS, OHIO, February 26, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:— I beg to acknowledge receipt of your communication of February 16th, wherein you ask:

> "May a member of the city board of review receiving a regular salary of $150.00 from the county for such services, legally be appointed by the probate judge to examine the county treasury under authority of Section 2700, et seq., and receive the compensation for that service provided by Section 2704, in addition to such regular monthly salary?"

Section 5621, General Code, provides:

> "The county commissioners shall fix the salary of the members of the board of review, which shall be not less than three dollars and fifty cents per day for each day the board is in session, and not to exceed two hundred and fifty dollars per month for the time such board is in session. Such salary shall be paid monthly out of the county treasury upon the order of said board and the warrant of the county auditor.
>
> "The board shall meet in rooms provided by the county commissioners, and when in session shall devote their entire time to the duties of their office. No member thereof shall be engaged in any other business or employment during the period of time covered by the session of the board."

While I do not believe there be much contention that an examiner appointed by the probate judge, under Section 2700, is an officer in the true sense of the word; still, whether he is or not, there woould be no incompatibility, either statutory or otherwise, in one person's performing the duties of examiner and member of the board of review.

Anderson's Law Dictionary states:

> "Offices are incompatible and inconsistent when, being subordinated and interfering with each other, they produce a presumption that they cannot be executed with impartiality."

Meecham on Public Offices, Section 422, lays down the rule that:

> "It seems to be well settled that the mere physical impossibility of one person's performing the duties of the two offices, as from the lack of time or the inability to be in two places at the same time is not the incompatibility here referred to. It must be an inconsistency in the functions of the two offices."

In the case instanced there is no connection between the duties of the two positions; one, in no way, is a check upon the other. So, even if they were offices, they would not be incompatible.

Section 5621, supra., provides, among other things: "when in session shall devote their entire time to the duties of their offices."

The Century Dictionary defines "session" as,

> "The sitting together of a body of individuals for the transaction of business; * * * the actual assembling of members of these or any similar body for the transaction of business."

It is my opinion that when the members are assembled for business, which would, of course, be at such hours during the day that they allot for the transaction of the daily affairs of the board, they are then "in session", and the members thereof are required to devote such time as is found necessary for a faithful and honest discharge of their legal duties. The duties of the board must receive primary attention and all other matters must be subordinated; still, the phrase "entire time" must not receive a strict literal construction, and so long as the duties of the board are not interfered with the statute meets with full requirement. The officer is not prohibited from temporary absence when such absence is not detrimental to public interests and does not evidence neglect of his official duties.

The last clause of Section 5621, supra, reads:

> "No member thereof shall be engaged in any other business or employment during the time covered by the session of the board."

This, too, should receive a liberal interpretation. According to Anderson's Dictionary "business" and "employment" are synonymous terms; and "business" is defined as "that which busys or occupies one's time, attention and labors as his chief concern; that state of being busy or actively employed".

In Teuttings vs. Harris, 19 Pas. 286, the court says:

> "Business is that which busys or occupies the time, attention or labor of one as his principal concern whether for a longer or shorter term."

While I do not think that a member of a board of review should give his time and attention to other matters of business or social duties during the hours fixed as office hours, or such hours as are required for the daily official acts of the board, yet, as there is nothing in your inquiry evidencing that the services as an examiner of the county treasury interfere with the duties of the person as a member of the board of review; and further, since the compensation as a member of the board of review is a monthly salary, and not a per diem, I am of the opinion that a member of a board of review, having performed the services of an examiner of the county treasury, under authority of Section 2700, et seq., is entitled to receive the compensation as such examiner, provided by Section 2704 and that this interferes in on way with the receipt by him of his regular monthly salary as a member of the board of review.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

166.

LIABILITY OF CITY FOR SALARY OF EXISTING OFFICE OF CITY EXAMINER FOR WHICH APPROPRIATION NOT MADE—DUTY OF CITY AUDITOR—POWERS OF COUNCIL AND SERVICE DIRECTOR TO FIX SALARIES OF EMPLOYES—CIVIL SERVICE—CLASSIFIED SERVICE—ILLEGAL APPOINTMENT BY SERVICE DIRECTOR.

When city council has by ordinance attempted to abolish the office of city examiner, which ordinance was vetoed by the mayor and not passed over his veto, council is obliged to make the usual appropriation for city examiner, and its failure so to do does not relieve the city of liability for the salary of said city examiner.

The auditor, however cannot allow a voucher drawn for such salary for the reasons that there has been no funds appropriated for that purpose, and the official's remedies must be sought in suit against the city or in mandamus proceedings to compel the appropriation.

The service director has power to create sub-departments and fix the number of employes therein but cannot fix salaries, the latter power being vested in the council by virtue of Section 4214 *General Code.*

The service director may not summarily dismiss persons holding positions in the engineers department who had been appointed by the civil service commission, upon examination, as members of the classified service.

Persons appointed without examination to such positions after a presumed dismissal of the legal incumbents by the commission are not entitled to salaries and vouchers for the same may not be honored by the city auditor.

COLUMBUS, OHIO, February 14, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under request of January 6, 1912, you ask an opinion of this department upon the following:

> By request of the city auditor of Dayton, Ohio, we submit for your written opinion the following questions:
>
> "1. City council, by ordinance, abolishes the office of city examiner; mayor vetoes ordinance; council does not pass an appropriation for said examiner.
>
> "Should voucher from mayor, by whom examiner is appointed, be honored by city auditor?
>
> "2. The service director creates a new office in the street department under title of clerk or secretary to superintendent of streets and fixes salary at $1,200.00 per year. Council has taken no action in the matter.
>
> "Should city auditor honor voucher for salary of said employe?
>
> "3. The service director has dismissed several persons holding positions in the engineer's department and appoints others in their stead. Men dismissed had passed examination and were appointed from the eligible list under civil service. Men employed have not taken examination. There are no charges filed against employes dismissed, they reporting for duty every morning.
>
> "Should the city auditor honor a voucher drawn in favor of new employes?"

In answering your first question it is assumed, for this opinion, that an allowance was made for the salary of the city examiner in the annual budget of the city, and that the same was allowed by the budget commission under the provisions of the one per cent. tax law. Council has failed to include said salary in the semi-annual appropriation ordinance.

The duty of the city auditor in such case is determined by the provisions of Section 4285, General Code, which reads:

> *"The auditor shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose,* or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

The fifth and sixth syllabi in case of State vs. Boyden, 10 Cir. Dec., 137, are as follows:

> "If there are not sufficient funds to the credit of the account upon which the voucher is drawn, the auditor is justified, under Section 1765*a*, Rev. Stat., which is mandatory, in refusing to draw his warrant until sufficient funds are on hand to meet the same.
>
> "And if the voucher is not drawn on any particular fund, or on the proper fund the auditor is justified in refusing to draw his warrant until a proper voucher is presented."

At Section 824, Throop on Public Officers, says as follows:

> "So, a mandamus will not lie, to compel a public financial officer to pay a demand where no appropriation has been made therefor; or where a lawful and regular warrant or other voucher therefor has not been made."

The above section of the General Code requires the auditor to keep all expenditures within the appropriation of each particular fund. He is to be governed by the appropriation ordinance as to the amounts in each respective fund. As there was no appropriation made by council to meet the salary of the city examiner there was no fund from which the auditor could allow payment of said salary. In compliance with this statute the auditor will be justified in refusing to honor the voucher for the salary of the city examiner. This conclusion is based upon the fact that the position of the city examiner was in existence prior to the allowance of the annual budget.

However, the failure of council to make an appropriation for the salary does not of itself abolish the position of city examiner, or dismiss the occupant thereof.

The first syllabus in case of Magner vs. St. Louis, 179 Mo., 495, reads:

> "If a public officer has been unlawfully removed and is otherwise entitled to recover his salary for the unexpired part of his term, *the fact that there had not been enough money appropriated to pay him will not defeat his claim."*

The position in the above case was that of inspector of buildings and was created by ordinance.

The second and third syllabi in case of City of Chicago vs. Luthardt, 191 Ill., 516, are as follows:

> "A municipal officer, regularly chosen under the civil service act who is illegally dismissed from his office and prevented from performing its duties by the chief of police, who acted under proceedings of the common council, had at his request, *failed to make any appropriation for the salary of the office, may, upon re-instatement by mandamus, recover back salary from the city, where it has not been paid to* any one performing the duties of the office.
>
> "The legal right to an office carries with it the right to the salary or emoluments of the office."

Section 856 of Mechem on Public Offices and Officers, reads in part as follows:

> "An act, however, fixing the officer's salary at a given sum, is not, unless that clearly appears to be the intention, impliedly repealed or amended by one subsequently passed appropriating for its payment a smaller sum, and the officer is not estopped from recovering the greater sum by the fact that he has accepted the former."

Section 461 of Throop on Public Offices, reads in part as follows:

> "Where the salary of an officer is fixed by law, and the legislature appropriates a small sum for his salary, without any provision declaring it to be in full for his salary, or repealing the provision fixing his salary; this is merely an insufficient appropriation, not a reduction, and the officer is still entitled to the difference. So the appropriation, for the payment of the salary of a municipal officer, of a smaller sum than he had before received does not itself reduce his salary. And not only does an insufficient appropriation fail to effect a reduction of the salary, but the officer is not precluded from claiming the difference, by his continuance to serve and accepting the smaller sum."

In the case at bar the position of city examiner was, no doubt, legally created, and the occupant of the position was legally appointed thereto. Council attempted to abolish the position by ordinance. The ordinance was vetoed by the mayor and was not passed over his veto. It did not become effective and the position of city examiner was not abolished. It is still a legal position. Council, by failing to make an appropriation for the salary of the position, could not thereby abolish the position, unless the appropriation ordinance clearly shows such an intent. If the failure to make an appropriation had the effect of abolishing the position it would result in council doing indirectly that which it was unable to do directly by the passage of the ordinance which was vetoed by the mayor. The position has been legally created and the occupant has been legally appointed and has not been dismissed. The city is therefore liable to him for the salary which has been heretofore fixed for the office.

Section 3797, General Code, prescribes the duties of council as to appropriations as follows:

> "At the beginning of each fiscal half year, *the council shall make appropriations for each of the several objects for which the corpora-*

tion has to provide, or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. *All expenditures within the following six months shall be made from and within such appropriations and balances thereof."*

A question arises as to the proper remedy to secure payment of the salary. Whether it must be by suit for the collection of the salary as it becomes due and payable, or by mandamus to compel council to make the necessary appropriation will not be passed upon, until the question is properly presented with all the facts.

It appears from your second inquiry that the director of public service has created a new office and has fixed the compensation therefor without any action of council.

Section 4214, General Code, provides:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, *and shall fix by ordinance or resolution their respective salaries and compensation,* and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor"

Section 4327, General Code, provides:

"The director of public service may establish such sub-departments as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons necessary for the execution of the work and the performance of the duties of this department."

The first syllabus in case of State vs. Lothschultz, 20 Low Dec. 390, reads:

"A director of public service of a city has no power, either under Sections 139, 140 or 141 of act 99 O. L., 563 (Gen. Code 4324, 4325, 4326), the Payne law, giving him the management and supervision of his department to fix salaries or compensation of employes therein *but the exclusive right to fix salaries and compensation thereof is reposed in the city council Section 227 of such act (Gen. Code* 4214)."

The above case was affirmed by the Circuit Court May 19, 1910.

There is no authority granted to the director of public service to fix the salary or compensation of the employes in his department. That authority is vested in council by Section 4214, General Code. As council has not fixed the salary, none can be paid and the auditor is not authorized to honor any voucher for the same.

Your third inquiry covers the right of dismissal of employes in the classified service.

Section 4479, General Code, provides:

"The civil service shall be divided into classified and unclassified service. The unclassified service shall include the positions of officers

elected by the people or appointed to fill vacancies in offices filled by popular election, or whose appointment is subject to confirmation by the council, or who are appointed by any state officer or by any court, employes of the council, persons who by law are to serve without remuneration, *persons who are appointed to positions requiring professional or technical skill as may be determined by the civil service commission;* persons appointed or employed to give instruction in any educational institution, persons appointed by any board or officers supervising elections; persons who as members of a board or otherwise, have charge of any principal department of the government of any city, the head or chief of any division or principal department relating to engineering, waterworks street cleaning, or health, the chief of the police department, the chief of the fire department, the superintendent of any workhouse, house of refuge, infirmary, or hospital, the librarian of any public library, private secretaries, deputies in the office of the city auditor and city treasurer, unskilled laborers, and such appointees of the civil service commission as they may by rule determine. The classified service shall comprise offices and places not included in the unclassified service."

The officer's in question who have been discharged are in the engineering department, and neither of them is at the head of the principal department relating thereto. It appears further that they have not been placed in the unclassified service by the civil service commission as positions requiring technical or professional skill. The converse appears to be the situation. They have been placed in the classified service, and were appointed from the list of the civil service commission after examination. These positions have been properly placed in the classified service.

Section 4485, General Code, prescribes how such employes shall be removed, as follows:

"No officer or employe within the classified service shall be removed reduced in rank or discharged, except for some cause relating to his moral character or his suitableness to perform the duties of his position, though he may be suspended from duty for a period not to exceed thirty days, pending the investigation of charges against him. Such cause shall be determined by the removing authority and reported in writing, with a specific statement of reasons, to the commission, but shall not be made public without the consent of the person discharged. Before such removing, reduction, or discharge, the removing authority shall give such person a reasonable opportunity to know the charges against him and to be heard in his own behalf."

It appears that the men were discharged without charges having been first preferred against them and in violation of said Section 4485, General Code.

Further more, the positions are in the classified service, and even if there were vacancies, the apointments have not been made in compliance with the provisions of Section 4481, General Code, which provides:

"Appointments shall be made in the following manner: The appointing board or officer shall notify the commission of any vacancy to be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest in the respective lists as shown by the result of such examination. Such board or officer shall there-

upon appoint one of the three so certified. Grades and standings so established shall remain the grades for a period of six months, or longer if the commission so determines, and in succeding notifications of vacancies, candidates not selected may be dropped by the commission after having been certified a total of three times."

Section 4504, General Code, provides:

"No clerk, auditor or accounting officer of any city shall allow the claim of any officer for services of any deputy or other person in violation of the provisions of this title."

The appointments were not made in compliance with Section 4481, General Code, and were illegal. The auditor is therefore authorized by the provisions of Section 4504, supra, to disallow the voucher for their salaries and it is his duty to disallow the same.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

172.

MUNICIPAL CORPORATIONS—ILLEGAL CONTRACT OF VILLAGE OF POMEROY WITH WHARFMASTERS FOR WHARFAGE FEES—NO RECOVERY BETWEEN PARTIES.

A contract by a village with a wharfmaster whereby the latter is to receive all wharfage fees in consideration of the construction by the wharfmaster of a road way or landing, is illegal and cannot be enforced. The law leaves the parties as it finds them and there can be no recovery by the city for fees received.

COLUMBUS, OHIO, February 28, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of October 24, 1911, you ask an opinion of this department upon the following:

"In 1902, the council of the village of Pomeroy entered into an agreement or contract with W. G. Downie for the paving of the wharf landing of said village. In consideration of the construction and maintaining of said roadway or landing by said Downie, who at that time was the wharfmaster of said village and charged with the duty of collecting wharfage of water craft landing at the public landing of said village as fixed by the ordinances thereof, said Downie was permitted to retain the fees collected for a period of fifteen years from the 10th day of January, 1902. Said Downie has collected such wharfage fees and has retained same as a reimbursement to him for the construction of said improvement, and we are now called upon to pass upon the validity and binding effect of said agreement, particularly as to whether it is at this time a binding obligation or agreement upon the present village council. If, in your opinion, such an agreement is held to be invalid, what, if any, finding should be made by this department or what recommendation do you suggest as proper in the premises."

It appears that this contract was entered into in the same manner as a contract by said village of Pomeroy with a certain ferry company in 1898, and which latter contract was passed upon by this department in an opinion to you on December 29, 1911.

The provisions of the statutes in 1902 governing contracts for improvements of this nature by a village, are the same as the provisions which were in force in 1898 and which were cited in said opinion of December 29, 1911.

The contract now under consideration is illegal for the same reasons that the other contract was held to be illegal.

Following the ruling in that opinion, no recovery can be had from W. G. Downie for money received by him for wharfage and applied on his alleged contract.

The contract, being illegal, is not binding upon the village and cannot be enforced by either party thereto.

The findings made in the opinion of December 29, 1911, apply to this contract.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

175.

TAXES AND TAXATION—ROAD IMPROVEMENTS—SMITH ONE PER CENT. LAW—LIMITATIONS UPON TOWNSHIP LEVIES AND BOND ISSUES UNDER GARRETT LAW—COUNTY COMMISSIONERS' POWERS.

The county commissioners may not levy upon the duplicate of the township for road improvements under the Garrett law in excess of the amount raised in 1910, *or the ten mill or two mill limitations of the Smith tax law without a vote of the electors.*

Neither may they issue bonds whose interest and principal, under the limitations of said law, cannot manifestly be retired within ten years as provided in Section 6949, *General Code. If, however, such limitations were exceeded unknowingly and in good faith, possibly the action might be remedied by an issuance, at the proper time, of refunding bonds, under Section* 5656, *General Code.*

COLUMBUS, OHIO, February 27, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 29th, enclosing three communications from the auditor of Wyandot County, presenting a question upon which you want my opinion. This question is as follows:

> "In what respect, if any, does the Smith one per cent. law, so-called, affect the power of the county commissioners to issue bonds and to levy taxes upon the duplicate of the township under what is known as the "Garrett Law," Section 6926, et seq., General Code."

The following sections of the General Code are applicable to the solution of this question:

> "Section 6926. When a majority of the resident owners of real estate situated within one mile of a public road, present a petition to the

board of county commissioners asking for the grading and improving of such road, the county commissioners shall go upon the line of the road described in such petition. If, in their opinion, the public utility requires such road to be graded and improved, they shall determine whether the improvement shall be partly or wholly constructed of stone, gravel or brick, any or all, and what part or parts of such road improvement shall be of stone, gravel or brick, and enter their decision on their journal."

"Section 6928. The county commissioners shall order that a portion of the cost, and expenses thereof, which shall not be less than one-half, nor more than two-thirds of the total, shall be paid out of the proceeds of any levy or levies upon the grand duplicate of the county against which the taxable property of any township or townships in which such road may be in whole or in part as authorized hereinafter. They shall also order that the balance of said cost and expense be assessed upon and collected from the owners of said real estate, and from the real estate benefitted thereby in proportion to the benefit to be derived therefrom by said real estate as determined by said commissioners."

"Section 6949. The county commissioners, if in their judgment it is desirable, may sell the bonds of any county in which such improvements is to be or has been constructed to an amount necessary to pay, of the cost and expenses of such road improvement, the respective shares of such township or townships and of the landowners whose lands therein are benefitted by such road improvement. Such bonds shall state for what purpose issued, bear interest at a rate not in excess of five per cent. per annum, payable semi-annually, and mature in not more than ten years after their issue, in such amounts and at such times as the commissioners shall determine, but not more than one-fifth of the principal of said bonds shall mature in any one year. They shall be sold according to law and for not less than par and accrued interest."

"Section 6950. The proceeds of such bonds shall be applied and used exclusively for the payment of the expenses and costs of construction of such stone or gravel road improvements and the levy for the payment of the principal and interest of such bonds may be in addition to any levy now authorized by law."

I shall not quote all the provisions of the Smith Law which bear upon the question. In order that all provisions of the law which have such an effect might be set forth, it would be necessary to quote the entire law, and that would unnecessarily burden this opinion.

Section 5649-3*a* of the Smith Law, 102 O. L., 269, imposes certain internal limitations upon the amounts that may be levied, for example, "by a township, for township purposes." In an opinion of recent date, I have held that levies made under other road laws than the one now under consideration, upon the township duplicate by the county commissioners are to be regarded as township levies, within the meaning of said Section 5649-3*a*, and not levies within a special district for road improvements, within the meaning of said section. I have just come to the conclusion that such levies are within the two-mill limitation of the Smith Law.

In other opinions I have held such levies to be within the other three limitations of the Smith Law, viz: that measured by the taxes for the year 1910, that of ten mills, and that of fifteen mills.

It will thus be seen that the ten-mill limitation of the Smith Law is not the

only one to be considered in determining the power of the county commissioners under the above quoted sections, as affected by said Smith Law. Levies to meet the principal and interest of bonds issued after June 1, 1911, without a vote of the people must, of course, be treated as any other levies made for ordinary running expenses. It follows, therefore, that the commissioners may not levy a tax under the Garrett Law, which, with other townwship taxes, will cause the total township levy to exceed two mills.

Therefore, the mere fact that the ten-mill limitation would not be exceeded by such levy would be immaterial.

The Smith Law has nothing whatever to do directly with the power of any board or officers to issue bonds. Insofar, however, as it prevents the making of sufficient levies to retire the bonds within the time limited by law, if there is such a limit, it does not impose a practical limitation upon the powers to issue bonds. Section 6949 does impose such a limitation as that above referred to. It is therein provided that the bonds issued under its authority shall be retired in ten years. It would, therefore, be unlawful for the commissioners to issue bonds which could not be retired, within the limitations of the Smith Law, in ten years from the date of issue. I am not prepared to state, however, that if the commissioners use their judgement in good faith as to the likelihood of their being able to retire bonds issued by them under this section, in ten years, and at the expiration of that time find themselves unable to pay them off because of the limits of taxation applicable to the creation of a fund for their payment, the commissioners could not then under Section 5656, General Code, provide for the payment of the indebtedness by the issuance of refunding bonds. This question, however, is not directly raised by the auditor's letter.

In connection with the question under discussion it is to be noted that Section 6950, above quoted, speaks of a levy for the "payment of the principal and interest of such bonds." The language here is seemingly meaningless, but upon careful consideration I have reached the conclusion that this phrase must refer to the levy on the grand duplicate of the township, provided for by Section 6928, also above quoted. It is this levy which, as aforesaid, must be made within all of the limitations of the Smith Law applicable to and in the township as a taxing district.

It follows, therefore, that the auditor's question must be answered by the statement that a vote of the people is necessary to authorize the making of a levy under Section 6928, General Code, if such levy cannot be made within the two-mill limitation of Section 5649-3*a*, as well as if the same cannot be made without exceeding the ten-mill limitations of Sections 5649-2 and 5649-3 of the Smith Law.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

176.

MUNICIPAL CORPORATIONS—COUNCIL—NO POWER IN PUBLIC SERVICE DIRECTOR TO EXCHANGE OLD AUTOMOBILE IN PART PAYMENT FOR NEW — CONTRACTS — ADVERTISEMENT—LOWEST AND BEST BIDDER—POWER OF PUBLIC SERVICE DIRECTOR TO PURCHASE AND SELL PERSONAL PROPERTY—NECESSITY FOR AUTHORIZING ORDINANCE.

Section 4328, *General Code provides that the Director of Public Service shall make no "expenditure" of more than* $500, *other than for compensation of employes, except upon authorization of council and upon written contract with the lowest and best bidder after advertisement. Section* 4330 *requires the corporation to pay the contract price in "cash" and therefore, under these sections, the city cannot include as part of such "expenditure" an old automobile in part payment of the purchase price of a new machine, exceeding* $500 *in value.*

Under Sections 3703 *and* 3699, *however, personal property in excess of* $500 *may be sold upon proper advertisement, to the lowest and best bidder. Personal property under* $500 *may be sold without advertisement by the director of public service but only after authorization by ordinance of council.*

The public service director may, therefore, sell an old machine under $500 *value after such authorizing ordinance, but a new machine may not be purchased except upon advertisement and contract, as aforesaid, in a separate proceeding.*

COLUMBUS, OHIO, March 4, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of February 15, 1912, you ask an opinion upon the following:

> "We submit herewith for your written opinion thereon a communication from the city auditor of Cleveland under date of February 10th raising the question of the legality of exchange of municipal property. As you will note, it is proposed to trade in an old automobile on a new machine, the purchase price of the latter being more than $500.00."

The letter enclosed states in part as follows:

> "I am now called upon to decide a case where one of the departments has an old Hupmobile on which can be secured a very good trade. The situation is as follows:
>
> "A new Hupmobile sells for $750.00. By trading in the old machine the dealer will make an allowance of $400.00, making a net due by the city of $350, but the purchase price of the new machine exceeding $500, the question arises as to whether it would be a regular and valid transaction for us to approve the bill.
>
> "From a business standpoint it is surely the best proposition. No other trade quite as satisfactory can be made."

There is no statutory authority to make an exchange of property in the manner asked.

Section 4328, General Code, provides:

"The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars, When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The word "expenditure" as used in the foregoing statue is not limited to the cash or money that might be paid out for a particular thing, but includes also any other thing of value. In the case submitted the purchase price is $750.00, and the expenditure would be $350.00 in money and $400.00 in property, making a total of $750.00. In such case the expenditure must be made at competitive bidding.

Section 4330, General Code, provides:

"The contract shall be between the corporation and the bidder, and *the corporation shall pay the contract price in cash.* Where a bonus is offered for completion of contract prior to a specified date, the department may exact a prorated penalty in like sum for every day of delay beyond a specified date."

By virtue of this section the contract price must be paid in cash. This provision for payment in cash would preclude the city from advertising for alternative bids after proper resolution of council, that bidders should submit bids for payment in cash and also bids for part payment in cash and part payment by taking the old Hupmobile.

However the matter might be worked out in another way.

Section 3703, General Code, provides for the sale of personal property as follows:

"Personal property not needed for municipal purposes, the estimated value of which is less than five hundred dollars, may be sold by the board or officer having supervision or management thereof. If the estimated value of such property exceeds five hundred dollars, it shall be sold only in the manner herein provided for the sale or lease of real estate."

Section 3699, General Code, provides for the sale of real estate and reads:

"No contract for the sale or lease of real estate shall be made unless authorized by an ordinance, approved by the votes of two-thirds of all members elected to the council, and by the board or officer having supervision or management of such real estate. When such contract is so authorized, it shall be made in writing by the board or officer having such supervision or management and only with the highest bidder, after advertisement once a week for five consecutive weeks in a newspaper of general circulation within the corporation. Such board or officer may reject any or all bids and readvertise until all such real estate is sold or leased."

There is a restriction, however, placed upon the director of public safety for

the sale of property in his department in Section 4371, General Code, which provides:

> "The director of public safety may make all contracts and expenditures of money for acquiring lands for the erection or repairing of station houses, police stations, fire department buildings, fire cisterns and plugs, that may be required, and for the purchase of engines, apparatus and all other supplies necessary for the police and fire departments under his supervision, but no obligation involving an expenditure of more than five hundred dollars shall be created unless first authorized and directed by ordinance of council. In making, altering, or modifying such contracts, the director of public safety shall be governed by the provisions of the preceding chapter relating to public contracts, except that all bids shall be filed with and opened by him. *He shall make no sale or disposition of any property belonging to the city without first being authorized by resolution or ordinance of council.*"

The old Hupmobile could be sold by virtue of the foregoing sections. As it is estimated to be of less value than five hundred dollars it could be sold without advertising for or receiving bids thereon.

It would be legal for the city to advertise for bids for the purchase of the new machine, and then it could sell the old machine to the successful bidder, if the price which he would give would be as good as can be secured therefor from any other person. The two transactions, however, would have to be two separate sales and purchases in order to be legal and should be complete in themselves.

While the above transaction would be legal caution must be used to avoid collusion, or abuse of power.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

186.

BANKS AND BANKING—MUNICIPAL CORPORATIONS—CO-PARTNERSHIP BANK AS DEPOSITORY.

If a co-partnership bank has capital and surplus which can be ascertained so as to apply the limitations of Section 4295 G. C. A municipality may legally award funds to such bank as a depository in a conformance with said section.

COLUMBUS, OHIO, March 9, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditer of State, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of February 29, 1912, requesting my opinion as follows:

> "May the council of a municipality (village) legally award the public funds of the village to a co-partnership styling itself a bank?"

I have already passed upon this question in a way in an opinion rendered to Hon. J. R. Stillings, prosecuting attorney, Kenton Ohio, on April 9, 1911, a

copy of which opinion I enclose herewith. This opinion was based upon the decision of Judge Dillon of Franklin County Common Pleas Court in the case of State ex rel vs. Madison Township, 15 Ohio Decisions, 720, in which opinion, construing Section 3968 of Bates' Statutes (7604 of the General Code), the Court held that the words "paid in capital stock" meant simply "capital," and that a partnership bank as well as an incorporated bank could be elected as a depository for the funds, under Section 7604 of the General Code.

The section providing for depositories for municipalities is slightly different. This section is Section 4295 of the General Code, and is as follows:

> "The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, in a sum not less than twenty per cent in excess of the maximum amount at any time to be deposited, but there shall not be deposited in any one bank an amount in excess of the paid in capital stock and surplus of such banks, and not in any event to exceed one million dollars."

Particular attention is called to the sentence "But there shall not be deposited in any one bank an amount in excess of the *paid in capital stock and surplus of such banks.*" The words "and surplus" do not appear in Section 7604 construed by the court in the case mentioned above; nor does it appear in the section relating to deposit of township funds; but under the decision of Judge Dillon, I feel constrained to hold that if a partnership bank has capital and surplus which can be ascertained, that such bank can be designated as a depository.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

194.

COUNTY COMMISSIONERS—ERECTION OF COUNTY JAIL TO COST OVER $25,000—PROCEEDINGS WHEN SUFFICIENT FUNDS ON HAND AND BOND ISSUE UNNECESSARY—VOTE OF ELECTORS—BUILDING COMMISSION.

Section 2333, General Code providing that the county commissioners, before erecting a county building in excess of $25,000, shall submit the question of issuing bonds or levying tax to the electors, (and upon an affirmative result) for the application to the common pleas court and the appointment of a building commission, presents a patent ambiguity when applied to a case where the county has on hand a sufficient fund without a bond issue or levy.

Determining the intention of the statutes however, from the history of the present statute and from kindred sections wherein the commissioners are required to submit the question of "appropriating funds" in excess of ten thousand dollars for other public buildings, it must be held that all other steps stipulated for in Section 2333 must be taken in the erection of a jail to cost over $25,000 even though the specific step of issuing bonds and making a levy, be dispensed with. A vote of the electors upon the question of the erection, and a building commission are, therefore indispensible.

COLUMBUS, OHIO, March 11, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 29th, requesting my opinion upon the following question:

> "The commissioners of Stark County desire to build a new jail and have sufficient funds at their disposal for that purpose without issuing bonds or making a special levy. Under such circumstances, are the commissioners authorized to proceed in accordance with the provisions of Sections 2343, et seq., or are they required to apply to the judge of the court of common pleas for the appointment of a building commission under Section 2333 before they are authorized to construct such jail?"

I assume that the cost of the proposed building exceeds $25,000. Section 2333 of the General Code, to which you refer, provides as follows:

> "When county commissioners have determined to erect a court house or other county building and a cost to exceed twenty-five thousand dollars, they shall submit the question of issuing bonds of the county therefor to vote of the electors thereof. If determined in the affirmative, within thirty days thereafter, the county commissioners shall apply to the judge of a court of common pleas of the county who shall appoint four suitable and competent freehold electors of the county, who shall in connection with the county commissioners constitute a building commission and serve until its completion. Not more than two of such appointees shall be of the same political party."

Section 2334 in pari materia, provides as follows:

> "The persons so appointed shall receive a reasonable compensation for the time actually employed, to be fixed by the court of common pleas

and on its approval paid from the county treasury. Their compensation in the aggregate shall not exceed two and one-half per cent. of the amount received by the county from taxes raised or from the sale of bonds for the purpose of constructing the building."

It seems to me that there is a patent ambiguity. These sections are consistent and clear enough, excepting as applied to the case when there is money available to construct a building without the making of a special levy or the issuance of bonds. As applied to such a case, they are meaningless. It would be a mere mockery to submit the question of issuing of bonds to the electors if it were not necessary to issue such bonds. It would be impracticable, indeed impossible, to pay the commissioners to erect the building any compensation out of the proceeds of an issue of bonds or a special tax, when there had been no issue of bonds or levy of special tax.

It would be possible to reconcile these ambiguities by adopting the construction that it was the Legislature's intention that in all cases in which the construction of a proposed building costs more than $25,000, the county shall provide for the same by a special levy or levies, or by the issue of bonds. Indeed, the reading of Section 2333 seems to lead to such a conclusion. I am satisfied, however, that there is still enough ambiguity in the section as codified to justify a resort to the preceding law. That law was section 1 of the act found in 98 O. L., 53, which provided in part as follows:

"That when the county commissioners of any county have determined under and by the authority of the statutes of the state of Ohio to erect a court house which shall cost to exceed twenty-five thousand dollars and after the question of issuing the bonds of said county for the construction of said court house or other county building has been submitted to a vote of the electors of the county, and said question has been determined by said electors in the affirmative, said county commissioners shall, within thirty days after said election has been held and the results thereof determined, apply to the judge of the court of common pleas for said county, who shall appoint four suitable and competent freehold electors of said county, and not more than two of whom shall be of the same political party, who shall, in connection with the county commissioners, constitute a building commission and who shall serve until the completion of said court house as contemplated herein. * * * *."

It thus appears that in the original act, the provision respecting the submission of the question to the electors was jurisdictional and not mandatory. That is to say, it was a condition precedent to the appointment of a building commission, and not an independent requirement. It is to be explained by reference to other statutes then in force. I refer, of course, to Section 2825, R. S., which, as in force at that time the act under consideration was passed, provided that when the cost of a public building exceeded ten thousand dollars, the commissioners should not levy any tax therefor without submitting the question as to the policy of building such edifice by general tax to the electors. While I do not hold, as a matter of law, that this election is the one referred to in the act of 1906, yet I cannot avoid the conclusion that the indirect way in which reference is made in that act to the vote of the electors indicate that the legislature must have had some such provision, independent of the act of 1906, in mind. I am, therefore, impelled to the conclusion that the act of 1906, of which Section 2333 of the General Code is a codification, did not, as enacted, of itself require a submission to

the electors or the appointment of a commission in case the cost of a proposed public building exceeded twenty-five thousand dollars; but that the act was intended to apply only in case it was necessary to submit the question of the levy of the tax or the issuance of bonds to the electors under sections like Section 2825 R. S.

Even as Section 2825 R. S. was in force in 1906, however, it required submission of the question to the electors in the case of the expenditure of public moneys when no special tax levy or issue of bonds was necessary. It expressly required that the county commissioners should not "appropriate any money" for the purpose of constructing a public building, the cost of which would exceed $10,000, without submitting the question to a vote of the electors. It would appear, therefore, that as these statutes were originally enforced, the commissioners would have in all instances, whether they had the money on hand or not, to submit the question of its expenditure for the purpose of constructing a public building to a vote of the electors. This being the case, it follows, in spite of the construction which I have given to the act of 1906, that it was impossible at all times under that act to erect a new public building without submitting the policy thereof to the electors; and that because of this fact a building commission was required in all cases, whether an issue of bonds was necessary or not.

Without tracing the subsequent history of Section 2825 R. S. suffice it to say that at the present time it comprises Section 5638 and succeeding sections of the General Code. As amended, 102 O. L., 447, this section provides as follows:

> "The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed $15,000, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $18,000, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed $10,000; without first submitting to the voters of the county, the question as to the policy of making such expenditure."

Section 5639-1 is a supplementary section enacted 102 O. L., 447, and provides in part as follows:

> "When the board of county commissioners desires to submit such question to the voters of the county, it shall pass and enter upon its minutes a resolution declaring the necessity of such expenditure, fixing the amount of bonds to be issued, if any, in connection therewith, and fixing the date upon which the question of making any such expenditure shall be so submitted, and shall cause a copy of such resolution to be certified to the deputy state supervisors of elections of the county; and thereupon the deputy state supervisor shall prepare the ballot and make other necessary arrangements for the submission of the question to the voters of the county at the time fixed in such resolution. * * **."

Section 5640-1, enacted at the same time, provides in part as follows:

> "The ballots provided by the deputy state supervisors shall have printed upon the same the words 'In favor of the expenditure of $ . . . . . for the purpose of . . . . . .' and 'Against the expenditure of $ . . . . .

for the purpose of . . . . . .'said blanks to be filled with the amount proposed to be expended and the purpose for which said money is to be expended. * ** * * * *."

It is thus apparent that, at the present time, the commissioners must seek the authority of the electors before they expend moneys which they have on hand, available for the construction of a public building. That being the case, I am of the opinion, for reasons already stated, that this election is the one really meant by the first sentence of Section 2333. It follows, therefore, upon the foreging reasoning, that county commissioners may not spend money on hand for the construction of a county building, without submitting the policy of the expenditure to the electors,—if the amount involved exceeds twenty-five thousand dollars, and without providing for the appointment of a building commission as required by Section 2333, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

196.

INTEREST—PAYMENT ON MONEY WILFULLY WITHHELD OR WITHDRAWN FORM PUBLIC TREASURY BY MISTAKE OF LAW—TIME OF RUNNING—COLLECTOR OF REVENUES—PUBLIC OFFICERS—CONTRACTORS—PRESUMPTION OF KNOWLEDGE OF LAW.

As interest begins to run from the time at which the principle is due and payable, interest will be chargeable against a collector of public revenues from the date which the statute prescribes for turning the money into the treasury.

Where a contractor is found to have been overpaid by reason of a clerical error in the estimate of an engineer, interest charges are collectable against such contractor only from the date upon which the mistake is discovered by him.

Depending upon the circumstances, public moneys, paid under a mistake of law, may or may not be recoverable. In cases where recovery is not defeated by reason of such mistake, the time when interest begins to run differs with various circumstances. A public officer withholding moneys, however, or parties dealing with such and receiving money from them, are presumed to know the law and interest would run from date of receipt of said moneys or when legally due. It is recommended that interest be chargeable in the case of public moneys so diverted, from the date of receipt of illegal payment or failure to pay over.

COLUMBUS, OHIO, March 23, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 16th requesting my opinion upon the following questions:

"If a collector of public revenue withholds the deposit of his collection from the public treasury for a considerable time beyond that required of him by law, what, if any, interest charges would be collectible of him occasioned by such delinquency on his part?

"If a contractor is found to have been overpaid by reason of a clerical error in the estimate of the engineer or in assembling his allowed

claims, what, if any, interest charges are collectible from the contractor by reason of the error?

"What, if any, interest charges, are collectible from parties illegally receiving or withholding public funds under mistakes of law?"

Section 8305, General Code, which fixes the legal rate of interest at six per cent. per annum, does not apply in terms to liabilities of the sort referred to in your three questions. It is practically the universal rule, however, that interest is chargeable under circumstances like those which you suppose, upon one of two theories; that is to say, upon the ground of implied contract, or upon damages.

In Ohio, interest is allowed upon money wrongfully withheld, at the legal rate, as damages for the wrongful withholding, and the legal rate is adopted upon the principle of analogy.

(Gray vs. Case School of Applied Science, 62 O. S., 1. Webster vs. Bible Society, 50 O. S., 1.)

Not only is the allowance of interest made as compensation to the party injured by the wrongful withholding, but also on account of the gain made from the use of the party by the party wrongfully withholding it. The law, however, does not permit an inquiry, for the purpose of ascertaining the exact loss to the injured party, and gain to the wrong-doer, but merges both in the interest at the legal rate, allowed as aforesaid.

From this, it follows, therefore, that if any interest at all were collectible under any of the facts stated by you, it would be at the legal rate. That is to say, the fact that the public treasury might have its money at two per cent, interest, say, under a depository contract, would not limit its recovery of interest as against an officer or another person wrongfully detaining money due such public treasury, to such two per cent. Nor, on the other hand, would the public be remitted to a remedy of accounting against the wrong-doer to compel him to show what, if any, profit he had made from the use of the money by him, and to pay the same into the public treasury.

Answering your first specific question, I beg to state that the general rule is that interest begins to run from the time at which the principal is due and payable. Therefore, if the statute described the date upon which a collector of public revenue shall turn his collections into the public treasury, interest at the legal rate will begin to run against him and in favor of the State from and after such date, so fixed, on moneys thereafter withheld by him.

The general principle above referred to is helpful in the solution of your second question. This question has never been decided in Ohio. The decisions in other states are not uniform, but I am satisfied that the better reason supports the rule that the default of the person wrongfully withholding the money, such as to start interest running, does not occur until the mistake has been discovered and the matter has been brought to his knowledge, either through his own discovery, or by demand of the public authorities. (22 Encyc. of Law and Procedure, page 1506, and cases cited.)

Your third question is more difficult of solution. It is made so by reason of the fact that the doctrine that voluntary payment under a mistake of law defeats recovery applies, at least in part, to the public.

(Vindicator Printing Company vs. State, 68 O. S., 362) I think that it would be confusing for me to discuss at this time and in connection with your third question the various aspects of the application of that rule to cases of attempted recovery of public funds paid out under mistake of law. There are, of course,

numerous instances in which the fact that the payment was made under a mistake of law does not defeat recovery by the public. I shall, therefore, without pointing what those instances are in detail, state my opinion as to the recovery of interest in such cases.

I am not sure that any single hard and fast rule can be laid down as constituting an answer to your third question. I have been able to find but very few decisions in any way bearing upon it, and none directly in point. I think, however, that the general principle above referred to, that there must be default before interest begins to run, should be applied to this question. In the case of a public officer wrongfully withholding or receiving moneys from the public treasury it seems that the fact that he did so under a mistake of law does not relieve him of the liability to pay interest. This is because, being a public officer, and in a sense a trustee, he is presumed to know the law, and to receive or withhold public moneys at his peril.

(Jones vs. Commissioners, 57 O. S., 189.)

In the case last cited the question of interest was not discussed, but the other principle last above referred to was clearly enunciated. There is a similar principle to the effect that all parties who deal with public officers are presumed to know the extent of their authority, which is limited by law. Applying this principle, it would seem that the default, which would start interest running, occurs when the party receiving the money from the public treasury, though under a mistake of law, accepts the same; this being on the theory that his mistake of law, even though shared by the public officers with whom he deals, is made at his own peril. So, it might be argued as the public officer cannot be presumed to have made a mistake of law, and as the other party receiving the money cannot be excused on the ground that he supposed he was receiving it lawfully, interest ought to run from the time the money was withdrawn from the treasury. There are cases in which private individuals have been excused from the payment of interest upon money received and held by them under a mistake of law until the discovery of the mistake and demand for replacement. These cases, however are those arising out of the administration of trusts, estates created by wills of doubtful construction, etc. In such cases the fact that the party paying the money had himself in a sense caused or sanctioned a wrongful withholding of money is relied upon as a ground of decision. I doubt whether this doctrine ought to be applied to a case in which the public is interested. So to do would be to hold, in effect, that public officers have power to bind the public by illegal acts in excess of their authority, though in good faith. I do not believe that this is the doctrine in Ohio, and I am therefore, constrained to reject the rule applying to private trusts as a guide to the solution of the present question.

In view of the state of the law, as I have fund it, I can only advise you to make findings for interest at the legal rate in all cases in which you find that money has wrongfully been withheld or paid out of the public treasury under alleged mistake of law. In some cases, of course, mistake of law is a defense against any action whatever.

(Vindicator Printing Company vs. State, supra.)

In such cases, however, in which there may be a recovery of the principal sum withdrawn or withheld under a mistake of law, I advise that the finding be for interest at the legal rate from the date of the illegal payment or failure to pay over. In this matter, I trust we may be able to secure a settlement of what seems to be a doubtful question of law.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

199.

EXPENSES—REGISTRATIONS, ELECTIONS GENERAL, SPECIAL, PRIMARY—PAYMENT BY CITIES AND COUNTIES WITH AND WITHOUT REGISTRATION CITIES—SALARIES AND COMPENSATIONS OF STATE SUPERVISORS, CLERKS, DEPUTY CLERKS, STENOGRAPHERS, ETC., AND OTHER EXPENSES.

For syllabus to this opinion, reference is made to the conclusion drawn at the end hereof.

COLUMBUS, OHIO, February 27, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You submit to this department for answer several questions relating to the payment of election expenses by the respective political subdivisions of the state, under dates of January 24, January 27, February 19, and February 20, 1912.

The several questions submitted are as follows:

"In Hamilton County, the compensation of the deputy supervisors of election is apportioned between the county and the city as 3 is to 5 and the compensation of the clerk of said board as 4 is to 6.

"In Cuyahoga County, these salaries are paid from the county treasury at the rate of $3.00 and $4.00 for the entire unmber of precincts in the county under Section 4822 and the balance is paid by the city. In both counties, such officials receive the maximum allowed by Section 4943. Which method of division, if either, is legal. We are of the opinion that neither method is legal, but that the division should be as the products of the whole number of precincts in the county multiplied by the rates under Section 4822 are to the products of the number of city precincts multiplied by the rates under Section 4942.

"In each of said counties, there is a considerable sum paid for deputy clerks, stenographers and other office help. What is the proper method of apportioning such expenses?

"Should the cost of poll books and tally sheets of general elections in odd numbered years be charged back to the several subdivisions of the county?

"Should the poll books and tally sheets and other expenses of special elections be charged back?

"What if any, expenses should be charged back for primaries in odd-numbered years?

"Should the salaries of deputy state supervisors of election and their clerk and deputy clerks, or any portion thereof, be charged back in odd numbered years?

"Should the expenses of supplying voting places with chairs, tables lights, fuel and other furnishings be paid by the city or by the county; i. e., if they have been paid in the first instance by the county, should they be charged back to the political subdivision of the county in the odd-numbered years?

"In counties containing a registration city or cities, what subdivision should be made of the following:

"General office expenses of the board of deputy state supervisors of election.

"Compensation of assistant clerks in general office work.
"Rent of offices of such board."

First: The payment of the salaries of the deputy state supervisors of elections and of their clerks.

Section 4822, General Code, provides:

"Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in on case be less than one hundred dollars each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof. Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it."

Section 4942, General Code, provides:

"In addition to the compensation provided in section forty-eight hundred and twenty-two, each deputy state supervisor of elections in counties containing cities in which registration is required shall receive for his services the sum of five dollars for each electon precinct in such city, and the clerk in such counties, in addition to his compensation so provided, shall receive for his services the sum of six dollars for each election precinct in such cities. The compensation so allowed such officers during any year shall be determined by the number of precincts in such city at the November election of the next preceding year. The compensation paid to each such deputy state supervisor under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk under this section shall in no case be less than one hundred and twenty-five dollars each year. The additional compensation provided by this section shall be paid monthly from the city treasury on warrants drawn by the city auditor upon vouchers signed by the chief deputy and clerk of the board."

Section 4943, General Code, provides a maximum salary as follows:

"In such counties containing registration cities, the whole amount of annual compensation paid to each deputy state supervisor and clerk under the preceding section and under Section forty-eight hundred and twenty-two, shall not exceed in any year the following:"

Here follows various maximum salaries graded according to the population of the county.

Section 4946, General Code, provides:

"The additional compensation of members of the board of deputy

state supervisors and of its clerk in such city hereinbefore specified, the lawful compensation of the deputy clerk and his assistants and all registrars of electors in such city, the necessary costs of the registers, books blanks, forms, stationary and supplies provided by the clerk for the purposes herein authorized, including poll books for special elections, and the cost of the rent, furnishing and supplies for rooms hired by the board for its offices and as places for registration of electors and the holding of elections in such city, shall be paid by such city from its general fund. Such expense shall be paid by the treasurer of such city upon vouchers of the board, certified by its chief deputy and clerk and the warrant of the city auditor. Each such voucher shall specify the actual services rendered, the item of supplies furnished and the price or rate charged in detail."

In counties containing no city in which registration is required, the payment of the salary of the deputy state supervisors of elections and of the clerk of the board, is governed solely by the provisions of Section 4822, General Code. Each deputy supervisor receives three dollars for each election precinct in his county, and the clerk receives four dollars for each precinct in the county, with a minimum annual salary of one hundred dollars to each deputy and of one hundred and twenty-five dollars to the clerk. The amounts due under this section are paid quarterly from the general revenue fund of the county.

In counties containing a registration city, additional compensation is allowed each deputy and clerk by Section 4942, General Code, and this additional compensation is paid from the city treasury monthly. This additional compensation for each deputy supervisor is five dollars for each election precinct in such registration city, and for each clerk is six dollars for each election precinct in such city. This section also provides a minimum salary of one hundred dollars to each deputy supervisor and one hundred and twenty-five dollars to the clerk, and this amount is in addition to the amount allowed by Section 4822, General Code. In other words, the minimum amounts allowed by either Section 4822 or by Section 4942, is not affected by the amount such deputy supervisor or clerk may receive by virtue of the other section.

The maximum salary provided by Section 4943, General Code, is to be determined by the salary received by virtue of both sections, to-wit, Sections 4822 and 4942, General Code. Until the maximum salary is exceeded by the compensations provided for in said Sections 4822 and 4942, there can be no question as to what part of the respective salaries must be paid by the county and what part by the city. Until the maximum salary is exceeded each deputy supervisor receives three dollars per precinct in the county from the county, and in addition thereto the sum of five dollars per precinct in the city from the city. The clerk receives four dollars per precinct for each precinct in the county from the county and also six dollars per precinct in the city, from the city.

The statute makes no provision as to the division of these respective salaries when the compensation allowed by the foregoing sections exceeds the maximum salary allowed by Section 4943, General Code. In the absence of such provision a rule of division should be ascertained that would divide the expense equitably in all cases, and which would not under any conditions, compel one subdivision to pay more than its just proportion of the maximum salary.

The amount allowed for each precinct in the county is different than the amount allowed for each precinct in the city. And in every county in the state the number of precincts in the county is greater than the number of percincts in the city contained therein, and such precincts are in different proportions in the

different counties. Therefore, any rule of division based solely upon the amounts allowed per precinct, to-wit, as 3 is to 5, or as 4 is to 6, would not divide the expense proportionately in all counties affected. Nor would a rule based solely upon the number of precincts be an equitable division.

The inequalities of a rule, if it has any, will be shown in extreme cases. For example, applying the rule used in Hamilton County. The maximum salary of the deputy supervisor is $1,800.00 and under their rule the county would pay $675.00 and the city $1,125.00, regardless of the number of precincts. Suppose the county has 500 precincts and the city has 300 precincts. If there was no limit to the salary the county would pay $1,500.00 and the city $1,500.00. In other words each would pay in such case one-half of the salary. But under the Hamilton County rule, the city pays more than half. By reason of the limit in salary, the amount payable by the city is reduced only $375.00 and the amount payable by the county is reduced $825.00. Applying the Cuyahoga County rule, the county pays $1,500.00 and the city only $300.00. The county saves, by reason of the limit only $300.00 and the city saves $1,200.00. The application of the rules of division used in Hamilton and Cuyahoga Counties to any number of precincts will produce the same inequitable results.

In the example taken, the county and city would each pay one-half of the salary of each deputy supervisor if there was no limit, and in my opinion, in such case, each subdivision should pay a like proportion of the salary when there is a limit placed upon the salary. In other words, each political subdivision should pay the same pro rata share of the salaries when there is a limit, that they would pay if there was no limit to the salary that could be drawn. The rule which you state will produce such result and will be equitable in all cases.

The share of the county is $3.00 upon each precinct in the county and the share of the city is $5.00 for each precinct in the city. The division of the salary should be in proportion to the respective products thus ascertained. That is the rule of division before the maximum salary is exceeded and it should be the rule after the maximum is reached, or exceeded.

The salaries of each deputy state supervisor of elections and of the clerk should be borne by the county and city in the ratio of the product of the whole number of precincts in the county multiplied by the rates per precinct provided in Section 4822, and the product of the whole number of precincts in the registration city multiplied by the rates per precinct provided in Section 4942 of the General Code. The first should be paid by the county and the latter by the city.

Another statute must be taken into consideration.

Section 4990, General Code, provides:

> "For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers at general elections."

Section 4991, General Code, provides:

> "All expenses of primary elections, including cost of supplies for election precincts and compensation of the members and clerks of boards of deputy state supervisors, and judges and clerks of election, shall be paid in the manner now provided by law for the payment of similar ex-

penses for general elections, and the county commissioners, township trustees, or council of municipal corporations or other taxing bodies duly authorized, shall make the necessary levies to meet them."

In limiting the salary of each deputy supervisor and clerk, Section 4943, General Code, makes such limit apply specifically to the compensation to be paid by virtues of Section 4822 and 4942, supra. The compensation allowed by Section 4990, General Code is not limited, nor does the limitation contained in Section 4943 oreach such compensation. The amount to be paid under Section 4990 for primaries is in addition to that provided by Sections 4822 and 4942, General Code, and it is in addition to the maximum salary allowed by Section 4943.

There is no specific provision of statute stating how the compensation provided by Section 4990 for holding primary elections shall be paid.

Section 4991, General Code, provides that "such compensation of the members and clerks of board of deputy state supervisors—shall be paid in manner now provided by law for payment of similar expenses, for general elections.

The only provisions for payment of compensation of deputy supervisors and their clerks at general elections is found in Sections 4822 and 4942, General Code, supra. In counties having no registration city all the compensation for such officers is paid by the county. Then, by virtue of the provisions of Section 4991, General Code, the additional compensation allowed by Section 4990 for primaries in such counties should be paid by the county.

In counties having a registration city the compensation of such officers is paid partly by the county, and partly by the registration city. The rate per precinct is not the same, one is $3.00 per precinct in the county and the other is $5.00 per precinct in the city for the salary of the deputy supervisor. The extra compensation allowed in registration cities is allowed on account of the extra work caused by the registration of voters. In holding primaries in a registration city there is also extra work on account of registering new voters, and transferring and registering removals. Such extra work however is not as great as it is for general registrations, and for general elections. It would be only epuitable and just that the city should pay for such extra work. But the statute does not provide how this extra compensation shall be divided. The statute provides that such compensation shall be paid in the same manner as the salary for general elections. The same rule of division must apply as was found above.

In counties containing registration cities the compensation allowed each deputy state supervisor of elections and the clerk of the board, for holding primaries, shall be paid by the county and city in the same ratio as the compensation allowed to such officers by Section 4822 and 4942, General Code.

In one of your other questions you ask what, if any, portion of the salaries of these officers shall be charged back to the various political subdivisions.

The authority of the county auditor to charge elections expenses back to the various political subdivision after it has been paid by the county, is found in Sections 5052 and 5053, General Code. These sections are hereafter quoted and constructed in answering some of your other questions.

They do not, however, apply to the salaries paid members or clerk of the board of deputy state supervisors of elections. There compensation is governed by Section 4822, 4942, and 4990, General Code, which have been construed. None of the amount payable by the county for such salaries can be charged back to the various subdivisions.

The part payable under Section 4822 is paid by the county and the part payable under Section 4943 is paid by the city, and the part payable by virtue of Section 4990 is payable by the county and city in the proportion as heretofore set forth.

Your second inquiry is:

"In each of said counties there is a considerable sum paid for deputy clerks, stenographers and other office help. What is the proper method of apportioning such expenses?"

Section 4794, General Code, provides:

"Biennially, within five days after such appointments are made, the deputy state supervisors and inspectors shall meet and organize by selecting one of their number as chief deputy, who shall preside at all meetings, and two resident electors of the county, other than members of the board, as clerk and deputy clerk, respectively, all of which officers shall continue in office for two years."

Section 4799, General Code, provides:

"The deputy clerk of the board of deputy state supervisors and inspectors shall perform such duties and receive such compensation, not exceeding one hundred and fifty dollars each month, as shall be determined by the board.

"These last two sections apply only to counties containing an annual registration city, or two or more registration cities."

Section 4877, General Code, provides:

"When necessary, the board may employ a deputy clerk and one or more clerks as temporary assistants of the clerk at a salary or not to exceed the rate of one hundred dollars per month each and precsribe their duties. The period for which they are so employed must always be fixed in the order authorizing their employment, but they may be discharged sooner at the pleasure of the board. Such deputy clerk and assistants shall take the same oath for the faithful performance of their duties as required of the clerk of the boards."

The foregoing section applied only to counties containing a registration city. Section 4811, General Code, provides for the election of a clerk, as follows:

"Within fifteen days after such appointments in each year, the deputy state supervisors shall meet in the office of the county commissioners and organize by selecting one of their number as chief deputy, who shall preside at all meetings, and a resident elector of such county, other than a member of the board, as clerk, both which officers shall continue in office for one year."

This section applies to all counties, except those containing cities in which annual registration is required, or which contain two or more registration cities.

There is no provision of statute authorizing the appointment of a deputy clerk by a board of elections in counties which do not contain a registration city. The payment of such compensation is governed by Section 4946, General Code, which provides:

"The additional compensation of members of the board of deputy state supervisors and of its clerk in such city hereinbefore specified, *the lawful compensation of the deputy clerk and his assistants* and all regis-

trars of electors in such city, the necessary cost of the registers, books, blanks, forms, stationary and supplies provided by the board for the purposes herein authorized, including poll books for special elections, and the cost of the rent, furnishing and supplies for rooms hired by the board for its offices and as places for registration of electors and the holding of elections in such city, *shall be paid by such city from its general fund.* Such expense shall be paid by the treasurer of such city upon vouchers of the board, certified by its chief deputy and clerk and the warrant of the city auditor. Each such voucher shall specify the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

Section 4945, General Code, provides:

"For November elections held in even numbered years, the county in which such city is located shall pay the general expenses of such election other than the expenses of registration. Such allowance and order of the board for such expenses and compensation to such judges and clerks of elections shall be certified by the chief deputy and clerk to the auditor of such county, who shall issue his warrants upon the treasury for the amounts so certified."

The provision of Section 4945, General Code, is a general provision that the county shall pay the expenses of the November election in even-numbered years. It excepts therefrom the cost of registration . The provision of Section 4946 is specific and is not controlled by Section 4945. As seen, deputy clerks and assistants are only authorized in counties which contain a registration city. These are principally required on account of the additional work to be done in such cities by reason of registration. Section 4945, excepts the expense of registration, from the expenses which are to be paid by the county.

The compensation of deputy clerks, stenographers and other office help in the offices of the board of deputy state supervisors of elections in counties containnig a registration city should be paid by such city from its general fund.

In your sixth inquiry you ask what part of this compensation should be charged back to the various political subdivisions. It is paid by the city in the first instance and there would be no need of the county auditor charging the same back.

Your third and fourth inquiries will be considered together. They are as follows:

"Third: Should the cost of poll books and tally sheets of general elections in odd-numbered years be charged back to the several subdivisions of the county?

"Fourth: Should the poll books and tally sheets and other expenses of special elections be charged back?"

Section 5048, General Code, provides:

"The board of deputy state supervisors of each county shall furnish at the expense of the county and at least five days before the day of election, the necessary poll books and tally sheets required in each voting precinct in the county for presidential, congressional, state, county, township, municipal or other elections."

Section 5052, General Code, provides:

"All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

Section 5053, General Code, provides:

"In November elections held in odd numbered years, such compensation and expenses shall be a charge against the township, city, village or political subdivision in which such election was held, and the amount so paid by the county shall be retained by the county auditor from funds due such township, city, village or political subdivision, at the time of making the semi-annual distributon of taxes. The amount of such expenses shall be ascertained and apportioned by the deputy state supervisors to the several political divisions and certified to the county auditor. In municipalities situated in two or more counties, the proportion of expense charged to each of such counties shall be ascertained and apportioned by the clerk or auditor of the municipality and certified by him to the several county auditors."

Section 4946, General Code, supra contains this provision:

"* * * * * the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, including poll books for special elections, * * * shall be paid by such city, from its general fund."

The clause "for purposes herein authorized," refers to the purposes of registration. The above provision of Section 4946 does not cover the expense of poll books and tally sheets except for poll books for special elections in such registration city, which are to be paid by such city.

The provision now found in Section 5048, General Code, was contained in Section 1252, Revised Statutes under the chapter entitled "Clerk of Common Pleas Court." The other sections were found under the title pertaining to elections.

Section 5048, General Code, specifically provides that the poll books and tally sheets for all elections shall be furnished at the expense of the county. Section 5052, General Code, does not specifically mention poll books and tally sheets, and the question arises as to whether the expense of furnishing poll books and tally sheets is included in the words "other proper and necessary expenses of any general or special election;" and also is it included in the words "such compensation and expenses," found in Section 5053, General Code.

The provisions now found in Sections 5052, 5053 and 5954, General Code, were all contained in one section in the Revised Statutes, known as 2966-27. The provision of Section 5048 as to furnishing ballot books and tally sheets was under an entirely different title and was not placed in the present chapter with Sections 5052 and 5053 until the passage of the General Code.

It will be observed that Section 5048 says that the poll books and tally sheets be furnished "at the expense of the county;" while in Section 5052 it is provided that the expense therein provided "shall be paid from the county treasury." The fact that Section 5048 was formerly under a different chapter, in addition to

this difference in language, leads me to believe that Section 5053 does not cover poll books and tally sheets. The words used in Section 5052, General Code, are not inconsistent with the provisions of Section 5053, that such expenses shall be charged back to the political subdivisions. Being paid out of the county treasury and being furnished at the expense of the county, are two different things. The provision of Section 5048 that they shall be furnished at the expense of the county is inconsistent with the provision of Section 5053 that they shall be charged back to the respective subdivisions and thereby furnished at their expense.

It is my conclusion therefore that the cost of poll books and tally sheets for all elections, except special elections in registration cities, should be paid by the county and should not be charged back to any political subdivision.

Poll books for special elections in registration cities shall be paid by such city from its general fund by virtue of Section 4946, General Code. That is, for special elections within such city.

The statute does not provide that the expense of special elections shall be charged back to the political subdivision in which such election is held. Section 5052 provides that the expenses for a special election therein specified shall be paid from the county treasury. Section 5053 then provides that in November elections in odd numbered years such expense shall be charged back. Nothing is said about the expense of a special election being charged back. Nor do I find any other provision governing the same. In the absence of statutory authority the county auditor cannot charge back such expense. It would be no more than right that the political subdivision in which a special election is held should pay the expense of such election. The statutes, however, do not so provide.

It is my conclusion, therefore, that the expense of a special election cannot be charged back to the political division in which such election was held.

In registration cities another section is to be considered.

Section 4944, General Code, as amended in 101 Ohio Laws page 344, provides:

> "The registrars of each election precinct in such cities shall be allowed and paid for their services as registrars four dollars per day and no more for not more than six days at any one election. In registration city having a population of three hundred thousand or more by the last preceding federal census, the judges of election, including the registrars as judges and the clerks of election, shall each be allowed and paid ten dollars for each general election and five dollars for each special election, at which they serve and no more, either from the city or county. In all other registration cities, the judges of election, including the registrars as judges and clerks of election, shall each be allowed and paid five dollars for each election at which they serve and no more either from the city or county. No registrar, judge or clerk shall be entitled to the compensation so fixed except upon the allowance and order of the board of deputy state supervisors made at a joint session, certifying that each has fully performed his duty according to law as such, and stating the number of days' service actually performed by each. Such allowance and order shall be certified by the chief deputy and clerk of the board to the *city or county auditor.*"

The foregoing section fixes the compensation of registrars and of precinct judges and clerks in registration cities, and how such compensation shall be paid. It does not specify what part shall be paid directly from the county and what part directly from the city.

Your fifth inquiry is:

"What, if any expenses should be charged back for primaries in odd numbered years?"

In odd numbered years are held the elections and primaries of municipalities and townships.

Section 4991, General Code, governs the payment of expenses at primaries and will be requoted here.

It provides:

"*All expenses of primary elections,* including cost of supplies for election precincts and compensation of the members and clerks of boards of deputy state supervisors, and judges and clerks of election, *shall be paid in the manner now provided by law for the payment of similar expenses for general elections,* and the county commissioners, township trustees or council of municipal corporations or other taxing bodies duly authorized, shall make the necessary levies to meet them."

The expenses of primaries are paid in the same manner as expenses for general elections. Although not specifically asked, this brings up the question as to what part of the expense of general elections shall be charged back in odd numbered years.

This is governed by Sections 5052 and 5053, General Code, supra.

We have seen that no part of the salary of the deputy supervisors and the clerk of the board is to be charged back. It is also held above that the cost of poll books and tally sheets is borne by the county, except for special elections in registration cities, and is not charged back in any instance.

By virtue of Sections 5052 and 5053, General Code, all expense of printing and distributing ballots, cards of explanation to officers of the election and voters and other proper and necessary expenses of general elections, which includes primaries, is paid from the county treasury, and such expense for the November election and primary election in odd numbered years is charged back to the political division in which such election or primary is held.

This question also brings up the payment of the compensation of the precinct election officers and registrars.

Section 4946, General Code, supra, contains this provision:

"* * * that the lawful compensation of all registrars in such city * * * shall be paid by such city from its general fund."

By virtue of this provision and of the provisions of Section 4991, General Code, the compensation of registrars in registration cities, for all elections, general, primary, or special, is paid by such city directly from its general fund.

Section 4944, General Code, has heretofore been referred to, and found that it fixes the compensation of the registrars and precinct officers, but does not provide how they shall be paid.

Section 4945, General Code, provides:

"For November elections held in even numbered years, the county in which such city is located shall pay the general expenses of such election other than the expenses of registration. * * * * *"

Construing these sections: In even numbered years the compensation of judges and clerks of election for general and primary elections is paid by the county directly from its treasury.

Payment of compensation of precinct election officers for elections held in odd numbered years is governed by Sections 5052 and 5053, General Code, supra.

Section 5052, General Code, provides:

> "* * * and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

Then Section 5053, General Code, provides that:

> "In November elections held in odd numbered years such compensation and expenses shall be a charge against the township, city, village or political division in which such election was held."

Then follows the provision to charge back such expenses to such political divisions.

By virtue of these provisions, in odd numbered years, the compensation of the precinct judges and clerks of election, including the registrars as judges, for the November and primary elections is paid from the county treasury, and charged back to the political division in which such general election or primary was held.

Your sixth inquiry is as follows:

> "Should the salaries of deputy state supervisors of election and their clerk and deputy clerks, or any portion thereof, be charged back in odd numbered years."

All of the foregoing inquiry has been answered in reply to your first and second inquiries.

In your seventh inquiry you ask:

> "Should the expenses of supplying voting places with chairs, tables, lights, fuel and other furnishings be paid by the city or by the county: i. e., if they have been paid in the first instance by the county, should they be charged back to the political subdivisions of the county in odd numbered years?"

Section 4844, General Code, provides:

> "Elections shall be held for each township precinct at such place within the township as the trustees thereof shall determine to be most convenient of access for the voters of the precinct. Elections shall be held for each municipal or ward precinct at such place as the council of the corporation shall designate. In registration cities, the deputy state supervisors shall designate the places of holding elections in each precinct."

Section 4821, General Code, provides:

> "All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. In counties containing annual general registration cities, such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

Section 4819, General Code, provides:

> "The deputy state supervisors for each county shall advertise and let the printing of ballots, cards of instruction and other required books and papers to be printed by the county; receive the ballots from the printer, and cause same to be securely sealed up in their presence in packages, one for each precinct, containing the designated number of ballots for each precinct, and make the necessary endorsements thereon as provided by law; provide for the delivery of ballots, poll books and other required books and papers at the polling places in the several precincts; *cause the polling places to be suitably provided with booths, guard rails and other supplies, as provided by law, and provide for the care and* custody of them during the intervals between elections; receive the returns of elections, canvas them, make abstracts thereof, and transmit such abstracts to the proper officers at the times and in the manner provided by law, and issue certificates to persons entitled to them."

Section 5044, General Code, authorizes the board of deputy state supervisors to furnish voting places with shelves and booths for the marking of ballots.

Section 4874, General Code, authorizes the board to furnish suitable booths for voting places and to furnish the same in registration cities.

Section 4946, General Code, supra, contains this provision:

> "* * * the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, * * * and the cost of the rent, furnishing and supplies for rooms hired by the board for its offices and as places of registration of electors and the holding of elections in such city, shall be paid by such city from its general fund."

In registration cities the expense of supplying voting places with chairs, tables, lights, fuel and other furnishings is paid by the city by virtue of the above provision.

In other places such expenses are paid out of the county treasury, if furnished by the board of elections, by virtue of Section 4821, supra.

We have seen that by Section 4945, General Code, the general expenses of the November elections held in even numbered years is paid by the county, and by Section 5053, that the general expense as set forth in Section 5052, for the November election in odd numbered years is charged back to the various political subdivisions.

It will then be necessary to lay down a rule as to what is an expense of a particular election. It seems to me that the proper rule for charging back expenses,

where there is no specific provision for their payment is that the expense for supplies which are consumed at a particular election would be considered an expense of that election and should be charged back in a proper case, and that the expense for supplies which are used for several elections should not be charged back but should be paid by the county when the same is to be used in precincts outside of registration cities and in counties not having a registration city, and by the city in registration cities.

Tables, chairs, and furnishings of a like nature should be paid by the county and not be charged back, while such supplies as coal for heat and oil for light should be charged back in odd numbered years.

> "Eighth: Payment of general office expenses of board of elections in registration city."
>
> "Ninth: Payment of assistant clerks in registration city."
>
> "Tenth: Payment of rent of offices of board of elections in registration city."

Each of the foregoing inquiries is governed by Section 4946 General Code and the provision quoted from said section in replying to your seventh inquiry governs.

The general office expenses of the board of deputy state supervisors of elections in registration cities must be borne by the city.

The payment of the assistant clerks to the board in registration cities must be paid by such city.

These have been covered in a general way in other parts of this opinion and do not need further comment.

Section 4946, General Code, specifically provides that "the cost of the rent, furnishing and supplies for rooms hired by the board for its offices * * * shall be paid by such city from its general fund".

In registration cities the rent of the offices of the board of deputy state supervisors of elections, and the cost of furnishing the same, is paid by the city.

The foregoing, I believe, covers all the questions asked. It might be well, however, to give a summary of the conclusions herein reached.

The salaries of the deputy state supervisors of elections and of their clerk, allowed by Section 4822, General Code, should be paid by the county.

The additional compensation allowed them by Section 4942, General Code, in counties having a registration city, should be paid by such registration city.

Where the maximum salary provided by Section 4943, General Code, is reached by the amounts allowed by Sections 4822 and 4942, General Code, such maximum salary shall be paid by the county and city respectively in proportion of the products secured by multiplying the number of precincts in the county by the rates provided in Section 4822, and the product secured by multiplying the number of precincts in the city by the rates provided in Section 4942, General Code.

In counties having no registration city the compensation of the deputy state supervisors of election and the clerk of the board, allowed by Section 4990, General Code for holding primary elections shall be paid by the county.

In counties having a registration city such compensation shall be paid by the county and city in the same proportion as the compensation allowed by Sections 4822 and 4942, General Code.

The compensation allowed by Section 4990, General Code, is in addition to the maximum salary allowed by Section 4943, General Code.

The compensation of the deputy clerk, stenographer, and other office help of the board of deputy state supervisors of elections in counties containing a registration city, shall be paid by such registration city.

Poll books and tally sheets at all elections, except special elections held in a registration city, shall be furnished at the expense of the county, and cannot be charged back to any political subdivision.

Poll books and tally sheets for special elections in a registration city shall be paid by such city.

The expense of printing and distributing ballots, cards of explanation to officers of the election and voters, and blanks for general, primary and special elections shall be paid from the county treasury, and in odd numbered years, such expense for the November and primary elections shall be charged back to the political subdivision in which such election is held. The expense for special elections cannot be charged back.

In counties having no registration city, and in precincts outside of registration city in counties having a registration city, the expense of supplying chairs, tables, etc., provided by the board of elections, shall be paid by the county, and cannot be charged back. The expense for light, fuel and such supplies as are consumed at a particular election is to be charged back to the political division in which such election was held in odd numbered years, except for special elections.

In counties containing a registration city, the general office expense, the compensation of assistant clerk, and the cost of the rent and furnishing of rooms for the office of the board of deputy state supervisors of elections shall be paid by the city.

The compensation of the judges and clerks of election in the precincts, including the registrars as judges, shall be paid from the county treasury for all elections. For the November and primary elections held in the odd numbered years such compensation is to be charged back to the various political divisions in which such elections were held.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

202.

CITY PAYS COST OF ELECTION BOOTHS IN REGISTRATION CITIES—COUNTY NOT LIABLE.

The cost of election booths in a registration city is payable by the city and no part thereof is chargeable to the county

COLUMBUS, OHIO, March 13, 1912

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of June 24, 1911, you ask an opinion of this department upon the following:

> "The City of Youngstown is contemplating the purchase of a number of election booths and the auditor of the said city claims that the county should pay a portion of the cost of the same, probably about one-third. Please advise us whether or not, in your opinion, any part of the cost of said booths may be paid from the county treasury and if so, upon whose allowance."

The election booths herein referred to are the booths to be used as voting houses. The city of Youngstown has a population, according to the last federal

census, of 79,066, and is therefore a city in which general registration is held quadrennially.

The provisions governing the conduct of registrations and the holding of elections in registration cities are found in Sections 4870, et seq., General Code.

Section 4874, General Code, provides for the purchase of election booths as follows:

> "The board of deputy state supervisors shall appoint all registrars of electors, judges and clerks of election, and other clerks, officers, and agents herein provided for, and designated the ward and precinct in which each shall serve. It shall appoint the places of registration of electors and holding of elections in each ward or precinct, *provide suitable booths or hire suitable rooms for such purpo*se, and for its offices, at such rents as it deems just, and provide the necessary and proper furniture and supplies for such rooms. It shall provide for the purchase, preservation and repair of booths and ballot boxes necessary for use at elections in such city, of books, blanks and forms necessary for the registrations and elections herein designated and for duly issuing all notices, advertisements or publications required by law."

The following statutes provide for the payment of the expenses of elections: Section 4821, General Code, provides:

> "All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. In counties containing annual general registration cities, such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

Section 4945, General Code, provides:

> "For November elections held in even numbered years, the county in which such city is located shall pay the general expenses of such election other than the expenses of registration. Such allowance and order of the board for such expenses and compensation to such judges and clerks of elections shall be certified by the chief deputy and clerk to the auditor of such county, who shall issue his warrants upon the county treasury for the amounts so certified."

Section 4946, General Code, provides:

> "The additional compensation of members of the board of deputy state supervisors and of its clerk in such city hereinbefore specified, the lawful compensation of the deputy clerk and his assistants and all registrars of electors in such city, the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, including poll books for special elections, *and the cost of the rent, furnishing and supplies for rooms hired by the board for its offices and as places for registration of electors and the holding of elections in such city, shall be paid by such city from its gen-*

eral fund. Such expense shall be paid by the treasurer of such city upon vouchers of the board, certified by its chief deputy and clerk and the warrant of the city auditor. Each such voucher shall specify the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

Section 4821, supra, governs in counties having no registration city and does not apply to the present question. Section 4945 and 4946 have reference to counties in which a registration city is located.

The latter sections provide, without doubt, that all expenses of registration, including the renting and furnishing of rooms or election booths for such registration, shall be paid from the city treasury. The only expenses to be paid by the county is the general expenses for the November election held in even numbered years.

The clause in Section 4946, "and the holding of elections in such city," means all elections, and is not limited to municipal elections, or to elections held in odd numbered years. If such limitation had been intended the Legislature could have easily so provided.

A registration city is required to pay "the cost of the rent, furnishing and supplies" for rooms used for places of registrations and elections in such city. There is no obligation upon the county for such expense. The board of elections may furnish these rooms by renting or by purchasing the same. The election booths are used for registration and for municipal elections to a far greater extent than for county or state elections.

This construction of the statutes in question was made in the recently reported case of Conrad vs. Davis, 14 cir. Ct., N. S., 475 (Ohio Law Rep., March 4, 1912), in which it is held:

> "A county is not liable for the cost of election booths constructed for use within a municipality located in that county."

This decision seems to hold that the county is not liable for cost of election booths for use in any municipality, but the opinion of the court shows that the question arose in a registration city, and the holding is in fact that the county is not liable for the cost of election booths for use in a registration city.

No part of the cost of the purchasing of election booths in which to hold registration of electors and to hold elections in a registration city is payable by the county. Such cost shall be paid by the registration city.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

241.

PUBLICATION OF NOTICES OF CONTRACTS BY MUNICIPAL CORPORATIONS—DIRECTORS OF PUBLIC SERVICE AND PUBLIC SAFETY —ONE NEWSPAPER.

The special provisions of Section 4328, General Code, are excepted from the general provisions of Section 4229, General Code, and therefore, contracts entered into by the director of public service and also (by virtue of Section 4371,) contracts entered into by the director of public safety are governed by provision of Section 4328, General Code, and should be published only in one newspaper.

COLUMBUS, OHIO, April 6, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of March 27, 1912, you ask an opinion upon the following:

> "Should publication of notice to contractors in cities soliciting bids for contracts involving an expenditure of more than $500.00 be made in two newspapers of opposite politics, or is such publication limited to one newspaper (see Section 4328 and Section 4229, General Code)?"

Section 4328, General Code, provides:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder *after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city.*"

Section 4371, General Code, provides:

> "The director of public safety may make all contracts and expenditures of money for acquiring lands for the erection or repairing of station houses, police stations, fire department buildings, fire cisterns, and plugs, that may be required, and for the purchase of engines, apparatus, and all other supplies necessary for the police and fire departments, and for other undertakings and departments under his supervision, but no obligation involving an expenditure of more than five hundred dollars shall be created unless first authorized and directed by ordinance of council. *In making, altering, or modifying such contracts, the director of public safety shall be governed by the provisions of the preceding chapter relating to public contracts,* except that all bids shall be filed with and opened by him. He shall make no sale or disposition of any property belonging to the city without first being authorized by resolution or ordinance of council."

Section 4229, General Code, provides:

> "*Except as otherwise provided in this title,* in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, *shall be published in two newspapers of opposite politics of general circulation therein,* if there are such in the municipality, and for the following times: The statement of receipts and disbursements required shall be published once; the ordinances and resolutions once a week for two consecutive weeks; proclamations of elections once a week for two consecutive weeks; *notices of contracts and* of sale of bonds *once a week for four consecutive* weeks; all other matters shall be published once. "

The preceding chapter, referred to by Section 4371, supra, is the chapter in which is found Section 4328, General Code. The provisions of Section 4328, General Code, as to advertisements for bids apply to contracts entered into by the director of public safety.

Section 4328, General Code, requires advertisement for contracts "in a newspaper," while Section 4229, General Code, provides that "notices of contracts" shall be published "in two newspapers of opposite politics, of general circulation therein, if there are such in the municipality."

However, Section 4229 contains the proviso "Except as otherwise provided in this title."

Section 4328, General Code, authorizes publication in "a newspaper" but does not otherwise fix the number of papers in which such notice shall be published.

In case of Cincinnati vs. Davis, 58 Ohio St., 225, Minshall, J., says at pages 237 and 238:

> "* * * * The statute does not limit the number of papers in which the advertisement shall be made. It simply is that, in each instance, the advertisement shall be in 'some newspaper.' But this is not saying that it shall not be in more than one. The board seems to be given a discretion in this matter; and when there is nothing to show an abuse of its discretion, exception cannot be taken to the amount paid for advertising the various steps in the proceedings as required by law."

While the Supreme Court holds that a provision for publication in "some newspaper" does not limit the number to one newspaper, I am, of the opinion that the provision of Section 4328, General Code, that such notice shall be published in "a newspaper" means publication in one and only one newspaper. If the holding were otherwise there would be no limit whatever to the number of newspapers in which such publication could be made, except the limit of the number of qualified papers.

The proposition as to which section controls where there is a special and general statute upon the same subject, is considered in reference to statutes requiring publication by county officials in case of Schloenbach vs. State, 53 Ohio St., 345.

On page 346 the court says:

> "* * * * The duty of the commissioners in regard to the publishing of their report is governed wholly by Section 917 of the Revised Statutes,

and that section does not afford authority for either ordering such report published in a German newspaper, or paying for the same. See Cincinnati vs. Brickett, 26 Ohio St., 49."

Section 917, Rev. Stat., (now Section 2511, General Code), therein referred to, was a special statute which required publication in two newspapers, while a general statute, (now Section 6253, General Code) authorized an additional publication in a German newspaper. The court held that the special statute controlled.

The present question, however, can be distinguished from that in 53 Ohio St., 345. The general statute in that case did not refer to the publication authorized by the special statute. In the present situation the general statute, Section 4229, General Code, refers to "notices for contracts" which is the same matter specially covered by Section 4328, General Code.

But the proviso in Section 4229, General Code, "except as otherwise provided in this title" exempts the contracts authorized by Section 4328, General Code, from its provisions.

It is my conclusion that contracts entered into by the director of public service and director of public safety shall be advertised as provided by Section 4328, General Code, and that Section 4229, General Code does not apply. Such contracts should be published in only one newspaper.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

244.

BONDS OF MUNICIPALITY—PUBLICATION OF NOTICE OF SALE—ONCE A WEEK AND THIRTY DAYS NOTICE.

Section 3942, General Code, providing for thirty days' notice, requires that a publication for the sale of municipal bonds shall be made at least thirty days prior to the date of sale and Section 4229, General Code requires such notice to be published once a week for four consecutive weeks prior to sale. Both statutes must be complied with.

COLUMBUS, OHIO, April 2, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of February 2, 1912, you ask an opinion upon the following:

"How many insertions are required to make legal publication of notices of bond sales? The wording used in said law provides for publication for four consecutive weeks."

Section 3924, General Code, provides:

"Sales of bonds, other than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking fund of the city school district as herein authorized, by any municipal corporation, shall be to the highest and best bidder, *after thirty days' notice in at* least two

newspapers of general circulation in the county where such municipal corporation is situated setting forth the nature, amount, rate of interest and length of time the bonds have to run, with time and place of sale. Additional notice may be published outside of such county by order of the council, but when such bonds have been once so advertised and offered for public sale, and they, or any part thereof, remain unsold, those unsold may be sold at private sale at not less than their par value, under the direction of the mayor and the officers and agents of the corporation by whom such bonds have been, or shall be prepared, advertised and offered at public sale."

This section requires thirty days' notice for the sale of bonds.
In case of Muskingum Valley Turnpike Co., vs. Ward, 13 Ohio, 120, it is held:

"Where the law requires 'at least sixty days' notice' to be given of the time and place of payment, a single notice, given at least sixty days before the time of payment, is sufficient; it is not intended that notice should be given sixty consecutive days."

In order to give thirty days' notice it is not required that such notice shall be published for thirty consecutive days. One insertion of such notice published thirty days prior to the date of the sale of bonds will be sufficient to give thirty days' notice.

Another section must be considered.

Section 4229, General Code, provides:

"Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, and for the following times: The statement of receipts and disbursements required shall be published once; the ordinances and resolutions once a week for two consecutive weeks; proclamations of elections once a week for two consecutive weeks; notices of contracts and of *sale of bonds once a week for four consecutive weeks;* all other matters shall be published once."

This section requires notice of sale of bonds to be made once a week for four consecutive weeks. A similar provision of a special act governing Cincinnati was construed in case of Cincinnati vs. Fenner, 11 Ohio Dec., 281, wherein it is held:

"An advertisement for the sale of municipal bonds under Section 2293*h*, Rev. Stat., 93 O. L., 374, providing that bids may be received, 'after advertising the same for sale once per week for four consecutive weeks, on the same day of the week,' is complete and effective after the fourth insertion."

Under Section 4229, General Code, the insertion of notice of sale of bonds should be made once each week for four consecutive weeks, that is, four insertions are required, and the sale could be made after the day of the fourth insertion.

Section 3924, General Code, requires thirty days' notice and Section 4229,

General Code, requires that the notice be published once a week for four consecutive weeks. Construing the two provisions together, it is necessary that the notice of sale of bonds by a municipal corporation shall be published once a week for four consecutive weeks, making four insertions, and that the first notice shall be inserted and published thirty days prior to the date of sale.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

248.

COUNCIL—PUBLICATION OF ORDINANCES AND RESOLUTIONS IN GERMAN PAPER, TWICE—RECOVERY BY CITY SOLICITOR OR TAXPAYER FOR ILLEGAL PAYMENT TO PAPER.

Publications of ordinances and resolutions in a German newspaper in accordance with Section 4228, General Code, should be published once a week for two consecutive weeks.

Where such German paper has been making but one publication, but has been paid for two, a finding should be had against the same for such excess payment, and recovery for the same may be had in an action either by the city solicitor or a tax payer.

COLUMBUS, OHIO, April 1, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of February 2, 1912, is received in which you ask an opinion of this department upon the following:

> "How many insertions should be given ordinances and resolutions of the city council required to be published in a German newspaper. Said ordinances and resolutions of a general nature and providing for improvements have been published in only one issue and the paper has received pay from the city treasury for two insertions (in the same amount as the English papers).
>
> "What, if any, finding for recovery should be made against said German paper?"

Section 4228, General Code, provides for German publication as follows:

> "Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide paid circulation within such municipality of not less than one thousand copies: Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council."

Section 4229, General Code, prescribes the number of insertions, as follows:

> "Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations,

> notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality and for the following times: The statement of receipts and disbursements required shall be published once; the ordinances and resolutions once a week for two consecutive weeks; proclamations of elections once a week for two consecutive weeks; notices of contracts and of sale of bonds once a week for four consecutive weeks; all other matters shall be published once.

While Section 4229, General Code, does not refer to publications in a German newspaper, it does not appear that the number of insertions therein provided is limited to the insertion in the two papers of opposite politics. There is no specific provision of statute, stating the number of insertions to be made in a German newspaper.

The provision of Section 4228, General Code, requiring the publication of the ordinances and resolutions of council in two newspapers of opposite politics, is the same as the provision requiring publication in a German newspaper when such a paper is printed in such municipality with the required circulation.

It is my conclusion that the number of insertions to be made in a German newspaper is the same as that required in the two newspapers of opposite politics.

Ordinanaces and resolutions requiring publication should be published two times in a German newspaper, when such German paper has the required circulation and meets the other requirements.

It appears that the paper has been making but one and geting paid for two insertions. The payment for the second insertion is clearly illegal.

The decisions of the Supreme Court are apparently not in harmony as to the right of recovery of such illegal payments.

The rule of recovery is laid down in the case of Vindicator Co., vs. State, 68 O. S., 362, as follows:

> "But where a claim for such excessive publications has been presented to the board and allowed, and payment made by the treasurer on the warrant of the auditor prior to April 25, 1898, the prosecuting attorney cannot maintain an action, in the absence of both fraud and mistake of fact, to recover back the money.
>
> "The act of April 25, 1898, (93 O. L., 408), clothes the prosecuting attorney with power to recover back money so illegally drawn from the treasury on and after the date of its passage."

On page 370 of the opinion, Spear, J., says:

> "* * * * * The situation then was that the company had received moneys of the county, in a way apparently regular but to which it was not in strict law entitled. But an accounting officer, the proper officer, had paid the money voluntarily, upon vouchers issued by another accounting officer, in form duly approved, and it is difficult to see why in these respects, as to a stranger, they did not represent the county, and why the facts do not present a case of voluntary payment with the usual legal result that, in the absence of an enabling statute and where there is no showing of fraud or mistake of fact, there can be no recovery back. The rule recognizes the fact that the money paid was un-

justly paid; that the claim itself is illegal, one which the party, had he sought to do so, could have resisted. He chose not to resist but to pay, and he cannot afterwards ask the law to rectify his mistake."

The court cites, among other cases, the case of Cincinnati vs. Gas Light Co., 53 Ohio St., 278, which denies the right of the city to recover illegal payments when voluntarily made.

In a more recent case, Walker vs. Village of Dillonvale, 82 Ohio St., 137, it is held:

"In the absence of statutory regulation a taxpayer may maintain an action, on behalf of himself and other taxpayers, to recover money illegally paid out of the public treasury; and in such action may unite as defendants all against whom any relief is asked and whose right will be affected by the determination of the subject of the action."

On page 145, Summers, C. J., says:

"* * * * If those entrusted with the custody of public funds, or those whose duty it is to protect the public interests are remiss in their duty, or refuse to act, the taxpayer should be permitted to do so, and the courts in the exercise of a sound discretion will prevent any abuse of the privilege."

While this last cited case does not directly hold that the city solicitor may sue to recover illegal payments, without an enabling act, yet from the part of the opinion above quoted such holding can be reasonably implied. The right of the taxpayer to sue is based upon the fact that some official has been remiss in his duty. The city solicitor is required to sue to prevent the misapplication of funds, and it no doubt would be his duty likewise to bring action to recover illegal payments.

Although this latter decision does not refer to, nor distinguish in any way, the former rulings of the court, it is the later decision and should be followed.

It is my conclusion that an action can be maintained, either by the solicitor or by a taxpayer, to recover the illegal payments. A finding should be made against the paper for such illegal charges.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

261.

COUNCIL—UNION LABEL MAY NOT BE REQUIRED IN PUBLIC PRINTING.

As the city council is not so authorized it may not require that the Union label shall be placed upon all matter printed for the corporation, or upon any part of it.

COLUMBUS, OHIO, April 3, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of March 6, 1912, you inquire:

"Has the city council the authority to prescribe that all job printing in the various departments shall bear the Union label stamp?"

There is no provision of statute authorizing council to require that all printing done for a city or village shall bear the union label. Council has only that authority which is granted it by statute, or which is necessarily implied to carry out power granted by statute.

The effect of requiring the union label upon all printing is to provide that none but union labor can be employed by the person, firm or corporation who contracts to do printing for the village or city.

In the case of City of Cleveland vs. The Clemens Bros. Construction Co., 67 Ohio St., 197, an act limiting the hours of daily labor to be inserted in contracts for public improvements was held unconstitutional.

There are cases in other states more directly in point.

In Lewis vs. Board of Education, 139 Mich., 306, it is held:

"The board of education of the city of Detroit has no power to require contractors constructing public buildings to employ union labor exclusively."

In the case of Adams vs. Brenan, 177 Ill., 194, syllabi read:

"A board of education has no power to agree with the representatives of labor organizations to insert in all its contracts for work upon school buildings a provision that none but union men should be employed in such work or placed upon its pay rolls.

"That a board of education might have been of the opinion its action was for the public benefit affords no justification for limiting competition among bidders upon school building contracts, by requiring them to employ only union men in the work.

"A provision in a contract for a public school building which requires the employment of union men only, creates a monopoly in their favor and restricts competition by preventing contractors from employing any but union men, excluding all others engaged in the same kind of work."

In delivering the opinion of the court Justice Cartwright says:

"There is another ground upon which complainant has an undoubted right to maintain the bill, and that is, that the contract tends to create a monopoly and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons and by excluding therefrom all others engaged in the same work, and such a provision is illegal and void."

This is not a question as to the merits of labor or trades unions, or as to the right of labor to organize for its mutual benefit in all lawful ways. These rights are well recognized. The question is as to the right of the council to stipulate that

all work for the city shall be done by union labor and thereby excluding all other labor from performing any work for the city. This right is not recognized by the courts.

Therefore, the city council has no authority to require that the union label shall be placed upon all matter printed for the corporation, or upon any part of it.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

273.

BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES, NOT AUTHORIZED TO AUDIT BOOKS OF CEMETERY ASSOCIATIONS.

As the trustees of cemetery associations are not public officers and as such associations are not "institutions of a taxing district" they are not within the statutory provisions referring to the duties of the Bureau with respect to the auditing of books.

April 9, 1912.

Bureau of Inspection and Supervision of Public Office, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 21st, requesting my opinion upon the following question:

> "Is it the duty of the Bureau of Inspection and Supervision of Public Offices to audit the books of cemetery associations?"

I quote the following statutory provisions which are the only ones that bear upon the question: Section 274 of the General Code, as amended, 101 O. L., 282, is as follows:

> "There shall be a bureau of inspection and supervision of public offices in the department of the auditor of state which shall have power as hereinafter provided in sections two hundred and seventy-five to two hundred and eighty-nine inclusive, to inspect and supervise the accounts and reports of all state officers including every state educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district, or public institution in the state of Ohio. By virtue of his office the auditor of state shall be chief inspector and supervisor of public offices, and as such appoint not exceeding three deputy inspectors and supervisors, and a clerk. No more than two deputy inspectors and supervisors shall belong to the same political party."

Section 276, as amended 101 O. L., 283:

> "* * * State examiners and assistant state examiners shall receive the following compensation for each day necessarily employed by them * * * *. Each state examiner assigned to examine offices or institutions of other taxing districts (than counties or cities), eight dollars * * *."

Section 284, General Code, as amended, 101 O. L., 384:

> "The chief inspector and supervisor, a deputy inspector and supervisor or a state examiner shall examine the condition of each public office, such examination of township, village, and school district offices to be made at least once in every two years, and all other examinations to be made at least once a year. * * * * On the examination, inquiry shall be made into the methods and accuracy of the accounts and reports of the office, whether the laws, ordinances and orders of the taxing district have been observed, and whether the requirements of the bureau of inspection and supervision have been complied with."

I think it is clear that under the most liberal construction of the foregoing sections, the duty of the Bureau of Inspection and Supervision of Public Offices does not extend beyond that of inspecting and auditing the accounts of an "institution of a taxing district."

Without quoting any of the sections pertaining to cemetery associations, I think it is reasonably clear that their officers are not "public officers" and that, if their accounts are subject to inspection by the bureau at all it is because the association, or, perhaps more properly speaking, the cemetery itself, might be called an "institution of some taxing district."

There are several sections of the General Code, which it will not be necessary to quote, which afford to township trustees and to village councils authority over the interment of dead bodies, and the measure of control over cemetery associations within their territorial jurisdiction. Suffice it to say that in my opinion such statutes have not the effect of constituting the cemetery an institution of the taxing district. In fact the only sections in any way applicable to the question at hand are Sections 3461 to 3463, inclusive, of the General Code, which are as follows:

> "Where the township owns a burial place within the grounds of a cemetery association, the trustees of the township may levy a tax not exceeding five mills on the dollar of the tax duplicate of the township for the purpose of erecting permanent buildings upon and within such cemetery grounds."
>
> "Section 3462. When such tax has been assessed and collected it shall be paid to the officers of such cemetery association, and by them applied to the erection of such permanent buildings as in their judgment may be requisite for the accommodation of the patrons of the cemetery."
>
> "Section 3463. In anticipation of such tax, the officers of such cemetery association may issue and sell bonds to bear interest at a rate not to exceed six per cent. per annum."

The question is here raised, of course, as to whether these provisions constitute a cemetery owned by a private cemetery association, but for which taxes have been levied as prescribed therein, an institution of the township within the meaning of the statutes pertaining to the Bureau of Inspection and Supervision of Public Offices.

Statutes similar to these are found elsewhere in the General Code. Thus it is provided that a municipal council may contribute to the support of a public library maintained by a private association and that a board of education may do likewise. In these statutes it is generally provided that the taxing district shall re-

quire an annual financial statement from the association. No such provision is found in Section 3462, but in other respects the essential similarity of the section under consideration to those just mentioned seems to be complete.

There is, of course, complete lack of authority upon the exact question. Most of the phrases used in the act relating to the powers of the Bureau of Inspection and Supervision of Public Offices have never been judicially construed, nor is there any authority whatever as to the construction or operation of statutes like those under consideration.

In the absence of any such authority, then, I am obliged to arrive at my conclusion by such reasoning as occurs to me. I am of the opinion that a cemetery association though aided in the manner set forth in Section 3451 et seq., above quoted, is not an institution of the township. The township has the power to maintain a cemetery of its own, just as the village or the school district has the right to have a public library of its own. The granting of aid by taxation to a private institution of either sort, however, is clearly distinguishable from maintaining such an institution as an institution of the taxing district. The taxing district would have the undoubted right even in the absence of specific provisions like that to which I have referred to require an accounting of the public moneys paid over to the private institutions. Such an accounting might be enforced by appropriate proceeding in equity, as the statutory duty imposed by Section 3462 upon the trustees of the cemetery association is in the nature of a trust. When the accounting has been obtained, it would become a part of the accounts of the taxing district,—in this case, the township. As such, it would be subject to the inspection of the Bureau of Inspection and Supervision of Public Offices. I am convinced, however, that the books of the cemetery association as such are not open to inspection by the bureau.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

278.

BOARD OF EDUCATION—EMPLOYMENT OF PERSON WITHOUT TEACHER'S CERTIFICATE DURING TEACHER'S ILLNESS, LEGAL —PAYMENT OF TEACHER DURING ILLNESS, AN INCREASE OF SALARY.

The board of education is not acting illegally in employing a person not possessed of a teacher's certificate to teach in the emergency arising by reason of the illness of a regular teacher.

The action of the board in allowing said regular teacher full pay during said absence is in effect an increase in pay and not illegal. Such action, however, should be scrutinized.

The payment by the absent teacher, of compensation to the aforesaid substitute, is a private arrangement not objectionable.

April 12, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I herewith desire to acknowledge receipt of your letter of February 3, 1912 wherein you inquire as follows:

"Mr. A., teacher in the third room of * * * * school was kept home by illness. His room was then placed in charge of a primary teacher, and the latter room was placed in charge of Miss M., a daughter of the president of the board of education, who had no certificate to teach. Mr. A. was paid for the full time he was out, and he then paid Miss M. $61.00 for her work. Was the payment illegal and if recoverable from whom?"

In reply thereto I desire to say that Section 7690 of the General Code provides as follows:

"Each board of education shall have the management and control of all the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. If deemed essential for the best interests of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings, and such other employes as it deems necessary, and fix their salaries. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

Section 7687 of the General Code provides as follows:

"Teachers of the public schools may dismiss their schools, without forfeiture of pay, on the first day of January, the twenty-second day of February, the thirteenth day of May, the fourth day of July, the first Monday in September, the twenty-fifth of December, and on any day set apart by proclamation of the President of the United States, or the governor of this state as a day of fast, thanksgiving or mourning."

I particularly call attention to the language used in Section 7687, General Code, in respect to the matter of the forfeiture of pay, to wit: "teachers in the public schools may dismiss their schools, without forfeiture of pay" on certain holidays, and I also call attention to the language used in Section 7690, General Code, above quoted, to wit: "teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

It will be noted that the management and control of all public schools of whatever name or character in the district is vested in the board of education. Under Section 7690, just quoted, each board shall fix the salary of all teachers which may be increased but not diminished during the term for which appointment is made. If the board allows the teacher full pay for his term, it amounts to an increase in salary, which was not contrary to the law. Aside from this, a matter of this kind seems to be peculiarly within the legislative control of the board of education. It was entirely competent for the board to place the primary teacher in room A, and while technically no one is authorized to teach, except one having a teacher's certificate, yet, it will be kept in mind that there are times and circumstances under which it is extremely difficult, if not quite impossible, to procure a teacher in an emergency. The statute itself,—Section 7690-6—provides:

"Nothing herein contained shall prevent the board of education of each city school district from defining the duties of its various employes,

and prescribing the rules and regulations under which they shall serve, nor from exercising proper supervision over them. Nor shall the board of education of such city school district be precluded *from securing labor or assistance for short periods within its discretion in cases of emergency.*"

The writer himself has observed instances in which it was impossible to procure a teacher or instructor in a school where there were many departments and one of two things would have to be done,—either fill the vacancy with one not having a certificate, or permit the room to be without an instructor and that department continued longer than the others. The reasonable and practicable thing to do under the circumstances would be to keep the school going. Of course, boards of education, under fear of being guilty of malfeasance in office, must act in good faith and within reason to the end that the spirit of the law requiring teachers to have certificates may not be abused.

In regard to the matter at hand, the payment by teacher "A" to Miss M was a purely private arrangement over which no authority has any control beyond the parties to the agreement. There can be no finding against Miss M.

As to teacher "A," if the board of education granted him full pay for his term, the effect of it in law was an increase in salary, and no finding can be made against him. While the action of the school board in allowing full compensation is to be carefully scrutinized, yet, when they act within reason and with evidence of good faith, it is the opinion of this department that no findings are to be made.

Very respectfully,

TIMOTHY S. HOGAN,
Attorney General.

308.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—TEN MILL LIMITATION—INTEREST AND SINKING FUNDS FOR BONDS ISSUED SUBSEQUENT TO JUNE 2, 1911 WITHOUT VOTE OF PEOPLE.

The municipal budget must provide for every object for which moneys are to be raised. Sinking funds and interest on all bonds issued subsequent to June 2, 1911, without a vote of the people must be counted within the ten mill limitation of the Smith One Per Cent. Law.

April 25, 1912.

Bureau of Irspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of April 9, submitting the following question for my opinion:

"Must the municipal budget provide for sinking fund and interest on all bonds issued subsequent to June 2, 1911, the issue of which has not been submitted to a vote of the people, from revenue levied and collected within the ten mill limitation? We would refer you to the concluding provision of Section 5649-2 of the General Code."

At the outset I beg to advise that the municipal budget must provide for every object for which moneys are to be raised, regardless of any of the limitations. As to whether or not sinking fund and interest levies like those concerning which you inquire must be made within the ten mill limitation, the sentence to which you refer is, it seems to me, conclusive. That evidence exempts from the ten mill limitation

> "* * * * such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred *by a vote of the people.*"

The Supreme Court, in the case of State ex rel Sanzenbacher, has been careful to use exactly the same language as that used in this sentence, and I can see no reason for holding otherwise than that levies for sinking fund and interest purposes in connection with bonds issued after June 2, 1911, without a vote of the people, must be counted in ascertaining whether or not the ten mill limitation of Section 5649-2, General Code, has been or will be exceeded.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

313.

EXECUTORS AND ADMINISTRATORS—RECOVERY FROM, OF EXCESSIVE FEES—OPENING OF ALL FORMER ACCOUNTS UPON FILING EACH ADDITIONAL ACCOUNT—ILLEGAL CONTRACT OF VILLAGE FOR SALE OF TIMBER—RECOVERY AGAINST HEIRS FOR AMOUNT RECEIVED FROM SUCH SALE.

In accordance with Section 10835, *General Code, all former accounts may be opened up and errors therein corrected, upon the filing of every additional account.*

Matters of dispute between parties which have been settled by a court however, may not be readjusted.

Under this rule, excessive fees paid an executor may be excepted to and recovered upon the filing of any account.

When council authorized the heirs of one Walker, who had willed certain timber land to the City, to sell timber on said land for a return of $1,515.42, *said action of council was illegal in that it was not taken in accordance with Section* 3699, *General Code, providing for the sale of real estate upon competitive bids. Council's action, in authorizing said heirs to devote moneys from the amount so received, to the making of improvements and repairs from time to time on said property, was legal however, in that bids were unnecessary.*

The heirs are, therefore, liable to the village for the amount received from the sale of said timber less the amount paid for repairs.

COLUMBUS, OHIO, April 23, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of January 27, 1912, you ask an opinion of this department upon the following:

"The enclosed statement gives the allowances made by the probate court of Clinton county to executors of the Walker estate as their fees for the settlement of said estate. You will note that the fees allowed said executors for ordinary services far exceeds the rate fixed by law and we would ask whether or not the matter at this time can be opened up and recovery be had from executors for the over allowance made them by the court for ordinary services. We might add that the estate was left to the village of Wilmington, Ohio, for the purpose of establishing a public library.

"We also desire your opinion as to whether or not recovery can be had of the heirs at law of said estate under an agreement for repairs, fences, etc., on farm belonging to said estate left to the village. The amount involved in this proposition is $497.07."

From the statement attached to your letter it appears that the fourth account of the executors was filed March 17, 1911. This appears to be the last account filed and this is not a final account.

Section 10834, General Code, provides:

"When an account is settled in the absence of a person adversely interested, and without actual notice to him, it may be opened on his filing exceptions to the account within eight months thereafter."

Section 10835, General Code, provides:

"Upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened as to correct any mistake or error therein. Matters of dispute between two parties, which previously had been heard and determined by the court, shall not again be brought into question by either of the same parties without leave of the court."

The date of the settlement of the fourth account is not given, but it is evident that more than eight months have elapsed since said settlement. If that is true then no exceptions can be filed to the account by virtue of Section 10834, General Code.

As other accounts are to be filed, all former accounts may be opened under the provisions of Section 10835, General Code, upon the filing of any additional account.

In case of Lambright, Admr., vs. Lambright, 74 Ohio St., 198, Crew, J., says at page 207, of the opinion.

"* * * * It is suggested in the argument, in the brief of counsel for plaintiff in error, that the adjudication and settlement by the probate court, of the first account filed by Frank Lambright as administrator,—no exception having been filed thereto,—was and is, as between the parties to the present controversy, final and conclusive. This claim we think is sufficiently answered by the provision of Section 6187, Revised Statutes, the language of which is as follows: 'and upon every settlement of an account by an executor or administrator all his former accounts may be so far opened as to correct any mistake or error therein; excepting that any matter of dispute between two parties which

had been previously heard and determined by the court shall not be again brought into question by either of the same parties without leave of the court.' "

The settlement of the former accounts is not conclusive and may be opened and all errors and mistakes therein corrected upon the filing of a further account. When the next account is filed, exceptions should be made thereto, and to the former accounts, so as to open all former accounts and the entire matter adjusted by the probate court.

You next inquire as to the right of recovery from the heirs upon an agreement for repairs and improvements. From the report of the axaminer attached to your letter, it appears that the village granted permission to the heirs of Walker to cut and sell growing timber and that the proceeds should be applied to building fences and making repairs on the farm, which had been given to the village by the will of Walker.

The resolution of council authorizing the repairs and sale was passed September 4, 1908, and provides:

"Whereas application has been made to this council by the heirs of Samuel Walker for permission to cut some declining trees on the land willed by said Walker to the village and a committee of this body having examined into said matters and finding that there are a number of trees on said land in a dying condition and will be worthless before the time expires for said land to be turned over to the village and numerous repairs are needed on said farm of a more permanent nature than are likely to be placed unless permission is given to cut said timber and believing that it is to the best interest of the town to keep said farm land in the best possible condition;

"Therefore be it resolved that permission be granted to cut such timber, as the committee of council have approved the proceeds of the same to be used in building permanent fences and other needed repairs on said farm and that the said heirs shall make a report to this council of the receipts and expenditures under this order."

The following motion was also passed by council:

"Motion made and seconded that the committee appointed to look after the sale of timber on the Samuel Walker farm be instructed to see that the money from the sale of said timber be properly spent in improvements on said farm."

It appears that in December, 1908, the sum of $1,515.42 was deposited in bank on account of the Walker timber, and which sum represented the amount of timber sold by the heirs. The amount expended therefrom for improvements on the farm was $1,018.35. The balance thereof, amounting to $497.07, was distributed among the heirs, after paying $250.00 for attorney fees.

The heirs afterwards sold their interest in the land to the village, but the balance due on the timber account was not taken into consideration in said sale.

It will first be necessary to pass upon the legality of the action of council in this matter.

Section 3699, General Code, provides how real estate shall be sold by a municipal corporation, as follows:

"No contract for the sale or lease of real estate shall be made unless authorized by an ordinance, approved by the votes of two-thirds of all members elected to the council, and by the board or officer having supervision or management of such real estate. When such contract is so authorized, it shall be made in writing by the board or officer having such supervision or management and only with the highest bidder, after advertisement once a week for five consecutive weeks in a newspaper of general circulation within the corporation. Such board or officer may reject any or all bids and readvertise until such real estate is sold or leased."

Section 3703, General Code, provides for the sale of personalty:

"Personal property not needed for municipal purposes, the estimated value of which is less than five hundred dollars, may be sold by the board or officer having supervision or management thereof. If the estimated value of such property exceeds five hundred dollars, it shall be sold only in the manner herein provided for the sale or lease of real estate."

The timber sold amounts to more than five hundred dollars and whether this timber was sold as real estate or as personal property the provisions of Section 3699, General Code, must have been complied with and such timber should have been sold at competitive bidding after advertising as required by said section.

In case of Hirth vs. Graham, 50 Ohio St., 57, Bradbury, J., says on page 65 of the opinion:

"Sales of growing timber are as likely to become the subjects of fraud and perjury, as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands, should depend, not upon the intention of the parties, but upon the legal character of the subject of the contract, *which, in the case of growing timber, is that of realty.*"

This is the leading case in Ohio on this question and has not been overruled. Growing timber is realty, and such timber must be sold at competitive bids as required by Section 3699, General Code. It does not appear that this was done, but on the contrary the resolution of council shows that the permission to cut and sell the timber was to be done without competitive bids. The contract then was illegal.

However, the timber has been cut and sold. The heirs who cut and sold it and who acted under the illegal agreement, would be liable, at least, for the reasonable value of the timber, which would be the selling price of such timber at the usual market price. The timber was sold for $1,515.42 and there is nothing to show that it was not sold at the market price at the time of sale.

Part of this money was expended for repairs upon the farm. The farm belonging to the village and it was within the power of council to have repairs made upon the same.

The repairs and improvements appear to have extended over a period from December, 1908 to June, 1911.

Section 4221, General Code, prescribes how contracts shall be made by a municipal corporation, as follows:

"All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor

and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

The repairs made may have been and probably were, such as could have been contracted for without competitive bidding. The repairs extended over more than two years, and there may have been several distinct and separate repairs and improvements, each of which involved an expenditure of less than five hundred dollars. In such case the contract need not have been let at competitive bidding.

If the contracts for the repairs and improvements were legally entered into, the heirs would be entitled to a credit for such repairs and would be liable to the village for the difference in the selling price of the timber and the cost of the repairs. This difference is $497.07 and the heirs should account to the village for this sum.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

336.

MUTUAL INSURANCE COMPANIES AND MUTUAL INSURANCE ASSOCIATIONS—RIGHT OF BOARD OF EDUCATION TO INSURE IN THE FORMER UNDER THE STOCK PLAN.

There are radical differences between mutual insurance companies and mutual insurance associations. Yet in as far as the former organizations possess all the features of the latter which prevent the insurance of boards of education with such associations such as the right to share in the profits and losses of the company, and the contingent liability of members, boards of education are also prevented in this respect from insuring in mutual insurance companies.

Under the stock plan of insurance, however, which is permitted to such mutual insurance companies by Section 9574, General Code, when their net assets amount to two hundred thousand dollars, the insured are not members of the company and the boards of a education may insure under said stock plan with said companies.

COLUMBUS, OHIO, May 13, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of January 25, 1912 you inquire as follows:

"Please render to this bureau your written opinion as to whether a board of education can legally insure a school building in a mutual fire insurance company organized under Section 3634, R. S. Attached is a letter from the Central Manufacturers' Mutual Insurance Company of Van Wert asking that the ruling of this bureau against the insurance

of school buildings in mutual fire insurance companies be reversed. Also attached is Attorney General's opinion of April 28, 1911, covering a part of the question involved."

The opinion of this department of April 28, 1911, to which you refer, applied to mutual protective fire associations organized under the provisions of Section 9593, et seq., General Code. On December 29, 1911, that opinion was again considered and the conclusion of the former opinion was adhered to. This last opinion was given at the request of the Legislative Committee of the Federation of Mutual Insurance Associations of Ohio, and a copy of the same is herewith enclosed.

Your inquiry is as to the right of boards of education to insure school buildings in mutual insurance companies, organized and doing insurance business in accordance with Sections 9524, et seq., of the General Code, upon the mutual plan.

An examination of the statutes governing these two kinds of insurance companies or associations will show that there is a radical difference between the two, and that the former opinions herein referred to, concerning those associations organized under Section 9593, General Code, are not necessarily conclusive as to mutual insurance companies organized under Sections 9524, et seq., General Code.

The difference between these two classes of insurance companies is stated in case of Richards vs. Swaim & McCormick, 9 Ohio Dec., 70, the first syllabus of which case reads:

"The system of insurance contemplated by Sections 3686 to 3690, Rev. Stat., and known as mutual insurance associations, differs essentially and radically from the plan of mutual insurance companies provided for by Sections 3634 to 3684, Rev. Stat."

Van Pelt, J., after giving the history of legislation in Ohio upon the subject of mutual insurance, points out the various differences in the two plans on pages 73 and 74 of the opinion, when he says:

"Mutual companies must have a certain amount of insurance subscribed before they can organize; a fund to pay losses and expenses is provided by the payment of annual cash premiums in advance; if the amount of premiums in any year exceed the amount of losses and expenses, the excess goes into the surplus and may be used to pay future losses; if the losses and expenses exceed the premiums a draft is made upon any surplus on hand from former years, or assessments may be made upon the policy holders, and the liability of members is secured either by deposit notes (before the amendment of April 14, 1888), or a contingent written contract liability, as now provided for. Such companies may have a capital stock; they may insure their risks, and maintain a reinsurance reserve fund; they may be organized for profit and may declare dividends out of surplus profits; they contemplate an extended business and a numerous and widely scattered membership. * * * * *.

"Mutual associations are not required to have any certain amount of insurance subscribed; they have no capital stock; they are not organized for profit; they are not required or empowered to charge or collect cash premiums in advance; they have no surplus or reserve fund; members are not by law required to secure their liability by deposit notes or any form of contingent liability, though a form of security may doubtless be provided for by the constitution and by laws. Such associations are of a local nature; the members are comparatively few in number and

are likely to be more or less acquainted with the financial standing of each other; * * * * * and the statute contemplates specific assessments of members from time to time to pay lossess as they occur, and when the amount thereof has been ascertained; and the liability of members is limited only by the amount of losses."

In mutual insurance associations organized under Sections 9593,, et seq., General Code, the liability of the members is limited only by the amount of the losses. In mutual fire insurance companies organized under Sections 9524, et seq., General Code, the liability is certain as to a particular amount and is contingent as to a further amount.

Section 9525, General Code, provides:

"A company so incorporated for the purpose of transacting the business of fire insurance on the mutual plan, thereupon may elect officers and, upon procuring from the superintendent of insurance his certificate that it has filed with him its bond in the sum of ten thousand dollars approved by him, conditioned upon the faithful accounting for all funds and property coming into his hands, also may solicit subscriptions for insurance and accept premiums, which shall be held by the company in trust for the respective subscribers until policies of insurance are issued to them."

Section 9526, General Code, provides:

"Any such company shall not issue policies or grant insurance until it has procured the certificate provided for in section ninety-five hundred and twenty-two. Such certificate shall not be issued until at least five hundred thousand dollars of insurance in not less than two hundred separate risks, no one of which exceeds five thousand dollars, have been subscribed, *and the premiums thereon, for one year to an aggregate of ten thousand dollars paid in cash by the subscribers, each of whom agrees in writing, to assume a liability to be named in the policy, subject to call by the board of directors, in a sum not less than three nor more than five annual premiums. The same liability shall be agreed to in writing by each subsequent subscriber or applicant for insurance who is not a merchant or manufacturer.* Each subscription before incorporation shall be accompanied by a certificate of a justice of the peace of the township or city where such subscriber resides, that in his opinion the subscriber is pecuniarily good and responsible to the extent of the contingent liability agreed to be assumed."

Section 9528, General Code, provides:

"Any such company, in its by-laws and policies must fix by a uniform rule the contingent mutual *liability of its members for the payment of losses and expenses.* Such contingent liabilities shall not be less than three nor more than five annual cash premiums as written in the policy; and shall cease with the expiration of the time for which a cash premium has been paid in advance, except for liability incurred during that time."

Those who insure in this class of insurance companies upon the mutual plan

are required to pay an annual cash premium and to assume a contingent liability of not less than three nor more than five annual cash premiums as written in the policy.

The status of the insured and the manner of making assessments upon the members is provided by statute.

Section 9538, General Code, provides:

> *"Every person who effects insurance in a mutual company, and continues to be insured,* and his heirs, executors, administrators, and assigns *thereby shall become members of the company during the period of insurance, and be bound to pay for losses and such* necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability. As often as they deem necessary, the directors may settle and determine the sum to be paid by the several members thereof, and publish this in such manner as they choose, or as the by-laws prescribe. The sum to be paid by each member always shall be in proportion to the original amount of the liability, and it shall be paid to the officers of the company within thirty days next after the publication of such notice. But when the company is not possessed of cash funds above its reinsurance reserve sufficient for the payment of incurred losses and expenses, it shall be deemed to have impaired its capital. When such impairment exceeds twenty-five per cent. of the reinsurance reserve required to be maintained, the company shall make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment, in proportion to their several liabilities, and to make good the reinsurance reserve."

Section 9540, General Code, provides:

> "If a member neglects for thirty days after the publication of such notice, and after demand for payment, to pay the sum assessed upon him as his proportion of such loss, the directors may sue for and recover the whole amount of contingent liability, with costs of suit. Execution shall only issue for assessments and costs as they accrue, and every such execution must be accompanied by a list of losses, for which the assessment is made. If the whole amount of liability is insufficient to pay the loss occasioned by any fire or fires, the sufferers insured toward making good their respective losses, shall receive a proportional share of the whole amount of such liability, according to the sums by them respectively insured. No member ever shall be required to pay for a loss occasioned by fire, or inland navigation, more than the whole amount of such liability."

In fixing the amount of the assessment the directors may take into consideration those claims which are worthless, and the assessments which may be uncollectable.

At Section 559 of May Insurance the rule is stated:

> "* * * * But in determining whether there are earned premiums available to pay losses, uncollectable and worthless claims may be disregarded. In fixing the amount to be assessed, interest on borrowed money, probable failures in the collection, a reasonable sum for the expense of collection, and a reasonable allowance by way of discount for prompt payment may be taken into account."

The amount which a member of a mutual fire insurance company will be required to pay upon his contingent liability depends not only upon the amount of loss by fire, but also the expenses of the company and the reduction of the amount raised by the assesment due to the inability of insolvent members to pay their liability.

May on Insurance at Section 548, sets forth the principle upon which mutual insurance is founded:

> "* * * * The principle which lies at the foundation of mutual insurance, and gives it its name, is mutuality; in other words, the intervention of each person insured in the management of the affairs of the company; and the participation of each member in the profits and losses of the business, in proportion to his interest. Each person insured becomes a member of the body corporate, clothed with the rights and subject to the liabilities of a stockholder. He is at once insurer and insured."

At Section 549 he defines the status of the members:

> "Although the members of a mutual company are not usually denominated stockholders, and are not stockholders in the usual sense of the word, yet they are in point of fact stockholders, and in many of the policies are recited to have taken a portion of the capital stock. This stock is usually taken by paying in a certain amount of cash premium, and the balance in what are denominatel premium notes, that is, notes given for premiums, to form the basis of assessments for losses and expenses, and constituting the capital or funds of the company. The capital stock of a mutual insurance company usually consists in its cash assets, its premium and deposit notes, assessable to pay losses, which are usually denominated absolute funds, and the liability to a fixed amount, by statute or charter, over and beyond these to be resorted to after the first are exhausted, and usually denominated conditional funds."

By Section 9540, General Code, it is seen that if the whole amount of liabliity is insufficient to meet losses by fire, the sufferers insured must accept a pro rata share of their losses and do not get the full amount of insurance called for in their policies.

While there is a radical difference in the two classes of companies, yet it is seen that the insurers on the mutual plan as provided in Section 9525, et seq., General Code, are members of the company with all the rights of membership in a corporation; that they share in the profits and losses of the company, and the solvent members must meet, to the extent of their contingent liability, the defaults of insolvent members. These are the features of the mutual insurance associations which prevent boards of education from insuring school houses in such associations. As these features are also contained in the mutual insurance companies, the same reasons as set forth in the former opinions herein referred to would apply to such companies and would prevent boards of education from insuring school houses in such companies upon the mutual plan.

Mutual companies doing business in accordance with Sections 9524, et seq., General Code, are authorized, under certain conditions, to issue insurance upon the stock plan.

Section 9574, General Code, provides:

> "Every mutual company shall embody the word 'mutual' in its title

which must appear upon the first page of every policy and renewal receipt. Each stock company upon the face of every policy and renewal receipt shall express in some suitable manner, that such policy or receipt is a stock policy or receipt. Neither class of companies doing business in this state, shall issue a policy not appropriate to its class, except that any mutual comapny doing business in this state, *having net assets not less than two hundred thousand dollars invested as provided in section ninety-five hundred and eighteen may issue policies either upon the mutual or stock plan,* and may continue to do such kind of business so long as its assets continue so invested, and may expose itself to loss on any risk or hazard, either by one or more policies, to an amount not exceding five per cent. thereof."

Under the stock plan of insurance, the insured are not members of the company, and there is no contingent liability, the cost of the insurance is known when the policy is written. The boards of education could insure school houses in mutual companies upon the stock plan if such companies are authorized to issue such policies.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

346.

COUNTY RECORDER—FEES FOR TRANSCRIBING INDEX RECORD DESTROYED BY FIRE ARE FOR OFFICIAL DUTIES—PAYMENT INTO COUNTY FEE FUND.

Service performed by the Recorder of Adams County (prior to November 28, 1910, when Section 2780 was amended) in transcribing a deed index record which had been defaced by fire, even though done at night and outside of office hours, are services performed as a part of his official duties, and the fees received by him for said work should have been paid by him into the county fee fund in accordance with Section 2977, General Code.

A finding should therefore be made for the amount received.

May 7, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—In your letter of February 29, you inquire as follows:

"Subsequent to the fire which destroyed the court house of Adams County, there was paid to the county recorder an amount for transcribing a deed index record defaced by the fire. The recorder states in a letter to this department that the work was done at night and on Sunday and all out of office hours. The amount paid the recorder was retained by him and not paid into his fee fund. What should be the finding of this department in the case?"

In reply to your inquiry, I desire to say that Section 2977 of the General Code provides as follows:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys to such county and accounted for and paid over as such as hereinafter provided."

Section 2995 of the General Code provides for the salary of the county recorder as follows:

"Each recorder shall receive sixty dollars for each full one thousand of the first fifteen thousand of the population of the copnty, as shown by the last federal census next proceding his election;

"fifty dollars per thousand for each full one thousand of the second fifteen thousand of such population of the county;

"forty dollars per thousand for each full one thousand of the third fifteen thousand of such population of the county;

"thirty dollars per thousand for each full ont thousand of the fourth fifteen thousand of such population of the county;

"twenty dollars per thousand for each full one thousand of the fifth fifteen thousand of such population of the county;

"ten dollars per thousand for each full one thousand of the sixth fifteen thousand of such population of the county;

"and five dollars per thousand for each full one thousand of such population of the county in excess of ninety thousand."

Section 2996 of the General Code provides that such salary shall be in full of all fees, etc., as follows:

"Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisities of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

Section 2479 of the General Code provides that the county commissioners may have certain records transcribed, as follows:

"When they deem it necessary, the county commissioners shall have any of the records or books in the office of the county auditor, county recorder, or county surveyor, transcribed into other books, by the officers having charge thereof, and pay them therefore six cents per hundred words. The records and books so made have the same force and be as valid in law as evidence as the records and books from which they were taken."

Section 2774 of the General Code provides that when the records in the county recorder's office become defaced or injured, and when directed by the county commissioners, the recorder shall transcribe them into new books, as follows:

"When the records of the recorder's office, or any part of them, become defaced or injured, the recorder when directed so to do by the

county commissioners, shall transcribe them into new books, which shall be as valid in law as the original record, and transcripts therefrom shall be received and taken as of the same force and effect."

Section 2775 of the General Code provides as follows:

"When any of the records of a county are destroyed in whole or in part, a map, plat, deed, conveyance, mortgage, power of attorney, or other instrument in writing, or record in any proceeding authorized by law to be recorded, which affects real estate in the county, or the continuing rights of parties to such record, and of which the original, or exemplification thereof has been recorded, such original or exemplification or a certified copy of the former record, may be recorded in the proper office therefor. In re-recording it, the officer shall record the certificate of the previous record with date of filing for record appearing on the original or certified certificate so recorded which shall be taken and held as the date of the recording of the instrument to which it is attached. Copies of records herein authorized to be made, duly certified, shall have the same force and effect as evidence as certified copies of the original record."

Section 2776 of the General Code provides that a competent person shall compare such records with the instrument so recorded, as follows:

"When any such instrument or record is presented to the county recorder or other proper custodian of such records, he shall forthwith record and index it in accordance with the law for the original recording. A competent person shall compare such record with the instrument so recorded, and, if correctly recorded, certify on the margin of the page upon which such record has been made the correctness thereof."

Section 2777 of the General Code provides for the fees to be paid to the recorder for such transcribing, and provides how the same are to be paid, as follows:

"Such recording officer shall receive compensation for recording such map or plat not exceeding six lines, fifty cents, and for each additional line, two cents, and for any such recording and indexing other than a map or plat, at a rate of not more than five cents for each hundred words. Such compensation shall be paid from the county treasury upon the allowance of the county commissioners.

"No bill for service under this section shall be allowed by the county commissioners until they are first duly satisfied that such services have been rendered and the charges therefor are not in excess of the rates herein provided."

It will be noted that said last quoted section fixes the compensation for recording and indexing all instruments other than a map or plat at a rate of not more than five cents for each one hundred words, which said provision seems to be in conflict with Section 2780 of the General Code, which provides that the recorder shall receive six cents for each one hundred words for transcribing defaced or injured records; and the section further specifically and unequivocally provides such fees shall be paid into the county treasury to the credit of the county recorder's fee fund, as follows:

"For services directed to be performed by the county commissioners in transcribing the records of other counties, and transcribing defaced or injured records, the recorder shall receive such compensation as the commissioners determine, not exceeding six cents for each hundred words; and for transcribing defaced or injured records of plats, not exceeding fifty cents for the first six lines and three cents for each additional line. For the purposes of this section, a line shall be such portion of the record as can be drawn by a continuous stroke of the pen without change of the rule, regardless of intersecting lines, and for making the general indexes provided for herein, such sum as is fixed by the commissioners. The commissioners shall allow the recorder his necessary expenses in transcribing records in other counties."

While there is a conflict as to the fee to be paid to the county recorder for transcribing defaced and injured records, nevertheless such fees, whether fixed according to the rate under Section 2777 of the General Code, above quoted, or according to the rate fixed by Section 2780 of the General Code, above quoted, are to be paid into the county treasury to the credit of the recorder's fee fund as specifically provided by Section 2780 of the General Code, above quoted.

I am verbally informed by your department that the fee for transcribing said deed index record mentioned in your inquiry was paid by the said recorder of Adams County on November 28, 1910, and that said services were rendered prior to that date, which was prior to the amendment of Section 2780 as passed by the last general assembly, 102 O. L., 277. If the services had been rendered and the fee paid since that date, it is my opinion that unquestionably the last mentioned section of the General Code, as so amended, would apply. The statutory law governs, however, as it existed on or prior to that date, and I have above quoted that section as it existed at that time, and which said section, I believe, determines the matter about which you inquire.

By reason of the provisions contained in Section 2479 of the General Code, supra, it was part of the official duty of the recorder to transcribe the records in question,—he being the officer in charge of the said records. Whatever amount was paid to the county recorder for transcribing defaced or injured records, whether at the rate fixed by Section 2777 of the General Code, or at the rate fixed by Section 2780 of the General Code,—said amount, in my opinion, is an allowance or perquisite which is paid to such recorder in the performance of his official duties, and in my judgment comes within the provisions of said Section 2977 of the General Code, supra.

THEREFORE, It is my opinion that the amount paid the said recorder and retained by him is an allowance or perquisite for the performance of his official duties and should have been paid into the Adams County fee fund in accordance with the above quoted sections, and a finding should be made by your department accordingly.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

347.

EXPENSES—SHERIFF—POWER TO PAY DEPUTY FIXED SUM PER WEEK FOR MAINTAINING HORSE—ALLOWANCE TO SHERIFF BY COUNTY COMMISSIONERS.

A sheriff may legally pay his deputy a fixed sum per week for the care of his horse and be re-imbursed therefor by allowance of the county commissioners.

April 26, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of February 2, 1912, you inquire of me as follows:

> "Is it legal to pay anyone a fixed rate per week or month for boarding the sheriff's horses under Section 2997? If so, is it legal for the deputy sheriff to receive pay from the county for boarding the sheriff's horses?"

In answer to the first question, I desire to state that this department, in an opinion addressed to you, on October 13, 1911, held that county commissioners could not legally adopt a resolution providing for the allowance to a sheriff of a certain stipulated sum per month for the expense of maintaining the horses and vehicles necessary in the proper discharge of his duties, under Section 2997, General Code, as amended 102 Ohio Laws, page 93, for the reason that said section only authorizes the county commissioners to allow to the sheriff his actual and necessary expenses of maintaining such horses and vehicles, because the commissioners are without authority to determine what the actual expense will be until the sheriff files his quarterly statement.

As I view it, the question presented by your latest inquiry is whether the sheriff may legally pay to any one a stipulated sum per week or month for the care of his horses, and be re-imbursed therefor by allowance of the county commissioners.

Said Section 2997 as amended authorizes the county commissioners to make allowances to the sheriff quarterly, "of all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office." This statute also requires, as preliminary to such allowance, that the sheriff file with his quarterly report, under oath "a full, accurate and itemized account of all his actual and necessary expenses." etc. So long as the amount claimed by the sheriff represents the amount actually expended by him for the maintenance of his horses, I am of the opinion that it is perfectly legal and proper to pay a stipulated rate per week or month for boarding the sheriff's horses, providing such arrangement is the best and most economical that can be made.

Section 2830 of the General Code authorizes a sheriff to appoint in writing one or more deputies subject to the approval of a judge of the court of common pleas of the sub-division in which the county is situated and Section 2831 provides that the sheriff shall be responsible for the neglect of duty, or misconduct in office of his deputies.

I have not found any authority which would prohibit a deputy sheriff from receiving pay from the county for boarding the sheriff's horses unless Section 12910 of the Code can be so construed.

Said section is as follows:

> "Whoever holding an office of trust or profit by election or appoint-

ment, or as agent, servant or employe of such officer or of a board of such offices, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years." (R. S., Section 6969.)

The foregoing section being criminal in its nature should be strictly construed, and unless the conduct of an officer or employee of such officer clearly comes within its terms, he is not amenable to the penalty prescribed for a violation thereof. The prohibition is against the interest of any officer in contracts "for the purchase of property, supplies or fire insurance for the use of the county * * *" with which he is connected.

In no sense can it be said that the boarding by a deputy sheriff of the horses used by the sheriff in the performance of his official duties constitutes an interest of the deputy in a contract for the purchase of property or supplies for the use of the county.

It is my conclusion, in answer to the second question, that a deputy sheriff may legally receive pay from the county for boarding the sheriff's horses, providing the cost thereof is no greater than if the same services were performed by any other person.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

357.

WATER RENTALS—POWER OF CITY TO COLLECT—DUTIES OF DIRECTOR OF PUBLIC SERVICE AND POWERS TO PASS REGULATIONS MAKING RENTALS A LIEN ON PROPERTY—RESPONSIBILITY OF LANDLORD—WATER RENTAL NOT A TAX.

The director of public service is authorized, by Sections 3956, 3957, 3958, *General Code, to adopt such rules and regulations as to security for water rent as he sees fit so long as they do not conflict with statutes, and these powers extend to making the premises a lien for water rents, or to making the landlord responsible for rentals due from a tenant.*

When, however, neither such rules and regulations, nor the statutes provide for the same, water rentals due from a tenant are not collectible against the landlord personally nor are they chargeable against the real estate.

Such rentals are in no sense a tax and there is no authority to certify such rents to the auditor for collection.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIR: Your favor of April 16th received. You inquire:

"1. Are delinquent water rentals collectible of the owner of real estate supplied with water service by a municipal plant in the event that payment thereof is not made by the tenant?

"2. Are delinquent water rentals a lien upon real estate if certified to the county auditor and placed by him upon the duplicate of the county treasurer for collection the same as other taxes? Should the county

treasurer refuse to take other taxes in the event the owner of the real estate refuses to pay water rent so placed upon the tax duplicate in his hands for collection?

"3. In the event that you hold that the law does not constitute such delinquent water rentals a lien upon real estate, could the director of public service, by rule or order entered upon his journal, make such claims a lien upon real estate and impose their collection upon the county auditor and county treasurer by requiring the water works officials to certify same to the county auditor?"

Answering your first question, Section 3958, General Code provides in part as follows:

"For the purpose of paying the expenses of conducting and managing the water works, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water."

It becomes important, in order to answer your first question to determine the nature of this rent or charges for water. It has been held, in a similar statute to ours in the state of New York that:

"The charge upon persons and their property for supplying them with water and commonly known as water rent, is not, in its inception, either a tax or an assessment * * *. As regards water rent, the city occupies the position of a merchant with commodities for sale. It collects a quanity of water, provides means for its distribution, fixes a rate at which it will supply with water, and proclaims that all requiring water can have it at that rate. The city does for water what the gas companies do for gas. The Legislature has a right to declare that an indebtedness for water rent shall be a lien, and that the property may be sold to satisfy that lien, equally as it declared the wages of a mechanic a lien, and that the property may be sold to pay that lien."

Hennessey vs. Volkening, 30 Abbots, New Cases, New York State. Abbot on municipal corporations, Volume II, paragraph 468 says that water rentals or assessments are not regarded as taxes, but simply the *purchase price* of commodities sold by a public corporation * * *.

Under the doctrine laid down in the foregoing authorities, the water rent, to be charged consumers at a rate fixed by the director of public service under authority of Section 3956 General Code, is not a tax, nor can it be said to be an assessment.

The relation between the city and the consumer of water is a contractual one. When a city erects a water works and furnishes water to the residents of a city on the terms prescribed by the director of public service, when these terms are assented to on an application for water and water is furnished under such application, it then becomes a matter of contract between the city and the consumer of water. The city agrees to supply water on specific terms and at a fixed rate and under certain conditions intended to secure the payment thereof; and the consumer of water agrees to use and pay for the same on the terms specified.

Having held that the relation between the city and consumer is a contractual one, the question now arises whether the language of Section 3950, General Code, above quoted, is sufficient to make the indebtedness for water rent, a lien against

the property furnished with water. There is no doubt that the legislature has a right to declare that an indebtedness for water rent shall be a lien upon real estate supplied with water and that the property might be sold to satisfy that lien. (Hennessey vs. Volkening, 30 Abbots New Cases, New York State.)

It was evidently the intention of the legislature, when they enacted Section 3958, General Code, to provide that the real estate furnished with water should be responsible therefor. Section 3958 seems to contemplate an assessment on the premises and not a personal charge for water supplied. However, it has been held, in the case of Eagle Manufacturing Company vs. Davenport, (101 Iowa, 493) that, "assessments for local improvements are not a lien unless made such *by express* statutes".

The legislature must expressly declare that a tax, assessment or charge shall be a lien on the premises sought to be charged. To illustrate—the legislature in providing for assessments for street improvements, Section 3857 General Code, provides that:

> "Every such assessment shall be a *lien* on the lands charged from the time the council determines the amount assessed against each parcel of land."

In assessments for sewers, Section 3897 provides:

> "Special assessments shall be payable by the owners of the property assessed personally, by the time stipulated in the ordinance providing therefor, and *shall be a lien* from the date of the assessment upon the respective lots or parcels of land assessed."

In the case of taxes, Section 5671, General Code, the legislature provides that:

> "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalty occurring thereon, are paid."

Section 3956, General Code, only authorizes the director of public service to assess and collect, from time to time, a water rent * * * on all tenements and premises supplied with water. It does not expressly provide that all water rent shall be a lien on the tenements and premises supplied with water, from the time the water is furnished.

It is right, however, that when water is furnished on credit by the city, some system must be adopted to save the city from numerous and constant losses which would simply increase the burden of those who pay promptly for the water they consume. It would be impossible to furnish, with any degree of safety, water on credit to persons having no visible property. However, the legislature has provided that the department of director of public service has a right to adopt such rules and regulations as to security, for water rent, as he deems advisable, provided that the rules and regulations do not conflict with the statutes. This authority is granted by Sections 3956, 3957 and 3958 which are as follows:

> Section 3956. "The director of public service shall manage, conduct and control the water works, furnish supplies of water, collect water rents, and appoint necessary officers and agents."
>
> Section 3957. "Such director may make such by-laws and regulations as he deems necessary for the safe, economical and efficient

management and protection of the waterworks. Such by-laws and regulations shall have the same validity as ordinances when not repugnant thereto or to the constitution or laws of the state."

Section 3958. "For the purpose of paying the expenses of conducting and managing the water works, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water * * *."

Under the authority of these sections, the director of public service may make a regulation that property supplied with water shall be held liable for all water rents and provide that such rents shall become a lien on the property supplied with water.

The city of Bellefontaine adopted the following rules and resolutions in reference to water rents:

"All applications for the use of water from the Bellefontaine waterworks for the purpose of introducing water into premises, must be made by the owner or his authorized agent.

"The applicant must state fully all purposes for which the water is required and answer all questions for which they required the use of water, and with the distinct understanding that the property is to be held liable for all water rents. Upon complying with these conditions the clerk of the waterworks will issue a permit granting the applicant the privilege of a service attachment and the number of the service.

"Water service pipes shall be taken to at least six inches beyond the curb line, where it does not exceed twenty feet from water main.

"An advance rate of eight dollars ($8.00) must be paid at the time of application."

The right of a city to adopt such rules and regulations, was tested in the case of Young vs. Hamilton found in 9 N. P. (n. s.). In that case an action was brought by Young to foreclose a mortgage. The city of Bellefontaine was granted leave to be made a party defendant and to file answer, and in its pleadings, set up the rules and regulations above set forth and claimed a lien of $4.00 for water rent due from a tenant of the owners of the property covered by the mortgage, and asked that the water rents be decreed to be a lien on the premises and ordered to be paid out of the proceeds of sale. It was held:

"Where waterworks were owned by a municipality and the by-laws and regulations prepared by the director of public service, where the waterworks department provided, among other things, that property to which water is supplied shall be held liable for all water rents, such rents become a lien on the property notwithstanding that application for the use of the water was made by the tenant instead of the landlord."

I am of the opinion, therefore, for reasons heretofore stated, that Section 3958, General Code, does not create a lien in itself for water rentals; but Section 3958, General Code, together with Sections 3956 and 3957, General Code, authorizes the director of public service to make such rules and regulations that he may deem advisable to protect the city in the payment of water rents and charges. He may make rules and regulations to the effect that a deposit shall be made by the owner of property, covering water rent for a certain period whether it be furnished

to a tenant or to the owner; or, he may make a rule that in case water rent is not paid, the water will be turned off until all arrearages are paid; or, he may adopt the rules and regulations adopted by the director of public service of Bellefontaine requiring the owner or his agent to agree that the property and premises furnished water, shall be responsible for water rent and shall be a charge upon the property until paid.

Sections 3956, 3957 and 3958, General Code, give sufficient authority to the director of public service to protect the city in the payment of water rents without making it an express lien on the premises.

Answering your first question specifically, I am of the opinion that in the absence of any rules and regulations made by the director of public service of a city, requiring the owner of property to be responsible for all water rent for water supplied to a tenant, and expressly providing that the property is to be held liable for all water rents; or, in the absence of any agreement on the part of the owner at the time water was furnished to a tenant, that he will be responsible for the water rent of a tenant, the water rentals are not collectible from the owner of the property personally, nor is it chargeable against the real estate supplied with water. On the other hand, if the department of public service has established rules and regulations making the owner of the property responsible or the premises liable for all water furnished to a tenant, then, in that event, the owner of the property could be held responsible or the premises could be charged for the water rent, being a question of fact in each instance.

Answering your second question, I am of the opinion that delinquent water rentals are not a lien on real estate when certified to the county auditor and placed by him on the duplicate of the county treasurer for collection the same as other taxes. I further hold there is no authority of law to certify delinquent water rents to the county auditor for collection. Therefore, the county treasurer should not refuse to take other taxes in the event the owner of real estate refuses to pay water rent so placed on the tax duplicate in his hands for collection.

Answering your third question, I am of the opinion that the director of public service cannot, by any rule or order entered upon his journal, make such delinquent water rents a lien upon real estate so as to impose their collection upon the county auditor and county treasurer by requiring the waterworks officials to certify the same to the county auditor; but I am of the opinion that the director of public service, by adopting a rule, regulation or order entered upon his journal, may require the property owner to stand responsible for water rentals for his tenant and can require him to agree, before water is turned on, that the property furnished with water is to be held liable for all water rents.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

359.

EXECUTORS AND ADMINISTRATORS—ACCOUNT AND RECEIPT BOOKS MAY NOT BE FURNISHED TO, BY COUNTY COMMISSIONERS.

Inasmuch as the statutes do not expressly authorize the furnishing of the same, the county commissioners are not authorized to provide account and receipt books at the expense of the county, for the use of executors, and administrators, etc., in the probate courts.

April 18, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 8, 1912, wherein you request my opinion as follows:

> "Please render this department your written opinion as to whether or not the county commissioners are authorized to provide at the expense of the county account books and receipt books for the use of executors, administrators, etc., in the probate courts of the counties. This question is submitted by the probate judge of Trumbull County and his letter is herewith enclosed. Your opinion will be sent out to probate judges in the form of a circular letter when received."

In reply thereto, Section 1583 of the General Code provides as follows:

> "A probate court is established in each county which shall be h. l at the county seat. Such court shall be held in an office furnished by the county commissioners, in which the books, records and papers pertaining to the court shall be deposited and safely kept by the judge thereof. The commissioners shall provide suitable cases for the safe keeping and preservation of the books and papers of the court, and furnish such blank books, blanks and stationary as the probate judge requires in the discharge of official duties. "

> "Administrators and executors are designated as officers of the court." Orlopp vs. Schueller, Administrator, 4 C. C. n. s. 614.

> "An administrator appointed by a state court is an officer of that court. His possession of the decedent's property is a possession taken in obedience to the orders of that court. Byers vs. McAuley, 149 U. S. 608-615.

Upon the theory that because administrators and executors are officers of the probate court any supplies necessary to the discharge of their duties ought to be furnished them as "blank books and stationary required by the probate judge in the discharge of his official duties", an affirmative answer to your quotation would have to be given. This theory, however, can not be accepted in its fullness, for it would embrace the renumeration of the administrator or executor for all the expenses of administration from the funds of the county instead of from those of the estate; thus, the railroad fare of an administrator or executor upon

a journey made necessary in the discharge of his duties is an expense to which he is entitled to be reimbursed, not out of the fund of the county, but from those of the estate; yet, it is an expense incurred in the discharge of his duties as officer of the court.

It is obvious, therefore, that a line must be drawn between those supplies which are to be furnished to the executor or administrator by the probate judge and those which he must procure for himself at the expense of the estate. In my opinion, this line ought to be drawn in strict conformity with the language of Section 1583, above quoted; that section authorizes and requires the commissioners to provide the stationary and blank books required by the probate judge in the discharge of his official duties; only by inference does it authorize the commissioners in the discharge of their duties. The inference must be rejected.

I am, therefore, of the opinion that blank account books and receipt books for the use of executors and administrators may not be furnished them by the probate judge at the expense of the county. The judge, perhaps, has authority to prescribe the form of the accounts to be kept by the administrator, but the book in which such accounts are to be kept must be paid for by the estate and not by the county.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM

As the above question is a close one, and as the probate courts of numerous counties have been providing blank account and receipt books for the use of executors and administrators, under the impression that the furnishing was authorized by law, I would suggest to the Bureau that no adverse findings be made against the probate judge or officials of counties in which such blank account and receipt books have heretofore been furnished.

382.

TRANSCRIPT OF PROCEEDING UPON SALE OF BONDS MAY NOT BE FURNISHED BY CITY—CITY SOLICITOR MAY NOT RECEIVE EXTRA COMPENSATION FOR SAME BY CITY.

A municipality is not authorized to furnish the purchases of bonds a transcript of the proceedings leading up to the sale of the same and therefore, the city solicitor may not be re-imbursed by the city for furnishing such a transcript.

May 2, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Under date of January 2, 1912, you propounded the following questions:

"1. In the issuance and sale of bonds by a city, is it a legal expense of the municipality to furnish the purchaser a transcript of the proceedings leading up to the sale of the bonds?

"2. If so, whose duty is it to prepare said transcript.

"3. If prepared by the city solicitor, could said solicitor legally receive compensation for such service in addition to his regular salary?"

The transcript, enclosed in your letter, is composed of copies of the ordinances and resolutions of the council of the city of Dayton, relative to the improvement of a certain street in said city.

The statutes concerning the issue and sale of bonds for municipal street improvements, and the duties of the various city officers in relation thereto, do not disclose that the bond buyer is entitled, as a matter of right, to receive, without payment therefor, a copy of such transcript, or that any officer or department of the city government is in duty bound to furnish the same and receive compensation therefor from the city treasury in addition to his regular salary. The successful bidder at a bond sale takes the bonds at his own risk, and if he deems it necessary to have a transcript of the proceedings, in order to determine their validity, the expense thereof must be borne by himself.

I conclude, therefore, in answer to your first question, that it is not a legal expense, chargeable against a city, to furnish a transcript to the purchaser of municipal bonds.

A negative answer to your first question renders an answer to the second unnecessary.

The preparation of such transcript, not being within the duties of the city solicitor, he is not entitled to receive compensation from the city treasury therefor. If the solicitor prepares such transcript he must look for compensation to the person at whose instance the same is done.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

388.

DIRECTOR OF PUBLIC SERVICE—POWER TO RENT OFFICES OUTSIDE OF ANY CITY HALL FOR ENGINEERS EMPLOYED IN INVESTIGATION AND IMPROVEMENT OF CITY SEWER SYSTEM.

The expenditure of a special fund raised from the sale of bonds for the investigation and improvement of a city sewer system, and the direction of such work is lodged in the director of public service and in the exercise of his vested discretion, that official may legally employ expert engineers and rent for them, offices outside of the city hall.

The city auditor is required to issue his warrant for the expenses so incurred regardless of the fact that there are quarters obtainable in the city hall.

Said expenses should be paid from the fund raised for the purpose and not from the general tax fund.

Bureau of Inspector and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of May 8, 1912, you ask an opinion of this department upon the following:

> "A special fund has been created by the issuance of bonds for the investigation and improvement of the city sewer system. Expert engineers have been employed and rooms have been rented outside the city hall by the service director as offices for such employes. May the city auditor refuse to issue his warrant in payment of the rental charge for said rooms if he is of the opinion that there is sufficient room in the city hall to accomodate said employes? Are such charges a legal claim against the special fund or should they be met by the service fund created by tax levy?"

The city hall is a public building and as such is under the management of the director of public service, by virtue of Section 4326, General Code which provides:

> "The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

It appears that the expert engineers for whom rooms have been rented outside the city hall are employed in connection with the specific improvement for which the bonds were issued. Their work pertains exclusively to the investigation and improvement of the city sewer system. No doubt, the compensation of these expert engineers is paid from the money raised by the sale of the bonds. The offices which they occupy are also used for the purpose for which the bonds were issued. The rent of such offices would be a part of the cost of the investigation and improvement of the city sewers. The money secured by the sale of bonds is to be used in payment of the cost of the improvement under consideration. The salary of officers, and the rental of offices used by them, where the time of such officers is used exclusively to promote the work for which the bonds are issued, would be a part of the cost of such improvement.

As it is a part of the cost of the improvement, the rent of offices may be paid from the money set aside for the improvement, and need not be paid from the funds raised by general taxation.

Section 4325, General Code, provides:

> "The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks playgrounds, sewers, drains, ditches, culverts, ship channels, stream and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements, and public works, except those having reference to the department of public safety, or as otherwise provided in this title."

It is made the duty of the director of public service to supervise the improvement of the sewers of a city. The sewers of the city are in his department. The director of public service also has charge of public buildings, including the city hall. The investigation and improvement of the city sewers is under his control and direction. The fund raised by the sale of bonds is expended under the direction of the director of public service.

The director of public service has some discretion in the management of the affairs of his department. It is for him to determine whether the offices in the city hall are suitable for the purpose and if not, he may secure offices outside the city hall. In renting offices, however, he must comply with the provisions of the statute as to making contracts.

The city auditor would not be authorized to refuse his warrant for the payment of the rent of the offices upon the ground that there is room in the city hall. That is left to the discretion of the director of public service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

393.

CIGARETTE TAX—DISPOSITION OF SECOND HALF OF TAX LEVIED IN MUNICIPAL CORPORATION AND TOWNSHIPS OUTSIDE OF MUNICIPAL CORPORATIONS—COUNTIES WITH AND WITHOUT COUNTY INFIRMARIES.

In counties where money is paid on account of the cigarette business conducted in a township outside of a municipality, the half which remains after the first half is paid into the state treasury, under Section 5901 *General Code, shall be paid to the credit of the infirmary fund of said county where an infirmary is maintained in said county.*

However, when the township is in a county not containing a county infirmary, the said remaining one half is to be credited to the poor fund of the township.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—You request my opinion as to the proper distribution of the cigarette tax collected in townships outside of a municipal corporation, in view of the somewhat obsecure language of Section 5901, General Code, under which such distribution is to be made.

Section 5901, General Code, provides:

> "One-fourth of the money paid into the county treasury on account of such business in a municipal corporation shall be paid, upon the warrant of the county auditor, into the treasury of such corporation to the credit of the police fund, or in a corporation having no police fund, to the credit of the general revenue fund. The remaining one-fourth thereof shall be credited to the poor fund of such county; but in counties having no county infirmary, it shall be credited to the infirmary fund or poor fund of the township, village or city in which it was collected. In counties where such money is paid on account of such business conducted in a township outside of a municipal corporation, the last named two-fourths shall be credited to the infirmary fund or the poor fund of such township."

The question then arises as to the proper application of the one-half of the cigarette tax left for apportionment, the other half having been paid into the state treasury, under Section 5900. Analyzing Section 5901, we find the money accruing from the cigarette tax to be derived from one of two sourses, namely: from a municipal corporation or from a township.

In the first situation the statute provides that one-half of the amount to be distributed shall go to the corporation and the other half to the poor fund of the county in which such municipality is located. It is true that the county has no poor fund, so-called, but the wording of the statute, "shall be credited to the poor fund of such county; but in counties having no county infirmary", makes it clear that the term "poor fund of the county" and the term "county infirmary" are used interchangeably.

Simplifying the language, then, the second half of the half to be distributed is to be paid to the county infirmary, if there should be one, and if not, then, to the city infirmary, if there is one, and to the city poor fund if not.

In the second situation, the one covered by your question, there are two phases to be considered; first, where the township is in a county containing a county infirmary, and, second, where the township is in a county not containing a county infirmary.

1. Where the township is in a county containing a county infirmary, then, the two-fourths or one-half of the tax remaining after the payment of the state treasury of the first half is to be credited to the infirmary fund of the county, or, in other words, to the county infirmary.

2nd. Where the township is in a county not containing a county infirmary, the remaining two-fourths or one-half is to be credited to the poor fund of the township.

The statute, as I understand, means, and with the words interpolated which are understood, would read as follows:

> "In counties where such money is paid on account of such business, conducted in a township outside of a municipal corporation, the last named two-fourths shall be credited to the infirmary fund of such county, or, in other words, to the county infirmary; but in counties having no county infirmary it shall be credited to the poor fund of such township."

The reason for the difference in the application of the funds in the case of a township within, and a township not in, a county containing a county infirmary, can be found in Section 3488 of the General Code, which provides:

> "When the trustees of a township in a county having no county infirmary, are satisfied that a person in such township ought to have public relief they shall afford such relief at the expense of their township as in their opinion the necessities of the person require. When more than temporary relief is required, they shall post a notice in three public places in the township, specifying a time and place at which they will receive proposals for the maintenance of such person, which notice shall be posted at least seven days before the day therein named for receiving proposals."

In other words, in the former situation the township is under no obligation to afford poor relief, while in the latter it is under such obligation.

Accordingly, if Lucas County maintains a county infirmary, which I presume it does, then the method of distribution employed by the county auditor in dividing the tax between the state and the county infirmary fund, to the exclusion of the township whence it is derived, is the direct method of distribution.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

406.

INTEREST OF PUBLIC OFFICIAL IN PUBLIC CONTRACT—MEMBER OF BOARD OF EDUCATION IN VILLAGE DISTRICT HAVING NO BANK, AS DIRECTOR OF BANK, CONTRACTING FOR DEPOSIT OF VILLAGE FUNDS.

The deposit of a board of education of a village district wherewith there is no bank, is governed by Section 7607 General Code which provides for a contract by the board with a conveniently located bank offering the highest interest. Such a contract is within Section 4757, General Code, and when made by the board, with a bank whereof a member of the board is both a stockholder and a director, it is therefore, void.

May 6, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of April 3, 1912, wherein you state:

> "There is no bank within the boundary of a certain village school district. The board of education of this district contracted with a certain bank making the bank the depositary for the school funds. This contract was made without submitting the same to bids, or without any publicity prior to the awarding of the contract which would be calculated to induce other banks to bid for the depositary. "H" was a member of the board of education of the village school district and was also a director in the bank now acting as depositary for the school funds at the time the contract was made, and is still a member of both boards.
>
> "Is the contract thus entered into by the board of education of the school district legal?"

The only material fact stated in your letter is that a member of the board of education was a director in the bank at the time the contract was made, and still retains his interest in the bank. The fact that the contract was entered into without submitting the same to competitive bids, or without any publicity whatever, is not a material one. Section 7607 of the General Code, as amended 102 O. L., 290, does not require any degree of publicity whatever in the selection of a depositary for the funds of a school district which has no bank within its territorial limit. That section provides as follows:

> "In all school dstricts containing less than two banks, after the adoption of a resolution providing for the deposit of its funds, the board of education may enter into a contract with one or more banks that are conveniently located and offer the highest rate of interest, which shall not be less than two per cent. for the full time the funds or any part thereof are on deposit. Such bank or banks shall give good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, at least equal to the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond."

It will be observed that the section authorizes the board of education to enter into a contract with any conveniently situated bank which qualifies otherwise. The procedure is quite different from that outlined in the preceding section, which I shall not quote. That section, which applies to the case in which the district contains two or more banks, requires that competitive bids be solicited in the manner therein described, and the board of education has nothing whatever to do, excepting to determine the sufficiency of the security offered by the successful bidder.

Under Section 7607, above quoted, however, the arrangement entered into between the board of education and the bank has every element of a contract. That being the case, I am of the opinion that Section 4757 of the General Code applies. That section is as follows:

> "Conveyances made by a board of education shall be executed by the president and clerk thereof. No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member, except as clerk or treasurer. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board."

My predecessor, Hon. Wade H. Ellis, rendered an opinion to the prosecuting attorney of Holmes county, in which he held that the section last above quoted would not render invalid a depository award made under what is now Section 7605 and Section 7606 of the General Code. In the course of that opinion he stated, speaking of what is now Section 4757, General Code, that:

> "If this section is applicable at all, it would render voidable all contracts between a bank and a school board on which there was a single member who was also a stockholder in a bank, regardless of whether his vote was necessary to pass a resolution. (Bellaire Goblet Company vs. Findlay, 5, O. C. C., 418)"

The former attorney general's reasoning was that inasmuch as a board of education of a school district having two or more banks has nothing whatever to do of a discretionary nature after it has passed the resolution now required by law, for the establishment of a depository, but is required by law to award the deposit of its funds to such bank or banks which offer the highest rate of interest and sufficient security, the case was not within the obvious intendment of the prohibitory section.

I have already pointed out the fundamental distinctions between the act of the board of education under Section 7605 and the corresponding act under Section 7607 of the General Code. The reasoning of Mr. Ellis' opinion, applied to what is now Section 7607, General Code, would produce results opposite to that which it produced as applied to the other sections. I am in accord with that reasoning, and give it to you as my opinion, that from the authority of the case cited by Mr. Ellis, and other cases to the same effect, a contract between a board of education of a school district in which there are fewer than two banks, and a bank for the deposit of the funds of the district is rendered void by reason of any interest in the bank which may be possessed by any member of the board of education.

I assume, as a matter of course, that the bank director is also a stockholder of the bank. A stockholder's interest, while small and indirect, has been repeatedly held sufficient to constitute a violation of statutes like Section 4757.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

444.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—POWER TO MAKE RULE TO TURN OFF WATER IN EVENT OF NON-PAYMENT OF RENT.

The board of public affairs of a village has the same powers to enforce its rules by turning off the water in the event of non-payment of rent as are possessed by the director of public service of a city, in this regard.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your favor of May 13th received. You inquire:

> "May the board of public affairs of a village enforce its rules by turning off the service if water rents are not paid in accordance with the contract and rules of the board?"

Section 4357 of the General Code provides when the board of trustees of public affairs shall be established, and is as follows:

> "In each village in which water works, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders water works, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

Section 4361, General Code, provides as follows:

> "The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of water works, and such other duties as may be prescribed by law or ordinances not inconsistent herewith."

Section 4361, General Code, was construed by this department in an opinion addressed to Hon. Allen C. Aigler, Village Solicitor, Bellevue, Ohio, under date of November 8, 1911, a copy of which opinion is as follows:

> "I beg to acknowldge receipt of your letter of February 27th, in which you call attention to the manifest defect in Section 4361, General Code, which confers upon the board of trustees of public affairs in villages, *all the powers of waterworks trustees, whereas there are no such officers as waterworks trustees mentioned in the code.* The specific question which has been raised under this statute is as to the authority of a board of trustees of public affairs of a village by contract to create an indebtedness of more than five hundred dollars, without advertising for competitive bids.
>
> "The question as to the meaning of Section 4361, General Code, was presented to this department and a bill prepared under the direction of my predecessor was presented to the general assembly for the purpose of correcting it, so as to make it read,

"'The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the director of public service with regard to waterworks.'

"Your inquiry was delayed, pending the action of the legislature thereon. The general assembly, however failed to pass the bill referred to."

Section 4361, General Code, provides in part as follows:

"'The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of waterworks.'

"As you pointed out, 'this title' does not again mention 'trustees of waterworks'; it is therefore an ambiguity, apparent upon the face of the codified section. I have, in numerous instances, held, following the established weight of authority, that where an ambiguity is created in process of codification the pre-existing law may be looked to for the purpose of ascertaining the intention of the legislature. The pre-existing law being consulted discloses at once the fact that the powers of trustees of waterworks are the same powers now vested in the direction of public service of a city by Sections 3956 to 3981, General Code. These powers, in my opinion, are the statutory powers of the board of trustees of public affairs. In addition thereto the board has such powers as may be conferred upon it by ordinance of council. * * *"

Following that opinion, I hold that the powers of trustees of waterworks are the same powers now vested in the director of public service of a city by Section 3956 to Section 3981, General Code, and those are the statutory powers of the board of trustees of public affairs.

Section 3958, General Code, provides for the assessment and collection of water rents and is as follows:

"For the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessment therefor are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes."

I have already held, in an opinion to your department under date of May 14, 1912, that,

"The director of public service may make rules and regulations to the effect that a deposit shall be made by the owner of property, covering water rent, for a certain period, whether it be furnished to a tenant or to the owner; or, he may make a rule that in case water rent is not paid, the water will be turned off until all arrearages are paid; or, he may adopt * * * rules and regulations * * * requiring the owner

or his agent to agree that the property and premises furnished water, shall be responsible for water rent and shall be charged upon the property until paid"

I am, therefore of the opinion that the board of trustees of public affairs of a village has authority to enforce its rules by turning off the service if water rents are not paid in accordance with the contract and rules of the board. They have the same authority as the director of public service in that regard.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

446.

FEES AND COSTS—CRIMINAL CASES BEFORE JUSTICES OF THE PEACE, MAYORS AND POLICE JUDGES—NO DISTINCTION AS REGARDS CASES PUNISHABLE BY IMPRISONMENT AND THOSE PUNISHABLE BY FINE ONLY.

From the arrangement of the statutes before their codification, the intent is clear that the words "such prosecution", as they appear in Section 13436, *General Code, making fees of constables, chiefs of police and marshals similar to those of sheriff's fees in criminal cases, and in Section* 13439, *General Code, with reference to payment of costs, refer to all cases coming under the jurisdiction of justices of the peace, police judges and mayors, as enumerated in Section* 13423, *General Code.*

There is nothing in the statutes, therefore, requiring a distinction as regards payment of such fees and costs, between cases in which imprisonment is a part of the penalty and those punishable by fine only.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of February 6, 1912, you inquire as follows:

"What cases are included within the purview of Section 13436. Does it cover all cases arising under Section 13423, and if not, which of the cases arising under said section are covered?

"So far as this department is concerned, the principal question arising in this matter is whether or not the fees of the officers in such cases can be paid under Section 13439."

Section 13423, General Code, to which you refer provides:

"Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to:

"1. The adulteration or deception in the sale of dairy products and other food, drink, drugs and medicines;

"2. The prevention of cruelty to animals and children;

"3. The abandonment, non-support or ill-treatment of a child by its parent;

"4. The abandonment or ill-treatment of a child under sixteen years of age by its guardian;

"5. The employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals, or which cause or permit it to suffer unnecessary physical or mental pain;

"6. The regulation, restriction or prohibition of the employment of minors;

"7. The torturing, unlawfully punishing, ill-treating or depriving any one of necessary food, clothing or shelter;

"8. The selling, giving away or furnishing of intoxicating liquor as a beverage, or keeping a place where such liquor is sold, given away or furnished, in violation of any law prohibiting such acts within the limits of a township and without the limits of a municipal corporation;

"9. The shipping, selling, using permitting the use of, branding or having unlawful quantities of illuminating oil for or in a mine;

"10. The sale, shipment or adulteration of commercial feed stuffs;

"11. The use of dust creating machinery in workshops and factories;

"12. The conducting of a pharmacy, or retail drug or chemical store, or the dispensing or selling of drugs, chemicals, poisons or pharmaceutical preparations therein;

"13. The failure to place and keep in a sanitary condition a bakery, confectionary, creamery, dairy, dairy barn, milk depot, laboratory, hotel, restaurant, eating house, packing house, slaughter house, ice cream factory or place where a food product is manufactured, packed, stored deposited, collected, prepared, produced or sold for any purpose."

By virtue of the foregoing section justices of the peace, police judges and mayors are given jurisdiction to try cases arising from violation of any law relating to the various subjects enumerated therein.

Section 13432, General Code, provides:

"In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him."

This section covers prosecutions before a justice, police judge or mayor when imprisonment is a part of the punishment prescribed for the offense charged. It will include prosecutions for violation of any law relating to the various subjects enumerated in Section 13423, supra, when the law prescribes punishment by imprisonment as a part of the penalty for the offense charged.

Section 13436, General Code, provides:

"In pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor."

Section 13439, General Code, provides:

"In such prosecutions, no costs shall be required to be advanced or secured by a person authorized by law to prosecute. If the defendant be acquitted or discharged from custody by nolle or otherwise, or convicted and committed in default of paying fine and costs, all costs of

> such case shall be certified under oath by the trial magistrate to the county auditor, who, after correcting errors therein, shall issue a warrant on the county treasury, in favor of the person to whom such costs and fees are payable. All moneys which are to be paid by the county treasurer as provided in this chapter shall be paid out of the general revenue fund of such county."

The question arises as to what prosecutions are referred to by the words "such prosecutions" as used in the foregoing sections. Do they refer to the prosecutions described in Section 13432, General Code, that is, those prosecutions in which imprisonment is a part of the punishment, or do they refer to the prosecutions for the various offenses enumerated in Section 13423, General Code, supra?

Said Sections 13436 and 13439, General Code, are placed in the same chapter as Section 13432. In this same chapter are also three other sections which use the words "such prosecutions."

Section 13438, General Code, provides:

> "In such prosecutions, the jurors and the witnesses shall be entitled to like mileage and fees as in criminal cases in the court of common pleas."

This section tends to show that the term "such prosecutions" refers to those prosecutions triable to a jury.

Section 13435, General Code, however, throws doubt upon this meaning, when it provides:

> "In such prosecutions, where a different punishment is provided for a second or subsequent offense, the information or affidavit upon which the prosecution is based, must charge that it is the second or subsequent offense or the punishment shall be as for the first offense."

The same is true as to the provisions of Section 13437, General Code which are:

> "In such prosecutions, if there is a verdict for conviction, a new trial may be granted for like reasons and subject to like conditions as a new trial in criminal cases in the court of common pleas."

The provisions of Section 13435, General Code, will apply to those offenses which only have a fine as the penalty for the first offense, and also to those which have a fine and imprisonment as a penalty for the second or subsequent offense. In such cases the term " such prosecutions" is not limited to those prosecutions which have imprisonment as a part of the penalty. There is no valid reason why the provisions of Section 13437, General Code, as to a new trial, and of Section 13439, as to security for costs should not apply to all prosecutions under Section 13423, General Code.

The provisions now contained in Section 13423 and 13432 to 13440, inclusive, General Code, were originally found in Section 3718*a* of the Revised Statutes. The codifying commission placed in Section 13423, General Code, the various offenses which were more generally enumerated in the first paragraph of said Section 3718*a*, Revised Statutes, and also those which came under its provisions by reference thereto.

The second paragraph of said Section 3718*a*, Revised Statutes, provides in part:

"In any such prosecution where imprisonment may be a part of the punishment, if a trial by jury be not waived, * * *."

In placing this provision in the General Code, it was put in a different chapter than the first paragraph and the language was changed so as to read:

"In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the punishment,* * *"

The third paragraph of said Section 3718*a*, Revised Statutes provides in part:

"In all cases prosecuted under the provisions of this act, no costs shall be required to be advanced or be secured by any person or persons authorized under the law to prosecute such cases; * * *"

This provision was carried into Section 13439, General Code.
The fifth paragraph of said Section 3718*a*, Revised Statutes, provided:

"In pursuing or arresting any defendant and in subpoenaing the witnesses, the jurisdiction and powers of the constable or other court officer acting in such capacity, in all such cases, shall be the same as that of the sheriff of the county in criminal cases in the common pleas court, and he shall receive the same fees therefor as are allowed said sheriff."

These provisions were carried into the General Code as Section 13436, supra.

Under the provisions of the Revised Statutes the fees of the constable or other court officer, in all cases under said Section 3718*a*, were to be the same as allowed to the sheriff. There was no distinction as to cases where imprisonment was or was not a part of the punishment. The same was true as to the provisions for security for costs and as to the payment of costs from the county treasury.

While said Section 3718*a*, Revised Statutes, has been subdivided into several sections of the General Code, some of which have been placed in separate chapters, yet there is nothing to show any intent to change the rule and to provide that the fees of the constable or other officer should be the same as those allowed to the sheriff, when imprisonment was a part of the penalty, and that they should be otherwise when the offense was punishable by fine only. The same is true as to the provision for a new trial and as to charging a second offense.

It is my conclusion that the provisions of Sections 13436 and 13439, General Code, apply to all cases enumerated in Section 13423, General Code, the same as under the provisions of Section 3718*a*, Revised Statutes.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

447.

WITNESS FEES—RAILROAD POLICEMEN AND HUMANE OFFICERS NOT ENTITLED TO, IN CRIMINAL ACTIONS IN JUSTICE'S, POLICE AND MAYOR'S COURTS.

Railroad policemen and humane officers are such "other police officers" as are intended by Section 3024, General Code, prohibiting such from receiving witness fees in criminal acting before justices of the peace, mayors and police judges.

June 14, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of June 4, 1912, you inquire as follows:

> "Is either a railroad policeman appointed under and by virtue of authority of Section 9150 or a humane officer appointed under and by virtue of authority of Section 10070 and kindred sections, such an officer as is precluded from receiving witness fees under the provisions of Section 3024?"

Section 3024, General Code, to which you refer, provides:

> "No watchman or other police officer is entitled to witness fees in a cause prosecuted under a criminal law of the state, or an ordinance of a city before a police judge or mayor of such city, justice of the peace, or other officer having jurisdiction in such cases."

The term "other police officers" as used in the foregoing section will include all police officers and the statute makes no exception therefrom. It will be necessary to determine whether a railroad policeman and a humane officer are in fact police officers.

First as to the railroad policeman.

Section 9150, General Code, provides:

> "Upon the application of a company, owning or using a railroad, street railroad, suburban or interurdan railroad in this state, the governor may appoint and commission such person as the company designates or as many thereof as he may deem proper, to act as policeman for and on the premises of such railroad or elsewhere, when directly in the discharge of their duties for such railroad. Policemen so appointed shall be citizens of this state and men of good character. They shall hold office for three years, unless for good cause shown, their commission is revoked by the governor, or by the railroad company as provided by law. Not more than one such policeman shall be appointed for each five miles of a street, suburban, or interurban railroad"

Section 9151, General Code, provides:

> "Before entering upon the duties of his office, each policeman so appointed shall take and subscribe an oath of office, which shall be endorsed on his commission. A certified copy of such commission, with the oath, shall be recorded in the office of the clerk of the common pleas court in each county through or into which the railroad runs for which

such policeman is appointed, and intended to act. *Policemen so appointed and commissioned severally shall possess and exercise the powers, and be subject to the liabilities of policemen of cities in the several counties in* which they are authorized to act while discharging the duties for which they are appointed."

A railroad policeman is appointed and commissioned by the governor. He is authorized to exercise the same powers and is subject to the same liability as a policeman of a city. His compensation, however, is not paid by the public, but by the company, by virtue of Section 9154, General Code, which provides:

> "The compensation of such policemen shall be paid by the company for which they respectively are appointed, and at such rates as may be agreed upon by the parties."

The fact that the railroad company pays his compensation does not alter his powers, duties or liabilities. He is a police officer, with the powers and liabilities of a policeman of a city. The term "other police officer" as used in Section 3024, General Code, makes no distinction between police officers and will include a policeman of a city and also a railroad policeman.

Second as to the humane officer.

Section 10070, General Code, provides for the appointment of the humane officer as follows:

> "Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense."

By virtue of Section 10071, General Code, such appointment must be approved by the mayor of the city or village for which such appointment is made, or by the judge of the probate court. Said section provides:

> "All appointments by such societies under the next preceeding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, appointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments."

The compensation of such humane officer is to be fixed and paid in accordance with the provisions of Section 10072, General Code, which provides:

> "Upon the approval of the appointment of such an agent by the mayor of the city or village, the council thereof shall pay monthly to such agent or agents from the general revenue fund of the city or village, such salary as the council deems just and reasonable. Upon the approval of the appointment of such an agent by the probate judge of the county, the county commissioners shall pay monthly to such agent or

agents, from the general revenue fund of the county, such salary as they deem just and reasonable. The commissioners, and the council of such city or village may agree upon the amount each is to pay such agent or agents monthly. The amount of salary to be paid monthly by the council of the village to such agent shall not be less than five dollars, by the council of the city not less than twenty dollars, and by the commissioners of the county not less than twenty-five dollars. But not more than one agent in each county shall receive remuneration from the county commissioners under this section."

The humane officer is appointed by the humane society, subject to the approval of the mayor or probate judge. His compensation is paid by the village, city or county from public funds. His special duty is to prevent cruelty to animals and persons. In order to carry out this duty he is given certain powers pertaining to the duties of a police officer. He may arrest persons violating any law relating to the protection of persons or animals or the prevention of cruelty thereto. He possesses all the powers of a policeman pertaining to these offenses. He is to that extent a police officer. The term "other police officer" as used in Section 3024, General Code, refers to all police officers, and is broad enough to include the humane officer, who has certain police powers.

In conclusion, the provisions of Section 3024, General Code, will include a railroad policeman appointed under authority of Section 9150, General Code and will also include the humane officer who is appointed by virtue of Sections 10071, et seq., General Code, and will prevent such officers from receiving witness fees in the class of cases enumerated in said Section 3024.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

455.

MUNICIPAL CORPORATIONS—MAY NOT FURNISH ELECTRIC LIGHT TO ADJACENT OR CONTIGUOUS VILLAGE.

The statutes do not authorize a village board of affairs managing and controlling a municipal electric light plant, to furnish electric light outside of the village and therefore, a contract providing for the same may not be entered into with either a contiguous or an adjacent municipality.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your favor of April 23rd, in which you request my opinion upon the following questions:

"Has a board of public affairs managing and controlling a municipal electric light plant the authority to contract with a village adjacent, but not contiguous, for furnishing street lighting, or for private consumers resident of said adjacent village?

"If said village is contiguous to the village owning and operating the municipal electric light plant, would said last named village have the authority to furnish light to said contiguous village?"

It is well settled that municipal corporations have only such capacities and

powers as are expressly granted, and such as may be implied as essential to carry into effect those which are expressly granted; and the doubtful claims to power are resolved against the corporation. So the question resolves itself into the proposition as to whether the power has been granted to a municipal corporation which owns its municipal electric light plant to contract with a village adjacent but not contiguous, for furnishing street lighting or lighting to private consumers, resident in said adjacent village, or with a village that is contiguous.

Turning to the enumerated powers of municipal corporations, Section 3618 of the General Code authorizes the establishment of lighting, power and heating plants and provides as follows:

> "To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat, to procure everything necessary therefor, and to acquire by purchase, lease or otherwise, the necessary lands for such purposes, within and without the municipality."

Section 3990 of the General Code gives specific authority to the council of a municipality to erect gas or electric works at the expense of the corporation, or purchase gas or electric works already erected therein; it provides as follows:

> "The council of a municipality may, when is is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas or electric works already erected therein, but in villages where gas works or electric works have already been erected by any person, company of persons or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein. If the council and owner or owners of such gas or electric works are unable to agree upon the compensation to be paid therefor, the council may file in the probate court of the county where such gas works or electric works are located, a petition to appropriate such gas or electric works, and thereupon the same proceedings of appropriation shall be had as is provided for the appropriation of private property by a municipal corporation. A municipal contract existing between any village and such person, company of persons or corporation, for the public or street lighting shall be considered as an element of value in fixing the compensation to be paid for such gas works or electric works"

Section 3991 and 3992 of the General Code expressly authorize *municipal gas plants,* which are erected or purchased under authority of Section 3990 of the General Code, to deliver gas outside the municipality. But these sections are silent as to the power of a municipality to dispose of electricity outside of the municipality.

Section 3991 provides:

> "When a municipal corporation is the owner of a natural gas plant by which the citizens thereof are supplied with natural gas, and such natural gas is so supplied through pipes from a point beyond the limits of such corporation which pipes pass through the limits of an incorporated village, the municipality may sell natural gas to such village, or

to a company, for the use of such village and the citizens thereof, such gas to be delivered at a reducing station to be located within one hundred feet of the main pipe line."

Section 3992 provides:

"When a municipal corporation is the owner of a natural gas plant to supply the citizens thereof with natural gas for fuel, the council of such municipal corporation may provide for supplying natural gas at rates to be determined by it, to persons living outside of and in the vicinity of such municipal corporation, and to county infirmaries, children's homes and other public institutions within or without such municipal corporation. To encourage the location or establishment of manufacturing industries within such municipal corporation, council may reduce the price of gas to be used to operate such manufacturing, or donate it for a term of years for such purpose, but this section shall be inoperative if the municipal corporation or the citizens thereof are thereby deprived of a full supply of such gas."

Section 3966 et seq., General Code, authorizes municipalities to dispose of water outside the corporation limits.

You will note, in the enumeration of powers of municipal corporations, as provided in Section 3613, that a municipality has the power to establish, maintain and operate municipal lighting, power and heating plants, and to furnish *the municipality and the inhabitants thereof with light.* But there is no express authority given by statute to furnish electricity outside of the corporate limits. Municipalities have a right to furnish gas and water to residents outside of the municipal corporation, because they are expressly authorized to do so by statute; but in the absence of a statute authorizing a municipal corporation to furnish electric light outside of the city limits. I am of the opinion that the board of public affairs, managing and controlling a municipal electric light plant, has no authority to contract with a village adjacent but not contiguous, for furnishing street lighting or to private consumers resident of said adjacent village; nor has the municipality which owns and controls its electric light plant any right to furnish light to a contiguous village.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

462.

COUNTY TREASURER—NO POWER TO CHARGE AGAINST COUNTY, FEES OF ATTORNEY EMPLOYED TO RECOVER TAXES COLLECTED BY INSOLVENT BANK—PERSONAL LIABILITY.

A county treasurer has no authority to delegate his duties to collect taxes to a bank. When he does so, therefore, and the bank becomes insolvent and he employs attorneys to collect from the receiver the taxes collected by the bank, there is no statutory authorization providing for the compensation of such attorneys and the treasurer must be held personally liable for their fees.

June 12, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your letter of May 9th received, enclosing a letter from Mr. M. P. Totman, treasurer of Athens County, and you request that I give you a written opinion in answer thereto. Mr. Totman's letter is as follows:

"The Albany State Bank, at Albany, Athens county, Ohio, took in from taxpayers of Albany village and the township of Lee, in which Albany is situated, $1,807.42, and sent to me as treasurer of said county a draft on The Second National Bank of Parkersburg, West Virginia, for the amount to pay said taxes, and I as said treasurer, marked paid and sent to said bank the receipts for said tax, and placed the draft in The First National Bank of Athens, which bank forwarded said draft to the bank at Parkersburg, but before payment was made, the State Bank of Albany was closed by the State Banking Association and a receiver appointed to take charge of said Albany State Bank.

"Now my tax receipts were out and I had not received money for same, so I went to Albany and saw the receiver and demanded the money but was refused, so I made every effort I could to get the money, but failed, so I employed attorneys of the firm, Wood and Wood, and they looked up the law and made out a brief of different decisions on like claims and finally got the money in full, $1,807.42, and the same has now been placed to the credit of the county, and the law firm of Wood and Wood has made a charge of $200.00 for their services.

"Now, what I want to know is, who has the $200.00 to pay? It does not seem that I as treasurer should be held for this personally, and I don't know whether the county could pay same. You see what I want; I don't feel that I should pay this fee of $200.00, and I don't know whether the law firm of Wood and Wood could draw said fees from the county, and I would like your opinion in regard to the matter."

It appears that for the convenience of the taxpayers of Lee Township, Athens County, the treasurer of Athens County sent a list of the taxpayers to the Albany State Bank, with the amounts assessed against each, and the Albany State Bank collected the taxes and sent a draft for the amount on the Second National Bank of Parkersburg, West Virginia. On receipt of this draft, the treasurer of Athens county sent the tax receipts to the Albany State Bank, and they were distributed to the proper parties. Before the draft was paid, the Albany State Bank went into the hands of a receiver, and the draft was held up. The treasurer of Athens county employed attorneys, who collected the amount in full, and charged for their services the sum of $200.00. The question presented for answer is; Who has the $200.00 attorney fee to pay,—the county treasurer personally, or the county?

Sections 2648 and 2649 et seq. G. C. makes it the duty of the county treasurer to receive and collect taxes throughout the county.

Section 2917 of the General Code provides as follows:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, *and no county officer may employ other counsel or attorney at the expense of the county except as provided in* section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

You will note that no county officer may employ other counsel or attorney at the expense of the county, except as is provided in Section 2412 of the General Code. Section 2412 G. C. provides as follows:

> "If it deems it for the best interest of the county, upon the written request of the prosecuting attorney, the board of county commissioners may employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards, in their official capacity."

It becomes the duty of the county treasurer under Sections 2648 and 2649 et seq. of the General Code to collect the taxes. He could not delegate the authority to the Albany State Bank. Having done so, and having entrusted the bank with the tax receipts he did so at his own peril, and the recovery of the money was a matter entirely personal with him as treasurer, and it was his duty to employ and pay for the attorneys personally, and the charge would not be a proper one against Athens county. He could not in any event in his official capacity have employed an attorney other than the prosecuting attorney, as it is the duty of the prosecutor, under Section 2917 of the General Code, to prosecute all actions in favor of the county; and the only instance in which the county can employ attorneys is under authority of Section 2412, G. C., and the commissioners might employ attorneys to assist the prosecuting attorney. The treasurer of Athens county employed these attorneys personally, and did not get the commissioners to employ them under Section 2412 of the General Code.

THEREFORE, I am of the opinion that the county is not responsible for the attorney fees of Sirs Wood and Wood under the circumstances related in your letter.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

475.

SHERIFF—CONTRACT WITH COUNTY COMMISSIONERS TO FURNISH LIGHT, HEAT, WATER, ETC., FOR RESIDENCE, IS VOID—PRISONERS' MAINTENANCE.

A contract by the county commisioners with the sheriff providing for the furnishing by the former of light, heat, water, fuel, telephones and cooking utensils for the residence of the latter and sixty cents a day for each prisoner maintained, would contravene the spirit of Section 2850, General Code, providing that the sheriff shall be allowed by the commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail. Such contract is unauthorized and void.

April 27, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Replying to your letter of March 6, 1912, in which you inquire relative to the legality, or, if it is held illegal, what the finding of this department would be, of a resolution of the board of county commissioners of Clark County, Ohio, as to entering into a written contract with one D. D. Lawrence, sheriff of the

county, providing that in consideration of the keeping and feeding of the prisoners in the county jail for the year 1911; that the board of county commissioners shall furnish all necessary light, heat, water, fuel, telephones and cooking utensils for the residence of the said D. D. Lawrence and pay to the said D. D. Lawrence the sum of sixty cents per day for keeping and feeding each prisoner in the county jail for one year beginning January 2, 1911.

Section 2850, *General Code* provides that the sheriff shall be allowed by the county commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail, and under certain circumstances may receive the same for idiots or lunatics. In addition thereto the section provides what the sheriff shall furnish at the expense of the county. Certainly not under this section and no other section of the General Code do we find authority for the county commissioners to make a contract as indicated by your letter. This resolution does not even indicate that the sheriff's residence is a part of the same building, nor under the same roof, and if it were, where can the commissioners find authority for furnishing the sheriff's residence with light, heat, water, fuel, telephones and cooking utensils? Why not add provisions?

But one branch of this question has come into the courts, that of light. Section 2850 and Section 3177, General Code was before the court in Wood County in the Circuit Court in the State of Ohio ex rel vs. Toan, 13 C. C. R. 276 (N. S.) in which the court say:

> "County commissioners are without authority to provide for the expense of lighting that part of the county jail which is used by the sheriff as a residence."

If not light, why heat—why water, fuel, telephones, and why cooking utensils for the sheriff's residence? The county commissioners can only make contracts under authority of the statute and there is none to warrant such a contract.

The purpose of this section is to limit the commissioners as to the per capita consideration of the contract and to be valid the section must be of general operation. A contract such as the one entered into might contravene the very purpose of the statute.

Suppose an instance of a sheriff, occupying a very large residence, lighted by electricity, heated most completely and in the expensive way and also carry the hypothesis to the extent of such a sheriff only having an average of one prisoner a week to board. Would this kind of a contract govern such a case and still be within the letter as well as the spirit of this section? Still this section is enacted to govern all cases.

If such a contract was entered into it was illegal and without authority of law. If money was paid out under such a contract, it should be returned to the county treasury and the sheriff paid for the keeping and feeding of prisoners within the limits of Section 2850, General Code.

Very respectfully,

TIMOTHY S. HOGAN,
Attorney General.

476

MUNICIPAL COURT OF CLEVELAND, OHIO—DUTY OF CLERK TO PAY FINES ASSESSED IN STATE CASES INTO THE COUNTY TREASURY AND TO THE LAW LIBRARY ASSOCIATION—DUTIES OF FORMER POLICE CLERKS—CONSTITUTIONAL LAW.

The clerk of the municipal court of Cleveland succeeds to the duty of the former police court clerk of paying the percentage of fines assessed in state cases, specified in Section 3056, *General Code, to the law library association of Cuyahoga county, notwithstanding the language of Section* 30 *of the act providing for the municipal court, stating that the clerk shall collect "all costs, fines, and penalties and pay the same quarterly to the treasurer of the city of Cleveland".*

This language is made ambiguous by the further language in said section providing that the clerk shall succeed to all duties and powers of police clerks, which duties provided for the payment of fines assessed in state cases, into the county treasury, and to the law library assosciation.

To permit state fines to be paid into city treasury would violate Article II, Section 26 *of the constitution providing against special legislation, by its interference with respect to disposition of state fines and with reference to common school funds, poor funds, and law library associations. As there is furthermore, no apparent reason for the sacrifice of state fines to the city, the ambiguity must be construed in favor of the latter language of Section* 30 *aforesaid, and the clerk of the municipal court given the duties which formerly devolved on the former police clerk of paying a certain portion of state fines to the law library association.*

May 23, 1912.

The bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In your favor of March 14th, you requested my opinion upon the following question:

> "Is the law library association of Cuyahoga county entitled, under Section 3056, General Code, to any part of the fines collected in the municipal court of the city of Cleveland, Ohio, created by act of the General Assembly on May 11, 1910 (101 O. L. p. 364—see Section 30)?"

You refer to Section 3056 which appears in 101 O. L. 295 as follows:

> "All fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court in state cases shall be retained by the clerk and be paid by him quarterly to the trustees of such law library associations, but the sum so retained and paid by the clerk of said police court to the trustees of such law library association shall in no quarter be less than 15 per cent. of the fines and penalties collected in that quarter without deducting the amount of the allowances of the county commissioners to said judges, clerk and prosecutor * * *."

and also you refer to 101 O. L. 304, Section 30, which has been amended in 102 O. L. 163 in a manner immaterial to your question so as to now read as follows:

"The clerk of the municipal court shall have general powers to administer oaths, and take affidavits, and to issue executions upon any judgment rendered in the municipal court, including a judgment for unpaid costs; he shall have power to issue and sign all writs, process and papers issuing out of the court, and to attach the seal of the court thereto; shall have power to approve all bonds, recognizances and undertakings fixed by any judge of the court or by law; shall file and safely keep all journals, records, books and papers belonging or appertaining to the court, record its proceedings and perform all other duties which the judges of the court shall prescribe. He shall pay over to the proper parties all moneys received by him as clerk; *he shall receive and collect all costs, fines and penalties, and shall pay the same quarterly to the treasurer of the city of Cleveland and take a receipt therefor,* but money deposited as security for costs shall be retained by him pending the litigation; he shall keep a book showing all receipts and disbursements, which shall be open for public inspection at all times; and shall on the first Monday of each term of court make to the city auditor a report of all receipts and disbursements for the preceding term. *He shall succeed to all and shall have all the powers and perform all the duties of police clerks,* and as to the selection of the deputy clerks he shall have power to appoint a chief deputy only. All other deputies and assistants shall be appointed or selected by him as hereinafter provided."

The first italicized portions of the language of Section 30 of the Municipal Court Act as above quoted when considered separately and independently from other provisions of the act would seem to impart a clear and unequivocal expression of an intent that *all* fines assessed in the municipal court should be turned over quarterly to the city treasury. Should this interpretation prevail, fines assessed in state cases, would, of course, be included and Section 3056 aforesaid, with reference to law libraries, would have no application.

Such an interpretation, however, would innovate a heretofore unheard of procedure. The practice of paying fines assessed for violation of state statutes into the county treasury has been a universal one. In this connection, Section 12378, General Code, has a substantial bearing to-wit:

"Unless otherwise required by law, an officer who collects a fine, shall pay it into the treasury of the county in which such fine was assessed, to the credit of the county general fund within twenty days after the receipt thereof, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."

And so, throughout the statutes, fines assessed in state cases are directed with respect to all courts to be paid into the county treasury. In some instances it is true the practice of payment into the general fund of the county has been departed from. For example, Section 12343 provides that fines assessed in quo warranto or ouster proceedings shall be paid into the county treasury to the credit of the common school fund; Section 13231, General Code provides that fines assessed for violation of Section 13229, General Code, which is a township local option provision, shall be paid into the county treasury to the credit of the poor fund, and Section 3056, the subject of our present interest, provides that certain fines shall be paid directly to the law library association. Only one instance is revealed where state fines are to be paid into a municipal treasury and this is the provision of Section 13247, General Code, of the chapter dealing with of-

fenses relative to intoxicating liquors, which section stipulates that fines assessed in a court of the county, shall be paid into the county treasury and that fines enforced in a court of a municipality, shall be paid into the treasury of a municipal corporation. This statute will be referred to in a further connection.

A possible reason for a change from the general practice suggests itself in the present case as a desire to reimburse the city for the benefits extended to the county by virtue of the relief accorded to the common pleas court through the extended jurisdiction of the municipal court. That this was the intention of the legislative mind, however, is made less probable by a contemplation of the part of the expenses of the maintenance of the municipal court which is directly borne by the county. Thus, Section 3 of the Municipal Court Act provides for a payment to each of its seven judges, by the county, of not less than $1,000 yearly, while the city pays not less than $3,500 each; Section 29 of the Act prescribes a compensation by the county of not less than $2,000 to the clerk while the city pays $2,500; and Section 38-1 of the Act, as it appears in 102 O. L. 167 provides that the commissioners may allow such further compensation to the city solicitor and his assistants for services in the court, as the county commissioners deem proper.

Since the legislature has provided the share of the expenses of the maintenance of the court which shall be borne by the county, such may be deemed exclusive and it seems improbable that a further expense was sought to be imposed upon the county, such as the forfeiture of fines in all state cases. It seems feasible, furthermore, that the county's assistance with respect to salaries of judges, clerk and prosecutor, is primarily intended as in the similar police court provisions, as a compensation to the court for its assistance in bringing fines into the county treasury. (See Sections 4568, 4599 & 4307, General Code.) In this connection, note may also be taken of the fact that the jurisdiction of the municipal court is confirmed solely to the City of Cleveland or to residents of the city except with reference to criminal procedure in general.

Coming now to the specific language of Section 30 of the act aforesaid, that the clerk *"shall receive and collect all costs, fines and penalties and shall pay the same quarterly to the treasurer of the City of Cleveland,"* attention may be called to certain other sections of the act to the end that the construction may be made in the light of the entire act.

Section 12 of the Act in 101 O. L. 366, provided as follows:

> "In criminal cases, the practice and procedure shall be as now or hereafter provided by law for police courts in cities."

This provision as amended 102 O. L. 159, Section 12-1 appears as follows:

> "In criminal cases and proceedings, the practice and procedure and the *mode of bringing and conducting prosecutions* for offenses and the *powers of the courts* in relation thereto, shall be the same as those which are now or may hereafter be possessed by police courts in municipalities."

This last quoted section points directly to Section 4578, General Code providing for the mode of bringing and conducting prosecution in the police court which is as follows:

> "Prosecutions for offenses against the laws of the state shall be *brought and conducted in the name of the state,* and prosecutions for violations of city ordinances shall be brought and conducted in the name

of the corporation. In any case a new trial may be granted within the same time and for the same cause as in like cases in the court of common pleas."

It will be noted that the amendment in Section 12-1 of the act above quoted, made clear and definite, what was obscure in the old section to-wit the intention to distinguish between state and city cases. The same intent was further clarified in the amendment to Section 8, now appearing in Section 102 O. L. as Section 8-1 with respect to misdemeanors and felonies, which section incorporated Sections 4582, 4583 and 4584, General Code of the police court provisions into the municipal court act.

These provisions point strongly to the intention to make the municipal court, in its criminal procedure, an immediate substitute for the former police court with the same powers, practice and procedure.

Coming again to Section 30 of the Act referring to the powers of the clerk, note may be had of the second italicized portion of the Act which is as follows:

> "He shall succeed to *all* and have *all* of the powers and perform *all* the duties of police clerks."

The powers and duties of clerks herein referred to are largely set out in Section 4599, General Code referring also to the police court to-wit:

> "On the first Monday of each month, he shall make, underoath, to the city auditor, a report of all fines, penalties, fees, and costs imposed by the court in city cases, showing in what cases they have been paid, and in what cases they remain unpaid, and, at the same time, he shall make a like report to the county auditor as to state cases. He shall immediately pay into the city and county treasuries, repsectively, the amount then collected, or which may have come into his hands, from all sources, during the preceding month."

From all the foregoing therefore, I am of the opinion that Section 30, at least presents a patent ambiguity and the problem is fairly presented as to whether or not the legislature intended the payment of all fines therein referred to, to include fines assessed in state cases.

In the ascertainment of the true intent, Article II, Section 26 of the Constitution providing that all laws of a general nature shall have a uniform operation throughout the state, seems material. Laws with reference to the disposition of state fines are manifestly of a general nature. The one statute which permits state fines to be paid into the city treasury to-wit the provision above referred to with reference to intoxicating liquors cannot be attached for lack of uniformity.

While having in mind the exception recognized by the courts with reference to the ability of the legislature to pass special laws with respect to the *organization and establishment of courts,* I do not hesitate to question strongly whether this exception would extend so far as to permit the passage of a statute which is in itself so contrary to this rule of uniformity and which furthermore would affect so universal an interference with the uniform operation of so many state statutes such as the code section afore mentioned with reference to payment of state fines to the credit of common school funds, poor funds, and to law library associations, as would a stipulation that all fines in all state cases assessed in one specific city should be paid into the treasury of said city. There is clearly an apparent limit to this exception to the rule of uniformity and when a statutory direction extends

beyond the sphere of establishing and organizing a court and amounts in reality to a violation of the constitutional inhibition, the scope of the exception has clearly been overreached.

The syllabus in the case of Portsmouth vs. Milstead, 18 Cir. Dec. 284 is as follows:

> "1. The provisions of 96 O. L. 61 Section 126 (Rev. Stat. 1536-633; Lan. 3228) requiring "that all fees pertaining to any office shall be paid into the city treasury" has reference to municipal fees solely, or such fees as may be fixed by municipal authority.
>
> "2. Said section does not authorize cities to interfere with the fees of mayors or chiefs of police in state criminal cases; whether such authority can be delegated to municipalities, quaere."

and on page 385 the court said:

> "It is uniformly held that municipal powers are strictly limited. They have only those powers that are expressly granted or are clearly implied, as essential to carry into effect such powers expressly granted, and in cases of doubt, the court should be resolved against the city"

In view of this decision and for the reason aforesaid, that there exists no apparent substantial reason for payment of the fines in state cases to the city, that the municipal court is manifestly intended to substitute the former police court and for the further reason that to hold otherwise would seem to admit of a violation of the constitutional inhibition against special legislation, I am constrained to conclude that Section 30 should be construed to require the clerk to pay all fines, penalties, and costs assessed in city cases only, quarterly, to the city treasurer and to pay all fines, penalties and costs assessed in state cases as directed in Section 4599, General Code relating to the duties of clerks in police courts.

Answering your specific question, therefore, in as much as Section 30 prescribes that the clerk shall "succeed to *all* and have *all* the powers and perform *all* the duties of police courts", he shall succeed to the duty set out for police clerks in Section 3056, General Code, of paying the amount of fines therein specified, to the law library association of Cuyahoga county.

This conclusion is further supported by the fact that the legislature has no way changed the obligations of said association to permit all city and county officials the use of said library, for which the payment of fines provided for in Section 3056, General Code was intended as a compensation, and also by the further fact that a discrimination against this particular law library association would not seem to be justified in law or equity.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

479.

COUNTY DETECTIVES ENTITLED TO WITNESS FEES IN CRIMINAL CASES—GRAND JURY WITNESSES—IDENTIFICATION CERTIFICATE OF FOREMAN OF GRAND JURY, NOT SUFFICIENT—WITNESSES BROUGHT FROM OUT OF STATE AND SERVED AT COUNTY SEAT, NOT ENTITLED TO MILAGE—"COMPENSATED BY PROSECUTOR IN FURTHERANCE OF JUSTICE".

Grand jury witnesses are entitled to their mileage only upon the certificate of the clerk. The identification certificate endorsed by the foreman of the grand jury, is not in itself sufficient.

In criminal cases, a county detective is entitled to witness fees as ordinary witnesses.

Witnesses in criminal cases responding to the request of the prosecutor from without the state or county and served with subpoenas at the county seat are not entitled to mileage. They may be compensated by the prosecutor however, out of the funds provided by Section 3004, *General Code, for expenditures made in "furtherance of justice".*

June 26, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge your letter of December 29, 1911, in which you state that Charles S. Homer, Clerk of Courts, of Cleveland, Ohio, has asked your department the following questions:

> "1. Are grand jury witnesses entitled to the milage marked upon their identification certificates and endorsed by the foreman of the grand jury?
>
> "2. Is the county detective entitled to witness fees in a criminal case?
>
> "3. Are witnesses in criminal cases, responding to the request of the prosecutor from without the state or county, and served after their arrival in the county, entitled to mileage from the county line?"

I will answer your questions in their order.

1. Section 3013 of the General Code provides that the officer serving a subpoena shall endorse thereon the number of miles to which each witness is entitled. This must go to the clerk of court in the first instance, and when the witness appears, he must, by favor of Section 13564, G. C., go before the clerk of court and take the oath provided by this section. The clerk must give him a certificate to that effect, and before he can be examined he must present this certificate to the foreman of the grand jury.

The witness, when examined, must return to the clerk to receive certificate for his fees.

The foreman of the grand jury has nothing to do with fixing his mileage. The clerk has that record. The foreman can certify that the witness was present and examined, but on this certificate he cannot go to the auditor or treasurer and draw any fees. The last sentence of Section 3014, G. C., says: "When certified to the county auditor by the clerk of the court, fees under this section shall be paid from the county treasury". Only such fees and mileage as are certified by the clerk can be drawn from the treasury. The indentification certificate spoken of by you has nothing to do in fixing mileage.

2. The county detective is entitled to witness fees in criminal cases, the same as any other witness, if properly subpoenaed.

3. Your third question is answered—*No.*

There is no such doctrine in Ohio as witnesses receiving mileage, in criminal cases, *"to the county line,"* if they appear at the place of holding court, and are then subpoenaed for the first time. Witness fees and mileage are statutory, and no legal departure can be made from the strict letter of the law.

If a witness appears *voluntarily, under some arrangement with a party or prosecutor,* he must look to the one with whom he made the arrangement, and cannot draw fees from the county, except such as are enumerated in the law.

Such witnesses as you speak of are only entitled to $1.00 per day, when subpoenaed at the county seat.

I have no doubt the prosecuting attorney can reimburse such a witness out of the funds provided for him by Section 3004, G. C., "in the furtherance of Justice."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

481.

SALARIES OF COMMON PLEAS JUDGES BASED ON CENSUS LAST PROCURING ASSUMPTION OF DUTIES—"TAKING" OF CENSUS AS OPPOSED TO "PROMULGATION."

Section 2252, General Code, provides that a Common Pleas Judge shall be compensated in accordance with the population as ascertained by the federal census next preceding the assuming of his duties.

Judges who took office prior to the "taking" of the census of 1910, *therefore, shall be compensated in accordance with the census of* 1900, *and those taking office subsequent to that time, in accordance with the census of* 1910.

June 28, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of May 17th you propounded the following inquiries:

> "Under Section 2252, G. C., each common pleas judge in the state shall receive not less than $1,000 to be paid by the counties in proportion to the population. Shall the salaries of the judges who were in office prior to the election in 1910, who continue to hold their offices, be apportioned according to the federal census of 1910, or shall they continue to draw from the several counties of their subdivisions on the apportionment of the census of 1900?
>
> "Shall the salary of a common pleas judge appointed after the promulgation of the federal census of 1910 be based upon such census or upon the census of 1900?"

Section 2252 of the General Code, cited by you, provides:

> "In addition to the salary allowed by the preceding section, each

judge of the court of common pleas and of the superior court shall receive an annual salary equal to sixteen dollars for each one thousand population of the county in which he resided when elected or appointed, as ascertained by the federal census next preceding his assuming the duties of such office, if in a separate judicial subdivision. Such additional salary shall be paid quarterly from the treasury of the county upon the warrant of the county auditor. If he resides in a judicial subdivision comprising more than one county, such additional salary shall be paid from the treasuries of the several counties of the subdivision in proportion to such population thereof upon the warrants of the auditors of such counties. In no case shall such additional salary be less than one thousand dollars or more than three thousand dollars."

I am of the opinion, in answer to your first question, that the salaries of common pleas judges who were in office prior to the census of 1910, and who continue to hold their offices, should be apportioned according to the federal census of 1900 and not the census of 1910. The statute explicitly states that such salary shall be based upon the population as ascertained, not by the "next preceding" census, but by that "next preceding his assuming the duties of such office." This language is perfectly clear.

It is equally clear that the salaries of common pleas judges, appointed after the promulgation of the federal census of 1910, should be based upon that census.

In this connection, I beg to enclose herewith a copy of an opinion rendered, under date of February 4th, 1911, to the Hon. F. J. Rockwell, prosecuting attorney, Akron, Ohio, in which I point out that it is not the *promulgation,* but the *taking* of the census that fixes the date at which such salaries are to be determined.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

482.

CONTRACT BY VILLAGE WITH PUBLIC UTILITY GRANTING FREE WATER TO LATTER, IS VOID.

The purposes for which council may supply free water, are enumerated in Section 3963, General Code, and free water for no other purpose is authorized.

A contract, therefore, by the village with a public utility, containing in its provisions a grant of free water and light to said utility, is void.

June 25, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You ask for an opinion as to the validity of a contract between the Village of Plymouth, Ohio, and The Northern Ohio Railroad Company. Copies of the contract, called "An Ordinance," and letter of the Village Clerk accompany your request.

In order to properly construe this contract and intelligently answer your question, I quote the contract, or "Ordinance:"

"AN ORDINANCE"

"Approving the contract entered into by the Northern Ohio Railway Co. and the Village of Plymouth, Ohio, with relation to the removal

of division terminals from New London, Ohio, to the Village of Plymouth, Ohio,

"Be it ordained by the Common Council of the Village of Plymouth, Ohio, that a contract signed by the Mayor and Clerk of the Village of Plymouth and by the Northern Ohio Railway Co., dated the 28th day of October, 1904, providing for the removal of the division terminals from New London, Ohio, to the Village of Plymouth with relation thereto be and the same is hereby in all things ratified and approved, and the same shall be in full force and effect from and after this date for the term and time mentioned in the said contract, and shall be binding and obligatory upon the said Village of Plymouth during all of said period. The said contract reads in words and figures following to-wit:

"This article of Agreement made and entered into this 18th day of October, 1904, between the Northern Ohio Railway Company, a corporation of the State of Ohio, first party, and the Village of Plymouth, O., second party, witnesseth:

"That whereas the said first party desires to change its division terminals on its railroad from the Village of New London, O., to a more convenient and satisfactory location on its said line of railroad, and whereas the said Village of Plymouth, O. is located upon said line of railroad, and desires to secure the location of said division terminal in said Village.

"Now this agreement is to the effect following:

"First, That the said first party agrees to change its said division terminal from the said Village of New London in the State of Ohio and locate the same in the Village of Plymouth in the said State of Ohio, for and in consideration of the things granted and to be done by the said village of Plymouth as hereinafter provided.

Second, The said second party agrees to furnish to the said first party, free of cost, electric current, lamps, connections and all other appliances necessary for lighting all street crossings crossed by said railroad within the said Village of Plymouth and required by said Village to be lighted, from this date during the full term and continuance of this agreement.

"Third, The said second party agrees to furnish to the said first party, free of cost, all electric current, lamps, connections, etc., for lighting the passenger station of said first party and the office of its roadmaster to be located in said village of Plymouth for and during the continuance of this agreement.

"Fourth, The said second party agrees to furnish to first party and deliver to its water tank, free of cost, sufficient water to supply at all times during the term and continuance of this agreement, water necessary for all of the locomotives of said first party, the said second party is to provide two lines of pipes to its pumping station so as to be able to pump water into the said tank from either the river or village wells in case of a shortage of water at either of said points.

"Fifth: The said second party agrees that if at any time the said water lines shall be extended in Riggs Ave. across the tracks of the first party the said second party will furnish to first party free of cost, water for its station, the said first party to pay for making the tap to said water supply.

"Sixth: The said second party hereby agrees that the said first party shall have the right to lay any and all tracks additional which may

be necessary in the proper conduct of its business, across Beelman St. in the said Village of Plymouth.

"Seventh: It is agreed that this agreement shall remain in full force and effect for so long as said first parties division terminal shall remain located in said Village of Plymouth.

"In witness whereof, the said parties hereunto subscribed this agreement in duplicate this the day and date first above written.

"THE NORTHERN OHIO RAILWAY CO.,
"By E. A. HANDY, *Chief Engineer.*
"THE VILLAGE OF PLYMOUTH, OHIO,
"By Geo. HANICK, *Mayor.*

"Attest W. A. JEFFREY, *Clerk.*

"This ordinance shall take effect from and after its passage and publication.

"Passed this 18th day of Oct., 1904.

"W. A. JEFFREY, *Clerk.* GEO. HANICK, *Mayor.*"

Then follows a "*Resolution to Approve Contract,*" which reads as follows:

"Resolved by the Council of the Village of Plymouth, Ohio, three-fourths of all members thereto concurring, that the agreement covering the matter of leasing the pump foundation and pipe line of the Northern Ohio Railway Co. to the Village of Plymouth, Ohio, be and the same is hereby approved and the Mayor and Clerk are hereby authorized to sign the same in duplicate for and in behalf of the Village of Plymouth, Ohio, and the same shall be in full force and effect from and after this date. This said contract reads in words and figures following:

"This agreement made this 7th day of December, 1907 between the Northern Ohio Railway Company, first party and the Village of Plymouth, Ohio, second party, witnesseth:

"Where as, by an agreement entered into by and between the parties hereto on the 18th day of October, 1904 said second party agrees to furnish said first party, at its water tank in the Village of Plymouth, O., sufficient water at all times during the term of said agreement for all locomotives of the first party, and to provide two lines of pipes so as to be able to pump water into said tank either from the Huron River or the Village wells; and whereas. to provide better facilities for furnishing said water to first party second party desires to use first parties old pump foundation located in said village of Plymouth, O. together with first parties three inch intake pipe leading from Huron River to said pump foundation, and two and one half inch supply pipe leading from said pump foundation to first parties water tank, said pump foundations and pipes being substantially as shown on the blue print attached hereto and made a part hereof.

Now, therefore, said first party does for and in consideration of one dollar to it in hand paid and the agreement hereinafter contained, hereby grant to the said second party the right to use the above designated pump foundation and pipes of first party upon the following terms and conditions.

"First: That all necessary repair work shall be done and the pipes maintained in perfect condition and repairs at the sole cost of said second party, and if at any time it fails to keep said pipes in such perfect

condition and repair and such default continues after ten days notice to said second party by the first party to repair said pipes in such manner as shall be designated by first parties Chief Engineer second parties right to use said pipes shall cease and terminate and the first party shall take possession thereof, or may, at its option, make such repairs, and charge the cost thereof to second party, which second party agrees to pay within ten days after presentation of bills therefor.

"Second: That second part may erect a building upon the old pump house foundation located on first parties right of way, as shown on the blue print hereto attached, which building shall be constructed and maintained satisfactory to first party.

"Third: This agreement is upon the express understanding and condition that the first party shall be permitted to terminate the same at any time by giving second party thirty days notice in writing of such intention.

Fourth: The second party shall and will indemnify the first party against any and all damages, claims and demands, which may in any manner and at any time be made, or which may arise from the bursting or leaking of said pipes, or from any other cause which would or could be attributed to the said pipes or to the maintaining, renewing or using of the same.

"In witness whereof the said parties have hereunto subscribed this agreement in duplicate this the day and year first above written.

"THE NORTHERN OHIO R. R. CO.,
"By E. A. HANDY, *Ass't Gen'l Mgr.*
"THE VILLAGE OF PLYMOUTH, OHIO.
"By J. T. GASKEILL, *Mayor.*

"Attest, W. A. JEFFREY, *Clerk.*

"Passed this seventh day of December, 1905.

"W. A. JEFFREY, *Clerk.* J. T. GASKILL, *Mayor.*"

I do not see much difficulty in answering your interrogatory.

The powers of villages, in Ohio, are all enumerated in the Municipal Code. Unless authority is given by said code, to enter into such an arrangement as is set forth in the quotations above, the village has no power to bind itself by such contractual relations, and the same, as to both parties, is unenforceable and void.

The municipal code nowhere gives a village the right to enter into such a contract as above set out; nor into any contract, however advantageous to the municipality, by which a person or corporation can enjoy free use of water or light, except as specifically provided by law.

A village can not, as such, give special privileges to any one, even in return for concessions to the municipality.

Water and light, when controlled and owned by the village, are elements of revenue, and not subject to gift.

The Legislature has fully spoken as to the free use of water. Section 3963, G. C., is inclusive, and as a matter of law, exclusive, as to all not mentioned therein.

Water Supply Free For Certain Purposes:

"Section 3963. No charge shall be made by the director of public service in cities, or by the board of trustees of public affairs in villages, for supplying water for extinguishing fires, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, and cleaning of market

houses, the use of any public building belonging to the corporation or any hospital, asylum, or other charitable institution, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of public school buildings; but, in any case where the said school building, or buildings, are situated within a village or cities, and the boundaries of the school district include territory not within the boundaries of the village or cities in which said building, or buildings, are located, then the directors of such school district shall pay the village or cities for the water furnished for said building or buildings."

Therefore, the contract between the village of Plymouth and the railroad company is void.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

483.

BLIND RELIEF COMMISSION—EXPENDITURES LIMITED TO YEAR AND FUND FOR WHICH LEVY MADE—NEW LEVY BY COUNTY COMMISSIONERS AND NEW ALLOWANCES.

The expenditures of the Blind Relief Commission are limited to the fund raised by levy by the county commissioners for this purpose, and each fund is limited to expenditures of the year succeeding March 1st, for which the levy was made.

Allowance made by the Blind Relief Commission, therefore, for months preceding March 1st, and exceeding the amount of the fund, are absolutely void, and the claims for which said allowances were made can only be paid through a specific levy made by the County Commissioners and a new allowance made by the Blind Relief Commission on the new fund so raised.

June 28, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 7th, enclosing a letter addressed to you by the acting secretary of the Franklin County Blind Relief Commission, asking the following question:

"I desire to know why the blind pensioners should not be paid for October, November and December, 1911, and for January and February, 1912. The fund became exhausted because a levy of 24/100 mills was made when the law authorized a levy of 3/10 mills, and under the Smith Law the levy cannot be increased over that made last year."

This question involves the consideration of the following provisions of the General Code:

"Section 2967. * * * If the commission is satisfied * * * that the applicant is entitled to relief hereunder, it shall issue an order therefore, in such sum as it finds needed not to exceed one hundred and fifty dollars per annum, to be paid quarterly from the fund herein provided, on the warrant of the county auditor, and such relief shall be in place of all other relief of a public nature.

"Section 2969, as amended 101 O. L., 50. In addition to the taxes levied by law for other purposes, the county commissioners of each county shall levy a tax not to exceed three-tenths of one mill per dollar on the assessed value of the property of the county, to be levied and collected as provided by law for the assessment and collection of taxes, for the purpose of creating a fund for the relief of the needy blind of their respective counties."

I am firmly of the opinion that the Blind Relief Commission is without authority, under the present laws at least, to issue orders in any one year aggregating a greater amount than the amount of the Blind Relief Fund as measured by the county comissioners. Likewise, of course, the county auditor would be without power to issue a warrant against this fund when the same has become exhausted. In connection with the above sections must be considered the provisions of the Smith One Per Cent. Law, so-called, as heretofore construed by me in an opinion to your department, and in one to Hon. E. C. Turner, Prosecuting Attorney of Franklin County, a copy of which you have. In the latter opinion, especially, it is pointed out that proceds of a levy made in June 1911, available in March, 1912, and in August, 1912, can be expended only for the purpose of paying claims arising during the year beginning on March 1st. In order to pay back claims, the commissioners would at least have to levy especially for that purpose, as well as to subsequently appropriate the proceeds of such levy for the payment of such claims arising prior to March 1st, 1912. In short, in the absence of an appropriation to pay claims arising in a previous year, each year must, under the Smith Law, take care of itself.

What I have already said furnishes a sufficient answer to the question presented. However, I am inclined seriously to doubt whether the commissioners would have the authority to make a levy especially for the purpose of paying claims allowed by the Blind Relief Commission in a previous year, in excess of the amount of the fund. I have already stated that in my opinion it is the duty of the Blind Relief Commission to confine their allowances in the aggregate to the amount of funds. Authority is not expressly granted to this commission to make the allowance, irrespective of the amount of the fund, but on the contrary it is expressly declared that the allowance must be paid from the Blind Relief Fund and from no other source of revenue. In the absence of specific authority in the statute conferred upon the Blind Relief Commission to create a claim against the county *as such,* as distinguished from the Blind Relief Fund. I am clearly of the opinion that such power does not exist. The general rule, that statutes providing for the expenditure of public money and creating agencies of the public for special purposes are to be strictly construed, applies here.

Indeed, if the law must be construed so as to give the Blind Relief Commission independent power to create an obligation against the county, then it is clearly unconstitutional, and in that event the members of the Blind Relief Commission would be county officers; such officers, under the constitution, must, of course, be elected by the people. As I have construed the law, I believe it to be constitutional, although the prosecuting attorney expresses some doubt as to that question.

From what I have said it follows that outstanding orders issued by the Blind Relief Commission prior to March 1, 1912, at a time when the Blind Relief Fund was exhausted, cannot be paid from this year's fund, or the appropriation therefor. While my opinion is not solicited upon the point, it seems to me, also, that the county commissioners are without power to recognize the validity of such orders, and to make a levy expressly for the purpose of paying them. Relief may, however, in my opinion, be lawfully extended to those who are the losers by reason of the

facts submitted to me in this case. A levy especially for that purpose must be made by the county commissioners and an appropriation thereof for the purpose of paying relief claims for the year 1911, then the Blind Relief Commission must make new allowances to these persons, the old ones being absolutely void. If the county commissioners are willing to do this, and are able to do it within the limitation of the budget, I believe the end sought can be accomplished in this way, but not by any other proceedings. The allowances already made are absolutely void.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

488.

COMPENSATION OF TOWNSHIP TRUSTEES—LIMITATION OF $150.00 PER YEAR APPLIES ONLY TO GENERAL TOWNSHIP DUTIES—COMPENSATION FOR SPECIAL DUTIES NOT PRECLUDED.

Section 3294, General Code, providing a limit to yearly compensation of township trustees to the extent of $150.00, applies only to compensation for general business of the township. Said section, therefore, does not preclude the township trustees from receiving additional compensation, under Section 1184-2, General Code, which is a later statute imposing special duties and providing for payment out of a special road fund, for making up statistics as provided in said section.

July 2, 1912.

Bureau of Inspection and Supervision of Public offices, Department of Auditor of State, Columbus, Ohio.

DEAR SIRS:—Your letter under date of February 29th containing the question:

> "Would a member of the board of township trustees be entitled to receive under Section 1184-2 G. C., an amount due for services rendered by him, if such an amount would make the total received by him for his services during the year over $150.00?"

Section 3294, General Code, provides:

> "Each trustee shall be entitled to one dollar and fifty cents for each day of service in the discharge of his duties in relation to partition fences, to be paid in equal proportion by the parties, and one dollar and fifty cents for each day of service in the business of the township, to be paid from the township treasury. The compensation of any trustee *to be paid for the treasury* shall not exceed one hundred and fifty dollars in any year including services in connection with the poor. Each trustee shall present an itemized statement of his account for such per diem and services, which shall be filed with the clerk of the township, and by him preserved for inspection by any person interested."

Section 1184, General Code, (Vol. 102, O. L. p 336, Sec. 9) provides among other things:

> "The township trustees shall be paid the per diem allowance by law for their services, for the actual time so employed" (that is in making

up the statistics provided for) "and the same shall be paid out of the *road fund* of the township, which shall be *in addition to all other compensations allowed them by law.*"

This section refers to duties of trustees in conjunction with the Highway Commissioner.

Sections 5942-3-4-5, *General Code,* PROVIDE for work to be done by the township trustees in keeping down brush, briars, thistles or other obnoxious weeds along partition fences, etc., and *Section* 5946, *General Code,* provides for the payment of one dollar and fifty cents per day for each trustee for such services and this per diem shall be paid by the parties as costs. See *Section* 3294, *General Code.*

Likewise under *Section* 6619, *General Code,* township trustees shall be allowed for locating and establishing ditches under the chapter, one dollar and fifty cents per each day, etc.

Section 6621, *General Code*:

"The clerk shall apportion the payment of the costs of location and establishing ditches under the chapter to the parties interested in such ditch."

The above sections provide for the allowance of one dollar and fifty cents per diem to the trustees and as the costs are to be paid by the parties, from no part of the general business of the township as provided for in *Section* 3294, *General Code.*

These sections seem to distinguish between the duties of the trustees on behalf of individuals and on behalf of the township and the township business is further subdivided into general and special duties of the trustees.

The *Section* 3294 limits the trustees' compensation for the administration of the *general business* of the township to $150.00 in any one year to be paid from the treasury; this we assume to mean the general fund.

Section 1184-2, *General Code,* to which you make reference imposes *special duties* and provides for the payment out of a *special fund* and the duties imposed are not wholly of township interest but are in assistance of a state officer in a matter of general state wide interest.

This last named section governs *Section* 3294 in this matter both because it is a later enactment and because it is a special provision which, if not inconsistent, would govern the general provision of *Section* 3294.

We do not think these provisions inconsistent or conflicting and I am, therefore, of the opinion that the allowance of fees permitted under *Section* 1184-2 *G. C.,* is proper and legal even though such allowance exceeds the limit of $150.00 provided by *Section* 3294, *General Code.*

Very truly,
TIMOTHY S. HOGAN,
Attorney General.

492.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—GENERAL FUNDS—LEDGER FUNDS—TRANSFER OF FUNDS—OVERDRAFTS—"REVERT TO GENERAL FUNDS"—LIMITATION UPON POWER OF APPROPRIATIONS—COUNTY COMMISSIONERS.

Under the Smith One Per Cent. Law in spite of the language of 5649-3e *G. C. providing that unexpended balances shall revert to the "general fund," it must be concluded in view of Section* 5649-3a *G. C. that the existence of so called "ledger funds" constituting appropriations for specific purposes for which levies have been definitely made, have not been supplanted by single "general" or "undivided tax fund."*

The power of the county commissioners in making appropriations is therefore limited not only by the requirement that appropriations shall not exceed the total amount fixed by the budget commission, but also by the requirement that all appropriations must be made from funds in the treasury, and not for a greater amount for any purpose than that which stands to the credit of the particular fund on the ledger of the county.

Under Section 2443 *G. C., transfers may not be made from the general fund to a particular ledger fund, nor vice versa, unless the fund to be transferred to is "exhausted," and unless furthermore there is authority for supplemental levies for the reimbursement of the fund transferred from, which authority does not exist under the Smith Law, and such fund could not be reimbursed unless a specific item has been provided for such purpose by the Budget Commission. A further reason preventative to such transfers from the general fund lies in the fact that said Section* 2443 *G. C., applies only to transfers from funds levied and collected for a special purpose, which cannot apply to a "general fund."*

In view of these limitations therefore, when county officials have, from a misunderstanding of the law, paid bills prior to March, 1912, *but of moneys coming into the treasury from the collection for the first half of* 1912, *so that there is therefore as a result of such overdrafts less money in the treasury then was appropriated for that period, monies cannot be transferred from the general fund to specific funds, or vice versa for the purpose of providing for such overdrafts.*

And so also the county commissioners may not resort to such transfers to and from the general fund in order to effect an expenditure of moneys appropriated for the second half of the year for purposes of the first half of the year, or vice versa, when it is thought advisable or necessary to expend a greater amount for one period than for the other.

Such transfers may be made under 2296 *G. C., by appeal to Common Pleas Court. Such a procedure is cumbersome however, and, when the transfer is to be only temporary, would have to be followed twice, once for the transfer and again for the retransfer.*

When as a result of the overdrafts aforementioned there is to the credit of the general tax fund balance a less amount of money than has been allowed for all purposes by the Budget Commission, the only method of bookkeeping would seem to be that of crediting the funds respectively with the amount which they should legally contain and requiring the commissioners to limit the appropriations to the amounts available from each fund as reduced by the overdrafts.

Section 5649-3e *of the General Code provides "that balances remaining over shall revert to the general fund." From the primary meaning of the word "revert" and also from the fact that the general fund is treated as a thing already existing and is not defined as a new creation such language should be construed to require such balances to revert to the funds from which they were taken.*

May 10, 1912.
Revised June 22, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I herewith acknoweldge receipt of your letter of April 15th, in which you submit for my opinion thereon the following questions:

> "1. May the county commissioners, in making appropriations for the first half of the fiscal year beginning March 1st, exceed the amount to the credit of any certain fund as shown by the auditor's ledger for any one object,—for instance, for maintenance and repair of bridges,—provided the amount appropriated for that object does not exceed the amount allowed therefor for the entire year by the budget commission and provided, further, that the aggregate of appropriations so made does not exceed the total amount of money in the county treasury subject to appropriations?
>
> In handling the finances of a county, it is often desirable and often necessary to use a much greater amount for certain objects the first half of the fiscal year than the last half, while certain other objects may, and often do, require the use of more money during the last half of the year. Keeping in mind the two limitations provided in Section 5649-3*d*, viz: that no appropriation shall be made for a greater amount for any purpose than the amount fixed by the budget commission for such purposes (exclusive of receipts and balances) and that all appropriations must be made from moneys known to be in the treasury, it seems to us that the plan outlined above would meet the requirements of said section. Of course, any appropriation made the first half of the year must be deducted from the amount fixed by the budget commisssion to ascertain the maximum appropriation that may be made for the same purpose the second half. If this plan were followed, it would be found at the end of the year that no more had been appropriated for any object for the entire year than the amount fixed by the budget commission and furthermore, the appropriations would be found to have been made from moneys in the treasury.
>
> "By this plan we do not mean that fund accounts should be entirely disregarded, but it would really have the effect of allowing the commissioners to make use of Section 2443 in an indirect manner.
>
> "2. Section 5649-3*e* provides that balances remaining over shall revert to the general fund, which, if interpreted literally, would in effect allow such balances to be used, in the discretion of the commissioners, for any purpose whatever requiring appropriations. In your opinion, may the last mentioned section be so construed as to authorize the balances to revert to the funds from which they were originally appropriated? This would seem to be the meaning of the word *'fund'* in the third line from the last in said section were interpreted to mean 'funds.'"

In order that my opinion may be of service to you in advising officials of as many counties of the state in which difficulty may exist because of failure to understand the application and workings of the Smith One Per Cent. Law, so-called, I shall assume that this statement of facts, to which I think you will agree, is typical of those found in many counties.

After the February settlement, so-called, in the year 1912, the amount of money in the treasury of the county to the credit of all of the funds of the county

combined as the proceeds of such settlement is found to be much less than the ledger balance which should be in the treasury to the credit of such funds after such settlement. This is due to the fact that the commissioners of the county, in good faith and in ignorance of the implied repealing and amendatory effect of the Smith Law as I have discussed the same in my previous opinion to your department, and in that to Hon. E. C. Turner, Prosecuting Attorney of Franklin county, a copy of which you have, have expended prior to March 1, 1912 a part of the proceeds of the collection for the first half of the year 1912. In this way they have created in various funds what are popularly called "overdrafts" prior to the settlement. For example, they had, in accordance with a long-established custom, expended from the general treasury balance money for purposes chargeable against the general county fund, although there was no money in the treasury to the credit of such been credited to such fund has been made technically was illegal.

Under this statement of fact, a county auditor after the settlement would, if he followed his usual custom, credit so much of the proceeds of the settlement of the tax collection as was derived from levies for the general county fund, to that fund and deduct the amount of the overdraft therein. In case the overdraft exceedsd the proceeds of collection his ledger will show the general county fund to be exhausted and no money therein subject to appropriation.

Your first question applied to the above hypothetical facts would be as to the whether or not the county commissioners in making the appropriation could appropriate anything from the general county fund for the purposes of such fund in the face of the fact that the auditor's ledger shows no balance therein.

Of course, your first question has primary application also to a case in which there are no overdrafts at all, but in which the commissioners for some reason or other satisfactory to themselves desire to appropriate a greater amount for the first half of the year for purposes chargeable against a given fund than the ledger balance in said fund after the semi-annual settlement without in the aggregate of their appropriations exceeding the total amount known to be in the treasury at the time of making such appropriation.

Section 5649-3*d* of the General Code, enacted as a part of the Smith One Per Cent. Law, 102 O. L., 266, provides in full as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3*a* of this act shall make appropriations for each of the several objects for which money has to be provided, *from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances.*"

Section 5649-3*e* must be read in connection with the foregoing section, and is as follows:

> "Unexpended appropriations or balances of appropriations remaining over at the end of the year, and the balances remaining over at any time after a fixed charge shall have been terminated by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the general fund, and shall then be subject to other authorized uses, as such board or officers may determine."

At the very outset the question arises as to whether or not under these two sections, and under the Smith Law as a whole, there are now any ledger funds of the county.

I state this question in this broad fashion because there is really some doubt as to whether or not the Smith Law has not effected a complete and revolutionary change in the manner of handling the finances of all the taxing districts. Speaking generally, the system of the administration of the fiscal affairs of all taxing districts heretofore has been based upon a theory of separate levies by the taxing authorities for the different general purposes, the proceeds of which have constituted in each instance what is known as a "fund." That is to say, the county commissioners at their March and June sessions annually would levy upon the grand duplicate of the county, say one mill for general county purposes, and the proceeds of that levy, together with some other miscellaneous revenues, would constitute what was popularly known as the "general county fund."

So, in a city under the Municipal Code, the council levied a specific number of mills for the different purposes of safety, service, health, etc., and the proceeds of such specific levies constituted the funds of the city.

Under such statutes, and particularly under the Municipal Code which has always provided for the semi-annual appropriations, the funds themselves could not be ignored in making the appropriations; or, stated in other words, the appropriation was not from the moneys in the general treasury, *but from the moneys in the treasury to the credit of the funds from which the appropriation was to be made.* Thus, Section 43 of the Municipal Code, which is a section quite similar to Section 5649-3*d* of the General Code (which supplanted it as to municipal corporation), although it provides that,

> "At the beginning of each fiscal half year the council shall make appropriations for each of the several objects for which the county has to provide from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue."

also privides that,

> "The unexpended appropriations or balances of appropriations remaining over at the end of the year, and balances remaining over at any time after a fixed charge shall have been terminated, by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the funds from which they were taken."

The same section of the Municipal Code also provides that the county may make transfer among several funds raised by taxation, so that reading the entire section as a unit, it is apparent that the general assembly intended not that the appropriation should be made from moneys in the treasury, as would seem to follow from the first sentence, but *from the FUNDS in the treasury.*

Now, Section 5649-3*d* does not contain language like that in the Municipal Code. You second question calls attention to this very fact. Instead of providing that the unexpended balances shall revert to the funds from which they were taken, Section 5649-3*e*, which disposes of such unexpended balances, expressly provides that they shall revert to

> "the general fund, and shall then be subject to other authorized uses as such board or officers may determine."

It will be necessary at this point to anticipate a little, and discuss some of the questions raised by your second inquiry as throwing some light upon the answer to your first inquiry.

So far as the primary meaning of the language employed in Sections 5649-3*d* and 5649-3*e* is concerned, it seems that the Legislature had in mind a supposition that all the proceeds of a tax collection and of the other sources of revenue subject to appropriation *constituted but a single fund,* which it denominated the "general fund," corresponding roughly to the "general treasury balance" so-called, under the pre-existing statutes; or, perhaps more accurately, to an "undivided tax fund" plus balances to the credit of funds not raised by taxation. If this be the true meaning of the two sections, then the answer to both of your questions is obvious; but at the same time the consequence of such a holding would be that what is known as a "fund" no longer has any existence. This would, indeed, be a revolutionary change.

The question which I have raised as preliminary to the specific question which you ask, and necessarily so, is best answered in the first instance by considering other related sections of the Smith One Per Cent. Law. Section 5649-3*a* is in point here, and provides in part as follows:

> "On or before the first Monday in June, each year * * * all * * * boards or officers authorized by law to levy taxes within the county * * * shall submit or cause to be submitted to the county auditor an annual budget setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budgets shall specifically set forth:
>
> "1. The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year.
>
> "3. The monthly expenditures from each *fund* in the twelve months and the monthly expenditures from all funds in the twelve months of the last fiscal year.
>
> 4. The annual expenditures from each *fund* for each year of the last five fiscal years.
>
> "5. The monthly average of such expenditures from each of the several *funds* for the last fiscal year, and also the total monthly average of all of them for the last five fiscal years."

It is scarcely necessary to go further in the light of the italicized portions of the above quotation. This section expressly recognizes the continuing existence of what are known as the *"funds"* of the taxing district. I might add, however, that the Smith Law does not purport to repeal or amend any of the numerous statutes relating to the fiscal affairs of the various taxing districts which provide for and recognize the existence of *funds* as above defined.

In the face of these facts, Sections 5649-3*d* and 5649-3*e* of the Code must be interpreted as having a meaning perhaps somewhat different from that apparent on the face thereof. The true meaning of Section 5649-3*e* is involved in your second question, and a discussion of it will be postponed until that question is reached. Section 5649-3*d,* however, must, for the foregoing reasons, be paraphrased so as to read as follows:

> "At the beginning of each fiscal half year the various boards * * * shall make appropriations for each of the several objects for which money has to be provided from moneys known to be in the treasury from the collection of taxes and other sources of revenue *to the credit of the several funds therein."*

This interpretation has the effect of introducing a new limitation or qualification into the section. Not noly is the power of the commissioners of a county, for example, in making appropriations, limited by the requirement that no appropriation shall be made for a greater amount for such purpose than the total amount fixed by the budget commissioners exclusive of receipts and balances, but also by the implied limitation that all appropriations must be made from funds in the treasury, and no appropriation may be made for a greater amount for any purpose than that which stands to the credit of the proper fund on the ledger of the taxing district.

But this conclusion does not necessarily furnish a completely negative answer to your first question; it does furnish the conclusion that the commissioners in making appropriations for the first half of the fiscal year beginning March 1st may not exceed the amount to the credit of certain funds as shown by the auditor's ledger for any one object, but it does not necessarily follow that the commissioners are limited absolutely to such amount.

Under the Municipal Code, Section 43, above quoted, the contingency concerning which you inquire was provided for by the vesting in council of the authority to transfer among funds raised by taxation. In this way, if a greater amount of money were needed for an object chargeable against a certain fund, then the amount of the fund, as shown on the ledger at the time of making the appropriation, and a lesser amount of another fund than that shown on the ledger were needed for the ensuing fiscal half year, council by proper transfer could make the necessary adjustment and still not appropriate an amount in excess of the legal balance to the credit of the funds.

It remains to be inquired as to whether there are any statutes under which the county commissioners may accomplish the same result. You refer in your letter to Section 2443 of the General Code. That section is, in part, as follows:

> "* * *. If there is a fund in such treasury that has been levied and collected for a special purpose, and such fund, or a part thereof, will not be needed for such purpose until after the period fixed by law for the next payment of taxes, and any of the other funds of the county are *exhausted,* the commissioners may transfer such special fund, or such part thereof as is needed to such *exhausted* fund, and reimburse such special fund from the taxes levied for such other fund, as soon as they are collected."

Without entering upon a lengthy discussion of this section, it seems to me that its availability for the present purposes depends upon the meaning of the word "exhausted" as therein used. The primary meaning of the very "exhaust," from which the adjective in question is derived, is given by the Century Dictionary as follows:

> "1. To draw out or break off the whole of, draw out until nothing of the matter drawn is left; removed or taken out completely * * *.
>
> "2. To use up or consume completely; expend or make away with the whole of; cause the total removal or loss of."

It is obvious that the primary meaning of the word "exhausted" precludes the use of Section 2443 for the purpose suggested by you, except for the relief of the funds to the credit of which appropriation time there is no money whatever in the treasury. Unfortunately, in my opinion, this primary meaning of the word must be given to it in Section 2443. That section is a grant of power and must be

strictly construed and limited to the specific things enumerated in it. Therefore, so far as this section is concerned, the commissioners are not authorized to augment an insufficient fund by transferring from a fund in which there is more than a sufficient amount. Authority for such a transfer must be sought elsewhere.

As to Section 2443, however, it is difficult to imagine how it could ever be made available at all. So long as any allowance has been made by the budget commission for any fund, and the collection made on that account, such fund, prior to appropriation, could not be regarded as "exhausted," while there is no authority in Section 5649-3*d* for supplemental appropriations. Furthermore, if the commissioners undertake to make such a transfer at the time of making the September appropriation, they are prevented from so doing by two causes:

In the first place they may not in this manner make the funds sought to be transferred by them available for expenditure from the transfered funds in excess of the total amount fixed by the budget commission, exclusive of receipts and balances as provided in Section 5649-3*d;* in the second place they may not make any transfer at all, unless they have put in the annual budget an item specifically devoted to the reimbursement of the fund from which the transfer was made. This is for the reasons set forth in my opinion to Mr. Turner, namely, that the proceeds of a levy under the Smith Law are in the first instance set apart and devoted to the uses of the fiscal year succeeding the making of the levy.

Still another limitation upon the exercise of power under Section 2443 seems to exist. The section authorizes the transfer from a fund "levied and collected for a special purpose." There is no judicial definition of this phrase, excepting, possibly, in The Infirmary Directors vs. Commissioners, 6 O. N. P. n. s., 347-350. In this decision, and upon the reasoning there in embodied, it seems that most of the specific levies made by the county commissioners are to be regarded as levies for special purposes; but this would not include, in all probability, the levy for the general county fund. Therefore, in my opinion, a transfer may not lawfully be made at anytime from the general county fund under Section 2443.

In seeking further authority to transfer funds on the part of the county commissioners, I find no other provision, excepting that embodied in Sections 2296 et seq. of the General Code. I need not cite these sections as you are familiar with them. Suffice it to say they authorize a proceeding in the common pleas court for the transfer of the public funds under the supervision of anyone board or legislative body from one fund to another, in addition to all the other procedures provided by law. This procedure is available to accomplish the purposes set forth in your letter. In my opinion it should be followed in all cases where a fund at appropriation time is not completely exhausted; it will enable the commissioners in the case supposed by you to transfer from any fund of the county under their supervision to any other fund of the same kind whether exhausted or not. The difficulty arises here, however, because this transfer when made appears to be permanent and not temporary whereas a temporary transfer would be desirable and necessary in order to accomplish the results under consideration. The only way this difficulty could be obviated would be to appeal again to the commonpleas court, at the time of making the apropriation for the second half of the year, for a re-transfer of the amount originally transferred to the fund from which the first transfer was made. This procedure is, of course, cumbersome and not at all desirable, but it is the only one I have been able to work out under the statutes as they exist. It is just possible that the court in proceeding under Sections 2296 et seq. would, upon proper petition, order a temporary transfer for the purposes which you suggest. I do not undertake to lay down a rule for the guidance of courts in such matters.

For all of the foregoing reasons, then, I am of the opinion that in spite of the literal languages of Section 5649-3*d*, appropriations may be made only from

funds in the treasury and not from the general treasury balance. That is to say, I am of the opinion that the funds of the county, and of the other taxing districts to which the section relates, are intended to be continued under the Smith Law, and not converted into one single fund. That being the case I am of the opinion further that the commissioners of the county are without authority at any one time to appropriate from a fund a greater amount than the ledger balance to the credit of that fund; that in order to expend a greater amount for such purposes than is shown by the ledger of the auditor to be in the fund at the time of making the appropriation, transfers may not be made under Section 2443 of the General Code, that being practicably inapplicable; and that recourse must be had to the cumbersome precedure outlined in Sections 2996 et seq. of the General Code.

I agree heartily with your assumption that at all events regardless of whether the transfer is permanent or otherwise, Section 5649-3*d* positively limits the amount to be appropriated in any one year for an object set forth in the annual budget to the amount fixed by the budget commission; so that even if there should be in a fund at any time other than at the end of a fiscal year an amount greater than the difference between the amount appropriated from the fund and the total amount fixed for the year by the budget commission, exclusive or receipts and balances, such amount would not be available for appropriation.

I also agree, of course, with your further assumption that at all times the appropriations made by the commissioners must not in the aggregate exceed the total amount of money actually in the treasury to the credit of all the funds combined at the time of making the appropriation.

The foregoing conclusions relate more particularly to the case as stated by you, but not necessarily to that hypothetically imagined by me. For the sake of clearness, I am impelled to qualify them to a certain extent insofar as they are to be applied to counties in which one or more funds were "overdrawn" on the books of the auditor prior to March 1, 1912. Here the situation is quite different from that before discussed. The auditor, prior to March 1, 1912, had the undoubted right to issue vouchers upon an exhausted fund, although after that date, as you have already been advised, he was without such power. The county treasurer, however, had no right to pay such vouchers. In fact, he was expressly prohibited from so doing by provisions of the law which I need not quote. At the same time, as I have already held in other opinions, the commissioners were without authority to transfer under Section 2443 from one fund to another and to make reimbursements out of any part of the proceeds of the 1911 levy for the purpose of meeting expenditures prior to March 1, 1912. For similar reasons, the county treasurer was not authorized to credit to any specific fund as an advance payment or otherwise any moneys in the undivided tax fund produced at the December collection of 1911 so as to make it available for expenditures prior to March 1, 1912. In short, none of the proceeds of the December collection of 1911 could legally be expended, except after appropriations made at the beginning of the fiscal year commencing on March 1, 1912. The reasons for this conclusion have all been set forth in other opinions with which you are familiar.

Now the treasurer's illegal act in paying vouchers out of what is virtually the undivided tax fund, whether or not attempted transfers or advance payments have been made, reduces the amount of such undivided tax fund and the amount of the general treasury cash balance on the books of the auditor. Of course this reduction appears as an overdraft in one or more specific funds. This overdraft could not be cancelled by the issuance of bonds under Section 5656 of the General Code, as I have already held in my opinion to Mr. Turner. The money having been paid, however, the question at once arises as to how the overdraft is to be treated. Without discussing the question further, and upon reasoning which I

have set forth in other opinions, I beg to advise that in my judgment a discrepancy between the amount of money in the treasury and the amount which should be credited to the several funds on account of the two collections of 1912 is not to be charged against any one fund regardless of the purpose for which the expenditures were made. The case would be just exactly the same as if a portion of the money in the undivided tax fund or in the general treasury fund had been stolen or destroyed, excepting, of course, as to the technical liability of the county treasurer. I have already stated in my opinion to Mr. Turner that I did not believe that the treasurer could be made to respond in damages to the county on account of this illegal act.

The question as to how the ledger of the county auditor should be kept under circumstances such as those supposed is very difficult. I have been unable to reach any conclusion perfectly satisfactory to myself on this point. My best judgment is that in such cases the auditor's ledger before settlement should show the extent of the overdraft in the funds on which his warrants erroneously paid, as aforesaid, were drawn. This, in my judgment, the settlement should show the amount which ought to have been to the credit of the several funds if the payments had not been made; then the commissioners in making their appropriations would be required to limit them in the first instance to the amount in each fund, as shown by such fictitious settlement sheet, and in the second instance, in the aggregate to the amount of money actually in the treasury. For example, if in the illegal manner I have tried to describe there is created an overdraft in the general county fund equal to or in excess of the amount to be credited to that fund at the first semi-annual settlement under the Smith Law, the amount to the credit of that fund after such settlement should, nevertheless, be that which would have been to the credit of such fund if no such illegal expenditures had been made. The commissioners would then have power to appropriate from such funds up to the amount so fixed, but if they should undertake to so appropriate them they would have to reduce the appropriation from other funds to a sum less than the ledger balance of such other funds in order to keep the aggregate of that appropriation within or equal to the amount of money actually in the treasury.

In cases, then, where the necessity for appropriating more than what under the former practice would be the ledger balance to the credit of the fund arising from overdrafts in such fund was created in the manner described by me, my first conclusion of law does not necessarily apply, but the situation should be handled in the manner just described.

I, perhaps, owe you an apology for injecting into my opinion a question concerning which you did not specifically inquire. I did so from a desire to be accurate and because of a suspicion that you might have had in mind in asking the question which you did ask some cases in which the facts are as I have supposed them.

Your second question is rendered difficult of solution by facts that are not apparent on the face of the act. Section 5649-3*e* speaks of "the general fund;" the problem is, of course, to give to this term, not defined in this section, a meaning. One such meaning is suggested by you. I can conceive of but two alternatives: the fund in the treasury known by that name as "the general county fund," "general township fund," etc.; second, a new and distinct fund separate from all other funds which might more appropriately be termed "a residuary fund" consisting only of balances remaining over at the end of the year or after fixed charges have been terminated.

The first of these two suggested alternative meanings clearly cannot be adopted for the sufficient reason that there is no such "general fund" of the school

district nor of the city or village. The choice, then, lies between the meaning suggested by you and the second one suggested by me. When I first considered this question, I was of the opinion that the matter would have to be adopted for the reason that the General Assembly evidently had before it in enacting Section 5649-3*e* Section 43*e* of the Municipal Code already referred to, and now consisting of Sections 3797 et seq. of the General Code.

It was provided in that statute that the unexpended appropriations and balances should "revert to the funds from which they were taken." It would seem reasonable that if the General Assembly intended the phrase "general fund" to mean "the funds from which they were taken," it would have used this language which was before it, and it is at least difficult to suppose the Legislature would have deliberately changed language so expressive as this without intending to use the phrase which it employed in a meaning different therefrom.

Two considerations, however, have inclined me to adopt the view suggested by you, which is equivalent to holding that the phrase "general fund" means "the funds from which they were taken" in the face of the above mentioned facts. In the first place Section 5649-3*e* speaks of "the general fund" as a fund already existing, not one created by virtue of the enactment of the law itself. This is rendered even clearer by the fact that the act contains no definition of what shall constitute the "general fund," but, as already pointed out, leaves the definition of that term to be sought for in other statutes. In the second place, the word "revert" has a meaning which is inconsistent with such a construction. In its primary and natural significance, this word means:

"To come back to a former place or position." (Century Dictionary)

The use of this word, then, is inconsistent with the idea that balances are to be passed to the credit of a fund other than that from which they were taken.

I am, therefore, of the opinion that the phrase "shall revert to the general fund" means, in effect, "shall revert to the funds from which they were taken; and, further, that the phrase "and shall then be subject to other authorized uses as such board or officers may determine" means "and they shall be subject to such other uses as are authorized *to be made of such funds;*" so that in order that a balance of an appropriation thus reverting may be expended for a purpose or use to which the original fund is not properly applicable, such balance must first be transferred in accordance with the law authorizing such transfers to the fund from which it is desired to make the new appropriation before being subject to expenditure in such matter.

I regret that the conclusion to which I have come will make it inconvenient to operate under the Smith Law and will perhaps confuse the bookkeeping of the counties. Supplementary legislation like that embodied in the Municipal Code with respect to the transfer of funds, or an amendment of Section 2443 of the General Code eliminating therefrom the word "exhausted" would answer the purpose of your first question.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

495.

BOARD OF EDUCATION—VILLAGE SCHOOL DISTRICT HAVING NO BANK—PUBLICITY—CONTRACT ILLEGAL WHEN MEMBER OF BOARD IS STOCKHOLDER OF BANK.

A board of education of a village school district within which there is no bank cannot contract without publicity, with a bank for the deposit of school funds when a member of said board was a director and a stockholder in the said bank, for two reasons:

FIRST: Sections 7608 and 7807 of the General Code require such proceedings to be sufficiently public to enable banks conveniently located to compete for the contract and thereby enable the the board to select the bank "offering the highest rate of interest."

SECOND: Under Section 4757 of the General Code such a contract is void when a member of such board is pecuniarly interested as stockholder in such contracting bank.

May 31, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of April 3, 1912, where in you state:

> "There is no bank within the boundary of a certain village school district. The Board of Education of this district contracted with a certain bank making the bank the depositary for the school funds. This contract was made without submitting the same to bids, or without any publicity prior to the awarding of the contract which would be calculated to induce other banks to bid for the depositary. 'H' was a member of the board of education of the village school district and was also director in the bank now acting as depository for the school funds at the time the contract was made, and is still a member of both boards.
>
> "Is the contract thus entered into by the board of education of the school district legal?"

Two considerations induce me to the opinion that the contract of which you speak was illegal. In the first place, Section 7608 of the General Code provides as follows:

> "The resolution and contract in the next four preceding sections provided for, shall set forth fully all details necessary to carry into effect the authority therein given. *All proceedings connected with the adoption of such resolution and the making of such contract must be conducted in such a manner as to insure full publicity and shall be open at all times to public inspection.*"

This section applies both to the case of a district containing two or more banks and to that of a district in which less than two banks are situated. Without quoting all the sections, which will hereafter be quoted in the course of this opinion, suffice it to say that while in the former case the board of education is required to advertise for competitive bids and in the latter case no such requirement is contained in the statute, yet, the above quoted provision of Section 7608 precludes

the board of education of a district containing less than two banks from arbitrarily selecting a single bank as the depositary without giving some opportunity to other banks to qualify as such. That is to say, while under Section 7607 the determination of what banks are "conveniently located" rests within the sound discretion of the board of education, this discretion must not be abused; and the evident intention of that section, read in connection with Section 7608, is that such degree of publicity shall be given to the proceedings of the board of education, in the adoption of the resolution and the making of the contract necessary for the designation of a depositary, that a considerable number of banks may be induced to bid for the funds.

In selecting the depositary, then, the board of education is authorized to consider the convenience of location in connection with the rate of interest offered.

The foregoing conclusion is supported not only by the express provisions of Section 7608, but also by that of Section 7607, which is as follows:

> "The board of education may enter into a contract with one or more banks that are conveniently located *and offer the highest rate of interest.*"

It is obvious that the board of education could not legally act under this section without knowing what banks "conveniently located" offer the highest rate of interest; and that this fact, in turn, could not be ascertained without offering an opportunity to numerous banks to offer to take the contract in question.

For the foregoing reasons, then, I am of the opinion that a depositary contract made by the Board of Education of a district containing less than two banks, with a single bank, without any publicity, and without notifying any other banks of the proceeding, is illegal, at least presumptively so.

But there is another, and in itself a sufficient reason, for the conclusion which I have reached. Section 7607 of the General Code, as amended, 101 OHIO LAWS, 290, heretofore referred to in this opinion, provides in full as follows:

> "In all school districts containing less than two banks, after the adoption of a resolution providing for the deposit of its funds, the board of education may enter into a contract with one or more banks that are conveniently located and offer the highest rate of interest, which shall not be less than two per cent. for the full time the funds or any part thereof are on deposit. Such bank or banks shall give good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, at least equal to the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

It will be observed that the section authorizes the board of education to enter into a contract with any conveniently situated bank which qualifies otherwise. The procedure is quite different from that outlined in the preceding section, which I shall not quote. That section, which applies to the case in which the district contains two or more banks, requires that competitive bids be solicited in the manner therein described, and the board of education has nothing whatever to do, excepting to determine the sufficiency of the security offered by the successful bidder.

Under Section 7607, above quoted, however, the arrangement entered into between the board of education and the bank has every element of a contract. That

being the case, I am of the opinion that Section 4757 of the General Code applies. That section is as follows:

> "Conveyances made by a board of education shall be executed by the president and clerk thereof. No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member, except as clerk or treasurer. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board."

My predecessor, Hon. Wade H. Ellis, rendered an opinion to the prosecuting attorney of Holmes County, in which he held that the section last above quoted would not render invalid a depository award made under what is now Section 7605 and Section 7606 of the General Code. In the course of that opinion he stated, speaking of what is now Section 4757, General Code, that:

> "If this section is applicable at all, it would render voidable all contracts between a bank and a school board on which there was a single member who was also a stockholder in a bank, regardless of whether his vote was necessary to pass a resolution. (Bellaire Goblet Company vs. Findlay, 5 O. C. C., 418)"

The former attorney-general's reasoning was that inasmuch as a board of education of a school district having two or more banks has nothing whatever to do of a discretionary nature after it has passed the resolution now required by law, for the establishment of a depository, but is required by law to award the deposit of its funds to such bank or banks which offers the highest rate of interest and sufficient security, the case was not within the obvious intendment of the prohibitory section.

I have already pointed out the fundamental distinctions between the nature of the act of the board of education under Section 7605 and the corresponding act under Section 7607 of the General Code. The reasoning of Mr. Ellis' opinion, applied to what is now Section 7607, General Code, would produce results opposite to that which it produced as applied to the other sections. I am in accord with that reasoning, and give it to you as my opinion, that from the authority of the case cited by Mr. Ellis, and other cases to the same effect, a contract between a board of education of a school district in which there are fewer than two banks, and a bank for the deposit of the funds of the district is rendered void by reason of any interest in the bank which may be possessed by any member of the board of education.

I assume, as a matter of course, that the bank director is also a stockholder of the bank. A stockholder's interest, while small and indirect, has been repeatedly held sufficient to constitute a violation of statutes like Section 4757.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

497.

MUNICIPAL CORPORATIONS LIABILITY FOR PREMIUM UPON AN APPEAL BOND.

A city is granted the power to sue and be sued, and to make necessary contracts. A city may therefore perfect an appeal and when in so doing it contracts with a surety company for an appeal bond it is liable for the premiums thereon.

June 28, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:— Your communication of January 2d in reference to cost of an appeal bond is as follows:

> "Is the cost of an appeal bond secured of a security company in a case in which the city is a party, a legal charge against the city?"

Particularly referring to the cost of appeal bonds of the City of Dayton in the case of the Dayton Reduction Company vs. The City of Dayton, Ohio.

Your question presupposes that all the necessary steps have been taken for the execution of the appeal bonds and the perfecting of the case in the circuit court. The city having given a surety bond under proper authority, the premium upon these bonds is a necessary charge against the city and must be paid as any other indebtedness of the city.

Section 3615, *General Code,* gives the power to municipal corporations to sue and be sued.

Section 3616, *General Code,* provides:

> "All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

> "Municipal corporations, in their public capacity, possess such powers and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted."

Ravenna vs. Penn. Co., 75 *O. S.,* 118.

Municipal corporations have the same "power to make contracts advantageous to the municipality as that of an individual."

Columbus vs. Railway Company—2 *C. C.* (*N. S.*) 305, 25 *C. C.,* 663.

The city having the right of appeal under the general statutes has also the powers, which are necessary to carry out powers expressly granted, and has, therefore, the right and power to carry out and perfect that appeal, by contracting for and securing surety bonds therefor, and to pay the premium thereon, the same as an individual.

See 2 *C. C.* (*N. S.*) 305, *herein cited.*

The city, therefore, dealing with the surety company does so as an individual, and the cost of an appeal secure of a surety company in a case in which the city is a party, is a legal charge against the city to be paid as other claims.

Very respectfully,

TIMOTHY S. HOGAN,
Attorney General.

499.

OFFICES INCOMPATIBLE—COUNTY COMMISSIONERS AND MEMBER OF BOARD OF DEPUTY STATE SUPERVISOR OF ELECTIONS.

Inasmuch as there are certain expenses of the Board of Elections which cannot be allowed except upon the approval of the County Commissioners, the office of County Commissioner and that of member of the Board of Deputy State Supervisors of Election are incompatible.

July 6, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This morning you orally submitted a request for opinion from this department as to whether or not the offices of county commissioner and member of Deputy State Supervisors of Elections were incompatible.

As far as I could find there is no statutory inhibition against the holding of the two offices, and consequently the matter resolves itself into whether or not by reason of the duties devolving upon each of said offices the same become incompatible.

I would call your attention to Section 4821 of the General Code which provides in part as follows:

> "All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor."

Section 5052 of the General Code provides:

> "All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

Section 2460, General Code, provides in part:

> "No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, *except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim.*"

In an opinion rendered to the Hon. W. B. Gongwer, Deputy Clerk, Board of Elections of Cuyahoga County, under date of June 27, 1911, I gave it as my opinion that in view of the provisions of Section 2460, General Code, the county commissioners have the right to exercise supervision over all expenses incurred by the Board of Deputy State Supervisors and Inspectors of Elections, except those the amount of which is fixed by law or authorized to be paid out of the county treasury or city treasury upon voucher of the Board of Deputy State Supervisors and certified by the chief deputy and clerk thereof as set forth in the various sections of the General Code. It would, therefore, appear that there are certain election

expenses which can only be paid upon allowance of the county commissioners. To permit the holding of the office of county commissioner and that of a member of the board of deputy state supervisors of elections would permit such member to pass upon bills incurred by the board of which he is a member by himself as one of the county commissioners. I believe that this is a sufficient check of one office upon the other as to create an incompatibility in the holding of both at the same time.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

501.

COMPENSATION OF POLICE JUDGE—REDUCTION FOR DAYS OF ABSENCE IN EXCESS OF SIXTY.

When a regular Police Judge is off the bench for more than sixty days in any one year his compensation is reduced to the extent that his absence exceeds sixty days, regardless of whether one or several acting police judges have performed his duties in his absence.

Each acting judge receives compensation for his period of duty on the same basis as the regular judge.

June 27, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 29, 1911, in which you say:

> "Under Section 4569 G. C., an 'acting police judge' may be selected under certain conditions and Section 4570 provides that such acting police judge shall be paid in the same manner and at the same rate as the police judge, and that amount so paid shall not be deducted from the compensation of the police judge if the holding of the court by the acting judge does not exceed sixty days in any one year.
>
> "If one or more acting police judges be selected in any one year no one of whom holds court for sixty days, but the aggregate number of days of court held by such acting police judge or judges exceeds sixty days in any one year, what if any compensation shall be deducted from the salary of the regular police judge? Shall the compensation for the aggregate time served by all the acting judges be deducted or only for the time in excess of sixty days? May the same acting police judge hold court sixty days and then be re-appointed and take a new oath of office and hold court sixty more days without his compensation being deducted from that of the police judge?
>
> "Would the city be required to make deduction from the salary of the regular judge under the same conditions as the county?"

I do not see much difficulty in disposing of your queries. The police judge is a salaried officer for a fixed term, with jurisdiction in the city and within four miles thereof. He is paid by the city and county, as provided in Section 4568 G. C.

By Section 4573 G. C. the court is required to always be open for transaction of business, adjourning from day to day, etc., with monthly terms commencing the first Monday of the month.

By Section 4569 G. C., an "acting police judge" may be chosen, for the reasons therein stated.

Under this section, during a year, there might be chosen several "acting police judges," serving such times, successively, as the emergencies might require. Each of said "acting police judges," by Section 4570 G. C., would, respectively, be entitled to pay for the time he acted as such, on same basis as the regular judge.

If, during any year, any or all of such "acting judges" were not on duty as such, in the aggregate over sixty days, then the regular judge is entitled to his entire annual salary. But, if the holding of such court by any or all of said "acting judges," in any year, exceeds, in the aggregate, sixty days, then the regular judge must lose so much of his salary as is in excess of sixty days.

I other words, the regular judge is allowed to be off of the bench sixty days *in a year, and no more,* and it makes no difference whether *one* or a *dozen* "acting judges" take his place, their times of serving must be taken as cumulative for a year, and the regular judge's salary computed and paid accordingly.

The city and county should each make deductions from the regular judge's salary when he is not on duty as aforesaid. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

504.

ELECTION EXPENSES—TABLE OF, APPROVED—COMPENSATION OF CLERKS—PUBLISHING NOTICES—INVESTIGATION AND PROSECUTION OF ELECTION LAW AND REGISTRATION LAW VIOLATIONS—VOTING PLACES—NO CHARGE TO COUNTY FOR RENT OF TOWN HALL.

Under Section 4821 *of the General Code in counties having no registration, cities where assistant clerks to the Board of Elections are unauthorized, persons may be hired to compile and tabulate election returns, and they may be compensated under the head of "proper and necessary expenses."*

Under Section 4852 *of the General Code ballot boxes must be paid for by the county and should not be charged back against other subdivisions.*

The expense of posting or publishing notices of elections should be paid by the political subdivision affected.

The expense of investigating and prosecuting violations of registration laws should be paid by the registration cities.

The expenses incurred in the investigation and prosecution of violations of election laws should be paid in the same manner as other general expenses of an election. Such expenses pertaining to elections in odd numbered years shall be paid by the county and charged back, those paid in even numbered years shall not be charged back.

The rent for voting places in a township or municipality other than a registration city should be paid by the county as a proper and necessary expense of an election under Sections 4821 *and* 5052 *of the General Code, to be charged back in odd numbered years under Section* 5053 *of the General Code.*

Townships and municipalities may not charge the county rental for use of its public hall or building for holding elections therein.

All other items of expense in schedules submitted are in accordance with prior opinion.

July 8, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of July 5, 1912, is received, in which you state:

"We hand you herewith three schedules relating to the payment of election expenses, denominated respectively, Schedules A, and B, and C, which were compiled by Mr. C. E. Brotton, one of the state examiners of this department in conformity to your written opinion to this department on this subject under date of February 27, 1912.

"Will you kindly review the schedules, and make the necessary corrections therein, if any, and embody the same in a letter or opinion to this department at your earliest convenience?"

The schedules enclosed are as follows:

"SCHEDULE A

"Election Expenses Counties Having no Registration Cities, or City: To be paid by county in both even and odd numbered years—never charged back.

"Salaries Members General Elections, Section 4822.

"Based upon the number of precincts, at the preceding November election.

"Three dollars for each election precinct in the county, based as above.

"Minimum salary one hundred dollars per annum. Payable quarterly, at the end of the quarter.

"Salary Clerk General Elections, Section 4822.

"Based upon the number of precincts, at the preceding November election.

"Four dollars for each election precinct in the county based as above.

"Minimum salary one hundred and twenty-five dollars. Payable quarterly, at the end of the quarter.

"No extra compensation is provided for either the members or clerk for holding special elections.

"Salary Members Primary Elections, Section 4990, G. C.

"Based upon the number of precincts at the date of holding primary election.

"Two dollars for each precinct in the county based as above. Payable quarterly, at the end of the quarter.

"Salary Clerk Primary Election, Section 4990, G. C.

"Based upon the number of precincts at the date of holding primary election.

"Three dollars for each precinct, in the county based as above. Payable quarterly at the end of the quarter.

ASSISTANT CLERK:—

"No provision for in counties not having registration cities.

"Where the Board of Elections and the County Commissioners have authorized the employment of an assistant clerk to assist in tabulating and compiling election returns, and a nominal per diem paid therefor, no find-

irgs have been made, the same being regarded as a proper and necessary expense under Section 4821 G. C.

"Where the same boards have employed an assistant, at a fixed monthly salary for the year, the amounts so paid have been held illegal.

"Ballot Boxes:—Section 4852 G. C.

"Ballot boxes and all equipments therefor, such as locks, etc., should be furnished by the board for each election precinct, in the county. Such ballot boxes are the property of the county and should never be charged back.

"Poll Books and Talley Sheets:—Section 5048 G. C.

"Poll books and talley sheets for all elections.

"Voting Shelves or Booths—Section 5044 G. C.

"Voting shelves or booth, and all equipment therefor, such as curtains, etc., should be furnished by the board for each voting precinct in the country and like ballot boxes are the property of the county and should never be charged back.

"Guard Rails—Section 5045 G. C.

"The provisions governing ballot boxes and voting booths apply to guard rails.

"Tables, Chairs, etc., Voting Places—Section 4919 G. C.

"Tables, chairs and furnishings of a like nature for voting places, should be paid by the county and never charged back.

"Election Expenses to be paid by the Township, Municipality or School District direct—never to be paid by County.

"Expenses of room for voting place:—Section 4844 G. C.

"The Attorney General in the report of 1906 at page 109 holds that the township or municipality must furnish the room for the voting place.

"Expense of posting Township Election Notices and Notifying Township Officers of Election:—Section 4833 G. C.

"Section 3346 G. C. shall be paid by the township trustees direct.

"Expense of publishing Mayor's Proclamation:—Section 4837 G. C.

"The expense of publishing the Mayor's Proclamation must be paid by the municipality.

"Expense of publishing Notice School Election:—Section 4839, G. C.

"The expense of publishing notice of school elections must be paid by the school board.

"SCHEDULE C.

"Expenses to be paid by county in even-numbered years, not charged back:—Section 5052 G. C.

"Expenses to be paid by county in odd-numbered years, charged back:—Section 5053 G. C.

"1. Printing and distributing ballots.

"2. Printing cards of explanation to officers and voters.

"3. Printing blanks required for such elections.

"4. Compensation of precinct election officers.

"5. Other proper and necessary expenses of any general or special election.

"The above phrase "proper and necessary expenses" is held to include:—

"a. Expenses incurred in setting up and returning voting equipment under Section 5046 G. C.

"b. Investigation and prosecution of violation of election laws relating to the right of suffrage and the conduct of elections:—Section 4800 G. C.

"c. Coal for heat and oil for light for voting places.

"d. Any other proper and necessary expense provided by law and not specifically enumerated under this or the foregoing schedules A or B.

"NOTE:—The statutes make no provision for the personal expenses of either the members or clerk in either even or odd-numbered years.

"SCHEDULE B.

"Expenses to be paid by county and registration cities both even and odd-numbered years.

"Salaries members and clerk general elections:—Sections 4822, G. C. and 4942, G. C.

"Based on the number of precincts at the preceding November election.

"The maximum salary provided in Section 4943, G. C., is to be apportioned between the county and the city in the ratio of product obtained by multiplying the whole number of precincts in the county by the rate per precinct, under Section 4822, G. C., to the product obtained by multiplying the number of city precincts by the rates per precinct under Section 4942, G. C.

"The first should be paid quarterly by the county and the second should be paid monthly by the city.

"Salaries of members and clerks, primary election:—Section 4990, G. C.

"Based upon number of precincts at the time of holding primary.

"The total amount to be paid members and clerk which is obtained by multiplying the total number of precincts in the county by the rates per precinct of $2.00 and $3.00, respectively, as provided by Section 4990, G. C.

"The total amount to be paid, thus obtained should be apportioned between the city and the county and paid in the same ratio and in the same manner as the salaries for such members and clerk for general elections.

"SCHEDULE D.

"Expenses to be paid by registration cities—Direct in both even and odd numbered years.

"Section 4946, G. C.

"Rent of offices for the board.

"Furnishings and supplies for same.

"Compensation of registrars.

"Cost of registers, books, blanks, forms, stationery and supplies for registration.

"Poll books for special elections.

"Rent of voting places for registration and elections in such city. Held to include the cost of portable voting houses or any expenditure for the general maintenance or upkeep thereof such as repairs, cleaning, hauling, erecting, watching, displaying of signals, lot for storage.

"General office expenses of the board of deputy state supervisors of elections.

"Chairs, tables, fuel, lights for voting places in city.

"Salary of deputy clerk, as provided by Section 4798, G. C.

"Salaries of assistant clerks, as provided by Section 4877, G. C.

"Voting shelves:—Section 5044 G. C.

"Guard Rails:—Section 5045, G. C.

"Section 4800, G. C.

"Investigation and prosecution of violation of election laws relating to registration of voters.

"Expenses to be paid by the county in both even and odd-numbered years. Never to be charged back.

"Section 4852, G. C. Ballot Boxes.

"Section 5048, G. C. Pool books and tally sheets, at all elections except special elections in a registration city.

"Section 5044, G. C. Voting shelves or booths, for precincts outside of registration cities.

"Section 5045, G. C. Guard rail for precincts outside of registration cities.

"SCHEDULE E.

"Expenses to be paid by county in even-numbered years—Not charged back.

"Expenses to be paid by county in odd-numbered years—Charged back.

"Section 4945, G. C.

"The above section provides that 'For November elections held in even numbered years, the county in which such city is located shall pay the general expenses of such election, other than the expenses of registration.'

"Section 5052, G. C.

"This section construed together with the language of Section 4945, G. C., seems to classify the general expenses mentioned in the last named section, as follows:

"1. Printing and distributing ballots.

"2. Printing cards of explanation to officers and voters.

"3. Printing blanks required for such election.

"4. Compensation of precinct election officers.

"5. Other proper and necessary expenses of any general or special election.

"a. This is held to include expenses incurred in setting up and returning voting equipment under Section 5046, G. C.

"b. Investigations and prosecutions of violation of election laws relating to the right of suffrage and the conduct of elections—Section 4800, G. C.

"c. Any other proper and necessary expenses provided by law and not specifically enumerated under foregoing schedules B, C, and D.

The greater part of the items in the foregoing schedules were passed upon in the opinion of February 27, 1912, to which you refer. Some items are not covered by that opinion. These will now be considered.

In the opinion of February 27 it is held that there is no provisions for an assistant clerk to the board of deputy state supervisors of elections in counties having no registration cities or city. You state that where boards employ an assistant clerk at a fixed monthly salary, it is held illegal, but that where an assistant clerk is employed at a nominal per diem to assist in tabulating and compiling election returns, no findings have been made.. As authority for this you cite Section 4821, General Code, which provides:

> "All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. In counties containing annual registration cities, such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

The term "all proper and necessary expenses of the board" in my opinion will include the compensation of persons who are necessarily employed to assist in compiling and tabulating the election returns. It will not, however, authorize the board to create a position of assistant clerk and pay him a stipulated salary as is done in the case of the clerk.

The schedule provides for the payment of ballot boxes by the county by authority of Section 4852, General Code, which section reads:

> "The deputy state supervisors of each county shall cause to be provided at the expense of the county a ballot box for each election precinct therein, and cause it to be deposited with the proper township or village clerk or city auditor. Each such officer shall cause a ballot box with a copy of this title to be delivered at each place of holding elections in his township or corporation as often as elections are held therein. After such election, such ballot box shall be forthwith returned to him by the judges of election for safekeeping. In registration cities, the care of the ballot boxes to be used at any election shall devolve upon the board of deputy state supervisors."

This section provides that the ballot box shall be provided at the expense of the county. The language used in this section as to payment for ballot boxes is the same as used in Section 5048, General Code, as to payment for poll books. As held in construing Section 5048, General Code, in the former opinion, so in con-

struing Section 4852, supra, it must be held that the ballot boxes must be paid for by the county and should not be charged back.

The schedule refers to payment of township election notices, cost of publishing mayor's proclamation and of notices for school elections.

Section 4833, General Code, provides:

> "The constable who receives such warrant shall notify the electors of the township by posting copies of the warrant in at least three public places in the township at least ten days before the meeting of the electors. If the office of one or more of the trustees is vacant, the township clerk, together with the trustee or trustees in office, shall issue such warrant."

"Section 4837, General Code, provides:

> "Previous to any election for municipal officers, the mayor shall issue a proclamation to the electors of the corporation or of the respective wards or districts thereof, as the case may require, setting forth the time and places of election and the officers to be chosen, and cause such proclamation to be published in a newspaper printed in the corporation at least ten days previous to the election. If no such newspaper is published in the corporation, such notice may be given by posters."

Section 4839, General Code, provides:

> "The clerk of each board of education shall publish a notice of all school elections in a newspaper of general circulation in the district or post written or printed notices thereof in five public places in the district at least ten days before the holding of such election. Such notice shall specify the time and place of the education, the number of members of the board of education to be elected, and the term for which they are to be elected, or the nature of the question to be voted upon."

Section 3346, General Code, provides:

> "The constable who advertises the time of holding elections and notifies the township officers of their election, shall be allowed a reasonable compensation therefor, to be fixed by the trustees and paid from the township treasury."

Section 3346, supra, requires payment for notices of township elections to be paid from the township treasury.

It will be observed that the various notices are given by officers of the political divisions for which the elections are to be held. They are for the benefit of such districts. It is a duty pertaining to an officer of the township, municipality, or school district. Neither the county nor the board of elections have any control over such expense or any duty to perform in reference thereto. The expense of posting or publishing such notices should be paid by the political division affected.

Notices of township elections should be paid by the township. Publishing of mayor's proclamation of election should be paid by the municipality and the publishing of notices of school elections should be paid by the school district.

The schedule contains several provisions for payment of expenses connected with the investigation and prosecution of violation of election laws. It states that such expense, when pertaining to elections should be paid by the county in all

years, and shall not be charged back in even-numbered years, but shall be charged back in odd-numbered years; and that such expense for violation of registration laws shall be paid by the registration city.

Section 4800, General Code, provides:

> "The board of deputy state supervisors and inspectors shall investigate and prosecute all violations of the laws relating to the registration of electors, the right of suffrage and the conduct of elections, and make report thereof to the state supervisor and inspector. When approved by the state supervisor and inspector and by a vote of a majority of its members, each such board may incur any expense necessary to the conduct of such investigations and prosecutions."

The last sentence in Section 4821, General Code, supra, provides:

> "In counties containing annual general registration cities, such expense shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

Section 4945, General Code, provides:

> "For November elections held in even-numbered years, the county in which such city is located shall pay the general expenses of such election other than the expenses of registration. Such allowance and order of the board for such expenses and compensation to such judges and clerks of elections shall be certified by the chief deputy and clerk to the auditor of such county, who shall issue his warrants upon the county treasury for the amounts so certified."

The expense of registration is excepted from the part of the expense of an election which the county is to pay in even-numbered years. The expense of registration is to be paid by the registration city, by authority of Section 4946, General Code, as held in the opinion of February 27, 1912. Nothing is said in said Section 4946, about the expense of investigating and prosecuting violations of registration laws. Such an expense would be an expense pertaining to the registration of electors, and should be paid by the registration city.

Section 5052, General Code, provides:

> "All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

Section 5053, General Code, provides:

> "In November elections held in odd-numbered years, such compensation and expenses shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county shall be retained by the county auditor from funds due such township, city, village or political division, at the time of making the semi-annual distribution of taxes. The amount of such expenses

> shall be ascertained and apportioned by the deputy state supervisors to the several political divisions and certified to the county auditor. In municipalities situated in two or more counties, the proportion of expense charged to each of such counties shall be ascertained and apportioned by the clerk or auditor of the municipality and certified by him to the several county auditors."

It will be observed that Section 4821, General Code, provides that all necessary and proper expenses of the board shall be paid from the county treasury and that the county commissioners shall make the necessary levy therefor. This expense shall include expenses incurred in investigation and prosecution of violations of election and registration laws in counties containing annual general registration cities. This provision does not affect the provisions of Sections 5052 and 5053, General Code, as to the payment of proper and necessary expenses from the county treasury and the right of the county to charge back such expense.

The expenses incurred in the investigation and prosecution of violations of election laws should be paid in the same manner as other general expenses of a particular election. For violations of election laws at elections in even-numbered years, such expense shall be paid by the county and not charged back, and in odd-numbered years shall be paid by the county and charged back.

The schedule states that the expense of providing a room for voting place in a township or municipality must be paid by the township or municipality by authority of Section 4844, General Code.

Said section reads:

> "Elections shall be held for each township precinct at such place within the township as the trustees thereof shall determine to be most convenient of access for the voters of the precinct. Elections shall be held for each municipal or ward precinct at such place as the council of the corporation shall designate. In registration cities, the deputy state supervisors shall designate the places of holding elections in each precinct."

The expense of furnishing voting booths and voting rooms with chairs, fuel, light, voting shelves, etc., is covered by the opinion of February 27, 1912.

Section 4844, General Code, provides that the township trustees shall select the place of voting in the township precincts; that the council of the corporation shall select the place in municipalities; and that the board of elections shall designate the place in registration cities. Nothing is said in this section as to who shall pay for such rooms or places. The payment of the rent of voting places is specifically provided for in registration cities and has been covered in the opinion of February 27.

There is no specific provision of statutes directing how the rent for voting places in a township or in a municipality other than a registration city, shall be paid. In the absence of such specific provision, any necessary expense incurred for renting rooms for elections in such places would constitute a proper and necessary expense of the election to be paid as provided in Sections 4821 and 5052, General Code, by the county, and to be charged back in odd-numbered years as provided in Section 5053, General Code.

You refer to the report of the Attorney General of 1906, at page 109. An opposite holding is apparently made by the Attorney General in the opinions of 1909-1910 at page 602.

A question will arise as to the right of a township or municipal corporation to charge the county rental for the use of its public hall or building for holding

elections therein. I find no authority to make such charge. Said buildings are provided for public purposes and it adds no expense to the township or municipality to permit the use of such building for elections.

With the one exception as to payment of rent for rooms for voting places in townships or municipalities, other than registration cities, the schedules as submitted are approved. It properly states the manner in which the election expenses shall be paid, except as above noted.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

506.

ADMISSION OF MINORS, ADULTS, AND EPILEPTICS TO INSTITUTION FOR FEEBLE MINDED—PROCEDURE—CERTIFICATE AND TESTIMONY OF MEDICAL WITNESSES.

Under Section 1892 *of the General Code the Trustees of the State Institution for feeble minded, shall prescribe the rules of admission for pupils under* 15 *years of age and medical witnesses are therefore not necessarily required for the admission of such.*

Feeble minded persons over 15 *years of age who are not public charges, can only be admitted to the institution by commitment by a probate judge after witnesses are subpoenaed, hearing had and certificate signed by two medical witnesses. Public charges, however, may be admitted upon simple application.*

By virtue of the requirement of Section 1902 *of the General Code that feeble minded adults may be committed to the institution for feeble minded only upon pursuing the same course of legal commitment as governs admission to the state hospital for the insane, the testimony and certificate of two medical witnesses are essential.*

By virtue of Section 2045 *of the General Code the certificate of only one physician is required to admit an epileptic to the state institution for epileptics.*

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your favor of May 29th received. You inquire:

> "1st. Whether two medical witnesses are required for the admission of patients to the institution for the feeble minded who are under legal age.
>
> "2d. Does a requirement that the same course of legal commitment be followed, as provided in Section 1902, governing admission to state hospitals for the insane, authorize the payment of fees provided in Section 1981?
>
> "3d. In the commitment of patients to state institutions for epileptics is an examination and certificate by two physicians required?"

Answering your first question, Section 1891 provides for the admission of pupils to the Institution for Feeble Minded Youth not over fifteen years of age, residents of the state, who are capable of receiving instructions. Section 1892 provides for the rules governing admission of pupils and is as follows:

> "The trustees shall prescribe and publish instructions and forms for the admission of pupils, and may include in them such interrogatories as

> they think necessary or useful. Such instructions and form shall be furnished to any person applying therefor, and also be sent in sufficient numbers to the probate judges in the several counties."

Under authority of Section 1892, General Code, the Board of Administration, who succeeded to all the duties of the Board of Trustees of the Institution for Feeble Minded Youth, may provide the terms and requirements for admission of pupils to this institution. No medical examination is required. The statute does not provide that applicants should first be examined as to their mental condition, but authorizes the board to prescribe and publish instructions and forms for the admission of pupils; and they may include therein such interrogatories as they may think necessary or useful to have answered.

This view is sustained by the case of Doran vs. Fleming, 17 Circuit Decisions 737.

Section 1893, General Code, provides for the admission of pupils over fifteen years of age; it is as follows:

> "If the capacity of the institution allows the reception of pupils besides those above described, the trustees may admit persons of greater age, and persons not resident in the state. For all who are not residents of the state for the required time, the trustees shall charge and receive for the institution a fair rate of compensation, to be fixed by them."

I have already held, in an opinion addressed to Dr. E. J. Emerick, of the date of September 25, 1911, that feeble minded persons over fifteen years of age, who are not public charges, can only be admitted to the institution by commitment by a probate judge, after witnesses are subpoenaed, hearing had, and a certificate signed by two medical witnesses; that persons who are public charges may be admitted upon simple application.

So that, answering your question specifically, two medical witnesses are not required to admit persons under fifteen years of age, eligible to be admitted to the Institution for Feeble Minded Youth; and two witnesses are not required to admit persons over fifteen and under twenty-one years of age, who are public charges, and who are admitted under authority of Section 1893, General Code; but two medical witnesses are required for persons over fifteen years of age and under twenty-one years of age, *not public charges,* who are admitted to the institution.

Coming now to your second question, Section 1902 provides as follows:

> "Feeble minded adults of such inoffensive habits as to make them proper subjects for classification and discipline in the institution may be admitted, on pursuing the same course of legal commitment as govern admission to the state hospital for the insane."

Proceedings for admission of the insane are found in Section 1953, et seq. General Code. To admit patients to a hospital for the insane requires the certificate of two medical witnesses, who are allowed, under Section 1981, General Code, five dollars each for making the examination and certificate. Section 1902, above quoted, provides: Feeble minded adults may be committed to the institution for feeble minded youth on pursuing the same course of legal commitment which governs admission to state hospitals for the insane. It therefore requires the testimony and certificate of two medical witnesses to commit feeble minded adults to the institution, and they are entitled to five dollars for making the examination and certificate, as provided in Section 1981, General Code.

Answering your third question, Sections 2045 and 2046 of the General Code provide as follows:

> "Application for admission to the hospital of an epileptic person, other than insane or dangerous, first shall be made in writing by such person, his or her parent, guardian or representative, to the probate court of the county in which the epileptic is resident. If such epileptic has no parent, guardian or representative, any citizen may make such application on his behalf. (Section 2405).
>
> "Not more than five days after the application is filed, on the day fixed by him, the probate judge shall examine and inquire whether the alleged epileptic is a suitable person for admission into the hospital, and for such purpose may subpoena witnesses. He shall subpoena a reputable physician, and, if necessary, may issue his warrant commanding the alleged epileptic to be brought before him. If deemed unsuitable to bring him into the probate court, the judge shall personally visit such person, and certify that he so ascertained his condition by actual inspection. The other proceedings then may be had in the absence of such person. (Section 2406)"

It is expressly provided in Section 2045 that the certificate of only one physician is required to admit an epileptic to the state institution for epileptics.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

512.

COMPENSATION OF WATCHMAN AND JANITOR OF COUNTY JAIL—ALLOWANCE OF COUNTY COMMISSIONERS TO SHERIFF FOR KEEPING AND FEEDING PRISONERS.

Under Section 2997 of the General Code the County Commissioners must make an allowance to the sheriff in addition to his salary for the keeping and feeding of prisoners and all employes hired by the sheriff must be paid by him from this fund.

Under Section 2410 of the General Code the County Commissioners may employ and pay out of the general fund of the county such watchman, jaintors and other employes as are deemed necessary for the care and custody of the jail building only.

Under Section 3161 of the General Code the sheriff may appoint his deputy keeper of the jail. Such deputy must be paid however from the allowance made by the county commissioners under Section 2980 of the General Code, and should be paid from the fee fund.

July 10, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of June 20, 1912, is received in which you inquire:

> "May the county commissioners employ and pay out of the general county fund watchmen and janitors for the county jail?
>
> "If a sheriff appoints one of his deputies jailer under Section 3161, shall he be paid from the sheriff's fee fund or the general county fund?
>
> "Under Section 2850, the mommissioners shall make the sheriff an

allowance for keeping and feeding prisoners in jail. Section 2410 provides that the commissioners may employ such watchmen, janitors and other employes for the care and custody of the jail as they deem necessary. Under these related sections, is it the duty of the sheriff to safeguard and keep the prisoners at his own expense in consideration of the amount allowed him for their board, or can the commissioners employ a turnkey and watchmen for the safeguarding of the prisoners and pay them out of the general county fund?"

Section 3157, General Code, provides:

"The sheriff shall have charge of the jail of the county, and all persons confined there, keep them safely, attend to the jail, and govern and regulate it according to the rules and regulations prescribed by the court of common pleas."

By virtue of this section the sheriff is made the keeper of the jail.

Section 3161, General Code, provides:

"The sheriff may appoint one of his deputies to be keeper of the jail."

Instead of performing the duties of keeper of the jail personally, the sheriff may appoint one of his deputies as the keeper of the jail.

Section 2980, General Code, provides:

"On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year begining January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal."

Section 2980-1, General Code, limits the amount to be allowed to such offices to a certain percentage of the fees of such office.

Section 2981, General Code, provides:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk or other employe shall be paid monthly from the county treasury."

Section 2987, General Code, provides:

"The deputies, assistants, clerks, bookkeepers, and other employes of such offices shall be paid upon the warrant of the county auditor, from the fees, costs, percentages, penalties, allowances, or other perquisites or

sums of whatever kind collected and paid into the county treasury and credited by the treasurer to the fee fund of such offices."

The foregoing sections authorize the county commissioners to make an annual allowance for the payment of the compensation of deputies and other employes in the office of the sheriff and other county offices. The amount to be allowed must not exceed the percentages of the fees of the office as prescribed in Section 2980-1, General Code. While the compensation of deputies is paid from the county treasury, yet the amount is limited by the fee fund and is to be paid from the amount credited to the fee fund.

When the sheriff appoints one of his deputies as keeper of the jail, such appointee is still a deputy to the sheriff. The compensation of such deputy who performs the duties of the keeper of the jail should be paid from the allowance made by the county commissioners for the sheriff's office and should be paid from the fee fund of that office.

Section 2410, General Code, provides:

"The board may employ a superintendent, and such watchman, janitors and other employes as it deems necessary for the care and custody of the court house, jail, and other county buildings, and of bridges, and other property under its jurisdiction and control."

This section authorizes the commissioners to employ a superintendent, watchman, janitors or other employes as they deem necessary for the care and custody of the jail. It makes no provision for the care and custody of the prisoners confined therein.

Section 2850, General Code, provides:

"The sheriff shall be allowed by the county commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail, but in any county in which there is no infirmary, the county commissioners, if they think it just and necessary, may allow any sum not to exceed seventy-five cents each day for keeping and feeding any idiot or lunatic. The sheriff shall furnish at the expense of the county, to all prisoners confined in jail, except those confined for debt only, fuel, soap, disinfectants, bed, clothing, washing and nursing when required, and other necessaries as the court in its rules shall designate."

The allowance authorized to be made to the sheriff by the county commissioners by Section 2850, General Code, is for "keeping and feeding prisoners in jail."

By virtue of Section 2997, General Code, this allowance is in addition to his salary as sheriff. Said Section 2997 provides:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses

of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

The compensation of the sheriff allowed him for keeping and feeding prisoners must cover all his expenses for such keeping and feeding. The sheriff is required to keep the prisoners safely, and in order to do so he must in many counties employ watchmen and guards. The expense of employing such watchmen and guards in connection with the jail must be met from the allowance made to him for "keeping and feeding" the prisoners.

The duty of the commissioners under Section 2410, General Code, is to care for the building, which is the property of the county, and not to care for the prisoners confined therein.

It is my opinion that the county commissioners may employ and pay out of the general fund of the county, watchmen and janitors for the care of the county jail, but the duty of such watchman or janitor must be confined to taking care of the building, and not in caring for the prisoners.

It is the duty of the sheriff to safeguard and keep the prisoners in the jail at his own expense in consideration of the amount allowed him for keeping and feeding them. The county comissioners are not authorized to employ a turnkey or watchman for safeguarding the prisoners.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

514.

FINDING OF BUREAU—LICENSE FEES NOT COLLECTED BY MAYOR FROM JUNK SHOP DEALERS MAY NOT BE COLLECTED BY LEGAL AUTHORITIES—CRIMINAL PENALTY—MANDAMUS AGAINST MAYOR.

Under Section 286 of the General Code when receipt of a report of finding is made by the Bureau of Inspection and Supervision of Public Offices it is made the duty of the proper legal authority to institute proceedings for the recovery of public funds "misappropriated."

When a mayor has failed to collect license fees from junk shop dealers, collection of the same may not be enforced under this section.

The proper legal authority may take action however to compel performance of the neglected duty.

The provisions for license are in the nature of a police regulation and whilst collection may not be compelled the criminal penalty for noncompliance may be enforced against the dealers.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your letter of June 19th received. You request my opinion upon the following question:

> "It is found that the provisions of an ordinance imposing a license fee upon junk shop dealers has not been enforced by the mayor of a city. Can a finding for recovery against the mayor of the city or junk shop dealers who refused or neglected to pay said fee be enforced to the amount of the license fees so remaining uncollected?"

The Bureau of Inspection and Supervision of Public Offices was created by Section 274, General Code, which provides in part as follows:

> "There shall be a bureau of inspection and supervision of public offices in the department of the auditor of state, which shall have power * * * * * to inspect and supervise the accounts and reports of all state offices * * * and the offices of each taxing district or public institution in the state of Ohio. * * * *."

Section 284, General Code, provides:

> "The chief inspector and supervisor, a deputy inspector and supervisor or a state examiner shall examine the condition of each public office such examination of township, village and school district offices to be made at least every two years, and all other examinations to be made at least once a year. Offices of justice of the peace, elected in cities, villages or townships, shall be examined at least once every two years. On the examination inquiry shall be made into the methods and accuracy of the accounts and reports of the office, whether the laws, ordinances and orders of the taxing district have been observed, and whether the requirements of the bureau of inspection and supervision have been complied with."

Section 286 provides in part as follows:

> "A report of the examination shall be made in triplicate * * *. If the report discloses malfeasance, misfeasance, or neglect of duty on the part of an officer or an employe upon the receipt of such copy of said report it shall be the duty of the proper legal officer, and he is hereby authorized and required, to institute in the proper court within ninety days from the receipt thereof civil actions in behalf of the state or the political divisions thereof to which the right of action has accrued, and promptly prosecute the same to final determination to recover any fees or *public funds* misappropriated or to otherwise determine the rights of the parties in the premises. * * * *."

You state that the provisions of an ordinance imposing a license fee upon junk shop dealers had not been enforced by the mayor of a city, and you inquire whether a finding can be made against the mayor for the amount of uncollected license fees or against the junk shop dealers. In view of the foregoing quoted provisions of the statute I am of the opinion that your bureau is not authorized to make a finding for other than fees and public funds misappropriated; your authority does not extend to making findings for loss of revenue or public funds, occasioned by the neglect of duty on the part of any public official in failing to collect licenses and other fees, provided for in ordinances such as you describe in your inquiry. However, it would be the duty of your examiners to note the neglect of duty complained of in your letter, and the proper legal officer should take cognizance of your report and compel, by proper proceedings, the mayor to perform his duty in regard to collecting the fees from the dealers mentioned.

The junk dealers, of course, would be subject to criminal prosecution for doing business without paying a license.

You also inquire whether a finding can be made against the junk shop dealers for the amount of unpaid fees. I am of the opinion that no such finding can be made, and if made would be of no more force than the original obligation to pay the license. The licensing of junk shop dealers is more in the nature of a police regulation and the failure to pay the fees can be enforced by criminal prosecution.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

529.

SHERIFF—ALLOWANCE BY COUNTIES COMMISSIONERS FOR BOARD-PRISONERS OF OTHER STATES AND COUNTIES—BOARDING OF FEDERAL PRISONERS PAID BY UNITED STATES AUTHORITIES.

By Section 3179 *of the General Code provision is made for payment by the United States authorities for the boarding of federal prisoners by a sheriff. The expense of boarding such may not therefore be made chargeable against the county.*

By provision on Section 2850 *and* 2997 *of the General Code the county commissioners may make an allowance to a sheriff for boarding in the county jail, prisoners held for another county or state.*

The latter conclusion does not however, effect the rights of a county for keeping prisoners for another county that has not a sufficient jail as provided in Sections 3170 *et seq. of the General Code.*

July 3, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

DEAR SIR:—Your favor of June 22, 1912, is received in which you inquire as follows:

> "Have the county commissioners authority to pay the sheriff out of the county treasury for boarding: First: Prisoners held for federal authorities; Second: Prisoners held for other states; Third: Prisoners held for other counties? (See Sections 2850, 2997 and 3179.)"

The provisions governing the detention and boarding of federal prisoners in the county jail are found in Section 3179, General Code, which provides:

> "The sheriff shall receive prisoners charged with or convicted of crime committed to his custody by the authority of the United States, and keep them until discharged by due course of law. A prisoner committed for an offense by the authority of the United States shall be supported at the expense thereof during his confinement in jail. *No greater compensation shall be charged by a sheriff for the subsistence of such prisoner, than is authorized by law to be charged for the subsistence of state prisoners.* The commissioners of a county in which a prisoner so committed may be confined shall receive from the United States one dollar per month for the use of the jail for each person so committed. A sheriff or jailor who neglects or refuses to perform the services and duties required of him by this section shall be liable to like penalties, forfeitures, and actions as if such prisoner had been committed under the authority of this state."

This section requires the sheriff to receive federal prisoners who are charged with or convicted of crime and who are committed to his custody by the federal authorities, or by the authority of the United States. Such prisoners are to be supported at the expense of the federal government? The sheriff cannot charge more for their subsistence than is authorized to be paid for the subsistence of state prisoners.

There is no provision that the county commissioners may make an allowance for the boarding of federal prisoners. The statute authorizes the sheriff to charge for boarding such prisoners, and the government to be charged is the United States. The county is not liable for their board.

The sheriff should settle directly with the federal authorities. The county commissioners have no authority to pay the sheriff for boarding federal prisoners.

The amount of compensation for feeding prisoners in a county jail is provided in Section 2850, General Code, which reads:

> "The sheriff shall be allowed by the county commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail, but in any county in which there is no infirmary, the county commissioners, if they think it just and necessary, may allow any sum not to exceed seventy-five cents each day for keeping and feeding any idiot or lunatic. The sheriff shall furnish at the expense of the county, to all prisoners confined in jail, except those confined for debt only, fuel, soap, disinfectants, bed, clothing, washing and nursing when required, and other necessaries at the court in its rules shall designate."

Section 2997, General Code, authorizes the county commissioners to make an allowance to the sheriff for keeping and feeding prisoners, as follows:

> "In addition to the compensation and salary herein provided, *the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law,* for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

The term "prisoners" as used in each of the foregoing sections is not qualified. It is not limited to prisoners of the county or of the state of Ohio. It may include any prisoner who is lawfully confined in the county jail. It does not, however, include federal prisoners, because the manner of paying their subsistence is specially provided for in Section 3179, supra.

The arrest of fugitives from other states is provided for in Sections 13520, 13521 and 13522, General Code.

Section 13521, General Code, provides:

> "When a person is arrested in pursuance of the next preceding section, and brought before the officer who issued the warrant, he shall hear and examine such charge, and, upon proof adjudged by him to be sufficient, commit such person to the jail of the county in which such ex-

amination is had, or cause him to be delivered to a suitable person to be removed before such judge or justice of the proper county in which to take such examination, who shall take it and proceed as if the warrant had been issued by him."

Fugitives from other states are legally confined in the county jail. The statutes do not provide specifically for the payment of their board therein. They are prisoners within the meaning of Sections 2850 and 2997, General Code, and the county commissioners may make an allowance to the sheriff for boarding such prisoners.

Section 13492, General Code, provides:

"A sheriff, deputy sheriff, constable, marshall, deputy marshall, watchman or police officer, shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained."

Section 13493, General Code, provides:

"When a felony has been committed, any person without warrant, may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained. If such warrant directs the removal of the accused to the county in which the offense was committed, the officer holding the warrant shall deliver the accused to a magistrate of such county, to be dealt with according to law. *The necessary expense of such removal, and reasonable compensation for his time and trouble, shall be paid to such officer,* out of the treasury of such county, upon the allowance and order of the county auditor."

This latter section authorizes the county wherein the offense was committed to pay the expense of the removal of such prisoner to the county. Nothing is said about boarding such prisoner in the county jail.

Section 13503, General Code, provides:

If a person charged with an offense abscond or remove from the county in which such offense is alleged to have been committed, a magistrate of the county in which such person is found may issue a warrant for his arrest and removal to the county in which the offense is alleged to have been committed, to be delivered to a magistrate of such county, who shall cause such person so delivered to be dealt with according to law. Such warrant shall have like force and effect as if issued from the county in which the offense is alleged to have been committed."

Section 13598, General Code, provides:

"When the accused resides out of the county in which the indictment was found, a warrant may issue thereon directed to the sheriff of the county where such accused resides or is found. Such sheriff shall arrest such accused and convey him to the county from which such warrant issued and there commit him to the jail or hold him to bail, as provided in this title."

Section 13599, General Code, provides:

"When the accused escapes and forfeits his recognizance after the jury is sworn, at the request of the prosecuting attorney, a warrant reciting the facts may issue to the sheriff of any county, who shall pursue, arrest and commit him to the jail of the county, from which such warrant issued, until he is discharged by law."

These sections authorize the arrest of a fugitive from justice or a person accused of crime in any county in the state. They contemplate that such prisoners shall be removed to the county in which the offense was committed, as soon as the same can be reasonably done. It will not always be possible to remove them at once and it may be necessary to confine them in the county jail. When so held in jail they are prisoners, within the meaning of Sections 2850 and 2997, General Code, and an allowance may be made by the county commissioners to the sheriff for boarding such prisoners. I find no other sections authorizing the pay of board of such prisoners.

In conclusion:

The county commissioners cannot make an allowance to a sheriff for boarding federal prisoners in the county jail.

The county commissioners may make an allowance to a sheriff for boarding prisoners in the county jail held for another county or for another state.

This latter conclusion does not affect the rights of a county for keeping prisoners for another county that has not a sufficient jail, as provided in Sections 3170 et seq, General Code.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

530.

SHERIFF'S EXPENSES—ALLOWANCE BY COUNTY COMMISSIONERS OF WAGES OF HOSTLER FOR MAINTENANCE OF HORSE—HOTEL BILLS, HACK FARE, ETC., OF ASSISTANT OF SHERIFF CONVEYING INSANE PERSON TO HOSPITAL.

The county commissioners may allow the sheriff his expenses in paying a hostler's wage for care of a horse maintained by the said sheriff, under the provisions of Section 2997 of the General Code authorizing the payment of the expense of the maintenance of horses and vehicles.

Section 1981 of the General Code authorizing the payment of $2.00 per day and two cents per mile each way to an assistant to convey an insane person to the state hospital is intended to cover compensation and railroad fare. It is not the intention of the Legislature that said assistant shall work without compensation however, and when other necessary expenses are incurred such as hack fare, hotel bill, etc. they may be allowed under Section 2997 of the General Code as actual expenses of the sheriff in making said conveyance.

June 28, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 17th, wherein you state:

"May the county comissioners, under Section 2997, allow to the sheriff his expenses incurred in maintaining his horses by way of wages paid to a hostler?"

Section 2997 of the General Code reads as follows:

> "In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroal fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

You will note that the foregoing authorizes county commissioners to allow to the sheriff quarterly "all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office."

In the case of State ex rel vs. Commissioners, 10 C. C., n. s., 398, the word "maintaining" as used in the above quoted section was defined by the court as follows:

> "All lexicographers define maintenance as 'maintaining; supporting; upholding; keeping up; sustaining supply of the necessaries of life; subsistence;' and the word 'maintain' 'to hold or keep up in any particular state of condition; to support; to sustain; to keep up.' So that the meaning of the word 'maintaining' as used in this section in reference to horses and vehicles, means supporting; sustaining; keeping up; supplying with the necessaries of life."

The statute does not enumerate specifically what may be allowed as expenses of maintenance of the sheriff's horses, but I have no hesitation in saying that the services of a hostler in the care of horses is a necessary part of their maintenance.

In an opinion recently rendered to your department I held, that it would be legal for the sheriff to contract to pay a stipulated sum per week or month for the care of his horses. If such contract were entered into between the sheriff and a livery stable keeper, for instance, it would undoubtedly include the services of a hostler as well as whatever else might be necessary in the maintenance of the horses.

If the sheriff kept the horses in his own barn, they would be entitled to, and should receive the same care as if they were maintained in a livery stable, or elsewhere, by virtue of a contract.

I am of the opinion that county commissioners may legally allow a reasonable cost for the care of sheriff's horses by way of wages paid to a hostler.

What is a reasonable cost for such services is a matter that must be determined by the circumstances of each particular case.

It is the intention of the statute that the *necessary* expenses of taking care of the sheriff's horses shall be paid by the county, and no more.

If the sheriff can contract with another person to care for the horses at a less price in the aggregate than he could purchase feed and pay the wages of a hostler, it is his duty to do so, to the end that the county may obtain as economical a bargain as possible, consistent with the proper maintenance of the horses.

You also inquire:

> "Under said section (2997 G. C.), may the commissioners allow the sheriff, as a part of his necessary expenses, the hack fare, hotel bills and other expenses of an assistant to convey an insane person to the State Hospital (see Section 1981 of the Canfield Act)?"

Section 1981 of the General Code, insofar as it applies to your inquiry, provides:

> "The costs and expenses, other than the fees of the probate judge and sheriff, to be paid under the provisions of this chapter, shall be as follows: * * * to one assistant to convey to the hospital, when authorized by the probate judge, two dollars, and two cents per mile each way;"

Section 1959 of the General Code authorizes the probate judge to appoint one person to assist the sheriff to convey an insane person to a state hospital, when he is satisfied, from proof, that such appointment is necessary, and, in all cases, where the insane person is a female it is the mandatory duty of the probate judge to appoint such assistant.

Under Section 2997 of the General Code, the sheriff is entitled to receive his "actual and necessary expenses incurred and expended * * * in conveying and transferring persons to and from any state hospital for the insane" etc.

In my judgment, it is not the intention of the statute that such assistant shall accompany the sheriff and the insane person to the state hospital without compensation, and, therefore, I hold that two dollars ($2.00) mentioned in said section is to be regarded as a fee for the services of such assistant, and the two cent (2c) per mile each way is intended to cover the railroad fare and that in addition thereto the sheriff should pay the hack fore and hotel bills of such assistant, for which he should be reimbursed by the county commissioners.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

531.

"PAVING" AND "REPAVING" 50 PER CENT. ASSESSMENT AGAINST ABUTTING PROPERTY HOLDERS FOR REPAVING.

Any material by which a hard, firm, or smooth surface for travel is secured constitutes a paving and when a street is paved the second time abutting property holders cannot be assessed for more than 50 per cent. of the cost of such "re-paving."

July 13, 1912.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of April 16th, you requested my opinion as follows:

> "1. A street has been paved with cobblestone on a gravel foundation and the cost thereof (except 2 per cent. for intersections) assessed against abutting property. If said street be now repaved with brick laid upon a concrete foundation, may the council assess more than 50 per cent of the cost thereof against the abutting property?
>
> "2. If a street has been paved with asphalt block and the cost thereof (except 2 per cent. for intersections) assessed against abutting property and is now repaved with brick on the same foundation, can council assess more than 50 per cent. against the abutting property. See letter of W. E. Dilley, City Auditor of Warren, enclosed herewith."

Section 3822, General Code, is material to your inquiry. It is as follows:

> "When a special assessment for the improvement of a street or other public place has been levied and paid, the property so assessed shall not again be assessed for more than one half the cost and expense of repaving or repairing such street or other public place unless the grade thereof is changed."

The question as to what constitutes a "re-paving," within the meaning of Section 3822, General Code, aforesaid, has been answered in the case of Baldwin vs. Springfield, 20 O. Dec. N. P. n. s., 265. On page 272, the court says:

> "Any material by which a hard, firm or smooth surface for travel is secured, constitutes a paving."

In view of this decision, therefore, the answer to each of your questions must clearly be a negative one. In each case, a former improvement constituted a paving and the same is true of the new improvement under contemplation.

I am, therefore, of the opinion that council can in neither case, assess more than fifty per cent. of the costs of the intended improvement, against the abutting property.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

533.

WITNESS AND PHYSICIAN'S FEES IN ADMISSION OF YOUTHS AND ADULTS TO INSTITUTION FOR FEEBLE MINDED.

Under Section 1902 of the General Code adults are admitted to the institution for feeble minded under the same method of legal commitment as governs admission to the state hospital for the insane, and physicians called in such proceedings are therefore entitled to $5.00 each and $1.00 per day and mileage.

As it is not otherwise provided, when physicians are summoned in the case of the admission of youths, they are entitled to ordinary witness fees only.

July 18, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In your letter of November 23, 1911, you ask what, if any, fees witnesses are entitled to for admission of youths and adults to the institution for feeble minded; and what, if any, fees physicians are entitled to for making the examination and medical certificate.

I will first take up the manner of admission of *adults* to this institution, and the fees connected therewith.

Section 1902 of the General Code says:

> "Feeble minded adults of such inoffensive habits as to make them proper subjects for classification and discipline in the institution, may be admitted, on pursuing the same course of legal commitment as govern admission to the state hospitals for the insane."

Let us see how the insane are admitted to such institutions.

Section 1953 of the General Code requires an affidavit to be filed with the probate judge of the county where the patient resides. The judge under Section 1954, issues his warrant bringing the person before him; and must immediately issue subpoenas for such witnesses as he deems necessary, *two of whom shall be reputable physicians.*

By Section 1956 of the General Code these medical witnesses must have five years' experience, and certify the insanity of the party on blanks provided for that purpose.

Section 1981 of the General Code says, that the costs and expenses shall be "to each of the two physicians designated by the court to make examination and certificate, five dollars and witness fees as allowed in the court of common pleas; to witnesses the same fees as are allowed in the court of common pleas."

The fees allowed in the court of common pleas to witnesses are $1.00 per day, and five cents per mile each way, from their residences to the court house.

So, physicians, in commitment of adults, receive $5.00 each and $1.00 per day and mileage as aforesaid. Ordinary witnesses receive $1.00 per day and mileage.

This disposes of the question of fees in cases of adults.

The question as to fees for witnesses and physicians in the admission of youths is not as clear as it might be.

The whole subject of institution for feeble minded youths is set forth in Sections 1891 to 1904, inclusive of the General Code.

There is no provision in this chapter for subpoenaing witnesses or physicians in the matter of admission of youths to said institutions. There is no provision for any sort of a trial before the probate court, as to youths.

Section 1901 provides that the Trustees (now Board of Administration) shall cause to be printed instructions and forms of applications for the admission of children, and that the same shall be endorsed by the probate judge.

Section 1903 of the General Code reads as follows:

> "In approving an application for the admission of a person to the institution, the probate judge shall state whether or not such person has an estate of sufficient value, or a parent or parents of sufficient financial ability, to defray the expense, in whole or in part, of supporting such person in the institution, and if there be means of supporting in part only, the amount per month which the parent, or legal guardian, may be able to pay. The person who makes the application for such admission shall therein make statement, under oath, as to such means of support."

This would seem to make it probable that on such questions as enumerated in this section the probate judge, in order to satisfy himself as to the matters, might subpoena witnesses. If he does so, such witnesses are entitled to $1.00 per day and mileage at five cents per mile, as above set forth as to adults. But there is no provision whatever for calling physicians as *experts* in the proceedings relative to youths; no provision that they shall sign or certify any document as in case of insanity. Therefore, if they are subpoenaed as witnesses, they only get what other witnesses receive and not $5.00 extra.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

534.

CLERK OF THE COURTS—FEES FOR ENTERING, ATTENDANCE AND CERTIFYING FEES OF EACH GRAND JUROR AND WITNESS.

Inasmuch as Section 2903 of the General Code in providing a fee for the clerk of courts for entering attendance and certifying fees of "each grand juror" and of each "grand jury witness," places emphasis upon the number of jurors and witnesses rather than the number of certificates and the number of entries, and as the history of the statute bears out such construction, the clerk is entitled to but one fee for each witness or juror in such cases and should issue but one certificate to each juror or witness.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of April 20th, requesting my opinion upon the following question:

> "Under section 2903, as amended in 102 O. L. 284, to what fee is the clerk of courts entitled for entering attendance of each grand jury witness, certifying the fees of each grand jury witness, entering the attendance of each juror and certifying the fees of each juror; i. e., are these fees based on the number of jurors and the number of witnesses, respectively, or upon the number of days' attendance and the number of certificates issued?"

Said Section 2903 of the General Code, as amended as aforesaid, provides in part as follows:

"The clerk shall receive out of the county treasury upon the allowance of the county commisissioners the following fees: * * * for entering the attendance of each juror, ten cents; for certifying fees of each juror, ten cents * * * for entering attendance of each grand jury witness, five cents; for certifying fees of each grand jury witness, five cents, * *."

Section 2903, General Code, prior to its amendment, did not embrace all of the matters now covered by it; it provided as to the fees of the clerk, however, in part as follows:

"* * * for certifying fees for each grand juror, eight cents; and for all services rendered to the grand jury, he shall receive the same fees as allowed for similar services in a cause pending in court * * *."

Reference here is to the fees formerly enumerated in Section 2900, among the provisions of which are the following:

"entering attendance each witness, four cents; a certificate to each witness for his fee, four cents."

Upon carefully comparing the amended section with the sections of the code in their unamended form I am unable to reach the conclusion that any change in meaning was intended by the General Assembly. This question is not free from doubt, but the evident purpose of the General Assembly here was to make specific provision for the fees of the clerk for services in connection with the grand jury, rather than to leave the same to implication and construction, as was the case under the former provision. I do not think the legislative intention was more far-reaching than this.

The corresponding provisions of the Revised Statutes are embraced in Sections 1262 and 1260 thereof, which are in part as follows:

"Section 1262. * * * certifying for fees for each grand juror, eight cents; * * *."

"Section 1260. * * * entering attendance each witness, four cents; a certificate to each witness for his fee, four cents; * * *."

I am of the opinion that insofar as the question which you submit is concerned, the Legislature has never intended to change the meaning of the statute, which is the same under the present language of the amended section of the General Code as it was under the original sections of the Revised Statutes.

All the provisions which I have quoted throw some light upon the solution of your question, which is, however, at the best, a doubtful one. However, inasmuch as the original section uses the words "a certificate to each witness" and "entering attendance, each witness," thus placing the emphasis upon the number of witnesses and the number of jurors, rather than upon the number of certificates or the number of entries, I am of the opinion that the present statutes should be construed so as to place the emphasis upon the same words. Amended Section 2903 is susceptible of such a construction; indeed, it seems to be the most natural construction; indeed, it seems to be the most natural construction to give to the language above quoted from that section.

I am, therefore, of the opinion that the clerk of the courts is entitled to one fee for each witness and each juror, whose attendance he enters, regardless of the

number of entries made by him and regardless also of recesses taken by the grand jury upon permission of the court, etc.

The adoption of the rule of construction adopted above, however, does not necessarily lead to a similar result in the case of the fee for issuing certificates for witnesses and jurors. Under all the statutes the fee seems to attach, so to speak, to the certificate as well as to relate to the number of witnesses. While the language of the original statute was "a certificate to each witness for his fees," this did not necessarily mean that the clerk was entitled to charge fees on only one certificate if, as a matter of fact, he issued more than one. Under Section 3014, General Code, fees of witnesses before the grand jury are required to be "certified to the county auditor by the clerk of the court." A similar provision is made in Section 3008 as to the fees of grand jurors. I do not find in these statutes any evidence of the existence of a right on the part of any juror or witness to demand more than one certificate. For example, if a grand jury be in session for a number of weeks, I do not believe that the clerk of courts has any right to issue more than one certificate to each juror for his entire attendance and fees. The practice of paying such jurors weekly or at other intervals has no foundation in law.

Considering Sections 3008 and 3014, then, in connection with Section 2903, and the prior provisions relating to the same subject matter, all doubt as to the right of the clerk to fees for certifying to the fees of grand jurors and witnesses before the grand jury is dispelled. The clerk is entitled to one fee for each juror or witness in such cases and should issue but one certificate to each juror or witness.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

541.

CEMETERY FUNDS—DEPOSIT IN MUNICIPAL TREASURY—DISPOSITION AND EXPENDITURE OF BY DIRECTOR OF PUBLIC SERVICE —WARRANT OF AUDITOR.

In accordance with Section 3795 of the General Code all moneys donated for cemetery purposes must be deposited in the municipal treasury to the credit of this specific fund and can only be paid out upon the warrant of the auditor upon the direction of the director of public service.

July 18, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of July 5, 1912, is received in which you call attention to the following paragraph in the opinion given to Roderick Jones on May 31, 1912, in reference to the income of funds invested by a city for the donors for the care of lots or other parts of a city cemetery, to-wit:

> "I find no statute which authorizes the auditor or treasurer of the city to receive or to pay out the income derived from the funds. The director of public service is required to take care of the lots and to expend the income of the funds for that purpose. By virtue of the provisions of section 4169, General Code, the income is paid to the director to carry out the purposes for which the principal was donated."

You call attention to the provisions of Section 3795, General Code, which provides:

"The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes. The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of such deposit to the auditor or clerk. Unless otherwise provided by law, no money shall be drawn from the treasury except upon the warrant of the auditor or clerk pursuant to the appropriation by council."

In accordance with the provisions of this section the income from the funds should be paid into the city treasury from which it should be paid upon the voucher of the auditor for the expenses incurred in the care of the lots or other parts of the city cemetery by the director of public service as required by the donors of the funds.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

544.

BOARD OF EDUCATION—MANDATORY DUTY TO ESTABLISH DEPOSITARY—RIGHT OF TREASURER TO RECEIVE MONEYS FROM CLERK AND AUDITOR WHEN NO DEPOSITARY ESTABLISHED.

Section 7604 of the General Code makes it mandatory upon the Board of Education of a school district to establish a depositary and when it fails so to do legal proceedings may invoke to compel the same.

When such depositary has not been established however, money may be paid to the treasurer of such school district in accordance with the procedure set out in Sections 4764, 4768 and 4769 of the General Code.

July 18, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of July 11th you requested my opinion on the following question:

"Is it legal for the clerk of a board of education or a county auditor to pay school funds to the treasurer of a school district, which district has not qualified to receive the same by complying with the law requiring the establishment of a depositary for said funds?"

Section 7604, General Code, provides that the Board of Education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of its treasurer.

Prior to the amendment of this statute, 101 Ohio Laws 290, the establishment of a depositary for a school district was optional with the board of education thereof.

Section 4764, General Code, provides:

"Before entering upon the duties of his office, each school district treasurer shall execute a bond, with sufficient sureties, in a sum not less

than the amount of school funds that may come into his hands, payable to the state, approved by the board of education, and conditioned for the faithful disbursement according to law of all funds which come into his hands, provided that when school moneys have been deposited under the provisions of Sections 7604-7608 inclusive, the bond shall be in such amount as the board of education may require."

Section 4768, General Code, provides:

"No treasurer of a school district shall pay out any school money except on an order signed by the president or vice-president and countersigned by the clerk of the board of education, and when such moneys have been deposited as provided by sections 7604-7608 inclusive, no money shall be withdrawn from any such depository, except upon an order signed by the treasurer and by the president or vice-president and countersigned by the clerk of the board of education; and no money shall be paid to the treasurer of the district other than that received from the county treasurer, except upon the order of the clerk of the board, who shall report the amount of such miscellaneous receipts to the county auditor each year immediately preceding such treasurer's settlement with the auditor."

Section 4769, General Code, provides as follows:

"The clerk of a board of education or the county auditor shall pay no money into the hands of the treasurer of a school district in excess of the amount of his bond. Should any such clerk or auditor violate this provision, he and his bondsmen shall be liable for any loss occasioned thereby. But where depositories for school funds have been created under the provisions of sections 7604-7608 inclusive, all school moneys shall be paid directly into such depository or depositories by the auditor upon the written order of the board of education signed by the president or vice-president and countersigned by the clerk. In case the school funds have been deposited under the provisions of sections 7604-7608 inclusive, the limitation of payment herein contained shall not apply. * *."

While Section 7604, General Code, since the amendment in 101 Ohio Laws 290, makes it mandatory upon the board of education to establish a depositary, yet from a reading of Sections 4764, 4768 and 4769 it will be noted that such sections contemplate that the board of education may not fulfill its duties in so establishing the depositary as required by law, and that until it does do so the treasurer shall be entitled to receive the money for such school district. Section 4764, General Code, states specifically that the treasurer shall execute a bond in a sum not less than the amount of the school funds that may come into his hands, and then states that when a depositary has been provided under Sections 7604-7608 that the bond shall be in such amount as the board of education may require. This provision shows that it contemplated that the treasurer shall receive school funds although the board of education has not established a depositary. Section 4768, General Code, provides that no money shall be paid to the treasurer of the district other than that received from the county treasurer, except upon the order of the clerk of the board, and by reference to Section 4769, General Code, it will be noted that when depositaries have been created the school money shall be paid into such depositaries by the auditor upon the written order of the board of education. The provision that the treasurer shall not receive any money "other than received from

the county treasurer except upon order of the clerk of the board" would be a nullity were it not considered that the treasurer was to receive the money prior to the establishment of the depository for the reason that when a depository is established the money is paid directly by the auditor into such depositary; furthermore, Section 4769 further provides that the clerk of the board of education or the county auditor shall pay no money into the hands of the treasurer of a school district in excess of the amount of his bond. The amount of the bond required by Section 4764, General Code, to be in a sum not less than the amount of the school funds is so fixed when a depositary has not been established, but as soon as a depositary has been established the amount of such bond is determined by the board of education.

For the foregoing reasons, I am of the opinion that it is legal for the clerk of the board of education or a county auditor to pay the school funds to the treasurer of the district before the board of education of said district has complied with the requirement of law that a depositary for said funds be established. If the board of education fail to establish a depositary they may by proper proceeding be compelled so to do, but until such depositary is established money should be paid to the treasurer as has been the custom heretofore prior to the amendment of the depositary statute making it mandatory upon the board of education to establish such depositary.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

550

COUNTY COMMISSIONERS—POWER TO AGREE TO APPOINT OFFICIAL COURT STENOGRAPHER TO TAKE EVIDENCE AND CHARGE TO PARTIES—REFEREE AND MASTER COMMISSIONER.

When a case in which the county commissioners are defendants is referred by both parties to the official court stenographer under the designation of master commissioner for the purpose only of taking the testimony offered by the parties and reporting the same to the court without any conclusions on the law and facts, the procedure must be referred to Section 1554 *of the General Code providing for the appointment of the court stenographer as a referee, in spite of the fact that said stenographer was designated as master commissioner.*

The stenographer may be compensated for the transcript so made under Section 1552 *of the General Code, the cost thereof being divided between the parties.*

The power of the county commissioners to make such an agreement proceeds from their power to sue and to be sued.

July 22, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN—Your inquiry of February 2, 1912, in regard to the allowance and payment of cost of master commissioner and stenographer (which in this case seems to be one and the same individual) for services and transcript furnished to the court before the case is finally settled. In the case stated by you, two cases were pending in the circuit court of Fulton County, Ohio.

John R. Mason for himself and others vs. The County Commissioners et al.
A. L. Russell for himself and others vs. The Commissioners, Auditor et al.

Both cases involving the same questions to be determined, the court, by consent of all interested, consolidated these cases for the purpose of disposing of law and facts.

At the May term of the Court, 1909, to-wit: May 19, 1909, a journal entry appears, the concluding part of which is as follows:

> "On motion of plaintiff and defendants herein, and for good cause shown, this cause is referred to George S. May as special Master Commissioner of this court to take the testimony offered by the parties and report the same to the court without any conclusions on the law and facts involved in the issues, and that he make a report of the evidence on or before October 1, 1909, and this cause is continued."

The same entry appears in both cases pending as above stated. The following account was filed and paid as follows:

"Court Stenographer, Geo. S. May.

"Advance payment by County Commissioners in Russell and Mason cases against commissioners.

"1909.	
"Aug. 31—7225 Transcript, on account	$ 50.00
"Oct. 23—7609 Transcript, on account	500.00
"1910.	
"Sept. 24— 152 Transcript, on account	260.00
"1911.	
"Aug. 12—2733, Transcript, on account	200.00
"Total	$1,010.00"

It appears that the transcript in question was furnished by the joint request of the parties, the commissioners on the one hand and the plaintiffs on the other, each party agreeing to pay half of the costs thereof, and apparently the transcript was ordered to be used in lieu of a transcript to be furnished to the court, thus eliminating the cost of the transcript as costs in the case.

At the May term of Court, 1910, to-wit: May 26th, 1910, the following entry appears:

> "On motion to the court and by consent of both parties hereto and for good cause shown it is ordered that this cause be and the same hereby is referred to William W. Campbell, who is hereby appointed Special Master Commissioner for that purpose, who shall upon being duly qualified, proceed without unnecessary delay to take the testimony in writing in said cause and report the same to this court and therewith his conclusions on the law and the facts involved in the issue."

The same entry appears in both cases as stated above.

The account of George S. May, as above stated, was paid by the county commissioners and at the times and upon the vouchers numbered above.

Your question is as to whether the county commissioners had the authority to issue vouchers for the payment of the fees of the stenographer (who appears to be the court stenographer.

Some confusion arises by virtue of the peculiar nature of the appointment in

this case. Section 1554 of the General Code provides that the official stenographer may be appointed a *referee* to take and report evidence.

In this instance, however, the stenographer was appointed as a *special master commissioner,* and I am inclined to the opinion that the court is without power to appoint a master commissioner to take evidence alone without reporting the finding of facts at least, and is likewise without power to appoint a referee under the general sections providing for such appointment, without referring to such referee one or more of the issues of the case for determination by him. Inasmuch as the duties delegated to the stenographer by the court are exactly those which may be delegated under authority of Section 1554, I am of the opinion that the appointment is referable to this section in spite of the use of the term "master commissioner."

Section 1554 does not prescribe any rule of compensation for the stenographer acting as special referee. Presumably, then, his compensation as such special referee under this section is to be determined by the section which regulates his compensation as court stenographer. That section is Section 1552 of the General Code, which provides as follows:

> "The compensation of stenographers for making such transcripts shall be not more than eight cents per folio of one hundred words, to be fixed by the common pleas judges of the subdivision. ' Such compensation shall be paid forthwith by the party for whose benefit a transcript is made. The compensation for transcripts made in criminal cases, by request of the prosecuting attorney or the defendant, and transcripts ordered by the court in either civil or criminal cases, shall be paid from the county treasury, and taxed and collected as other costs. The clerk of the proper court shall certify the amount of such transcripts, which certificate shall be a sufficient voucher to the auditor of the county, who shall forthwith draw his warrants upon the county treasurer in favor of such stenographers."

It will be observed that transcripts ordered by parties must be paid for forthwith, while transcripts ordered by the court must be paid for from the county treasury and the compensation so paid must be taxed and collected as other costs.

It would appear that a reference to the stenographer under Section 1554 of the General Code itself amounts to an order by the court for the making of a transcript. I am of the opinion, however, that the court has the power, with the consent of the parties, to substitute a transcript ordered by the parties, or either of them, for the report to be made to the court under Section 1554.

Clearly, if either of the parties to a civil action desires a transcript for his own use, upon a reference to the stenographer under Section 1554, such a transcript must be made and paid for by the party ordering.

In the case under consideration it appears that the transcript was ordered by the parties. It also appears that by the consent of all concerned this transcript was substituted for the transcript which otherwise would have been made for the use of the court in pursuance of the order of reference.

I am of the opinion that the procedure in this case is lawful, being a convenient way of dividing what is doubtless the largest item of the costs in the case.

County commissioners have authority to sue and are vested with the capacity to be sued. By virtue of these provisions of law the commissioners are given the same degree of control over litigation, in which they are parties, as private individuals are given, at least so far as agreements to divide costs and like matters are concerned. I know of no reason why the commissioners may not lawfully agree with their adversaries and with the court, just as the private suitor, to

substitute a transcript ordered by the parties for another transcript to be ordered by the court, and to divide the cost in that way. In fact, if the commissioners desired, for the convenience of their counsel, to ask for a transcript, they could have done so, and could lawfully have paid for the entire cost of making such transcript in addition to having a transcript made for the court itself. The arrangement which was made was an economical one for the county, and was entirely lawful and proper.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

551.

CONSTITUTIONAL CONVENTION ELECTION—SHERIFF NOT TO ISSUE PROCLAMATION OF.

The Sheriff is nowhere authorized by the statutes to make proclamations of the election on the results of the Constitutional Convention, nor has the convention itself exercised its power to provide for the same. The sheriff therefore is not required to make such proclamation.

July 24, 1912.

The Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Your communication of July 19th, received. You state:

> "Please advise us whether or not, in your opinion, sheriffs are required to issue proclamation of election on the adoption of the amendments to the Constitution to be voted on September 3, 1912?
> "If you should hold in the affirmative, will you kindly give an outline of what said proclamation should contain?"

The following sections of the General Code make provision for the sheriffs issuing proclamations of elections:

Section 4824, General Code, provides for election of electors of President and Vice-President.

Section 4825, General Code, provides:

> "At least fifteen days before the time for holding the election provided for in the preceding section, the sheriff shall give public notice by proclamation through his county of the time and place of holding such election and the number of electors to be chosen. A copy of such proclamation shall be posted at each of the places where elections are appointed to be held and inserted in a newspaper published in the county."

Section 4826, General Code, provides the time of state and county elections.

Section 4827, General Code, provides:

> "At least fifteen days before the holding of any such general election, the sheriff of each county shall give notice by proclamation throughout his county of the time and place of holding such election and the officers at that time to be chosen. One copy of the proclama-

tion shall be posted at each place where elections are appointed to be held, and such proclamation shall also be inserted in a newspaper published in the county."

Section 4829, General Code, provides for the sheriff or sheriffs giving notice for a special election to fill a vacancy in the office of congressman or member of the General Assembly.

Section 4840, General Code, provides for the submission of questions to be voted for at a regular election when a special election is not provided for, and for the embodiment of the notice of such questions, in the proclamation.

I find no other sections of the General Code which would authorize the sheriff to make proclamations for election, other than in the above quoted statutes, and unless the Act providing for the Constitutional Convention makes express provision therefor, it would be my view that the sheriff would be without authority to make such proclamation, nor would he be so required to do, by virtue of the duties of his office.

Section 4 of the Act providing for the election to and assembling of a convention to revise, alter and amend the Constitution of the State of Ohio, 102 O. L. p. 298, provides:

> "Said convention shall have authority to determine its own rules of proceeding, and to punish its members for disorderly conduct, to elect such officers as it may deem necessary for the proper and convenient transaction of the business of the convention, and to prescribe their duties: to make provisions for the publication of its proceedings, or any part thereof, during its session; to provide for the publication of the debates and proceedings of the convention, in durable form, and for the securing of a copyright thereof for the state; and to fix and prescribe the time and form and manner of submitting any proposed revision, alterations or amendments of the constitution to the electors of the state: *also the notice to be given of such submission.*"

In view of the above express provisions, reserving to the Constitutional Convention, among other things, the authority concerning notice to be given of the submission of the Convention to the vote of the people, as well as the entire absence of any statutory authority to the sheriff for making such proclamation, I am of the opinion that sheriffs, as part of their general duties, are not required to issue a proclamation of election upon the adoption of the amendments to the Constitution, to be voted for on September 3, 1912.

2. The answer to the first question being negative, it dispenses with any reason for answering your second inquiry.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

558.

CIVIL SERVICE COMMISSION—PAYMENTS OF SALARIES TO CLERKS AND EXAMINERS MUST BE AUTHORIZED BY ORDINANCE OF COUNCIL.

Under Section 4486 of the General Code the council must provide for the salaries of clerks and examiners of the civil service commission and any payments made before such ordinance has been passed or in conflict with such an existing ordinance are illegal.

July 26, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of July 17, 1912, you inquire:

> "Section 260 of the salary ordinance of the city of Cincinnati allows the civil service commission a clerk at $1,200.00 and an assistant clerk at $1,000.00 per annum. On April 30, 1912, council passed an amendatory ordinance creating the position of examiner and secretary at $2,040.00 per annum. Previous to the passage of this amendatory ordinance and without any further action by council, on February 23, 1912, the auditor received certification of appointment of an examiner in the civil service department at $170.00 per month, and seven days' salary was paid at this rate. On March 1st, the auditor received certification of same appointee as clerk at $100.00 per month and March and April salary was paid at this rate, instead of $170.00 per month.
>
> "Question—1. Was payment for first seven days at $170.00 per month legal?
>
> "2. May the appointee legally be paid the balance of $70.00 per month for the months of March and April?
>
> "3. Is it legal for the city auditor to draw his warrant in payment of a pay roll for employes under the civil service commission in excess of $183.33 1/3 a month prior to the going into effect of the ordinance passed April 30, 1912, viz., sixty days after said date?"

Council is authorized to fix the salaries of the employes of the civil service commission by Section 4486, General Code, which reads:

> "The commission shall make such other other rules and regulations as are not inconsistent with this chapter for the promotion and betterment of the service. The council shall provide for the salaries, if any, of the commission, for such clerical force, examiners, necessary expenses and accommodations as may be necessary for the work of the commission."

By virtue of this section council had created the positions of clerk and assistant clerk at the salaries of $1,200.00 and $1,000.00 per annum respectively. The amendatory ordinance of April 30, 1912, which did not become effective until sixty days after its passage, created the position of examiner and secretary at a salary of $2,040.00 per annum.

In February, 1912, there was no ordinance providing for the position of examiner, and no ordinance authorizing the payment of a salary at $170.00 per month. The appointment on February 23, 1912, was for a position which had not been

created and at a salary which had not been provided. The appointment was therefore illegal and no payment could be made for services performed under such appointment.

On March 1, 1912, the same person was appointed as clerk at a salary of $100.00 per month. This appointment and salary was authorized by the ordinance.

Your inquiries are therefore answered as follows:

First: The payment of the salary for the seven days from February 23 to March 1, 1912, at the rate of $170.00 per month was illegal.

Second: The appointee was legally entitled to $100.00 per month and no more for the months of March and April.

Third: Until the amendatory ordinance of April 30, 1912, became effective sixty days after its passage, the city auditor could only draw his warrant for the positions created by the original ordinance and at the salaries therein fixed, which are to the clerk $100.00 per month, and to the assistant clerk $83.33 1/3 per month. Any payment in excess of these amounts would be illegal.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

585.

MUNICIPAL CORPORATION—PLAN OF SEWERAGE CONSTRUCTION—POWERS OF DIRECTOR OF PUBLIC SERVICE AND OF COUNCIL—SALARY ORDINANCE—INITIATIVE AND REFERENDUM ACT.

Under Section 4327 of the General Code, the director of public service may fix the number of assistants in his department, whose compensation must be fixed by council under Section 4214 of the General Code.

The formation of a general plan of sewerage within a municipality, when not intrusted by the municipal corporation, under Section 3871 of the General Code, to some specially employed person, must be performed by the regular engineer as work belonging to the department of public service.

The construction of the sewerage system must be carried out by the regular employees of the department notwithstanding that council has provided for payment of the same by special bond issue.

When council has fixed the salaries of employees at certain rates for certain classes the director of public service may appoint as many numbers in each class for the performance of such special work as he deems necessary.

Should the general salary ordinance in existence not cover necessary new appointments, a new salary ordinance would be necessary, and such ordinance would be subject to suspension for sixty days, under the Initiative and Referendum Act.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of July 17th submitting for my opinion the following question:

> "If, by reason of the necessary investigation of special engineering problems in the city government, it is found expedient to increase the staff in the engineering department, would the general salary ordinance theretofore passed by council fixing the salaries in said department govern additional employes assigned to said special work, provided that

said salaries are payable from a special fund created by a bond issue for that particular purpose? If not, may the director of service make such employment by individual contract with the engineers employed in such service, or would the council be required to pass a salary ordinance (or amend the existing ordinance) fixing said salaries, and would the same be required to lie sixty days before it could become effective? If the salary ordinance provides for 'principal assistant engineer $3,000.00 per annum' (expressed in the singular), would this salary govern the engineer appointed to make said special survey of sewerage system?"

The following sections of the General Code furnish, I think, a guide which must be followed in answering all the questions which you submit:

Section 4214.

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, * * *."

Section 4327.

"The director of public service may establish such sub-department as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

Section 4324.

"The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. * * *."

Section 4325.

"The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship channels, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title."

Section 4326.

"The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. * * * He shall have the management of all other matters provided by the council in connection with the public service of the city."

Section 4328.

> "The director of public service may make any contract or purchase supplies or material or *provide labor* for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, *other than the compensation of persons employed therein,* exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The letter enclosed with your communication discloses that the special engineering work to which you refer was under authority of an ordinance which I quote herewith:

> "Section 1. That the director of public service and the chief engineer of the city be, and they are hereby directed to devise and form or cause to be devised and formed a plan of the sewerage for the city of Cincinnati with regard to the present and prospective needs and interests of the whole corporation. And said director of public service and the chief engineer of the city are hereby authorized and empowered to do all things necessary to that end.
>
> "Section 2. That the proceeds of bonds issued under Ordinance No. 107, passed February 12, 1912, 'To issue one hundred and twenty-five thousand dollars of bonds for sewer purposes' shall be available and may be used for the purposes specified in Section 1 of this ordinance."

It does not appear from this ordinance whether any or all of the cost of the sewer system covered by the bond issue is to be paid for by special assessments. Presumably this is true as it seems likely that the city authorities are proceeding under Section 3871, etc., General Code, which provides in general for the formation and adoption of a plan of sewerage and the assessment of a portion of the costs of constructing sewers according to that plan by "sewer districts."

Section 3871 provides as follows:

> "In addition to the power herein conferred to construct sewers and levy assessments therefor, council of a municipal corporation may provide a system of sewerage for such municipal corporation or any part thereof. The engineer of such corporation, or some person employed by the municipality shall devise and form or cause to be devised and formed, a plan of the sewerage of the whole corporation, or such part thereof as may be designated by the council. Such plan shall be devised with regard to the present and prospective needs and interests of the whole corporation, and shall be by him reported to the council for its confirmation."

While the question may appear to be doubtful I am of the opinion that although the formation of the plan of sewerage may be entrusted under Section 3871 to "some person employed by the municipality," such work is by virtue of sections 4325 and 4326, *supra,* within the department of public service and must be done under the supervision of the director of that department. At any rate

council did not direct the director of public service to employ an independent engineer or person for the purpose of instructing to such engineer or person the formulation of the plan of sewerage instead in the ordinance above quoted the work itself was entrusted to the director of public service and the chief engineer as such. Clearly then, in the present case, the work contemplated by the ordinance is regular work of the department of public service in the sense that any preparation of plans and supervision of improvements is regular work of that department. The magnitude of the specific undertaking may make it appear as if the work is not regular work of the department, but it is as much such work as any of the other matters and things covered by Sections 4324, 4325 and 4326 above quoted.

Nor does the fact that the cost of the preparation of the plans is to be charged against and paid out of the proceeds of the bonds militate against the above conclusion. The fact that a municipal corporation borrows money to carry on specific undertakings under authority of law does not change the nature of the undertaking. Much of the work performed under the supervision of the director of public service must necessarily be immediately paid for out of borrowed money. An interesting question might possibly arise when the time arrives for the determination of the cost of the improvement assessable upon benefited property whether or not the compensation of engineers paid out of the proceeds of the bond issue in question could be included in the total cost so assessable, but this is an entirely separate and distinct question from those presented in your letter.

Inasmuch as the work is regular work of the department of public service it necessarily follows that those who participate in the doing of the work are the regular employes of that department, and that, therefore, the contracts of employment are within the exception contained in Section 4328 and need not be specially authorized by council or entered into after advertisement and competitive bidding. In fact, I am of the opinion, as I am advised that my predecessor was, that every engineer employed by the city to do work under the supervision of the department of public service is an employe of that department and though he be retained in the capacity of an expert or consulting engineer, yet his compensation must be measured by the same rule as the compensation of other members of the department unless council provides special compensation for employes of this kind.

Now by virtue of Section 4327, *supra,* the number of employes in the department of public service is to be fixed by the director, while under Section 4214, *supra,* the compensation of such employes is to be fixed by ordinance or resolution of council. It appears from the correspondence enclosed in your letter that the general salary ordinance of the city of Cincinnati prescribes different grades of compensation in the department of public service, thus leaving it to the director of that department to appoint as many employes to a given grade as he may choose (with a possible exception of the "principal assistant engineer"). This method of dealing with the question is, in my opinion, in exact conformity with the requirements of Sections 4314 and 4327 with the possible exception already noted.

Answering your first question specifically, I am of the opinion, for reasons already stated, that inasmuch as the work contemplated, though paid for out of the proceeds of a bond issue, is regular work of the department of public service to be carried on presumably by its regular staff—the ordinance not otherwise providing—the general salary ordinance in effect at the present time would presumably control and limit the authority of the director of public service to prescribe and agree upon the amount or rate of compensation of the persons employed in this special investigation. I say that it would presumably so limit the director. Not having the whole salary ordinance before me I cannot venture to state

whether its terms would compel strict construction, and would exclude the compensation of employes employed in the department of public service in work of this nature. I am satisfied, however, that unless the terms of the ordinance rather clearly showed that such a limited operation thereof was intended, the ordinance would apply to the specific cases concerning which you inquire.

I am further of the opinion in connection with your second question, and in direct answer thereto, that if the general salary ordinance does not apply, and there is no ordinance of the city prescribing the compensation of persons specially employed in the department of public service the director of public service is without authority to employ any person upon such special work and to fix his compensation, and the auditor of the city may not lawfully honor any salary vouchers in favor of such person if so employed. If an ordinance were now to be passed prescribing a different or special rule for the salaries of persons specially employed in the department of public service, upon this or any other work, such ordinance would undoubtedly, in accordance with the opinions already rendered by this department, be governed by the provisions of the initiative and referendum act of the last General Assembly and would not become effective until sixty days from the passage thereof.

Answering your third question I beg to state that there is, as I have already hinted, some doubt as to whether council has the authority in passing a salary ordinance to limit the number of persons in the department of public service who shall receive a given compensation. Council has the authority to fix the compensation of each employe in each department of the city government; but as to the department of public service I am of the opinion that this authority is limited to the fixing of compensation which shall attach to each *position* in the department, leaving to the director of public service the authority to which he is entitled under Section 4327, *supra*, to determine the number of persons who shall be employed in each position. While the singular number is used in the ordinance in question, I am of the opinion that in order to render it legal this fact may be ignored and the ordinance interpreted to mean that all principal assistant engineers shall receive $3,000 per annum. If then the director of public service chooses to appoint more than one person as "principal assistant engineer" because of some special work he may have in his department, I believe that such plural appointments to the position would be legal. Whether or not the salary of $3,000 to which you refer would govern that of the engineer appointed to make a special survey like that of which you speak depends entirely, of course, upon the interpretation of the salary ordinance as a whole, as to which I have already stated that I would prefer not to render a positive opinion.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

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CEMETERIES—LOTS MAY NOT BE LEASED OR DEEDED TO MAUSOLEUM COMPANY.

Cemetery trustees, or boards, either municipal or township, are not authorized to lease or deed lots to Mausoleum company.

June 25th, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Replying to yours of June 5th, 1912, as to contract of Greenville Cemetery Trustees with Mausoleum Company, regarding the sale of lots, and payment therefor by said company, either in cash or crypts, I beg leave to say:

I see no reason to change my mind on the opinion rendered by me to the prosecuting attorney of Ashtabula County on the same general subject, a copy of which opinion you have.

The fact that this is a joint City and Township Cemetery, makes no difference as to the title to the property and the sale of lots therein, and the control therein, and the same can not be avoided by a contract, which, on its face, is not provided for by law.

I base by opinion on the following clause of your transcript as to this contract, in the light of the general cemetery laws:

> "On the 11th day of January, 1911, an agreement was entered into between the board of trustees of Greenville cemetery and The International Mausoleum Company of Chicago, Ill., whereby lots 22, 23, 26, 27, and 30 to 40 inclusive, at the corner of First and Fifth avenues, in section 4, were set apart for the purpose of erecting thereon a mausoleum sufficient to accommodate at least three hundred crypts. At the completion of said mausoleum, the said company are to pay to the trustees as an endowment fund, $5.00 for each and every crypt, said fund and income therefrom to be used for the care of the land and building as cemetery property and to be left intact, all excess to be placed to the credit of the original sum.

You will notice that fifteen lots are set apart *"for the purpose of erecting thereon a mausoleum,"* etc. Then it is provided, by said contract, that said Mausoleum Company is to pay $5.00 for each crypt, etc., to the trustees, as an endowment fund with provisions as to disposal of the fund and income therefrom.

The whole matter, as proposed, despite the proposition that the cemetery officers are supposed to retain control of their lots, resolves itself into a *dual control of these lots and the mortuaries and crypts erected thereon;* and deprives the union city and township cemetery trustees of the *full and absolute control of all the lots in the cemetery.*

Until the legislature provides for this new arrangement, all cemeterw trustees are bount by the law as it now is; and the only safe course to pursue, in order to avoid conflict of jurisdiction and legal questions, is to deny the right to make such contracts as are submitted herein.

Progressive movements, public demand and general accommodation, no doubt, would be accelerated by such an arrangement; but great confusion and conflict of rights would result if the law is not changed to authorize this departure from the strict letter of the law.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

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HEALTH OFFICER—BOARD OF HEALTH MAY PAY EXTRA COMPENSATION FOR PHYSICIANS' SERVICES IN QUARANTINE CASES—RATIFICATION AND ADOPTION OF UNAUTHORIZED ACTS OF HEALTH OFFICER—PAYMENT BY MUNICIPALITY.

A Board of Health is empowered to employ a health officer to perform physician's services in quarantine cases, under 4436 *General Code, and said health officer may be compensated by the municipality in addition to his salary for such services as are not within his duties as health officer, when the quarantined family is unable to pay the same.*

When a health officer employs himself as physician in such cases, the board of health is not bound to compensate him, but it may or may not, in its discretion, adopt the services and certify them for payment by the municipality, under said Section 4438 *General Code.*

When a health officer, without being so directed by the board of health, contracts for guards, nurses, supplies, etc., in quarantine cases, the board may or may not, as it sees fit, ratify such contracts and certify their amounts to the municipality for payment.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under favor of June 19th, you requested the opinion of this department upon several questions pertaining to the compensation of Health Officers when acting in the capacity of physician in small pox cases.

I quote Section 4436 of the General Code, which governs each of your inquiries:

> "When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel, and all other necessaries of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the municipality in which quarantined."

Your first question is as follows:

> "May a health officer of a city board of health be employed by said board as a physician in charge of small pox cases and be allowed extra compensation, in addition to his regular salary for said services as physician?"

The answer thereto is fully covered by an opinion hereto attached which was rendered, under date of October 4, 1911, to M. R. Smith, City Solicitor of Conneaut, Ohio, which held that when a health officer in a city was employed to perform physician's services in a case of quarantine, "all the work done by him in connection with the case of small pox he was called upon to perform in his capacity as health officer, must be compensated for by his monthly salary. All services as a physician not falling within his official capacity as health officer, can be paid by virtue of Section 4436, General Code."

Your next inquiry is as follows:

> "May he, as health officer, employ himself as physician in quarantined cases and bind the board of health to pay him for such services in such an amount as said board of health may determine to be just and reasonable? May said health officer perform the services of a physician in charge of quarantined cases (small pox) and later present a claim therefor to the board and in this manner create a valid obligation against the public funds of the city, if said claim be allowed and approved by the board of health at a subsequent date?"

These questions may be answered together.

Section 4436 above quoted, provides that the *Board of Health shall provide* the necessary medical attendance, etc., and further provides that the bills for the same *when properly certified by the President* and Clerk of the Board of Health, shall be paid by the municipality in the event that the quarantined family is unable to meet the same. The power to employ physicians and the duties to approve the payment of their compensation under these circumstances, therefore, rests with the Board itself.

The health officer is designated in Section 4408 of the General Code to be the "executive officer" of the Board of Health; he is the instrument of the board. It is his duty to execute its orders and, in all his duties, unless otherwise provided by statute, he is subject to its direction. When he acts without orders, therefore, he clearly exceeds his authority and has no legal claim for compensation for services as physician, which he performed without such direction.

A public agency or board, however, is empowered to adopt or ratify unauthorized acts which it has itself the power to authorize or perform. The general rule is stated in Mecham on Public Officers, Section 533, as follows:

> "It is, however, the general rule, that whoever was capable of performing an act or entering into a contract with another, unauthorized, has asumed to perform or make for him as his agent, and who is still capable of performing or entering into it, is capable of ratifying that act or contract, thereby rendering it good from the beginning and the same as though he had originally authorized or made it."
>
> Section 534. And this rule is as true in the case of a corporation, private or municipal, as of an individual. * * *

Also, in Section 838 of the same authority, the rule is stated as follows:

> "* * * * For it is a principle applicable to states and lesser municipal governments and agencies, as well as to private principals, that whatever the principal might originally and could still lawfully do himself, and might then and could still lawfully delegate to an agent, he may subsequently, when done in his name and on his behalf, lawfully ratify and adopt with the same effect as though it had been properly done under a previous authorization."

I am, therefore, of the opinion that the health officer cannot bind the board of health for his own services, in the absence of the latter's authorization or ratification. When, however, the board has ratified his act, by approving the same, the health officer is entitled, in the light of the answer to your first question, to such

compensation from the municipality, for such work as a physician, which is not included in his duties as health officer, as the board has legally certified to.

Your last question is:

> "Could the health officer create valid obligations against the city for supplies, guards, nurses, etc., provided such claims ordered by said health officer be subsequently allowed and approved by the board of health?"

The purchasing of supplies, under Section 4436, General Code, and the employing of nurses thereunder, as well as the employment of guards, under Section 4431, General Code, as subject to the same rules and procedure as the employment of physicians as aforesaid, and may be accomplished through the instrumentality of the Health Officer, upon due authorization or ratification by the Board. When bills are so incurred therefor by the Health Officer and properly certified by the Board of Health, they become a legal charge against a municipality, in accordance with Section 4436, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

617.

MUNICIPAL COURT OF CLEVELAND—WITNESS' AND JURORS' FEES IN STATE AND CITY CASES.

Under 1579-2, *General Code, criminal jurors in the Municipal Court of Cleveland, shall receive the same fees as jurors in the Court of Common Pleas, which are* $2.00 *per day and five cents per mile from residence.*

Under 1579-4, *General Code, witness fees in said court are the same as those formerly provided for the police court of Cleveland, except that the judges of the court may provide a standard of fees and costs.*

Such witness fees as the city of Cleveland has fixed for cases of violation of ordinances or as have been fixed by the judges of said court, must be allowed to govern.

Under 4580, *General Code, if council or the judges have fixed no standard witness fees in cases of violation of ordinances, they shall be the same as in cases before justices of the peace, viz: fifty cents a day and mileage at five cents per mile.*

In State cases under 4580, *General Code, witnesses are entitled to* $1.00 *a day and five cents a mile.*

August 5, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge yours of March 21, 1912, in which you ask:

> "What are the legal fees of witnesses and jurors serving in the trial of misdemeanor cases in the municipal court of the City of Cleveland, Ohio? Also, what are the fees of jurors and witnesses when serving in cases tried in said court for the violation of municipal ordinances?"

The municipal court of Cleveland was established by Tit. IV., Chapter 5a, General Code; and the provisions of said code relating thereto, are embraced in

Sections 1579-1 to 1579-45, General Code, inclusive. By Section 1579-1 it is made a *court of record.* Section 1579-9 gives this court "Jurisdiction of all misdemeanors and of all violations of city ordinances of which police courts in municipalities now have or may hereafter be given jurisdiction."

This municipal court was created by a *special act;* and it succeeded the old police courts of Cleveland—the latter, together with all offices thereof, having been abolished by Section 1579-45, General Code (effective anuary 1, 1912).

This court, then, being a creature of Chapter 5a, supra, *is governed by its provisions,* and not by the *general laws of the State on the subject,* except insofar as references are made to, and adoption of, the provisions of general law on the subject, as recited in the Cleveland Municipal Court Act.

The Legislature is presumed to have covered the ground fully in this Act, on this subject; and when any questions, such as the ones propounded herein, arise, our first duty is to carefully read this special act, construe it as a *whole,* and govern ourselves accordingly. I will first take up the question of jurors' fees in said court.

Section 1579-21, General Code, provides:

> "Jurors in the municipal court shall be chosen and summoned in accordance with an ordinance of the Council of the City of Cleveland, or if no such ordinance is enforced, in accordance with a rule of the court. They shall be impaneled in the same manner and challenged for the same causes as jurors in the Court of Common Pleas; *they shall have the same qualifications and receive the same fees as jurors in the Court of Common Pleas; their fees shall be paid out of the treasury of the City of Cleveland."*

The marginal reference to this section in Page and Adams statutes is: "choosing and summoning jury." This is the only section of the municipal court chapter wherein jurors' fees are *specifically mentioned.* There is no ambiguity in the language, and I believe it includes *all criminal juries in said court.* This court holds four terms a year, keeps permanent records, ranks next to the Common Pleas, and it was the intention of the Legislature that uniform fees should be drawn by its jurors, which it fixed in this section.

Jurors' Fees in Common Pleas Court.

Section 3008, General Code, provides that each juror shall receive $2.00 for each day's service; and if not a talesman, five cents a mile from his residence. I am, therefore, of the opinion that jurors in said Municipal Court are entitled to the above fees, in criminal cases.

But it is claimed that Section 1579-40 of this special act, might and does, provide a different rule. The marginal note to this section, in Page and Adams Statutes, is: *"Costs and how taxed."* In the first place jurors' fees in criminal cases, in courts of record are not *costs,* and are never taxable or recoverable as such—being paid *directly from the treasury.* So this section has no relation to jurors' fees—the same having been fully covered in Section 1579-21; and the Legislature is not presumed to have intended to make *two provisions, covering the same subject, in the same chapter.*

Witness Fees in Criminal Cases in Cleveland Municipal Court.

The disposition of this question requires a careful investigation of all general laws on the subject, involving jurisdiction of this court, rules of practice therein,

together with the antecedent history of the various police courts of Cleveland of which the present municipal court is the successor; and all the provisions of Chapter 5 aforesaid on the subject of fees and costs, must be construed in *pari materia* with all general statutes on the subject.

Section 3014, General Code, provides that each witness attending under subpoena, before Common Pleas Court, Grand Jury, *or other court of record,* shall receive, for each day's attendance, $1.00 and five cents for each mile, the same as in civil cases.

If this were the only expression on this subject, no difficulty could arise concerning their fees, as this general statute interprets itself. But Section 1579-40 (which is a part of the *special chapter,* above cited) contains the following provision: "In criminal cases, all fees and costs shall be the same, *as now fixed in the police court of said city.* The judges of the municipal court may by rule of court provide in all cases, not covered by this act, a standard of fees and costs." Witness fees are within these provisions. What is meant by "as now fixed in the police court of said city?" How fixed? By city ordinance, by statute or rule of court? The above provisions being fixed in the *special chapter,* must dominate as against *general provisions on the same subject,* if we can arrive at an intelligent conclusion as to their interpretation. I do not know whether the City of Cleveland has, by ordinance, fixed witness fees or not; neither am I apprised whether the court has established a standard of fees and costs. These matters would appear only in the record of ordinances, and the journals of the Municipal Court, respectively, of said city. There is no provision in this special act, or in any law on the subject, in which witness fees are *specifically mentioned, applying to Cleveland.*

If the City of Cleveland, through its council, has fixed witness fees by ordinance, in the municipal court, then the fees so determined and specified are to be paid. This would solve the question, and we need look no further. Simply to follow the ordinance, or the standard fees established by the municipal court, is all that is necessary; and the officers whose duty it is to certify fees are to be guided solely by what the local records of the city disclose on that subject. If the expression in Section 1579-40—"in criminal cases all fees and costs shall be the same as now fixed in the police court of said city"—means *fees fixed by law,* then we must see what these fees were, under the general law applying to *all police courts,* at and before the enactment of the special act creating Cleveland's Municipal Court.

Subdivision 11, Tit. XII., Division 5, Chapter 3, of Bates Statutes, being Sections 1536-794 to 1536-846, inclusive, denominated "Police Courts," is an uncertain commingling of special acts applying to police courts of different cities, as well as a few sections intended to apply to *all.* Section 4578, General Code, provides that prosecutions for offenses against the laws of the State shall be conducted *in the name of the State;* and for violation of ordinances *in the name of the corporation.*

The fees for witnesses in these two classes of cases are different. Section 4580, General Code, says that witnesses in cases for *violation of ordinances* shall receive the same fees as in like cases before a Justice of the Peace, which are fifty cents a day, and mileage at five cents per mile. The same section says that in *State cases* the fees are the same as in like cases in Common Pleas Court, which are one dollar a day and five cents a mile as above set out.

Section 4581 says that fees for violation of ordinances shall be such as the council prescribes by ordinance, not exceeding fees for like services in State cases.

My conclusions are as follows:

First. All jurors in criminal cases in said court are entitled to $2.00 a day and five cents a mile, if living more than one mile from place of holding court.

Second. All witnesses in State cases are entitled to $1.00 a day and five cents a mile, if living more than a mile from place of holding court.

Third. If the Council of Cleveland has by ordinance fixed the fees for witnesses in cases brought in the name of the city for violations of ordinances, then such witnesses are entitled to the fees specified in the ordinance; and if the municipal court has fixed a standard of fees, the same must be paid as provided in the order of the Court.

Fourth. If there is no ordinance of the city on the subject, then all witnesses in cases for violation of ordinances are the same as before Justice of the Peace —fifty cents a day and five cents a mile, if residing more than a mile from the place of holding court.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

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TOWNSHIP TRUSTEES—FEES PAID FOR ANNEXATION PROCEEDINGS ARE ILLEGAL—MUST FURNISH CIVIL DOCKETS TO JUSTICE OF PEACE.

Inasmuch as the limits of Millcreek Township, Hamilton County, include more than one municipal corporation, Section 3512, *General Code, cannot apply to an annexation of a part of such township to Cincinnati, and the township offices would not be abolished by such annexation, and the ordinary duties of the township trustees will continue.*

The township trustees are not authorized to perform any duties in a proceeding for annexation of a part of a township to a village. Payment from the township treasury, presumably for such services, is therefore illegal and should be recovered and repaid into the township treasury.

Under 1724, *General Code, the township trustees are required to furnish Justices of the Peace with civil dockets. Criminal dockets, however, must be paid for out of fines retained by the Justice under* 1741, *General Code.*

August 3, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of March 6, 1912, you inquire of this department:

"On October 28, 1911, Millcreek Township, Hamilton County, became a part of the city of Cincinnati. A part of Norwood City, St. Bernard and Elmwood Village, within the original boundaries of the said Millcreek Township, were not annexed to Cincinnati. Are there statutory duties that will make necessary the continuance of the Millcreek Township board of trustees? If so, what are the duties?

"An examination of Millcreek township books shows that on December 16, 1911, J. P. M., E. S. P. and J. W. H., township trustees, each drew from the township funds for services in annexation proceedings, $100.00. Were these payments legal? If not legal and should be returned, to whom should they be returned?

"During the years 1910 and 1911, township trustees paid $187.00 for dockets for S. B. B., Justice of the Peace, and during the same

period, $77.60 for docket for C. F. D., Justice of Peace. Were these payments illegal and if so, from whom should the money be recovered and if recovered, to whom paid?"

I assume from your inquiry that at the time of the annexation of the territory to Cincinnati, Millcreek township consisted of the territory so annexed and also of territory in Norwood City, St. Bernard and Elmwood Village.

Your first inquiry involves a construction of Section 3512, General Code, which provides:

> "When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

This section applies when the boundaries of a township are identical with the corporate limits of a city or village. In the case you submit the boundaries of Millcreek township include more than one village or city, or parts thereof. The boundaries thereof are not identical with the corporate limits of either of the cities or villages.

The provisions of Section 3512, General Code, cannot apply for another reason. Said section retains the offices of justice of the peace and constables, who are to exercise their powers under muncipal ordinance. The effect of merging the township when its boundaries are identical with a village or city is to place the justices of the peace and constables under municipal authority. A question would arise in the care of Millcreek township as to which municipal corporation should assume jurisdiction over such officers. The same will apply to the provisions for claims for or against the township. The statutes do not provide for such a situation.

I find no other provision for merging a township with a municipal corporation. As Section 3512, General Code, does not apply to the case in question, the township is continued in existence and is entitled to have its statutory officers.

You ask what are the statutory duties of the township trustees of Millcreek township? As will be seen in answer to your third inquiry herein the township trustees are required to furnish dockets for justices of the peace. They have other duties to perform in reference to the bonds of justices of the peace. There are other statutory duties of the board of township trustees. Those above mentioned are sufficient to show that they have some duties to perform.

In your second inquiry it appears that the township trustees have drawn certain fees for services in annexation proceedings. Upon inquiry at your office it appears that this money was drawn for services performed as trustees of the township in connection with the annexation of the part of the township to the city of Cincinnati referred to in your first inquiry.

Section 3540, General Code, provides:

> "Each officer shall receive for the services required of him under

this division, the same fees he would be entitled to for similar services in other cases. Unless such fees are paid in advance, for services under this chapter, by the agent of the petitioners, of whom demand may be made, and by some person interested for services under other chapters of this division, the officer shall not be required to perform the service."

This section is found in the chapter relating to the incorporation of villages, wherein the township trustees may have certain duties to perform.

Section 3294, General Code, provides:

"Each trustee shall be entitled to one dollar and fifty cents for each day of service in the discharge of his duties in relation to partition fences, to be paid in equal proportions by the parties, and one dollar and fifty cents for each day of service in the business of the township, to be paid from the township treasury. The compensation of any trustee to be paid from the treasury shall not exceed one hundred and fifty dollars in any year including services in connection with the poor. Each trustee shall present an itemized statement of his account for such per diem and services, which shall be filed with the clerk of the township, and by him preserved for inspection by any person interested."

The annexation of territory to municipal corporations is provided for in sections 3547 to 3576, General Code. The proceedings in these cases are had before council of the corporation and before the county commissioners. I find no statute wherein the township trustees are required to act in a proceeding for the annexation of a part of a township to a city or village. Neither do I find any authority for the payment to the trustees of any money from the township treasury for such services.

Payment for such services is unauthorized and was therefore illegal. As the township still exists, the money so illegally paid should be recovered from the township trustees and paid into the township treasury.

Your third inquiry is as to certain expenditures for the dockets of the justices of the peace.

Section 1724, General Code, provides ,in part:

"Each justice of the peace must keep a docket, which shall be furnished by the trustees of the township, in which must be entered by him:"

The statute then enumerates in detail what shall be entered into the docket.

This statute has reference to civil dockets and not to criminal dockets. The trustees are required to furnish the civil dockets of the justices of the peace, and pay for the same is to be made from the township treasury.

Criminal dockets are to be paid for as provided in Section 1742, General Code, which reads:

"A justice of the peace may retain out of fines or other moneys belonging to the county coming into his hands in criminal proceedings, the amount paid for a criminal docket, and each justice of the peace, except those receiving a salary, may retain out of such fines or other moneys an amount not exceeding twenty dollars for a suitable desk in which to keep the dockets, files, papers, books and documents of his office, which shall be the property of the county and shall be turned over by each justice of the peace to his successor. Such justice may expend of such fines and other moneys not exceeding five dollars per annum,

for necessary paper, blanks and other stationery for his office, but a justice shall not purchase such desk if he has received a suitable desk from his predecessor. A justice of the peace paying out money for such purposes shall file with the county auditor, at the expiration of his term of office, a sworn itemized statement thereof. In making the annual statement to the auditor as required by law, a justice of the peace, having made such expenditures or having such moneys in his hands contemplated for such purposes, shall include therein the moneys so paid or held by him."

The criminal docket is not furnished by the township.

If the expenditures for dockets were for civil dockets of the justice of the peace to be used by him as such justice the expenditures were authorized and are legal. The amount of such expenditures appears rather large, This might bear further investigation.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

621.

OFFICES COMPATIBLE—INCOMPATIBLE—CITY AUDITOR AND CLERK OF COUNCIL, COLLECTOR OF WATER RENTALS, CLERK OF SINKING FUND TRUSTEES, CLERK OF BOARD OF CONTROL AND CLERK OF SAFETY OR SERVICE DEPARTMENT.

By Sections 4284 and 4286, General Code, the office of city auditor is made a check upon those officers of a city who in any way handle funds of the city, or who are required to keep accounts of the same, or who are required to certify claims for payment to the city auditor, in order that he may draw vouchers for the same. His office is therefore incompatible with any of such offices.

When the duties of a clerk of council of a city do not require him to perform any of such acts, the city auditor may hold both positions and receive the payments incidental to each, providing it is physically possible to perform the duties of both.

The same is true with reference to the duties of the office of clerk of the Board of Control, and clerk of the Service or Safety Department.

September 9, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of August 12, 1912, is received in which you state:

"We respectfully request your reconsideration of the opinion rendered this department under date of January 19, 1912, wherein it was held that it is illegal for a city auditor to serve as clerk of council, clerk of the department of service, and various clerkships in the municipal government."

The question under consideration in the opinion of January 19, 1912, to which you refer, was as follows:

"Is it legal for the city auditor to serve as clerk of council, clerk to the director of safety, clerk to the director of service, clerk to the

board of control, secretary of the sinking fund trustees, or collector of water rentals if said city auditor has been selected or appointed to said position by the proper authority? And, if so appointed, is he entitled to the compensation fixed by council for each of said positions in addition to his salary as city auditor?"

In this opinion it was held that the city auditor could not hold these positions because they were incompatible with the office of city auditor.

The rule of incompatibility in office is stated by Dustin, J., in the case of State vs. Gehert, 12 Cir. Ct. N. S., 274, on page 275 of the report, where he says:

"Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

This rule states two conditions of incompatibility, first, when one office is subordinate to, or is in any way a check upon the other; second, when it is physically impossible for one person to discharge the duties of both offices.

It appears from your letter that it is physically possible for the same person to perform the duties of city auditor and of the clerkships in question, in a large number of the smaller cities of the State. It will be necessary, therefore, to consider only the first ground of incompatibility.

In order to determine whether a particular office is incompatible with another upon the first ground it is necessary to examine the duties of each office.

The duties of the city auditor are prescribed in Sections 4275 to 4278 and Sections 4283 to 4292 of the General Code.

Section 4284, General Code, provides:

"At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof. Upon the death, resignation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the indebtedness."

Section 4286, General Code, provides:

"On the first Monday of each month, detailed statements of the receipts and expenditures of the several officers and departments for the preceding month shall be made to the auditor by the heads thereof. The auditor shall countersign each receipt given by the treasurer before it is delivered to the person entitled to receive it, and shall charge the treasurer with the amount thereof. If the auditor approves any voucher contrary to the provisions of this title, he and his sureties shall be individually liable for the amount thereof."

By virtue of these sections it is made the duty of the city auditor to examine and audit the accounts of the various officers of the city, and the head of each

department is required to make detailed statements of the receipts and expenditures of the department to the city auditor.

These duties of the city auditor pertain to the receipts and expenditures of money of the city, and of accounts with the city. The office of city auditor is a check upon those officers of the city who in any way handle funds of the city, or who are required to keep accounts of the same, or who are required to certify claims for payment to the city auditor in order that he may draw vouchers for the same. It is the duty of the city auditor to examine and audit the accounts of all such officers, and if he finds an officer indebted to the city at the termination of his official services to report such indebtedness to the proper official.

Therefore, the city auditor is a check upon every officer of the city who has charge of any accounts of the city, or who receives or pays out funds of the city, or who makes a certificate to the auditor for the payment of claims. The office of city auditor would be incompatible with any and all of such offices.

Therefore, the city auditor cannot also fill a position in the service of the city, when the duties of such other office require the incumbent to account for, receive or expend moneys or funds of the city, or to certify claims to the auditor for payment.

This rule will now be applied to the various positions of which you inquire.

In an opinion given to Hon. G. T. Thomas, city solicitor of Troy, Ohio, under date of March 16, 1912, it was held that when council has made provision for and has fixed the compensation of a clerk or secretary of the sinking fund trustees, the city auditor cannot fill such position. That opinion is still adhered to.

The clerk of council of a city has certain statutory duties and in addition thereto council may prescribe other duties, by virtue of Section 4210, General Code, which reads:

> "Within ten days from the commencement of their term, the members of council shall elect a president pro tem, a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

The statutory duties of a clerk of council pertain principally to the authentication of ordinances, the certification of their publication, the serving of notices of public improvements, the certification of special assessments to the county auditor, and to the recording of the proceedings of council. None of these duties are incompatible with the duties of the office of city auditor.

When the duties of a clerk of council of a city do not require him to handle funds or to keep an account of the same, or to certify an indebtedness for payment to the auditor, the positions of clerk of council and of city auditor may then be occupied by the same person, and he would be entitled to receive the compensation provided for each office.

Another position inquired of is that of collector of water rentals. The duties of this office are not prescribed by statute, but from the title of the office, it is apparent that the person who fills this position must receive and account for funds belonging to the city. It is the duty of the city auditor to examine and audit the accounts of such officer. These positions are, therefore, incompatible and cannot be filled at the same time by the same person.

The duties of the clerk of the director of public service; clerk of the director of public safety; and clerk of the board of control, and of the service and safety departments, are not prescribed by statute.

The city auditor has certain duties to perform in reference to the opening of bids in the safety and service departments as prescribed in Section 4278, General Code, which reads:

> "When bids are required to be filed for the letting of contracts by the director of public service, or public safety, it shall be the duty of the city auditor or his chief deputy to attend and assist at the opening thereof and to inspect them."

This duty will not of itself make the positions of city auditor and clerk of the safety or service department incompatible.

Unless the duties of the office of clerk of the board of control, or clerk of the safety or service department, require such officer to receive, pay out or to account for funds of the city, or to certify an indebtedness for payment to the city auditor, such positions are not incompatible with the position of city auditor, and the same person may fill said positions and that of city auditor at the same time and receive the compensation fixed for each office.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

622

PARK COMMISSION—COUNCIL MAY MAKE APPROPRIATION FOR EXPENDITURES OF.

The council is empowered to make appropriations for park purposes where there is no park commission and the control and management of the parks remain in the directors of public service. The park commission act does not take this power away from the council, and where such commission exists, therefore, council has the same authority to make detailed appropriations of the park funds to be expended by the park commissioners, as council has to make appropriations for other municipal purposes.

July 18, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of January 2, 1912, you inquire:

> "Has the council of the city of Cincinnati the authority to make detailed appropriations of the proceeds of the levy made for park purposes, the parks of said city being under the control of a park commission, or has said commission the absolute control over the moneys produced by the levy for park purposes."

The law relating to park commissioners in cities is found in Sections 4053 to 4065, inclusive, of the General Code.

Section 4056, General Code, provides the manner of disbursing the money received for parks as follows:

> "All disbursements of money shall be made by the treasurer of the city upon warrants drawn by the auditor and no warrant shall be drawn by the city auditor or paid by the treasurer unless approved and attested by the signatures, in their own handwriting, of the president and secretary of the board of park commissioners."

In cities having park commissioners the management and control of the parks thereof are placed under their control and management by virtue of Section 4057, General Code, which reads:

> "The board of park commissioners shall have the control and management of parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's play grounds, public baths and stations of public comfort located in such parks, of all improvements thereon and the acquisition, construction, repair and maintenance thereof. The board shall exercise exclusively all the powers and perform all the duties, in regard to such property, vested in and imposed upon the director of public service."

Section 4058, General Code, provides for the expenditure of the money by the park commissioners as follows:

> "The board shall have the expenditure of all moneys *appropriated by the city council* or received from any other source whatever, for the purchase, acquisition, improvement, maintenance, equipment or enjoyment of all such property, but no liability shall be incurred or expenditure made unless the money required therefor is in the treasury *to the credit of the park fund and not appropriated for any other purpose.*"

Section 4062, General Code, provides:

> "All moneys received by the city from taxation or otherwise for the purpose of acquiring, constructing, equipping and maintaining parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's playgrounds, public baths and stations of public comfort located in such parks, shall be deposited in the city treasury and transferred by warrants on the city auditor to the credit of the board of park commissioners in a fund designated as 'the park fund.' All expenditures incurred by such board shall be by warrant of the city auditor drawn in pursuance of the regularly authorized attested voucher of such board of park commissioners."

The park commissioners are not authorized to levy a tax for park purposes but must act through council by virtue of Section 4064, General Code. If the council fails to make the levy the question shall be submitted to a vote.

Said Section 4064, General Code, provides:

> "When the board of park commissioners deems it necessary to issue bonds or to levy a tax for the purpose of carrying into effect the powers herein conferred, the board shall by written resolution so declare its judgment and state therein the amount of bonds to be issued or the tax to be levied for such purposes and transmit the resolution to the city council. If the council fails to enact legislation for the issuance of such bonds or the levying of such tax, within ninety days after the time the resolution was received by the council, the question of the issuance of the bonds or the levy of the tax shall be submitted to a vote of the qualified electors of the city, and the board of park commissioners shall file the resolution and request with the board of deputy state supervisors of elections of the county. Such board of deputy state supervisors shall then submit the question of the

issuance of such bonds or the levying of such tax, or both, to the qualified voters of the city, at either a special or general election as the resolution and request may specify, to be held in the manner provided by law for voting on the question of the issue of bonds in excess of the limit fixed by law, except as otherwise provided herein."

None of the sections pertaining to the park commission give any authority to make appropriations of funds raised for park purposes.

Section 3797, General Code, provides:

"At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made from and within such appropriations and balances thereof."

Where there is no park commission the parks are under the control and management of the director of public service. In such case there is no question as to the right and duty of council to make detailed appropriations for park purposes. The park commission act does not take this authority from council. The language used in Section 4058, *supra,* that the board shall have the expenditure of all money "appropriated by the city council" "in the treasury to the credit of the park fund and not appropriated for any other purpose," shows that it is the duty of council to make appropriations for park purposes.

I am, therefore, of the opinion that the council of a city has the same authority to make detailed appropriations of the park funds of said city, which are to be expended by the park commissioners thereof, as council has to make appropriations for other municipal purposes.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

624.

COUNCIL—PLURALITY VOTE SUFFICIENT TO ELECT COUNCILMAN—APPOINTMENT BY MAYOR TO FILL VACANCY AFTER THIRTY DAYS—DISQUALIFICATION BY VIRTUE OF INTEREST IN PUBLIC CONTRACT—POWER OF COUNCIL AND OF COURT TO ADJUDGE.

In the absence of a contrary rule of council adopted by authority of 4238, *General Code, a plurality of votes is sufficient to determine an election by council.*

Under 4236, *General Code, the mayor is empowered to fill a vacancy in council by appointment, when council fails to make such appointment before the expiration of thirty days from the date of the creation of said vacancy.*

From a review of the decisions, council is empowered to declare a person disqualified for the reason set out in Section 4207, *General Code, but disqualifications set out in* 3808, *General Code, must be adjudicated by a court in quo warranto proceedings. When disqualifications admittedly exist under either section, however, council is not in any event empowered to declare the person qualified, and when such person admits the disqualification, quo warranto is unnecessary.*

When a person is elected by council, therefore, to fill a vacancy, and such person admits himself to be disqualified, by virtue of interest as stockholder in a corporation furnishing gas to the municipality, there has been no election, and if council has taken no other steps to fill the vacancy within thirty days, the mayor may make the appointment, provided by 4236, *General Code.*

August 27, 1912.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of April 16th you requested my opinion upon the following questions:

> "1. Is an election by council to fill a vacancy in its membership made by a plurality vote legal?
>
> "2. Is the appointee of a mayor to fill a vacancy in council appointed after the expiration of thirty days from the date of the creation of said vacancy, if he qualifies and is recognized by council, a legally constituted member of said body? If such an appointee serves would measures passed by his vote be legal enactments of the council?"

In answer to your first question, the cases of State ex rel Attorney General vs. Anderson, 45 O. S., 196, and State ex rel Calderwood vs. Miller, 62 O. S., 436, are directly in point, both presenting authority for the principle that in the absence of a contrary rule of council adopted by authority of Section 4238, General Code, a plurality of votes is sufficient to determine an election by council.

Sections 4236 and 4237, General Code, provide as follows:

> "Section 4236. When the office of councilman becomes vacant, the vacancy shall be filled by election of council for the unexpired term. If council fail within thirty days to fill such vacancy, the mayor shall fill it by appointment.
>
> "Section 4237. Council shall be the judge of the election and qualification of its members. A majority of all the members elected shall be a quorum to do business, but a less number may adjourn from day to

day and compel attendance of absent members in such manner and under such penalties as are prescribed by ordinance. The council shall provide rules for the manner of calling special meetings."

Section 4238, General Code, provides that "council shall determine its own rules."

As there are no statutory provisions specifying the method which shall be adopted by council in such elections, I am of the opinion that under the power to determine its own rules council may provide for the election of a member to fill a vacancy by other than a plurality vote should it so desire, provided, of course, that it can not exceed the limitations of Section 4237, General Code, requiring a majority to constitute a quorum to do business.

In answer to your first question, therefore, I am of the opinion that in the absence of any other rule of procedure legally adopted by council, a vacancy in its body is filled by the plurality vote of a quorum.

The answer to your second question is afforded by Section 4236, General Code, above quoted.

In view of the clear provisions of this statute there can be no doubt that the mayor is empowered to fill a vacancy in council by appointment after the expiration of thirty days from date of creation of said vacancy. If such appointee, therefore, qualifies, he becomes a legally constituted member of said body, and measures passed by his vote would be legal enactments of council.

In the letter of Mr. Dilley which prompted the above inquiries and which you have submitted therewith, the facts are materially as follows:

"A vacancy was created by the death of a councilman. An election was held by council (a quorum being present) to fill the vacancy, at which one Mr. B., who was incidentally a holder of $15,000 worth of preferred stock in the Trumbull Public Service Company, which corporation furnished light and water to the city, received a plurality vote. The mayor believing that council had adopted a rule which required a majority vote to elect and that Mr. B. was not, therefore, elected, appointed one Mr. C. at a time subsequent to the expiration of thirty days from the death of the original councilman, but within thirty days after the date upon which the plurality vote had been accorded. Mr. B had, meanwhile, believing himself disqualified by virtue of Section 4208, General Code, withdrawn all claims to the election."

You inquire as to the legality of measures passed with the vote of Mr. C.

Sections 3808 and 4207, General Code, provide as follows:

"Section 3808. No member of the council, board, officer or commissioner of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom.

"Section 4207. Councilmen at large shall have resided in their respective cities, and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election. Each

> member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

It is well settled that statutes of this nature extend to the interest of a stockholder in a corporation contracting with the municipality.

The case of State ex rel vs. Egry, 79 O. S., 391, distinguishes between the right of council to declare a member disqualified under Section 4207, General Code, and the right to declare such members disqualified under Section 3808, General Code. The case presents authority for the proposition that council is not judge of the qualifications set out in Section 3808, General Code, whilst on page 407 there appears a dictum to the effect that the qualifications set out in Section 4207, General Code, are such as council may be the judge of. Other ruling decisions of Ohio courts on the question are as follows: Stearns vs. Wyaming, 53 O. S., 532; State ex rel vs. Berry, 42 O. S., 232, present authority for the rule that ordinarily council is the exclusive judge of the election and qualifications of its members. In these cases, however, the court had not before it the question of any violation of Sections 4207 or 3808, General Code, above quoted, but was considering questions purely of the validity of an election.

The case of State ex rel vs. O'Brien, 47 O. S., 464, is in point, in that it had before it the question of the disqualification of a councilman under Section 4207 General Code, on the ground of non-residence in the respective ward for the period of one year previous. The court held the ward had no legal existence and ousted the claimant to office, thus overruling the action of council in declaring said member elected.

In the case of State ex rel vs. Collister, 600 C. N. S., page 33, authority is presented for the right of a court to oust a member elected by council on the ground of disqualification or non-citizenship, specified in Section 4207, General Code.

There is no case which has held that where any of the *disqualifications set out in either Section* 4207 *or* 3808, *General Code, indisputably exists* that council has, nevertheless, the right to declare the claimant elected. To so hold would enable the council to override the express will of the Legislature and, in effect, would be a substitution of the discretion of an inferior body for the express will of a superior body. Such a ruling was surely not intended by the courts. In every case which presented the admitted fact of the existence of any of the disqualifying provisions set out in either Section 4207 or 3808, General Code, the courts have overruled the choice of the council.

I am, therefore, of the opinion that the aforesaid dictum in the case in the 79 O. S., to the effect that council is the judge of the qualifications set out in Section 4207, General Code, extends such discretion to council only to the extent of declaring a person *disqualified* under said section, but does not enable that body to declare a person *qualified* in the face of the fact that there is an admitted circumstance which would render such person disqualified under said section. In short, the effect of the case in the 79 O. S. is that *disqualifications* under Section 3808, General Code, must be judicially determined, while *disqualifications* under Section 4207, General Code, may be determined by council. Council may not determine a person qualified, however, when admitted facts exist which would render him disqualified under either section. I see no reason, however, why, when the person elected admits his disqualification and makes no contest for the office, there

should be any necessity for a decision of court determining the disqualification in any case.

In the present question the case is that of a councilman admittedly disqualified by interest in a contract in contravention to Section 4207, General Code. The council, however (presumably by mistake), has declared him elected. The councilman in question, according to your statement of facts, has withdrawn his claim and the new appointee of the mayor is serving as councilman. The facts having been admitted, the court would have no discretion in quo warranto other than to oust him from his seat. His admission and withdrawal has rendered the quo warranto unnecessary.

Mr. B. was admittedly disqualified from the beginning; the new appointee was duly appointed after the expiration of thirty days from the creation of the vacancy. He is, therefore, a legal member of council and all measures passed by his vote are legal enactments.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

626

EXAMINERS OF WATERWORKS—APPOINTMENT BY MAYOR AND FIXING OF COMPENSATION BY COUNCIL—APPROPRIATION—PAYMENT FROM MAYOR'S FUND.

A resolution of council providing for the appointment by the mayor of an examiner of a department of a city is not necessary, as such appointment may be made by the mayor by virtue of Section 3792 General Code.

The compensation of such examiner, by virtue of said Section 3792, General Code, must be fixed by council.

Council may fix an appropriation for said compensation or designate a fund from which it shall be paid. When council does not so do, payment must be made from the mayor's fund.

August 27, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of July 17, 1912, you inquire:

"The following is a copy of a resolution passed by the council of the city of Cincinnati:

"'A RESOLUTION

"'Requesting the mayor to appoint an investigating committee to ascertain whether more modern methods of bookkeeping could be installed in certain departments.

"'Be it resolved by the council of the city of Cincinnati, state of Ohio.

"'Section 1. That the mayor be and hereby is, requested to appoint competent disinterested persons not exceeding three in number, and not more than two of whom shall be of the same political party, to examine the affairs of the water works department for the purpose of ascertaining whether or not a more modern or better system of bookkeeping can be installed therein, and for such other purposes and departments as may be deemed proper, at a reasonable compensation to be hereafter de-

termined by council, which compensation shall in no event be less than $100.00 per month, nor in excess of $200.00 per month, for time actually expended in the work.'

"'Passed April 2, 1912.

"'(Signed) J. W. PECK.
"'*President pro tem of Council.*

"'Attest: ARTHUR ESPY, Clerk.

"'Approved April 3, 1912.

"'(Signed) SIMEON M. JOHNSON,
"'*Acting Mayor.*'

"Also follows a copy of an appointment under said resolution:

"'CINCINNATI, May 9, 1912.

"'HON. IRA D. WASHBURN,
"'*City Auditor.*

"'DEAR SIR:—This is to certify that on April 1st, 1912, I appoint C. R. Hebble as examiner of the water works department at a salary of two hundred ($200) per month.

"'Respectfully,
"'(Signed) HENRY T. HUNT, *Mayor.*'

"QUESTIONS.

"1. Is said resolution valid in view of the requirements of Section 4284, General Code, which specifically enjoins the duties of the appointees under said resolution upon the city auditor?

"2. Is the appointment under date of May 9 to cover services from and after April 1st, legal?

"3. Is an appointment under date of April 1st valid if said appointment is by virtue of a resolution passed April 2 and approved April 3?

"4. Said resolution provides for a reasonable compensation to said appointees, the amount thereof to be hereafter determined by council. If council has taken no further action in the matter, is it legal for the mayor, who is the appointing officer of said commission, to place the salary at $200.00 per month?

"5. As said resolution makes no provision as to what fund or appropriation is to meet the expenditures arising thereunder, has the auditor the authority to determine to what fund and appropriation said charge shall be made? Are such claims, if held to be legal under the resolution, legally payable from the water works contingent fund?"

Section 4284, General Code, to which you refer, provides:

"At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof. Upon the death, resignation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted

to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the indebtedness."

This section prescribes the duties of the city auditor.
Section 3792, General Code, provides:

"At any time the mayor may appoint competent, disinterested persons, not exceeding three in number, not more than two of whom shall be of the same political party, to examine without notice the affairs of any department, director, officer or employe in the city government, for the purpose of ascertaining facts. In connection with such examinations, the mayor or such appointees may compel the attendance and testimony of witnesses, administer oaths and examine such persons as they deem necessary, and compel the production of books and papers. The result of the examination shall be recorded in the office of the mayor and transmitted by him to the council without delay. The council shall provide the examiners reasonable compensation for such services."

By virtue of this section the mayor is authorized to appoint not more than three competent, disinterested persons to examine any department or officer of the city government. It is not necessary that council should authorize the mayor to make such appointments. The duty of council in regard thereto is to provide a reasonable compensation for the services of the appointees.

The compensation may be fixed by council after the appointments have been made and the service performed. As the examination may be made without notice, the mayor may appoint without first requesting the council to fix the compensation. Otherwise the provision for examination without notice would to a certain extent be nullified.

The notice to the auditor on May 9, 1912, states that the appointment was made on April 1, 1912. This notice does not state the authority by which the appointment was made. As the appointment is apparently within the provision of Section 3792, supra, it must be presumed that it was made by virtue of the provisions of that section. If the appointment was made on April 1 it was a legal appointment from that date, and council would be required to fix a compensation for the services of such appointee from that time, or from the time the services were commenced.

Section 4491, General Code, provides:

"The appointing board or officer shall certify to the auditor all appointments to offices and places in the respective departments of the classified service of such city, and all vacancies occurring therein, whether by dismissal, removal, resignation or death, and the date thereof."

This section covers the classified service, and I find no other provision of statute requiring a certificate of appointment to be filed with the auditor.

The statutes do not provide when an appointment to office shall be certified to the auditor. One of the purposes of such notices to the auditor is to inform him of the appointment so that the appointee may draw proper vouchers for the pay of such appointee.

The notice to the auditor does not control the date of the appointment.

The appointment may have been made and become effective some time prior to the notice to the auditor.

In the resolution of council of April 2, 1912, it is provided that the compensation of such examiner shall not be less than one hundred dollars per month, nor more than two hundred dollars per month, the exact amount to be thereafter determined by council. Council has not determined the amount to be paid. It is the duty of council to fix the compensation. The mayor has no authority to fix it. The fixing of the salary by the mayor in the notice to the city auditor is null and void.

You inquire further as to what fund this compensation shall be paid from.

The investigation and appointment under Section 3792, General Code, is made at the instigation of the mayor. He may, under this section, make inquiry into any department of the city. The expense created by such investigation is properly an expense of the mayor's office. The expenditure is not made at the instance of the superintendent of water works. The water works department has no control over such expenditure.

The contingent fund of the water works department is provided to pay expenditures in that department, and which are under the control of the head thereof. The expense of an examination by the mayor under Section 3792, General Code, into the affairs of the water works department should not be charged against the funds of the water works. This is an expense of the mayor's office and should be paid from the funds appropriated for the use of his office, unless council creates a special fund, or makes a special appropriation for that purpose.

Council has not yet fixed the compensation to be paid the examiner. Council may yet provide the fund from which the expenditure shall be made. Council may create a special fund, or make a special appropriation for this purpose. If council does not so act the expenditure should be made by the auditor from the mayor's fund from money not otherwise appropriated.

Your several questions will now be specifically answered.

First.—The resolution of council providing for the appointment of an examiner of a department of a city is not necessary, as such appointment may be made by virtue of section 3792, General Code.

Second.—The appointment purports to have been made on April 1, 1912. The notice to the auditor on May 9, 1912, is not conclusive as to the time of the appointment.

Third.—It does not appear that the appointment was made by virtue of the resolution.

Fourth.—Council should fix the compensation of such examiner. The fixing of the compensation by the mayor is unauthorized and is null and void. The resolution of council does not definitely fix the compensation to be paid.

Fifth.—The compensation of the examiner in question is not a proper charge against the water works contingent fund. Such compensation should be paid from the mayor's fund, if council does not designate the fund, or make a special appropriation therefor.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

628.

INFIRMARY DIRECTORS—POWER TO CONTRACT FOR TOWNSHIP AND INFIRMARY PHYSICIANS IN EXCESS OF APPROPRIATIONS AND FOR PERIOD EXCEEDING TERM OF DIRECTORS.

The infirmary directors are themselves levying authorities, and there is no statutory provision requiring a certification of the auditor to the effect that there is money in the treasury as a condition precedent to the incurring of expense. When such directors, therefore, enter into legal contracts for physicians, for amounts in excess of existing appropriations, they may pay the same from the succeeding appropriations.

The limitation of Section 2546, General Code, providing that contracts for township physicians shall not exceed one year, excludes all other limitation and a contract for such period would be legal even though it extended beyond the term of the infirmary directors who made the contract.

In the absence of statutory provision a contract extending beyond the term of the officer making the same is void unless the public good requires the same. A contract entered into with a physician for the infirmary, therefore, under Section 2522, General Code, for a period exceeding the term of the directors, is void unless said contract can be shown to be for a reasonable time, and necessary for the public good or for the good of the infirmary.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge the receipt of your letter of August 16th, requesting my opinion upon certain questions submitted by the Auditor of Butler County, as follows:

> "The infirmary directors attempted to enter into contracts for infirmary and township physicians to become effective July 1, 1912, for periods of one year. The amount of these contracts exceeds the amount appropriated at the semi-annual appropriation for the period ending September 1st. The auditor refused to certify that the money was in the treasury not appropriated for other purposes.
>
> "On September first may appropriations 'be made to cover the six month period' under these contracts and may such appropriations if made be lawfully extended for this purpose in face of the fact that the certificate has not been entered into, and in view also of the fact that the periods of these contracts extend beyond the terms of the infirmary directors?"

The following sections of the General Code are to be considered in connection with these questions:

Section 2546 provides as follows:

> "Infirmary directors may contract with one or more competent physicians, to furnish medical relief and medicines necessary for the persons of their respective townships to come under their charge, but no contract shall extend beyond one year. Such contract shall be given to the lowest competent bidder, the county commissioners reserving the right to reject any or all bids. The physicians shall report quarterly to the county commissioners on blanks furnished by the commissioners the

names of all persons to whom they have furnished medical relief or medicines, the number of visits made in attending such persons, the character of the disease, and such other information as may be required by the commissioners. The commissioners may discharge any such physician for proper cause."

This section provides for the employment of *township* physicians. Section 2522, General Code, provides in part as follows:

"The infirmary directors shall make all contracts and purchases necessary for the county infirmary and prescribe such rules and regulations as it deems proper for its management and good government, and to promote sobriety, morality and industry among inmates. * * *"

This section confers the only power that is found in the statutes for the employment of a physician for the infirmary itself. There is no provision of law specifically applicable to the infirmary directors or to the expenditure of their moneys requiring the issuance of the auditor's certificate as a condition precedent to the making of a valid contract by such infirmary directors.

Section 5660, General Code, familiarly known as the "Burns Law" under which the auditor is required to issue certificates for certain contracts, provides as follows:

"The commissioners of the county, the trustees of a township and the board of education of a school district shall not enter into any contract * * * unless the auditor or clerk * * * first certifies, etc."

This section does not apply to the infirmary directors; therefore, the question which the auditor asks respecting the necessity for the issuance of a certificate by him, and the effect of his failure to issue it upon the validity of the contracts, may be dismissed from consideration.

In this connection I beg to cite Sections 2537 and 2538, General Code, without quoting them, because upon examination they will be found to be inconsistent with the idea of Section 5660.

The only question remaining to be considered is the effect of the contract extending beyond the term of office of the infirmary directors. This question is rendered interesting, but not materially different by the fact that the board of infirmary directors, as such, will be abolished on January 1, 1913, and thereafter the county commissioners will by virtue of the act found in 102 O. L., 433, succeed to the powers and duties of the infirmary directors.

As to the township physician, it seems to me that Section 2546 itself contains a sufficient answer to the question which you suggest. Inasmuch as this section provides that a contract for township medical services shall be entered into after competitive bidding and that the directors (hereafter the commissioners) may discharge such physicians for proper cause, I am of the opinion that there is no principle of law upon which it can be held that the infirmary directors may not contract for services beyond their terms of office. The express limitation that the contract shall not extend beyond one year excludes all other limitations and the reservation of the power to discharge which would vest in the successors of the directors, making the contract, as well as in those directors themselves, safeguards the exercise of this power against any of the abuses which are sometimes said to flow from permitting a contract to be made so as to extend beyond the term of office of the contracting officer.

In Commissioners vs. Ranck, 6 Circuit Decision, 133, it is held that a "con-

tract for the employment of a janitor, made by a board of county commissioners, for a period of time extending beyond the time when a change is certain to occur in the personnel of the board is against public policy and void unless made in good faith in the interest of the public and for a time reasonable under the circumstances."

This decision is a very well considered one and many authorities are cited, but at least insofar as the employment of township physicians is concerned, it has no application. The Legislature itself has determined what is a "reasonable time" for the employment of such physicians and has safe-guarded the interests of the public by vesting in the controlling board the power of discharge.

The case of the infirmary physician, however, is somewhat different. As already remarked the infirmary directors employ this physician under their broad and general power to "make all contracts and purchases necessary for the county infirmary." There is no specific authority here to enter into a periodical contract with any physician. The infirmary directors have discretion as to whether or not they will employ such physician; they may prefer to call in physicians upon cases requiring medical attendance as they occur and to pay such physicians their regular fees for such services. On the other hand, they clearly have power to enter into such periodical contracts and in the exercise of good business policy ought certainly to do so.

It cannot be held, under the case above cited, that all contracts extending beyond the term of office of the contracting board, in the absence of specific authority, are void or even voidable. It is only such contracts as cannot be shown to have been made under circumstances showing that the public good required them to be made for such period of time as are against public policy. In the specific case there might be some reason requiring an annual contract. For example, it might be shown to be impossible or impracticable for the directors to secure the services of physicians on the contractual basis for a period of time less than a year. Under those circumstances a year might not be an unreasonable time and the extension beyond the term of office might be shown to be reasonably "necessary for the county infirmary" within the meaning of Section 2522 and reasonably "required by the public good" within the doctrine of Commissioners vs. Ranck, *supra.*

It is clear, however, that the case cited does establish the proposition that *prima facie* a contract of this sort, extending beyond the term of office of the contracting board is, in the absence of special provisions like those in Section 2546, not perfectly valid.

The further question is then presented as to whether such contracts are void *ab initio* or simply voidable. The facts presented in Commissioners vs. Ranck, *supra,* were such as to make an answer to this question somewhat difficult. It appears from the report of this case that after the unauthorized contract was entered into the board of commissioners rescinded it and employed another person as janitor; whereupon the plaintiff sued for services during the first month of the employment of his successor. The same conclusion would have been reached by the court if it had held the contract merely voidable as would be reached by holding it void. There is a fundamental difference, however, between the two cases. In the case of the contract being void *ab initio* no right of action lies for recovery thereon by either party. If the contract is simply voidable, however, the party performing the services thereunder prior to its avoidance by the adversary party is entitled to compensation therefor.

The cases cited in Commissioners vs. Ranck seem to hold that such contracts being against public policy are entirely void. In other words, these cases are not decided upon the ground that the interests injured are those of the successors

in office of the employing authority, but those of the public generally. See Commissioners vs. Taylor, 123 Ind., 148; Craft vs. McConnoughy, 79 Ill, 436; People ex rel vs. Chicago, etc., Co., 22 N. E. 798, and other cases cited in the opinion of Commissioners vs. Ranck.

I am, therefore, of the opinion that a contract by a board of infirmary directors with a physician for services to be rendered to the inmates of the infirmary during the year, which year extends beyond the term of office of the infirmary directors is, unless circumstances exist making the period of time reasonable, and the extension beyond the term of the directors promotive of the public interest, to be regarded as entirely void. Whether or not these facts exist must be determined in each particular instance. The county auditor in the exercise of the powers and duties vested in him by law may satisfy himself upon this point, and if in his judgment the public interests are not to be subserved by the unusual contract may refuse to issue warrants under any such contract.

As to whether or not appropriations may be made is a question with which the auditor has nothing whatever to do. Inasmuch as the infirmary directors are, under the present law, themselves levying authorities, it is their duty to appropriate funds under their control and not that of the county commissioners. If the directors see fit to appropriate money for this purpose they cannot be restrained from so doing as the money so appropriated might be expended under another contract lawfully made.

Yours very truly,
TIMOTHY S. HOGAN
Attorney General.

629.

"FINES AND PENALTIES" DOES NOT INCLUDE COSTS—FINES IN HUMANE CASES MAY NOT BE PAID TO LAW LIBRARIES.

The words "fines and penalties" as employed in Section 3056, General Code, providing for the payment of such to law library associations, cannot be construed to include "costs."

Section 12971, General Code, providing for the disposition of fines assessed in humane cases must be construed as an exception to Section 3056, General Code, and fines assessed in such cases cannot be paid to the Law Library Association.

September 13, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your communication of August 24, 1912, which is as follows:

> "Some question has arisen in Hamilton County in regard to the payment of fines by the police court to the law library of that county.
>
> "Please give us your opinion in answer to the following questions:
>
> "1. Can the words 'Fines and Penalties' contained in Section 3056 be construed to cover costs?
>
> "2. Section 12971 provides for the disposition of fines in humane cases. Shall the fines in such cases be included in determining the amount to be paid to the law library association?"

Answering your first interrogatory, I am of the opinion that the expression

"fines and penalties" cannot be construed to cover or include the word *"costs."* The legal and dictionary definitions of these three words are not the same; and when the statute referred to by you says, "fines and penalties," it must be strictly construed and limited to the accepted meaning thereof.

If the Legislature intended to include *"costs"* it *should have said so.* The common meaning of these words is as follows:

> "A fine is the exaction of a money payment as a punishment for an offense or dereliction of any kind—as a fine for assault."
>
> "A *penalty* is money recoverable by virtue of a penal statute." Sometimes called a *forfeiture.*
>
> "Costs are the sums fixed by law or allowed by the court for charges in a suit."

Costs are based upon the services of the officers and witnesses; and are a separate and distinct item in the final judgment of the magistrate.

That these three items are entirely distinct is shown in Section 4599 of the General Code, where the clerk of the police court is required to make a report of all *fines, penalties, fees,* and *costs,* to the city auditor in *city cases;* and a like report to the county auditor in *state cases.* This is a requirement of the clerk of the very court referred to in your letter, and it shows that *costs are a separate item* to be accounted for by the clerk *as such,* and cannot be included in any other name or term.

Your second question is determined by a comparison of Sections 3056 and 12971 of the General Code.

There is at first sight an apparent conflict between these provisions; but it must be remembered that statutes on the same subject must be read and construed together, and the intention of the Legislature determined therefrom.

Section 3056 is the older statute, having been enacted on the 27th of April, 1872 (69 O. L., 165). It has been amended three times since, but retains its original substantial form as to these fines and penalties. At that time there was no law for the incorporation of societies for the prevention of cruelty to animals. On March 29, 1875, the law was passed for that purpose (720 L., 129). This opened up a new field for a new kind of prosecutions, never contemplated in Section 3056 G. C., as originally passed. Something had to be done to keep up this society, which was doing a new work in Ohio. So the Legislature, on April 11, 1876, (730 L., 219), passed the law which is carried into Section 12971, through various amendments. Now, the effect of Section 12971 is to take out of the provisions of Section 3056 all cases instituted by a humane society, and leave the other cases "prosecuted in the name of the state," still subject to the provisions of Section 3056.

The Legislature, no doubt, had before it the older statute when it passed the one relating to cases prosecuted by the humane society; and intended that the first law should be modified to that extent. The last section cited by you does that very thing, and by implication the first law, Section 3056, is modified or repealed to that extent.

There is nothing inconsistent with such a conclusion, when both statutes and their history, and objects, are considered.

Therefore, it is my opinion that such fines as are mentioned in Section 12971 are not to be "included in determining the amount to be paid to the law library association."

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

643.

BOARDS OF EDUCATION—CONTRACT BY TOWNSHIP BOARD FOR TUITION OF BOXWELL PUPILS EXEMPTS BOARDS, HAVING NO HIGH SCHOOLS, FROM PAYMENT OF TUITION OF PUPILS ONLY WITHIN THREE MILES OF SCHOOL SO PROVIDED—BOARDS MAINTAINING HIGH SCHOOL GOVERNED BY SECTION 7748 GENERAL CODE.

Where a township board of education having no high school, enters into a contract for the payment of tuition for the schooling of its Boxwell graduates with a village district high school within the township, Boxwell pupils resident in the township district, living more than three miles from the high school provided by the board may attend any other high school in the state in accordance with 7744 General Code and their tuition must be paid by the township board as provided by Section 7747, General Code.

The language of Section 7748, General Code, providing for the payment of tuition of pupils living more than four miles from the school provided by a board of education or for transportation of such pupils in lieu of such payment, is general in its application, and since high schools having no boards of education are provided for by Sections 7747 and 7750, said language in 7748 is restricted in its application, to boards of education maintaining high schools of their own.

September 23, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Under date of September 17, 1912, you submit for my opinion the following:

> "Scipio Township School District does not mantain a high school. The board of education of this district has an agreement with the board of education of Republic Village to furnish schooling for Boxwell graduates of Scipio Township School District. Republic Village is situated in Scipio Township. I. H., a Boxwell graduate of Scipio Township School District, residing more than three miles, to-wit, three and one-half miles from the above mentioned Republic village, attends the high school at Tiffin. Tiffin is in Clinton township, and adjoins Scipio township.
>
> "Can a bill presented by the Tiffin Board of Education to the Scipio Township Board of Education for the tuition of the said I. H. be legally paid from the funds of Scipio Township School, assuming that the legal notice was given and that the schools of both Republic Village and Tiffin are of the kind prescribed in the statutes providing for the education of Boxwell graduates?"

Section 7744 of the General Code provides with respect to the Boxwell graduates' diplomas, that

> "* * * Such diploma shall entitle its holder to enter any high school in the state."

Sections 7747 and 7750 provide as follows:

Section 7747.

"The tuition of pupils holding diplomas and residing in township or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other non-resident pupils."

Section 7750.

"A board of education not having a high school may enter an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

Under Section 7747, township or special school districts in which no high school is maintained are required to pay a tuition of pupils attending high schools in other districts.

Section 7750 provides that any board of education having no high school, may, by entering into contract for the schooling of its high school pupils with one or more boards of education of the same or adjoining township, exempt itself from paying the tuition required by Section 7747 of the General Code, except as to pupils who live more than three miles from the school designated in the contract.

Inasmuch as in the case you present the pupil lives more than three miles from the school designated in the agreement, said Scipio township board is not exempted by Section 7750 of the General Code from paying a tuition of said pupil as required by Section 7747, supra. I am informed that the difficulty which prompts your inquiry arises by reason of the language of Section 7748 of the General Code, which is italicized in this section as it is herewith quoted:

"A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required

to pay the tuition of any pupil for more than four school years; *except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or* in lieu of paying such tuition the board of education *maintaining* a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. **Where more than one high** school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a township or special district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a Boxwell-Patterson graduate."

The language italicized cannot, in my opinion, under any mode of construction, be held to exempt Scipio township board from the payment of tuition of the pupils living more than three miles from the Republic school provided by its contract.

This language is of a general nature with respect to which the provisions of Section 7750, General Code, with reference to boards of education, having no high school, must be regarded as a modification. In brief, the Legislature having provided in Section 7750, General Code, for the payment of the tuition of pupils living more than three miles from a high school, provided by a board of education having no high school, the requirement of Section 7748, General Code, that the tuition of pupils living more than four miles from a school provided by a board of education, must be paid by such board, must be confined to boards of education other than those not having a high school.

I am therefore of the opinion that this language applies only to such boards as maintain a high school of their own.

To summarize, therefore, the right of a Boxwell graduate to attend any high school is fixed by Section 7744 of the General Code. The liability for tuition for such pupil of the school district having no high school is fixed by Section 7747 of the General Code. Scipio township board is not exempt from such liability for pupils living more than three miles from the Republic school, by virtue of contracts made under authority of Section 7750 of the General Code. And lastly the above quoted italicized language of Section 7748 of the General Code cannot operate to dispense with the liability resting upon a board making such contracts to pay the tuition of pupils living more than three miles from a school contracted for.

I am, therefore, of the opinion that said Scipio township school district is liable to the board of education of Tiffin for the tuition of said "I. H." and that tuition may be paid from the funds of the Scipio township school district as provided by Section 7751 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

667

ROADS AND HIGHWAYS—PROSECUTING ATTORNEY LEGAL ADVISER OF ONE MILE ASSESSMENT PIKE COMMISSIONERS—FINDING OF BUREAU FOR EXTRA COMPENSATION FOR SERVICES, JUSTIFIED.

The road commissioners under the one mile assessment pike law are appointed by the county commissioners, are required to file their maps, profiles and reports with the latter, cannot levy a special tax but must act through the commissioners, must turn over their completed work to the commissioners and are clearly made the agents of the commissioner for the accomplishment of county work.

Under 2917, therefore, General Code, the prosecuting attorney is made the legal adviser of the Pike Commissioners and must serve them without compensation.

A finding of the Bureau of Inspection and Supervision of Public Offices is, therefore, justified for the amount of any extra compensation paid to a prosecuting attorney for services rendered the pike commissioners.

October 9, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of August 6, 1912, is received, in which you state:

> "Under the opinion of your predecessor dated September 20, 1910, published in the annual report of that year, page 435, a state examiner of this department returned a finding against Mr. John H. Clark for payments made to him by the one mile assessment pike commissioners for legal services while he was prosecuting attorney. Mr. Clark does not agree with the ruling, and we respectfully request you to consider the same and give us your own opinion in the matter."

The question answered in the opinion referred to was as follows:

> "May a prosecuting attorney be employed by the board of pike commissioners, organized under the one mile assessment pike law, and be legally paid for his services out of the funds of the pike district in addition to his salary as prosecuting attorney."

Section 2917, General Code, provides:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

Section 2412, General Code, referred to in the above section provides:

> "If it deems it for the best interests of the county, upon the written request of the prosecuting attorney, the board of county commissioners may employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other officers and boards, in their official capacity."

By virtue of Section 2917, General Code, the prosecuting attorney is made the legal adviser of all county officers and boards, and also of all township officers.

Section 4761, General Code, prescribes what official shall be the legal adviser of boards of education. The statutes specifically provide who shall be the legal adviser of a city, and specifically authorize the employment of legal counsel for a village. There is no specific provision of statute as to who shall be the legal adviser of road commissioners, neither are said commissioners specifically authorized to employ legal counsel.

The construction and repair of roads outside of municipalities, usually devolve upon the county commissioners, or upon the township trustees. Such work is considered part of the work of the county or of the township.

Sections 7232, et seq. General Code, cover the one mile assessment pikes. There is no specific provision therein as to a legal adviser, or specific power to employ counsel.

The board of road commissioners under the one mile assessment pike law, are constituted by a body corporate and are authorized to sue and can be sued.

Section 7265, General Code, provides:

> "The road commissioners and their successors shall be a body corporate, under such name as the commissioners of the county may designate, for the purpose of carrying into effect the provisions of this chapter. They shall prosecute for all obstructions to the road, or for injuries done thereto, or to bridges thereon. The amount recovered in each case shall be the amount of damages actually found by the court or jury, and the interest thereon."

Section 7266, General Code, provides:

> "In all cases the road commissioners may sue, either before a justice of the peace, or in the court of common pleas of the county, as in other cases, and the amount collected in each case shall be used for the benefit of the road, and be paid over to the road commissioners."

The roads under this act are established upon petition to the county commissioners. The county commissioners are then authorized to appoint the pike commissioners. Said pike commissioners are required to make settlement with the county commissioners.

Section 7234, General Code, provides:

> "Thereupon the county commissioners shall appoint three judicious freeholders of the county resident within the bounds of said road, to be commissioners of such free turnpike road, who, by the name fixed by the county commissioners, shall be a body corporate, for the purpose of laying out and establishing a free turnpike road between the points within the county named in the petition. The county commissioners shall ap-

point such persons to be commissioners of such free turnpike road as have been recommended by petition of a majority of the landowners, if such recommendation is so made."

Section 7262, General Code, provides:

"The road commissioners, annually, on the first Monday in December, shall make a full settlement with the county commissioners of the several counties in or through which their respective roads are located, and file them with a statement of all their receipts and expenditures within the county, and deposit a copy thereof in the auditor's office of the county."

Section 7263, General Code, provides:

"If such road commissioners fail to make settlement as provided by the next preceding section, the county commissioners, at the next term of the court of common pleas of the county shall cause an action to be instituted against them, in the corporate name of the road, to enforce such settlement."

Section 7264, General Code, provides:

"Such action shall be conducted by the prosecuting attorney of the county, and such delinquent road commissioners shall be prima facie liable for the full amount of taxes and money which were applicable to the construction of the road as they appear upon the tax duplicate of the county. In all cases judgment shall be rendered against them for costs of the suit."

The above section specifically provides that the prosecuting attorney shall conduct the suit for settlement on behalf of the county commissioners. It would not be conducive to good results to permit the prosecuting attorney to act for the pike commissioners and to receive extra compensation therefor, when he might be required to enter suit on behalf of the county commissioners, against his former clients. Situations occur wherein the prosecuting attorney could not represent a county official, as where county officials are plaintiff and defendants. In such case the prosecuting attorney must choose which he will represent. Section 7264, supra, in effect chooses for him and requires him to represent the county commissioners.

In order to determine the status of the road commissioners under the one mile assessment pike law, in connection with the county commissioners, it will be necessary to examine the entire act. Several of the sections will now be quoted.

Section 7237, General Code, provides:

"The road commissioners, so appointed by the board of county commissioners, and who qualify as hereinafter provided, within a reasonable time, shall proceed to lay out and establish such free turnpike road within the points named in the petition. As soon thereafter as can be done they shall return to the board of county commissioners a map and profile of the road, including upon the map, as near as can be done, the names of the land owners, whose property is liable to be taxed for its construction, as hereinafter provided, with a statement of the probable cost of building and completing it."

Section 7238, General Code, provides:

"The board of county commissioners shall forthwith thereafter transmit to the auditor of the county the map, profile and statement as returned to them by the road commissioners, and, at the same time, direct the auditor to levy upon the grand duplicate of the county, for the purpose of constructing, improving, and repairing such road, the amount of the tax, and for the number of years petitioned for. The auditor shall enter the levy upon the duplicate for collection, on all the lands and taxable property within the bounds of the road, as laid out and established in like manner and subject to like penalties and forfeitures as other taxes are entered thereon. No such tax shall be levied for an amount or for a term of years greater than that set forth in the petition."

Section 7239, General Code, provides:

"If it is ascertained by the board of county commissioners, by the report of the road commissioners appointed by them, or otherwise, that the property upon the tax duplicate for the purpose of raising a fund for the construction of a free turnpike or road, under the provisions of this chapter, will not be sufficient during the time for which extra taxes may be levied and collected to build and construct a good road or the kind of road provided for, and if no bonds have been issued that remain unpaid or if there are no unpaid certificates outstanding for the work and labor done on said road or proposed road, the board shall order that work on the road or proposed road shall not be done, and shall at once notify the road commissioners thereof."

Section 7240, General Code, provides:

"The county commissioners shall order the county auditor not to levy further tax or any tax for said road or proposed road, and all extra taxes heretofore levied for the road or proposed road and not paid shall not be treated as delinquent taxes but, by like order, be cancelled off the tax duplicate against the lands and personal property on which they were levied."

Section 7241, General Code, provides:

"The road or proposed road shall not be built until the county commissioners are satisfied that the extra taxes to be levied will build a good and sufficient turnpike road as contemplated by the provisions of this chapter."

Before the road commissioners can proceed with the construction of the proposed road they must make a map and profile of the same, with a statement of the probable cost of construction and the names of the landowners whose property is liable to be taxed, and must file the same with the county commissioners. The county commissioners are thereupon required to transmit the same to the county auditor and direct such auditor to levy the tax. By virtue of Sections 7239 and 7240, General Code, the county commissioners are authorized to stop the construction of the road if they ascertain that the special taxes to be levied will not be sufficient to construct a good road. By virtue of Section 7241

the proposed road is not to be built until the county commissioners are satisfied that the extra taxes to be levied will be sufficient to construct a good road as contemplated by the act.

Section 7245, General Code, provides:

> "The road commissioners shall severally execute a bond payable to the state, for the use of the county in which the road is located, with good and sufficient sureties, to be approved by the board of commissioners of the county, and in such sum as such board thinks proper, conditioned for the faithful performance of their duties as such road commissioners. They shall each take an oath faithfully and honestly to discharge their duties, before they shall be authorized to do or perform any matter or thing under this chapter."

The bond to be given by each road commissioner is to be made payable to the state, but is for the use of the county.

Section 7257, General Code, provides:

> "So much of the taxes annually levied for road purposes by the trustees of townships which are collected within the bounds of such road, including the two days' labor authorized by law, shall be applied in the construction of the road under the direction of the road commissioners, and the payment of the principal and interest of bonds, if any have been issued therefor."

Section 7260, General Code, provides:

> "So much of the taxes mentioned in section seventy-two hundred and fifty-seven, levied and collected on taxable property within the bounds of a road located under the provisions of this chapter, which is not discharged in labor, and which is paid into the county treasury, shall be paid by the treasurer, upon the warrant of the county auditor, to the road commissioners of such road to be expended by them in constructing it, and to the payment of the principal and interest of bonds, if any have been issued therefor, this section shall apply to such taxes as have been levied heretofore and have not been paid to township trustees."

These sections show that the one mile assessment pike is to receive the benefit of the road tax in conjunction with other roads, township and county.

Section 7267, General Code, provides:

> "When the road commissioners deem they have their road completed in a good substantial manner, the bridge and culverts thereon having been built, and the road graded and macadamized, or paved, they may make application to the board of county commissioners to receive it. The county commissioners, within a reasonable time after the filing of such application, shall proceed upon actual view to examine the road. Upon such examination, if it is their opinion that the road is in suitable condition to be received as completed, they may receive it, and the road

may be kept in repair as provided in chapter eleven of this title. The provisions of this section and section 7276 shall apply to all pending proceedings for the establishment of one mile assessment pikes."

Section 7268, General Code, provides:

"When a road, as provided for under this chapter has been completed and received by the county commissioners, they shall enter such finding upon their journal, and the county auditor shall certify it to the trustees of the several townships through which a part or all of the road runs. When the road is paid for, and its bonds and coupons, if bonds have been issued thereon, have been redeemed, the road commissioners, by order of the county commissioners, shall cease to be a body corporate."

When the road is completed it may be turned over to and received by the county commissioners. It is then to be repaired in the manner provided for other roads under chapter eleven of title four of the statutes. It is provided also that when the road is paid for and the bonds redeemed the road commissioners cease to be a body corporate.

Attention has been called to the provisions of Sections 7270 and 7308, General Code.

Section 7270, General Code, provides:

"The expenses of surveying and locating the road shall be paid out of the county treasury, and the other expenses incident to the construction of the road shall be paid out of the funds appropriated by this chapter to the construction thereof. The sum paid the surveyor and his assistants shall not exceed the customary wages per day for each day they are actually employed in locating and surveying the road."

This section shows that a certain part of the expense shall be paid from the county treasury, this tending to show that the construction of such road is part of the work of the county.

Section 7308, General Code, provides:

"When the commissioners of a free turnpike road have completed it, they shall forthwith make a final report to the county commissioners of the total expenditures on the road and deposit their books and papers with the county commissioners. Upon the acceptance of said road by the county commissioners, as provided in this chapter, and the approval of the final report, the road shall be kept open and in repair, as provided in chapter eleven of this title. Money remaining in the hands of the free turnpike commissioners upon the acceptance of the road by the county commissioners shall be paid into the county treasury and paid out in conformity to law. Whenever any free turnpike road, constructed in accordance with the provisions of this chapter, shall have been fully paid for, and the bonds and coupons, if bonds have been issued thereon, shall have been redeemed, and the pike commissioners of such road shall have ceased to exist, any money remaining in the treasury of the county in which such road was or shall be constructed, and which was derived from taxation or the sale of bonds to construct

such road, shall upon the order of the county commissioners, be paid over, upon the warrant of the county auditor in such amounts and at such intervals as they deem proper, to the pike superintendent, or superintendents as the case may be, to be by such superintendent or superintendents used, under the provisions of chapter eight, title IV, part II, in making repairs of such road, for the construction of which such remaining money was raised. And this provision shall apply in all cases where there is now a balance remaining in the county treasury, as well as to all such cases as may arise in the future."

This section only follows the general tendency of all the other provisions of the act, that is, that the construction of the one mile assessment free turnpike is county work.

Instead of the county commissioners constructing such pikes under their personal supervision, they are authorized, upon petition to them, to appoint three road commissioners, who are to have direct supervision of the construction of such road. The road commissioners are made a body corporate, but the district upon which the special tax is levied, is not made into a political subdivision, nor into a special road district.

The road commissioners do not levy the special tax. This is done by the county commissioners. The county commissioners may also stop the construction of the road if they find that the fund to be raised is not sufficient to construct a proper road.

The road commissioners are required to make settlement annually with the county commissioners, and when the road is completed they must forthwith make a final report to the county commissioners and deposit their books and papers with the county commissioners.

After the road is turned over to and received by the county commissioners, the duty of the road commissioners as to the road itself ceases, and when the road is paid for, and bonds and coupons are redeemed, the road commissioners cease to be a body corporate by order of the county commissioners, as shown by Section 7268, General Code, supra.

One of the purposes of appointing road commissioners is to have the pike built under their direct supervision, rather than under the county commissioners. The road commissioners are not independent of the county commissioners, but are dependent upon them in a great measure. The road commissioners are engaged in a work which rightly belongs to the county, the construction of a road. They do not continue as a body corporate indefinitely. Upon the happening of the conditions set forth in Section 7268, General Code, they cease to exist. The road itself is, however, continued.

The road commissioners are in fact the agents of the county commissioners in the construction of the one mile assessment pike. They are appointed by the county commissioners and are required to file their maps, profiles and reports with the county commissioners. They cannot levy the special tax but must act through the county commissioners. They are the agents of the county commissioners in this work.

It is my opinion, therefore, that the provisions of Sections 2917, General Code, will cover the board of pike commissioners under the one mile assessment pike law, and that the prosecuting attorney shall be the legal advisor of such board without extra compensation.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

691

DITCHES, COUNTY—LOWER LAND OWNER MAY PETITION FOR DITCH EXTENDING HIGHER UP THAN OWN LAND—COUNTY COMMISSIONERS MAY EXTEND DITCH HIGHER THAN PETITION CALLS FOR—ASSESSMENT OF UPPER LAND OWNER ACCORDING TO BENEFIT.

Under Sections 6440 *and* 6443, *General Code, a land owner may petition for the construction and tiling of a county ditch which extends higher up the water course than his own land extends.*

Under 6443, *General Code, the county commissioners may upon their own initiative extend a ditch higher up the water course than the land of the petitioner extends, even though the petition only provides for a ditch upon the land of the petitioner where such extension is necessary for the better accomplishment of the improvement and will be necessary or conducive to the public health, convenience or welfare of the neighborhood.*

Assessments must be made according to benefits and if the upper land owner derives no benefit from the improvement, he cannot be assessed for the same. He may be assessed, however, when by reason of artificial interference with natural conditions, he has made the construction of the ditch necessary for the good of the lower land owners or the neighborhood.

October 4, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Under date of September 19 you requested my opinion with reference to a set of facts, included in a letter submitted to you by the County Commissioners of Crawford County, which communication read in part as follows:

> "Can Mr. A, a land owner, petition for the construction and tiling of a county ditch higher up the water course than his own land extends? If not, can the county commissioners when they view the ditch improvement extend the ditch and the tiling of the same further up the water course than what the petition calls for, under section 6443, G. C., when they think that the object of the improvement will be better accomplished thereby?
>
> "We have in this county this situation: Mr. A. owns a farm through which there is a *natural water course* and he wants a county ditch constructed and tiled through the same. The county commissioners think that the improvement ought to extend further up the water course than what Mr. A's land goes. It will not make a satisfactory job to have the ditch constructed and tiled only up as far as A's land extends. The object of the improvement would be better accomplished by extending the ditch and tiling about one mile further up the water course than what A's land extends, but the land owners on that mile of territory do not care for the improvement. Now, if Mr. A. petitions for the construction and tiling of a county ditch on that water course, have the commissioners the right to grant and extend the improvement higher up the water course than what Mr. A's land goes and assess the land owners on that extension for said improvement without the consent of them or any of them?"

Inasmuch as the statutes seem to employ the term "natural water course "when speaking of living streams, whilst the term "water course" is used in accordance with Section 6442 as synonymous with the term "drain," the assumption is undoubtedly justified that the commissioners intended in above letter, to refer to a water course or natural drain and that the term "natural water course" in the letter should be "water course."

The question included in this letter may be resolved into the three following questions, based upon the situation therein presented:

> "1. May the land owner petition for the construction and tiling of a county ditch higher up the water course than his own land extends?
>
> "2. May the county commissioners upon their own initiative extend such ditch higher up the water course than the land of the petitioner extends, when the petition only provides for a ditch upon his own land?
>
> "3. In the event that either of these powers exists, may the owners upon whose land the ditch is constructed above the land of the petitioner, be assessed without their consent for the improvement made under the exercise of such powers?"

Sections 6443 and 6447 provide as follows:

> "Section 6443. The board of county commissioners, at a regular or called session, *when necessary* to drain any lots, lands, public or corporate road or railroad, *and it will be conducive to public health, convenience or welfare, in the manner provided in this chapter, may cause to be located and constructed, straightened, widened, altered, deepened, boxed, or tiled,* a ditch, drain or water course, or box or tile part thereof, or cause the channel of a river, creek or run, or part thereof, within such county, to be improved by straightening, widening, deepening, or changing it, or by removing from adjacent lands timber, brush, trees or other substance liable to obstruct it. *The commissioners may change either terminus of a ditch before its final location, if* the object of the improvement will be better accomplished thereby."

> "Section 6446. Application for such improvement shall be made to the commissioners of the county, *signed by one or more* owners of lots or lands which will be drained or benefited thereby, or shall be made by the street commissioner or superintendent of the road district in which it is required to be done. The trustees of an original surveyed township owning land granted by congress for the support of common schools, or the infirmary directors of a county, may make such application and file the petition and bond provided for in this chapter."

> "Section 6447. A petition shall be filed with the county auditor setting forth the necessity and benefits of the improvement and *describing the beginning, route and termini thereof.* It shall also contain the names of the persons and corporations, public or private, who, in the opinion of the petitioner or petitioners are in any way affected or benefited thereby. There shall be filed therewith a bond, subject to the approval of said auditor, payable to the state of Ohio, with at least two sufficient sureties, in not less than two hundred dollars, conditioned for the payment of all costs if the prayer of the petition is not granted or is

dismissed for any cause. If the name of a person or corporation, either public or private, in any way affected by the proposed improvement, is omitted from the petition, the county commissioners, upon discovering that such omission has been made, shall supply such name, and cause notice to be served as herein provided."

With respect to the first question it will be observed that under Section 6446, General Code, the petition need be presented by one or more owners of lots or lands which will be drained or benefited by the improvement and that under Section 6447, General Code, said petition must contain the name of person or corporation, public or private, for whom the improvement contemplates benefit. Also under 6447 the petition must describe the beginning, route and termini of the improvement.

I am of the opinion that under these statutes, the provision is clearly made for such a petition signed by a lower land owner as the first question contemplates. The said question may therefore be answered affirmatively.

In answer to question No. 2 the italicised portion of Section 6443, above quoted, provides that in the manner provided in this chapter, the commissioners may cause to be located, constructed and tiled a ditch, drain or water course, when necessary or when it will be conducive to public health, convenience or welfare. Said section provides further that the commissioners may change either terminus of a ditch before its final location, if the object of the improvement will be better accomplished thereby.

In the case of Marsh vs. County Commissioners, 26 Weekly Law Bulletin, page 4, Judge Rockel says:

"It is contended that this notice is defective because the route therein described is not the same as that in the petition, and, therefore, does not give the "prayer" of the petition, as required by the statute above quoted.

"The commissioners, in determining the location of the route, did not agree with the petitioner in the termini of the proposed ditch. Instead of commencing at a point in Newton Marsh's land, about one hundred rods down the proposed ditch, at a point on the line of the lands of Wm. E. Yeazell and Andrew Phalen, and instead of terminating the ditch at one hundred rods southeast of Andrew Phalen's and Jonathan Markly's lands, they concluded to run it about 600 feet further, to the Old Columbus road.

"Under the broad language of Section 4448, and the liberal interpretation that is always applied to our ditch laws, there is no doubt in my mind but that the commissioners had ample authority to change "either terminus of the improvement" if they were of the opinion that the object of the improvement will be better accomplished thereby."

The second paragraph of the syllabus in the case of Railway Company vs. Commissioners, 63 Ohio State, page 32, reads as follows:

"Under section 4448, of the revised statutes (now 6443 General Code), the commissioners may change either terminus of a ditch before its final location, when in their opinion the object of the improvement will be better accomplished thereby; and their official action making the change raised the presumption that there was legal cause therefor."

In the case of Gease vs. Carlisle, 15 Ohio Decisions, nisi prius, page 435, at page 436, Judge Dilion says:

"There was an evident purpose in providing that the commisioners could change the termini of any ditch, drain or watercourse, and expressly omitting that power with reference to a river, creek or run, That purpose evidently is based upon two considerations; First, that a river, creek or natural run has its termini already fixed by nature and it would be absurd to say that the commissioners might change the termini thereof. A second consideration is that as to a ditch or other artificial body to be established, it may be apparent to the commissioners that the judgement of the petitioner is not at all conclusive as to the manner in in which the lands should be drained, and that upon a hearing the commisioners might find that the purpose would be more fully accomplished by change of proposed termini. I am of the opinion, therefore, that commissioners have only power to change the termini of a ditch, a drain or artificial water course, and that as to any river, creek, run or natural water course they have no such power."

The fourth paragraph in the case of Chesbrough, vs. Commissioners, 37 Ohio State, 508, provides as follows:

"It is the *public health, convenience, or welfare of the community* to be affected by the proposed ditch, and not that of the public at large, that is to be regarded in the construction of a ditch. Hence, if it appears that the proposed ditch will be conducive to the public health, convenience and welfare *of the neighborhood*' through which it will pass, the commissioners are authorized to construct the same."

In view of these authorities, I am of the opinion, that the commissioners may extend the terminus of the proposed ditch on lands above those of the petitioner, provided that they exercise a legitimate discretion in determining that said improvement will be accomplished thereby and will be necessary or conducive to the public health, convenience or welfare of the community or neighborhood.

With respect to question No. 3, Sections 6442 and 6452, General Code, provides as follows:

Section 6442:

"The word 'ditch' as used in this chapter shall include a *drain or watercourse.* The petition for such improvement shall include a side, lateral, spur or brench ditch, drain or watercourse necessary to secure the object of the improvement, whether it is mentioned therein or not; but no improvement shall be located unless a sufficient outlet is provided. The words *'according to the benefits'* as used in this chapter in directing boards of county commissioners to assess lands for ditches, and in directing engineers to report assessments therefor, shall *not authorize an assessment for benefits conferred upon lands by nature nor the right of easement of the owners of superincumbent lands to pass the water therefrom through* natural water courses."

Section 6452:

"The county commissioners may hear and determine at the same time and under the same petition, the necessity of locating a new ditch, or a ditch partly old and partly new, or of deepening, widening, straightening, or altering an old ditch, as the necessity of the case requires, and shall cause such entry to be made on their journal as in their judgement is required. Estimates by the surveyor, engineer, or commissioners,

shall be made as provided in this chapter, *and no assessment shall be made on lands upon any principle other than that of benefits derived,* and *in proportion thereto, in deepening,* widening, straightening, or altering a ditch. *No lands, lying below, shall be assessed for the benefit of lands lying above. All assessments shall be made in proportion to the benefits derived."*

The case of Blue vs. Wentz, 54 Ohio State, page 247, in the first paragraph of the syllabus thereof, provides as follows:

"Where the lands of an owner, by reason of their situation, are provided with sufficient natural drainage, they are not liable for the costs and expense of the ditch necessary for the drainage of other lands, simply for the reason that the surface water of his lands naturally drain therefrom to and upon the lands requiring artificial drainage."

The third paragraph of the syllabus of the case of Pontifical College vs. Kleeli, 5 Nisi Prius, page 241, provides as follows:

"Where an upper proprietor has drained his lands without exceeding legal rights, and no advantage results to him from a township ditch which he did not enjoy before it was constructed, he is not chargeable with any part of the assessment for the cost of such an improvement, and an injunction will lie against the collection of an assessment levied on his land."

The syllabus in the case of Mason vs. Commissioners, 80 Ohio State, page 151, is as follows:

"A landowner may, in the reasonable use of his land, drain the surface water from it into its natural outlet, a watercourse, upon his own land, and thus increase the volume and accelerate the flow of water without incurring liability for damages to owners of lower lands; and his land is not subject to assessment for the cost of a ditch, or an improvement, that will not benefit its drainage, but is constructed to prevent overflow from the watercourse or to benefit the drainage of servient lands."

On the other hand the fifth paragraph of the case of Mason vs. County Commissioners, 10 Ohio Circuit Court, page 201, is as follows:

"Where plaintiffs, by reason of *artificial* improvements on their lands above, helped to make it necessary for the protection of the lands below that improvements be made in a ditch or watercourse, they should contribute toward payment thereof."

The intention and spirit of the above quoted statutes and decisions is clearly evident, to wit: *all assessments shall be made in proportion to the benefits derived* Question No. 3, therefore, is a question of fact.

If no benefit accrues to the upper land holders, by reason of the construction of the ditch and if they will be in no better position as far as the drainage of their land is concerned, than they are with the watercourse remaining in its natural state, they can be assessed nothing whatever for the cost, expense, or appropriations necessary to the improvements. If, however, by reason of artificial

interference they have caused overflow or other inconvenience to the lower land owners, they may be assessed for the construction of the ditch, insofar, as it is made necessary, by their artificial interference with the natural conditions.

In direct answer to question No. 3, therefore, I am of the opinion that the upper land owners may be assessed for the improvement, if they derive any benefit therefrom and only to the extent that they are actually benefited.

In conclusion, therefore,

1. A land owner may petition for the construction and tiling of a county ditch higher up the watercourse than his own land extends.

2. Under the conditions prescribed, the county commissioners may extend the ditch improvement further up the watercourse than where the petition calls for if it is necessary or conducive to the public good of the neighborhood.

3. Assessments may be made upon the upper land owners in proportion to the benefits derived by them from the improvement.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

699.

DEPUTY STATE SUPERVISORS OF ELECTIONS AND CLERKS—ADDITIONAL COMPENSATION IN PRESENT YEAR BASED UPON PRECINCT IN ALLIANCE WHICH RECENTLY BECAME REGISTRATION CITY—BOARD CAN HAVE OFFICE IN BUT ONE CITY—TRAVELING EXPENSES OF BOARD AND OF CLERK.

Under Section 4942, General Code, deputy state supervisors of election and the clerk of the board are allowed additional compensation at a fixed rate for each election precinct in a registration city. This section applies to each city in the county wherein registration is held.

In Stark County, registration has been held in the cities of Canton and Massillon and this year it was conducted for the first time in the city of Alliance, held:

That based upon the time of appointments of members of the board and of the clerk, the years of each begin about May 1st, and they are, therefore, entitled from that date to the compensation provided by 4942, General Code, from the city of Alliance. If, however, the clerk is not appointed until after May first, his compensation will date from the time of his appointment and qualification

Sections, 4920, 4873, 4803, 4874 and 4935, General Code, provide for but one office in one registration city for the board of election, the selection of the registration city in which such office shall be located being left to the board. The board cannot, therefore, be allowed their traveling expenses to and from places in other cities wherein they have held meetings.

By virtue of Sections 4821, 5052 and 4946, General Code, all necessary and proper expenditures of an election or registration may be paid from public funds. When the clerk of the board, therefore, is sent from the office on necessary official business to different parts of the county, the amount necessarily expended in so doing may be allowed.

November 8, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of October 26, 1912, is received in which you enclose a copy of letter from the clerk of the deputy state supervisors and inspectors

of elections of Stark County, and ask for an opinion upon the several questions therein submitted.

The facts and questions are stated as follows:

"As provided in Section 4870, General Code, the board of deputy state supervisors of elections for Stark County, Ohio, has conducted registration of electors in cities of Canton and Massillon, and is now conducting same for the first time in the city of Alliance.

"The board of deputy state supervisors and inspectors of elections was appointed as provided by Sections 4788 and 4789, General Code, and the clerk was elected as provided by Section 4794, General Code.

"The members of the board and clerk have been drawing their compensation for conducting registration from cities of Canton and Massillon, as provided by Section 4942, General Code, from May 1, 1912.

"First: Are not the members of the board and the clerk entitled to draw compensation (as provided by Section 4942 of the General Code of Ohio) from city of Alliance, beginning May 1, 1912?

"As required by Section 4920 of the General Code of Ohio, the members of the board are in session in their offices in cities of Canton, Massillon and Alliance on Saturday and Monday preceding election day, to examine applicants as to their rights to register and vote. The main office of the board is in the city of Canton.

"Second: Are the members of the board entitled to draw car fare for attendance upon such meetings, the same to be figured from the city of Canton?

"The clerk is required, acting under instructions of the board, to make trips to various voting precincts on official business for the board.

"Third: Is the clerk entitled to car fare when making trips on official business for the board?"

Section 4942, General Code, provides:

"In addition to the compensation provided in section forty-eight hundred and twenty-two, each deputy state supervisor of elections in counties containing cities in which registration is required shall receive for his services the sum of five dollars for each election precinct in such city, and the clerk in such counties, in addition to his compensation so provided, shall receive for his services the sum of six dollars for each election precinct in such cities. The compensation so allowed such officers during any year shall be determined by the number of precincts in such city at the November election of the next preceding year. The compensation paid to each such deputy state supervisor under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk under this section shall in no case be less than one hundred twenty-five dollars each year. The additional compensation provided by this section shall be paid monthly from the city treasury on warrants drawn by the city auditor upon vouchers signed by the chief deputy and clerk of the board."

In Stark County there are three cities in which registration of voters is required. The above section fixes the compensation to be paid to the members and clerk of the board of deputy state supervisors and inspectors of elections in registra-

tion cities. This compensation is in addition to that paid by virtue of Section 4822, General Code, and is paid at so much per precinct from the city treasury. It applies to each city in which registration is held and to each precinct thereof.

In the city of Alliance registration was held for the first time this year and the question is as to whether the compensation of the members of the board and its clerk shall be allowed for the precincts in the city of Alliance starting with May 1, 1912.

Section 4870, General Code, provides:

> "In cities which at the last preceding federal census had, or which at any subsequent federal census may have, a population of eleven thousand eight hundred or more, there shall be a general registration of electors in the several wards or precincts thereof in the manner, at the times and on the days hereinafter provided. No person shall have acquired a legal residence in a ward or election precinct in any such city for the purpose of voting therein at any general or special election, nor shall he be admitted to vote at any election therein unless he shall have caused himself to be registered as an elector in such ward or precinct in the manner and at the time required by the provisions of this chapter."

It is evident that by virtue of the federal census of 1910, and of this section, the city of Alliance became a registration city.

Section 4788, General Code, provides:

> "In each county of the state which contains a city wherein annual general registration of the electors is required by law, or which contains two or more cities in which registration is required by law, there shall be a board of deputy state supervisors and inspectors of elections, consisting of four members who shall be qualified electors of the county."

This section was amended in 102 Ohio Laws 98, by inserting the words "or which contains two or more cities in which registration is required." Said section now applies to Stark County which has three registration cities.

Section 4789, General Code, provides:

> "On or before the first day of May, biennially, the state supervisor and inspector of elections shall appoint for each such county two members of the board of deputy state supervisors and inspectors of elections, who shall each serve for a term of four years from such first day of May. One member so appointed shall be from the political party which cast the highest number of votes at the last preceding November election for governor, and the other member shall be appointed from the political party which cast the next highest number of votes for such officer at such election."

The terms of the members of the board are for four years and commence on May first of the year of their appointment.

Section 4794, General Code, provides:

> "Biennially, within five days after such appointments are made, the deputy state supervisors and inspectors shall meet and organize by selecting one of their number as chief deputy, who shall preside at

all meetings, and two resident electors of the county, other than members of the board, as clerk and deputy clerk, respectively, all of which officers shall continue in office for two years."

The clerk is appointed within five days of the appointment of the members of the board and is appointed for a term of two years.

The compensation fixed by Section 4942, General Code, for the members of the board and the clerk is their annual compensation and is paid quarterly. The year for the members of the board begins on May first and that of the clerk from the time of his appointment and qualification. The appointment of the clerk is to be made within five days after the appointment of the deputies. The term of the clerk must begin about May first.

As Alliance is now a registration city and the members of the board of elections and the clerk were appointed by virtue of Section 4788, General Code, they are entitled to the compensation provided for in Section 4942, General Code, from the city of Alliance for the year beginning May 1, 1912. The salary of the clerk will begin from the time of his appointment and qualification if not made on May first.

The second question is in reference to the allowance of car fare to members of the board for attending meetings of the board at its offices in Alliance and Massillon. The main office of the board is in Canton.

It is stated that these meetings are held as required by Section 4920, General Code, which provides:

"At such meeting and subject to the same conditions, any qualified elector of such precinct may be registered who shall appear and present an order requiring it, signed by not less than three members of the board of deputy state supervisors. No such order shall be made or considered by the board, except in a session of the board, to be held in its office on Saturday and Monday preceding the November election in each year, and during such hours as may be prescribed by the board therefor, nor unless the applicant shall appear before the board personally at such session after the last day of general registration and proves to its satisfaction that he could not by due diligence have appeared before the registrars in his proper precinct on either of the days appointed herein, and shall furthermore comply with all the prescribed requirements for general registration."

It appears that the board of elections has offices in each of the three registration cities in the county and that they meet in each city on the Saturday and Monday preceding the election in November for the purpose of issuing orders of registration. Section 4920, General Code, provides that the board shall meet "at its office," and not at its offices. This section does not contemplate that the board shall have more than one office. The difficulty arises with the provisions of Section 4873, General Code, which reads:

"In counties containing a registration city, the board of deputy state supervisors shall have a sufficient and suitable office and rooms in such city for the purposes required by this chapter, which shall be in charge of the clerk thereof. In cities in which annual general registration is required, such office shall be kept open daily, except Sundays and legal holidays, and in quadrennial general registration cities such office shall be kept open at such times as the board may require."

This section does not specifically take into consideration a county which has two or more registration cities. It is made to govern in a county which has only one registration city. But as it is the only section providing for the office of the board in counties having a registration city it must also apply to a county having more than one registration city.

The amendatory act of 102 Ohio Laws 98, is the first instance of the present election laws of the state that takes into consideration a county containing two or more registration cities. In that act only two sections were amended: Section 4788, supra, and Section 4803, General Code, which provides:

> "Except in counties containing cities wherein annual general registration of electors is required by law, or which contains two or more cities in which registration is required by law, there shall be a board of deputy state supervisors of elections for each county consisting of four members who shall be qualified electors."

The amendatory act did not provide for the office of the board of elections in a county containing two or more registration cities.

Section 4874, General Code, authorizes the board of deputy state supervisors to provide for its office, as follows:

> "The board of deputy state supervisors shall appoint all registrars of electors, judges and clerks of election, and other clerks, officers, and agents herein provided for, and designate the ward and precinct in which each shall serve. It shall appoint the places of registration of electors and holding elections in each ward or precinct, provide suitable booths or hire suitable rooms for such purpose, *and for its office,* at such rents as it deems just, and provide the necessary and proper furniture and supplies for such rooms. It shall provide for the purchase, preservation and repair of booths and ballot boxes necessary for use at elections in such city, of books, blanks and forms necessary for the registrations and elections herein designated and for duly issuing all notices, advertisements or publications required by law."

This section also contemplates only one office for the board.

Section 4935, General Code, provides:

> "The board of deputy state supervisors shall convene in session at its office at five-thirty o'clock forenoon on the day of each election in such cities, and remain in session continuously until such statements giving the result of the election are received from every precinct in such city. The board may employ messengers, use the telephones and telegraph, direct the police force of the city, and use any other lawful means to secure prompt and correct reports from the election judges. The police authorities shall assign at least one policeman to do duty in each precinct on each day of election."

This section requires the board of deputy state supervisors to meet at 5:30 a. m. on the day of each election in a registration city, at its office, and remain in session until returns are received from each precinct of the city. It would be impossible for the board to comply with this section if it had an office in each of the three cities in which registration is held. The statute does not contemplate that it shall meet in more than one office on election day.

The statutes do not authorize the board of deputy state supervisors of elections to have an office in each registration city in the county when such county has more than one registration city. The board is authorized to provide for one office, and that office must be in the registration city where the county has only one city in which registration is required by law. The statutes do not provide a method of selecting the city in which such office shall be located, if the county has more than one registration city. In such a case the election of the city in which its office shall be located is left to the board. Such office must be located in one or the other of such registration cities.

As the board of elections is not authorized to have more than one office, its members cannot charge car fare against the county or city for traveling from one office to another office of such board.

It may be urged that it will be inconvenient to compel the voters of Alliance and Massillon, in this case, to go to Canton to secure orders from the board permitting them to register on the Saturday and Monday before the November elections. This is no doubt true. But that is a matter for the Legislature to provide for. This department can only construe the law as it finds it.

The third question is in reference to the car fare of the clerk when making trips on official business of the board.

Section 4821, General Code, provides:

> "All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. In counties containing annual general registration cities, such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

Section 5052, General Code, provides:

> "All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

Section 4946, General Code, provides:

> "The additional compensation of members of the board of deputy state supervisors and of its clerk in such city hereinbefore specified, the lawful compensation of the deputy clerk and his assistants and all registrars of electors in such city, the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, including poll books for special elections, and the cost of rent, furnishing and supplies for rooms hired by the board for its offices and as places for registrations of electors and the holding of elections in such city, shall be paid by such city from its general fund. Such expense shall be paid by the treasurer of such city upon vouchers of the board, certified by its chief deputy and clerk and the warrant of the city auditor. Each such voucher shall specify

the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

By virtue of these sections all necessary and proper expenses of an election or registration may be paid from the public funds.

If the clerk of the board of elections is sent from the office of the board upon necessary official business to different parts of the county, the amount necessarily expended by such clerk in reaching the various points and in returning to the office would be an expense which could properly be paid by the board and for which the board could make an allowance to the clerk. This allowance must be for the amount actually and necessarily expended by the clerk.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

700.

PROBATE JUDGE CANNOT RECEIVE ADDITIONAL COMPENSATION FOR TRANSCRIBING INDEX—WORK MUST BE DONE BY OFFICE FORCE AND BE COMPENSATED FROM ALLOWANCE MADE BY COUNTY COMMISSIONERS—ADDITIONAL ALLOWANCE BY COMMON PLEAS COURT—FEE FUND.

When the index of estates, executors and administrators in a probate judge's office is so badly worn as to require re-transcribing and the use of said index is so necessary as to prevent the doing the work during office hours, held:

If the work is done by the probate judge himself, under Section 2493, *General Code, the allowance made by that section, of six cents per hundred words, must be paid into the fee fund, under Section* 2983, *General Code.*

The work must be done by the employees of the Probate Court and their compensation must be made from the allowance made by the county commissioners for the Probate Court's office, under Section 2980, *General Code, which allowance is based upon a detailed statement of the needs of the office made by the probate judge.*

If such expense was not included in the statement made for 1912 *and no allowance, therefore, made for the same, and the work can be postponed until* 1913, *such expense may be provided for in the allowance for* 1913.

If the work connot be postponed, and additional allowance may be made upon application to a judge of the court of Common Pleas, under Section 2980-1, *General Code.*

Such work need not be done during office hours and errors may be corrected during the transcribing.

In no event can the Probate Judge receive compensation in addition to his salary for such work.

September 13, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of August 21, 1912, you inquire as follows:

"The index of estates, executors and administrators in a probate judge's office is so badly worn as to render re-binding impracticable. It has been discovered that there are some errors in the book and it is desired to correct and copy same in a new volume. The book is in use

so much of the time during the day that little progress can be made in copying it during office hours. The probate judge does not feel that the corrections could be reliably made by any of the clerks in his office.

"First: Would it be legal for the county commissioners to pay the probate judge in such case, extra compensation for correcting this index provided the work was done entirely out of office hours?

"Second: Would it be legal for the commissioners to pay such judge extra compensation for copying this index after it has been corrected, provided the work is done after office hours?

"Third: If neither of these payments would be legal what, if any, proceeding can you suggest by which the index may be corrected and copied and the services be legally paid for out of the county treasury?"

Section 1583, General Code, provides:

"A probate court is established in each county which shall be held at the county seat. Such court shall be held in an office furnished by the county commissioners, in which the books, records and papers pertaining to the court shall be deposited and safely kept by the judge thereof. The commissioners shall provide suitable cases for the safe keeping and preservation of the books and papers of the court, and furnish such blank books, blanks and stationery as the probate judge requires in the discharge of official duties."

This section makes it the duty of the county commissioners to furnish the probate court with the necessary blank books.

Section 2493, General Code, provides:

"When a record, journal, or other book belonging to any of the courts, is so worn or defaced as to require transcribing, the commissioners shall order it done by the officer in charge thereof, and pay him therefor six cents per hundred words."

The index in question is a book of one of the courts of the county. This index is so worn that it is necessary to transcribe its contents into a new book. The officer in charge, in this case the probate judge, shall do the work upon the order of the county commissioners. For this work he is to receive compensation at the rate of six cents per hundred words. These fees, however, would be credited to the fee fund of the probate judge.

The work of transcribing this index must be done by the employes of the probate court. The compensation to be paid the employe who performs this work must be paid from the allowance made by the county commissioners for the clerks and employes of the office of probate judge.

Section 2980, General Code, provides:

"On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year.

Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, book-keepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal."

This section covers the office of probate judge as shown in Section 2978, General Code.

Section 2980-1, General Code, provides:

"The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, county probate judge's office, county recorder's office, sheriff's office, or office of the clerk of courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office of official services during the year ending September thirteenth, next year preceding the time of fixing such aggregate sum; provided, however, that if at any time any one of such officers requires additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same, said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries.

"When the term of an incumbent of any such office shall expire within the year for which such an aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year."

Section 2981, General Code, provides:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

It appears that the regular force in the probate court cannot transcribe this index and at the same time perform the other services required of them. I assume that the compensation of the regular force consumes the allowance made by the county commissioners for the office of probate judge. As heretofore held by this department, the county commissioners cannot make an additional allowance when they have once fixed the annual allowance. They cannot now make an additional allowance for this work for the year 1912.

If the matter is so urgent that it must be done at once, application for an additional allowance can be made to a judge of the common pleas court as provided in Section 2980-1, General Code.

If, however, the work can be postponed until the first of the year, the cost of transcribing the index may be estimated and included in the estimate and allowance to be made for the office of probate judge for the year 1913.

It is not necessary that the work shall be done during office hours. It may be done at the time most convenient. Whether done during office hours or not, the compensation of the person who transcribes this index is a charge against the office of the probate judge and must be paid from the allowance made for his office.

I find no statute in reference to the correction of errors in an index or other record of the probate court. The errors nevertheless should be corrected when the index is transcribed.

Your inquiry involves another question. That is, the right of the probate judge himself to correct and make a new index out of office hours, and his right to be allowed compensation for such services in addition to his salary.

Under the county salary law, all fees and perquisites of the office of probate judge are paid into the county treasury for the benefit of the county.

Section 2977, General Code, provides:

> "All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2983, General Code, provides:

> "On the first business day of April, July, October and January, and at the end of his term of office, each such officer shall pay into the county treasury on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during the preceding quarter or part thereof for official services, which money shall be kept in separate funds and credited to the office from which received; and he shall also at the end of each calendar year, make and file a sworn statement with the county commissioners of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind which has been due his office and unpaid for more than one year prior to the date such statement is required to be made."

The fees to be paid for transcribing the index, as fixed in Section 2943, supra, General Code, are for official services of the probate judge, and should, under the foregoing sections, be paid into the county treasury for the benefit of

the county. These fees are no longer paid for the benefit of the officer or employe who performs the services. Such officers and employes are now paid a salary.

Section 2989, General Code, provides:

> "Each county officer herein named shall receive out of the general county fund the annual salary hereinafter provided, payable monthly upon warrant of the county auditor."

The amount of the salary to be paid to the probate judge is fixed by Section 2992, General Code.

Section 2996, General Code, provides:

> "Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

The salary fixed for the probate judge is his compensation for his official services, and is paid to him instead of all fees and other allowances.

By virtue of Section 1584, General Code, the probate judge is authorized to act as clerk of the probate court. Said sections reads:

> "Each probate judge shall have the care and custody of the files, papers, books and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint a deputy clerk or clerks, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each deputy clerk may administer oaths in all cases when necessary, in the discharge of his duties. Each probate judge may take a bond with such surety from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment."

The salary of the probate judge is to cover his compensation for his official services. The transcribing of an index in his office is to be made under his direction and is a part of his official duty. All fees and allowances of all kinds collected or received by the probate judge for official services must be paid into the county treasury.

The county commissioners have no authority to allow a probate judge extra compensation for services performed by him, within or without office hours, in transcribing an index of his office.

The county commissioners may make an additional allowance for deputies and clerks for this service, at the time they make the allowance for the year 1913, or for any other year. They cannot now make an additional allowance for this work for the year 1912.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

701.

HUMANE AGENT ALLOWED NO FEES IN ADDITION TO SALARY FIXED—NO FEES FOR SERVING SUBPOENAS—NOT A COURT OFFICER—POWER TO MAKE ARRESTS—EXPENSES MAY NOT BE PAID BY COUNTY.

Under Section 10072, *General Code, the compensation of agents of humane societies is fixed upon a salary basis by the council of a municipality or by the county commissioners or by both.*

By virtue of Section 10076, *General Code, such agents are allowed and paid such fees for services under that chapter "as they are allowed for services in other cases".*

Inasmuch as Section 13436, *General Code, which provides the compensation for "court officers" in such "other cases" cannot be construed to include agents of humane societies, such agents cannot, therefore, be allowed anything in addition to their fixed compensation for their services.*

The humane agent is more than a court officer, but is an officer of the humane society, authorized to prosecute persons charged with cruelty to persons or animals.

Section 11504 *enumerates persons who may serve subpoenas in official capacity, and inasmuch as agents of humane societies are not therein named, they may serve subpoenas only in their individual capacity and no costs may be taxed for such services.*

A humane officer may arrest as provided by Section 10070, *General Code, "any persons found violating any provision of that chapter," also by* 10075, *General Code, any member of the humane society may require the agent or officer of the society "to arrest any person found violating the laws in relation to cruelty to persons or animals", and under* 13491, *General Code, a humane officer may make arrests provided for in that section when a warrant is issued to him therefor by a magistrate or court authorized to issue such warrant.*

As the statutes do not so authorize, the county is not authorized to pay from the county treasury any expense incurred by the humane officer in the discharge of his official duties.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of September 19, 1912, you inquire of this department as follows:

> "Is an agent of the humane society authorized by law to act and collect fees for his services, either from the defendant or from the county treasury? If so, under what section or sections shall the fees be taxed?
>
> "Has a humane agent any authority, as such, to serve subpoenas?
>
> "Under what circumstances is such humane agent authorized to make arrests?
>
> "May such agent be allowed any expenses from the county treasury incurred in the discharge of his official duties?"

Agents of humane societies are appointed by virtue of Section 10070, General Code, which reads:

> "Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals,

who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense."

The agent is appointed for the purpose of prosecuting persons who are guilty of acts of cruelty to animals or persons. He is also authorized to arrest any person found violating the provisions of the chapter pertaining to the humane society.

Section 10072, General Code, prescribes how his compensation shall be fixed, as follows:

"Upon the approval of the appointment of such an agent by the mayor of the city or village, the council thereof shall pay monthly to such agent or agents from the general revenue fund of the city or village, such salary as the council deems just and reasonable. Upon the approval of the appointment of such an agent by the probate judge of the county, the county commissioners shall pay monthly to such agent or agents, from the general revenue fund of the county, such salary as they deem just and reasonable. The commissioners, and the council of such city or village may agree upon the amount each is to pay such agent or agents monthly. The amount of salary to be paid monthly by the council of the village to such agent shall not be less than five dollars, by the council of the city not less than twenty dollars, and by the commissioners of the of the county not less than twenty-five dollars. But not more than one agent in each county shall receive remuneration from the county commissioners under this section."

Section 10075, General Code, provides:

"A member of such society may require the sheriff of any county, the constable of any township, the marshal or policeman of any city or village, or the agent of such society, to arrest any person found violating the laws in relation to cruelty to persons or animals, and to take possession of any animal cruelly treated, in their respective counties, cities, or villages, and deliver it to the proper officers of the society."

Section 10076, General Code, provides:

"For this service and for all services rendered in carrying out the provisions of this chapter, such officers, and the officers and agents of the association, shall be allowed and paid such fees as they are allowed for like services in other cases, which must be charged as costs, and reimbursed to the society by the person convicted."

By virtue of this section "the officers and agents of the association shall be allowed and paid such fees as they are allowed for like services in other cases." The section does not fix the fees that shall be paid or charged as costs, but says that they shall be the same as are allowed such officers or agents in other cases. The pronoun "they" in the above quoted clause refers to the officers enumerated in Section 10075, General Code, to-wit, the constable, marshal, policeman, or humane officer making the arrest. This provision cannot be construed to mean that the humane officer or agent shall be paid the same fees as are allowed constables, marshals or policemen for like services in other cases. It means that the humane

officer or like agent shall be allowed the same fees as are allowed such humane officer or agent for like services in other cases. It is, therefore, necessary to ascertain what, if any, fees such humane officer or agent is allowed in other cases.

Section 13436, General Code, provides:

> "In pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor."

Section 13439, General Code, provides:

> "In such prosecutions, no costs shall be required to be advanced or secured by a person authorized by law to prosecute. If the defendant be acquitted or discharged from custody by nolle or otherwise, or convicted and committed in default of paying fine and costs, all costs of such case shall be certified under oath by the trial magistrate to the county auditor, who, after correcting errors therein, shall issue a warrant on the county treasury in favor of the person to whom such costs and fees are payable. All moneys which are to be paid by the county treasurer as provided in this chapter shall be paid out of the general revenue fund of such county."

It has been held in an opinion to your department that the words "such prosecutions" refer to the several prosecutions enumerated in Section 13423, General Code. Subdivision two of said section reads:

> "Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to:
> "2. The prevention of cruelty to animals and children."

The humane officer is required to prosecute for the class of offenses set forth in said subdivision two of Section 13423, General Code. The term "such prosecutions" as used in Sections 13436 and 13439, General Code, would apply to prosecutions by a humane officer for such offenses if made before the officers named in said Section 13423, General Code.

Section 13436, General Code, does not specifically mention the humane officer or agent as one of the officers who are entitled to the fees which are allowed a sheriff in criminal cases in the common pleas court. The humane officer must come under the term "or other court officer" if he is entitled to said fees.

A humane officer is given certain powers to arrest a certain class of offenders and to that extent he possesses certain police powers, which powers are also possessed by a constable, marshal, chief of police, and policeman.

The humane officer has more duties than this. He is required to prosecute such persons as are guilty of cruelty to persons or animals. He is more than a police officer. He is also a prosecutor. And for his services as police officer and prosecutor he is paid the compensation which is fixed in accordance with the provisions of Section 10072, General Code. It appears from the letter enclosed that the county commissioners have made the humane officer in question an allowance to be paid by the county.

The term "or other court officer" refers, in my opinion, to officers who at-

tend the trial of a criminal case in a capacity similar to that of a constable, marshal, or chief of police, or policeman. These officers attend upon the court and execute its orders rather as peace officers than as prosecuting officers.

It does not refer to a humane officer, who has power to arrest, but is in fact the prosecutor of the person charged with the offense. He is not an officer of the court, or a court officer, but is the agent and officer of the humane society and authorized to prosecute persons charged with cruelty to persons or animals.

Therefore, said Section 13436, General Code, does not authorize the payment of fees to the agent or officer of the humane society.

In Section 3718*a*, Revised Statutes, of which the provisions of Section 13436, General Code, were a part, the words "or other court officer" are limited by a phrase not now found in the General Code. It reads:

> "The jurisdiction and powers of the constable or other court officer acting in such capacity—"

This does not change my opinion as to the proper construction of Section 13436, General Code, but rather confirms it. By this provision the court officer must act in the capacity of a constable. Except as to his power to arrest, the humane officer acts in a capacity other than that of a constable.

I find no provision of statute which authorizes the taxing of costs, either against the defendant or against the county for the services of a humane officer or agent in prosecutions made by such humane officer.

Therefore, the humane officer or agent is not entitled to charge fees or costs for his services in arresting persons or for any other services performed by him.

Section 11504, General Code, provides:

> "A subpoena may be served by the sheriff, coroner, or any constable of the county, by the party, or other person; but if service is not made by a sheriff, coroner or constable, proof of it shall be shown by affidavit, and no costs shall be taxed."

This section does not name the humane officer as one who can, in his official capacity, serve subpoenas. He may serve subponeas in his individual capacity, the same as any other person, but no costs can be taxed for such services.

The humane officer may arrest, as provided in Section 10070, General Code, "any person found violating any provision of this chapter." That is, the chapter pertaining to the humane society and its powers and duties.

By virtue of Section 10075, General Code, any member of the humane society may require the agent or officer of the society "to arrest any person found violating the laws in relation to cruelty to persons or animals."

Section 13491, General Code, further authorizes the humane officer to make arrests, as follows:

> "When complaint is made, on oath or affirmation, to a magistrate or court authorized to issue warrants in criminal cases, that the complainant believes that the law relating to or affecting animals is being or is about to be violated in a particular building or place, such magistrate or court shall forthwith issue and deliver a warrant directed to any sheriff, constable, police officer, or agent of a society for the prevention of cruelty to animals, authorizing him to enter and search such building or place, and arrest all persons there violating or attempting to violate

such law, and bring such persons before a court or magistrate of competent jurisdiction within the city, village or county within which such offense has been committed, to be dealt with according to law. Such attempt shall be held to be a violation of such law, and shall subject the person charged therewith, to the penalties thereof."

The humane officer may make the arrest or arrests provided for in this section when a warrant is issued to him therefor by a magistrate or court authorized to issue such warrant.

The foregoing are three instances where a humane officer may make arrests. His power to arrest must rest upon statutory authority.

Your next inquiry is as to the right of the county to pay the expenses of the humane officer. I find no statutory provision which authorizes the county to pay for any of the expenses of a humane officer, other than the salary of such officer to be fixed in the manner provided in Section 10072, General Code.

The statutes authorize certain fines to be paid to the humane society. These fines are used to defray the expenses of such society.

For example, Section 12971, General Code, provides:

"If prosecution under either the next preceding section or section twelve thousand nine hundred and sixty-eight, is instituted by an incorporated society for the prevention of cruelty to animals, the fines collected thereby shall be paid to such society; otherwise fines collected under such sections shall be paid to any society so incorporated."

The county commissioners cannot pay any of the expenses of the humane officer from the funds of the county without statutory authority therefor. As the statutes do not so provide, the county is not authorized to pay from the county treasury any expense incurred by the humane officer in the discharge of his official duties.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

702.

LAW LIBRARIES—COLLECTION ON FORFEITED BONDS IN POLICE COURT NOT INCLUDED IN FINES AND PENALTIES—NOT TO BE PAID TO LAW LIBRARIES.

The provision of Section 3056, *General Code, requiring a proportion of all fines and penalties assessed and collected by the police court for offenses prosecuted in the name of the state, cannot be construed to include collections made on forfeited bonds in state cases.*

Both the words "fines and penalties" partake of the nature of punishment, whilst collection on a bond is in the nature of a forfeiture and cannot be included within the term "fines and penalties."

Moreover, the history of Section 3056, *General Code, makes clear, by the provision in the former enactments, restricting such payments to fines and penalties to cases "which shall be tried and determined in such police court," that collections on forfeited bonds were not included therein.*

November 1, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of October 1, 1912, you inquire as follows:

"Are law library associations entitled to collections made in the police court of forfeited cash bail taken in state cases brought in said court and afterwards forfeited by the court by reason of the non-appearance of the defendant?

"Also, are said libraries entitled to collections made on forfeited bonds in state cases brought in the police court?"

Fines and penalties are paid to law library associations by virtue of Section 3056, General Code, which provides:

"All fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court in state cases shall be retained by the clerk and be paid by him quarterly to the trustees of such law library associations, but the sum so retained and paid by the clerk of said police court to the trustees of such law library association shall in no quarter be less than 15% of the fines and penalties collected in that quarter without deducting the amount of the allowances of the county commissioners to said judges, clerk and presecutor. In all counties the fines and penalties assessed and collected by the common pleas court and the probate court for offenses and misdemeanors prosecuted in the name of the state, shall be retained and paid quarterly by the clerk of such courts to the trustees of such library association, but the sum so paid from the fines and penalties assessed and collected by the common pleas and probate courts shall not exceed five hundred per annum. The moneys so paid shall be expended in the purchase of law books and the maintenance of such association."

The original act for assisting law library associations by the payment of fines and penalties to them was passed in 1872, as shown in 69 Ohio Laws, 166. In that act the provision now under consideration reads as follows:

"That all fines and penalties, which may hereafter be assessed and collected by the police court, and mentioned in the first section of this act, for all offenses and misdemeanors prosecuted in the name of the state of Ohio, *which shall be tried and determined in such police court,* * * *."

In the Revised Statutes of 1880, which was a general revision of the laws of Ohio, the words "which shall be tried and determined in such police court," were omitted and have been so omitted in amendatory acts and revisions of said section.

In the original act these words, which are now omitted, limited the application of the term "fines and penalties" to those offenses and misdemeanors "which shall be tried and determined in such police court." In the case of a forfeited bond, cash bond or other bond, the offense is not tried and determined, unless the non-appearance of the defendant occurs after trial and sentence. In the latter event it is customary to take the fine which was assessed from the cash bond.

The original act did not authorize the payment of money secured by reason of the forfeiture of a bond to the law library association. It limited the payments to the association to the "fines and penalties" which were assessed and collected in state cases which were "tried and determined" in the police court.

Under the original act the word "penalty" did not refer or apply to forfeited bail. There is nothing to show that the Legislature intended to change the meaning and application of the word "penalty" in said section as said word is used in any of the subsequent amendments or revisions thereof. The mere omission from a statute of the definition of a word used therein does not change the meaning thereof when such word is used in the same manner in all succeeding amendments.

The words "fines" and "penalties" as used in Section 3056, General Code, have the same meaning and application as did the same words in the original act in 69 Ohio Laws 166.

As it has been strongly urged that the word "penalty" will include money received on forfeited cash bond, and money collected on a forfeited bond, the question will be further considered.

Bouvier in his Law Dictionary gives the following definitions of "fine" and "penalty," as used in criminal law.

> "Fine: Pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor. It may include a forfeiture or penalty recoverable in a civil action.
>
> "Penalty: The punishment inflicted by a law for its violation. The term is mostly applicable to a pecuniary punishment.
>
> "The words penal and penalty in their strict and primary sense, denote a punishment whether corporal or pecuniary imposed and enforced by the state for a crime or offense against its laws."

A fine is limited to a pecuniary punishment. While a penalty is also usually limited to a pecuniary punishment, it may also include a corporal punishment. "Penalty" is a broader term than "fine." A fine in all cases may be termed a penalty, yet a penalty is not always a fine.

In United States vs. Nash, 111 Federal 525, it is held:

> "While the word "penalty" has a broader meaning than the word "fine" still a fine, in a judicial sense, is always a penalty, although a penalty may sometimes not be a fine, or even a criminal punishment."

In the case of In re Brittingham 5 Federal 191, the syllabus reads:

> "Sums recovered on forfeited bail-bonds are not "fines, penalties, or forfeitures" within section 4 of the act of June 22, 1874, and the petitioner is not entitled under the provisions to compensation as an informer. "

Also in United States vs. Fanjul, Vol. 25 Federal Case No. 15069, it is held:

> "The penalty of a recognizance for the appearance in court of a defendant charged with a crime under the customs act of 1799 (1 Stat. 627), is not a penalty recovered by virtue of that act.
>
> "It seems that a fine imposed under that act goes, in part, to the informer.
>
> "But money paid into court by the sureties on a recognizance is not such a fine, and is not instead of a fine, though the alleged crime was one that might have required the imposition of a fine if the defendant had been convicted; and no part of it belongs to the informer."

Lowell, D. J., says on page 1040:

> "But in this case, the penalty, so called, which has been paid into court, is not a fine, penalty or forfeiture recovered by virtue of that act, but the penalty of a recognizance taken by the court to insure the appearance of the defendant to answer the charge. The amount in which the bond was taken was estimated with a view to all the circumstances of the charge, including the possible fine; but it was in no sense a substitute for the fine. If the defendant, after his default, had appeared, or had been brought in by his bail the court might have remitted to the sureties the whole or some part of the penalty of the recognizance, by virtue of the act of 1839 (5 Stat. 321). Supposing the time for such action to be passed, and that the sureties have relinquished all claim to a remission, still if the defendant is found he can be tried, and if convicted, may pay a fine, in which the petitioner may be interested, but as I said before, no such fine or penalty has yet been imposed or paid."

In case of State vs. Horgan, 55 Minn. 183, Collins, J., says at page 183:

> "Now the selling of the article or substance mentioned in chapter 11, unless it be colored a bright pink, is an act forbidden by law; it is a public offense. Upon conviction, a pecuniary penalty, is imposed, and this is nothing more or less than a fine, according to the lexicographers. The offense is a misdemeanor, and the penalty or fine, is to be recovered in accordance with the provisions of 1876, G. S. ch. 78, Section 10, by a criminal prosecution in a court of competent jurisdiction."

Tenney, J., defines a fine and penalty on page 179 of Lord vs. State 37 Me., 177, as follows:

> "The terms "fine" and "penalty" signify a mulet for an ommission to comply with some requirement of law; or for a positive infraction of law and do not include the costs, which accrue in the prosecution."

The terms "fine" and "penalty" are often used interchangeably and both are used to express a pecuniary punishment which is imposed for violation of some law.

Section 3056, General Code, limits the fines and penalties to those which are "assessed and collected" "for offenses and misdemeanors prosecuted in the name of the state. The usual method of assessing fines and penalties in criminal cases is to first try the defendant and if found guilty to then assess the fine or penalty.

In the case of forfeited bail there is no trial and there is no assessing of a fine or penalty for an offense or misdemeanor. The forfeiture of a bail bond is made because the accused failed to appear at the specified time. It is not a punishment for the offense charged. It is a forfeiture, which might be termed and often is called a penalty, because of the failure to appear in court when ordered.

Dickman, J., defines bail on page 267 of Reinhard vs. City, 49 Ohio St., 257, as follows:

> "Bail may be defined as a delivery of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of

going to jail. To say nothing of its liability to abuse, the deposit of money with the officer, as security for the appearance of the accused, would not be so likely to secure the end proposed as that provided by the statute."

In Hampton vs. State, 42 Ohio St. 401, Follett, J., says at page 404:

"Thus it is clear that after conviction and until sentence, the court has power to admit to bail. The object of bail is to secure the appearance of the one arrested when his personal presence is needed; and, consistently with this, to allow to the accused proper freedom and opportunity to prepare his defense. The punishment should be after the sentence."

The recognizance in a criminal case is taken to secure the attendance of the prisoner when wanted or needed. It is not taken as security for the fine or penalty that may be imposed for the commission of the offense. The amount recovered upon forfeiture of a bond is not a punishment for the offense but is a penalty imposed because the accused failed to appear, because the sureties failed to produce the body of the prisoner who was placed in their charge, as it were. The cash bond is forfeited because of the failure of the accused to appear and is not assessed or collected as a fine or penalty for the offense or misdemeanor.

The fines and penalties referred to in Section 3056, General Code, are the fines and penalties which are imposed as punishment for the commission of an offense. A forfeited bail is not such a punishment. The collection upon a bail bond is not a bar to a further prosecution of the offense charged.

The rule is stated in 12 Cyc. 262, as follows:

"And a judgment against the accused on a recognizance for failure to appear is not a former jeopardy, and is no bar to another prosecution for the same offense."

The forfeiture and collection of a bond does not constitute a jeopardy.

Section 3056, General Code, does not authorize the payment of money secured upon a forfeited bail bond, cash or other bond, to the law library association.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

703

CITY AUDITOR—NOT LIABLE FOR PAYMENT OF ILLEGAL CLAIMS IF MADE IN GOOD FAITH UPON ADVICE OF CITY SOLICITOR—BOND CONDITIONED UPON FAITHFUL PERFORMANCE OF DUTIES.

The bond of the city auditor is conditioned that he will "faithfully perform the duties of his office." Neither he nor his bondsmen, therefore, are liable upon said bond unless he has failed to faithfully perform said duties.

His liability, therefore, is a question of fact. If he uses ordinary care, prudence and good faith in the payment of illegal claims, if his payment of such is advised by an opinion of the city solicitor, and there appears no substantial reason for doubting such opinion, he is not liable for the payment of the same.

October 30, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio

GENTLEMEN:—Your favor of October 19, 1912, is received, in which you inquire:

> "Are the city auditor and his bondsmen protected from liability in the payment of illegal claims if the former has used ordinary care and prudence in his approval of the same and has the written opinion of the city solicitor that said claim was legal?

Section 4666, General Code, provides for the oath of a city official as follows:

> "Each officer of the corporation, or of any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector within the corporation, except as otherwise expressly provided, and before entering upon his official duties shall take an oath to support the constitution of the United States and the constitution of Ohio, and an oath that he will faithfully, honestly and impartially discharge the duties of the office. Such provisions as to official oaths shall extend to deputies, but they need not be electors."

Section 4668, General Code, prescribes the condition of the bond:

> "In each such bond, the condition that the person elected or appointed shall faithfully perform the duties of the office shall be sufficient. The fact that the instrument is without a seal, that blanks like the date or amount have been filled subsequent to its execution but before its acceptance, without the consent of the sureties, that all the obligees named in the instrument have not signed it, that new duties have been imposed upon the officers or that any merely formal objection exists shall not be available in any suit on the instrument."

The city auditor takes an oath that he will "faithfully, honestly and impartially discharge the duties of his office." The bond is conditioned that he will "faithfully perform the duties of his office." In holding the sureties upon the bond liable, it must be determined whether or not he has faithfully performed the duties of his office. The individual liability of the auditor is to be measured

by the manner in which he is required to discharge his duties. The question is, has he "faithfully, honestly and impartially" discharged the duties of his office If he has, then he cannot be held individually liable for loss to the city.

In the case of the Common Council of Alexandria vs. Corse, 2 Cranch C. C. (U. S.) 363, it is held:

> "The surety in an official bond, conditioned that the principal shall faithfully execute the duties of his office, is not liable for the honest error in judgment or want of skill of the principal. But gross negligence is want of fidelity."

At Section 243 of Troop on Public Offices, the rule is laid down:

> "An official bond, whatever special condition it may contain, almost invariably contains a general condition that the officer shall faithfully discharge the duties of his office. This condition is not broken by an honest error of judgment, or an honest mistake, or want of skill in the discharge of a duty, where the precise mode of discharging it is not pointed out by the statute. But the mere fact that the officer acted in accordance with the opinion of the attorney general will not suffice to protect him or his sureties."

In support of the latter proposition he cites Dodd vs. State, 18 Ind. 56, in which it is held:

> "An official opinion of the attorney general of the state can constitute no legal justification of any officer, for any act done in pursuance of it, but such act must be tested by the law.
>
> Hanna, J., says on page 66:
>
> "It is insisted that when an officer of state, in pursuance of this statute, calls upon, and obtains from, the law officer of the state, a legal opinion in reference to his duties, and proceeds in accordance with the same, that a suit will not lie upon his official bond, whether said opinion is sound in law or not. And the question is asked, if this is not so, then what use is there in requiring the opinion?
>
> "There are several reasons why this position is not tenable. First, if the opinion can shield the officer from a civil suit, when he does wrong, then it ought to be binding upon him; and of course, as it is expressed in as strong language, when called for, binding upon the legislature. The auditor audits money accounts before the applicant can receive the same from the treasury. Suppose under a mistaken view of the law, based upon an erroneous opinion, he should refuse to allow a just account to a private citizen. Would that opinion be a bar to proceedings to obtain the amount so due? Would an unconstitutional law be held binding because an opinion had been given to the legislature in advance that it was valid? The position is so plainly untenable that it is useless to pursue the subject."

I find no decisions in Ohio upon the proposition under consideration. There are authorities which show the tendency of our courts. None of these are upon cases of an illegal payment of money from public funds. They are in reference to negligence of an official which caused damage to an individual.

In Kloeb vs. Mercer County, 16 Cir. Dec. 152, the third syllabus reads:

"Although the drawing of a warrant by a county auditor upon the county treasurer, upon direction of the county commissioners, is a mere subservient and ministerial act, yet it is the official duty of the auditor, as a public officer and agent of the people, to protest against and object to drawing any warrant which he in good faith, and in the exercise of his judgment as a prudent and honest agent of the people, deems to be an unlawful expenditure of the public money. The order of the county commissioners does not have the effect of a judgment at law or stop the auditor from questioning, in good faith, its validity."

This decision states the duty of an auditor in reference to an order from the county commissioners. It does not touch the question of the effect of an opinion of the legal adviser of the county.

In Gregory vs. Small, 39 Ohio St., 346, it is held:

"The local directors of a sub-school district, dismissed a person found in possession of the schoolhouse and teaching the public school, under their control, on the ground that he had not been employed, and placed a teacher they had employed, in charge of the school. Held; that they were not liable personally, in damages, for such dismissal, if they acted in their official capacity, in good faith, and in the honest discharge of official duty."

On page 349, Johnson, C. J., says:

"If there was no valid employment, and there could be none except by official action when the salary was payable out of the public funds, the directors acting officially might refuse him possession of the schoolhouse, or to recognize him as teacher. Indeed it was their duty to do so. If there was a valid contract of employment, followed by a subsequent dismissal, for sufficient cause, the plaintiff was without remedy even at common law; but if there was no sufficient cause for such dismissal the directors are not personally liable when they acted in good faith, in what they supposed was the honest discharge of official duty. They are personally liable, only when they act with a corrupt intent."

In Thomas vs. Wilton, 40 Ohio St., 516, the syllabus reads:

"County commissioners, who act in their official capacity in good faith and in the honest discharge of official duty, cannot be held to personally respond in damages."

This case arose out of damages received by reason of a defective bridge. These cases are not in point but tend to show that more than a mere error in judgment is required to hold an officer individually liable.

It is not possible to lay down a rule of liability which can be applied to every case that may arise. The individual liability of an officer is always a matter to be determined by the particular facts, and the law applicable thereto, of each particular case.

In the case of a city auditor it is a question as to whether or not he has "faithfully, honestly and impartially" performed the duties of his office. If he has, he is not individually liable. If he has not so performed his duties, he and his bondsmen may be liable for any loss occasioned thereby.

The liability of the auditor and the sureties on his bond, must in the end be measured and tested by the law.

The opinion of the city solicitor that a payment or claim is legal is not of itself sufficient to excuse the auditor from liability. The opinion of the solicitor may be palpably wrong and given from corrupt motives of which the auditor may be presumed to have notice. For example, if the city solicitor should declare a claim legal, which had been declared illegal by a court of competent jurisdiction and whose jurisdiction extended to the officers who were acting, and such decision was known to the auditor, he could not rely solely upon the opinion of the city solicitor. He must act honestly and faithfully in the matter.

The opinion of the city solicitor would be a circumstance and a strong circumstance to show that the city auditor has acted in good faith and has made an honest effort to faithfully and honestly discharge the duties of his office. In addition to securing the opinion of the solicitor the auditor must use ordinary care and prudence in allowing the claim. The opinion of the solicitor does not excuse him from using his judgment.

It is difficult to lay down a rule of liability without knowing the particular facts of the case.

It may be safely held, as a general rule, that where a city auditor has used ordinary care and prudence in the allowance of a claim and in addition has the written opinion of his official legal adviser, the city solicitor, that such claim is legal, the city auditor and his bondsmen would not be liable on the official bond, if such claim should eventually be declared illegal.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

710.

SURETY BONDS OF PUBLIC OFFICES—MUNICIPALITY MAY NOT MAKE ABSOLUTE REQUIREMENT OF, AND MAY NOT PAY PREMIUMS ON.

Inasmuch as the Legislature has not authorized the municipality so to do, it may not pay the premiums on the bonds of its officers and employes out of the public funds.

Since it is unconstitutional for the Legislature to require that only surety company bonds may be given by officers, the Legislature is without power to delegate to a municipality the right to make such a requirement, and the latter can have no such power. Personal surety may, therefore, always be given by municipal officers, providing said surety be acceptable to the approving officer.

October 19, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of July 17th, you submitted for my opinion the following:

> "1. Is it a legal use of the public funds of a city to be used in the payment of premium on the official bonds of officers and employes of the city, provided that the ordinances of the city require that said officers and employes give a surety company bond?
>
> "2. If said ordinances so provide, is it obligatory on said officers or employes, or may they give personal surety on their official bonds, provided said sureties be acceptable to the approving officers?"

"3. If no ordinance exists requiring that only surety company bonds be accepted of officers and employes, would the payment of the premium on such bonds be held to be legal, provided that appropriation had been made therefor by council?"

Before answering your questions specifically as they are above set out I shall consider two propositions:

"1. Whether or not a municipality has the power to pay premiums on the bonds of its officers and employes out of the public funds of the municipality.

"2. Whether or not it is legal for a municipality in fixing the bonds of its officers and employes to provide that the same shall be furnished only by a surety company."

It is a well settled rule in Ohio that municipal corporations cannot exercise any powers which are not expressly granted to them by the Legislature, or such powers as are necessarily incident thereto in order to carry out the powers specifically granted and that whenever a municipal corporation attempts to go beyond the powers so specifically granted or those which are necessarily incident thereto the acts of such corporation in reference thereto are void. It is, therefore, nesessary at the outset to examine the statutes by which the Legislature grants powers to the municipal corporations in order to determine whether or not the power was so granted to such municipal corporation to use the funds belonging to such corporation in the payment of premiums on official bonds of officers and employes. If no such power can be found then it is illegal for the municipal corporation to use the public funds in the payment of such premiums.

Section 4214, General Code, in relation to cities, provides:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

Section 4219, General Code, in relation to villages, provides in part:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor."

Section 4592, General Code provides in part:

"The clerk of the police court shall give such bond, with sureties, as may be required by the council and county commissioners."

Section 4155, General Code, in relation to cemeteries provides:

"Council may require the officer authorized to receive and disburse moneys arising from the sale of lots, or otherwise, and to invest, man-

age and control the property and funds in his hands, to enter into a bond to the corporation with sufficient sureties, conditioned for the faithful performance of his duty, in that behalf, and account for all moneys by him received, and pay over to his successor all moneys or other property unexpended. Such bond shall be filed in the office of the corporation clerk."

While the sections above quoted are not intended to be exhaustive in reference to the bonds to be given by municipal officers and employes, yet it is to be noted that none of them provide that the expenses of procuring the bonds by the officer or employe shall be paid out of the public funds. In fact, I have been unable to find any authority whatever which could be construed as authorizing such a payment, and while it is true that it is a rule of law that the legislative determination as to what is a municipal purpose will not be annulled by the courts in any doubtful case (People vs. Kelly, 76 N. Y. 475), yet in the matter under consideration the legislature has not seen fit to delegate any power of paying premiums on official bonds to municipalities, and, therefore, since a municipality is only authorized to exercise such powers as are delegated, either specifically or by necessary implication, I am of the opinion that the payment of the premium on official bonds out of the public funds of the municipality is clearly unauthorized as much so as the paying of the expenses of celebrations and entertainments are without municipal authority.

(State vs. Cincinnati, 6 N. P. 15; Moore vs. Hoffman, 2 C. S. C. R. 453; See also Dillon on Municipal Corporations, Fifth Edition, Sec. 309.)

The giving of bond by an officer or employe is one of the things necessary to be done in order to qualify him for office, and while it is true that it has been held that the giving of such bond is not a condition precedent to such officer or employe entering upon the duties of his office, and that the same may be given subsequently thereto, nevertheless, it has never been held, as far as I am able to ascertain that the premium for such bonds when so given shall be paid by the municipality to which it is given. Furthermore, the giving of such bond by the officer or employe is one necessary to complete his full qualifications for the position, and although it has been held that he may enter upon the performance of his duties without first giving such bond, nevertheless since it is required that an officer taking an oath of office must give a bond, in contemplation of law the same should be done prior to his assuming office. Furthermore, the giving of surety company bonds is of recent origin. Prior to the creation of surety companies it was customary to give personal bonds, and all expenses incident thereto were borne by the officer in so giving such bond. Again, at the time of the adoption of the Municipal Code in 1902, surety companies were then in existence and were then supplying bonds for premiums to be paid, and had it been the intention of the legislature that the premium for such bond should be paid from public funds it would have so stipulated. Not having done so, and not having subsequently done so, the power does not exist in municipal corporations to pay such premiums.

It has been suggested that since it is a rule of law that a municipality may indemnify its officers for any losses incurred by them in the performance of their duties that, therefore, there is no distinction between so reimbursing an officer for losses incurred in the discharge of his duty, even though he exceeded his lawful right and authority and to expend the funds of a municipality for insurance against such a liability.

Dillon on Municipal Corporations, Fifth Edition, Section 307, states the rule in this regard. The author states (page 363):

> "But such a corporation has power to indemnify its officers against liability which they may incur in the *bona fide* discharge of their duties, although the result may show that the officers have exceeded their legal authority."

This is an entirely different proposition, as I view it, from paying the premium on a bond which bond is one given to the municipality itself as security for the faithful performance of the duties of officers. It is to indemnify the municipality not for the *bona fide* discharge of their duties, but for malfeasance or misfeasance on the part of the officers.

I am, therefore, of the opinion that payment of premiums on official bonds is not a municipal purpose as the law now stands and is, therefore, illegal.

Second. As to the right of a municipality to provide by ordinance that its officers and employes shall provide only surety company bonds.

Since municipal corporations have only such powers as are delegated to it by the legislature it is a self-evident proposition that the legislature cannot delegate a power to the municipal corporation which it itself could not exercise.

In the case of Robins vs. State, (71 O. S. 273), it was held that:

> "The act of the general assembly entitled 'An Act to amend section 3641c of the revised statutes of Ohio, relating to the giving of surety bonds' passed April 20, 1904 (97 O. L. 782), is unconstitutional and void, being in violation of article I., sections 1 and 2 of the constitution."

While the suit in that case was in reference to the right to require an administratrix of an estate to give a surety company bond in accordance with the act passed April 20, 1904, yet the court on page 290 states as follows:

> "The provisions of the act are so interdependent and interwoven that the whole act must stand or fall together. It provides that the execution of all bonds for the faithful performance of official or fiduciary duties, or the faithful keeping, applying or accounting for funds or property, or for one or more of such purposes, with certain exceptions, is thereby *required* to be by a surety company or companies. We are, therefore, not able clearly to perceive that the general assembly intended in any event to require bonds to be executed by a surety company or companies in any one of the classes mentioned to the exclusion of another, This being so if the statute is void as to administrators, or other fiduciaries, it is void as to public officers, and if void as to public officers it is void as to fiduciaries, and the contention here made as to the bond of an administratrix involves as well the question as to the validity of the bonds of public officers."

and on page 294 the court concludes the opinion as follows:

> "The issue raised here is whether the general assembly may make security by security companies exclusive and compulsory. It is not whether corporations may be authorized to secure bonds, nor whether the person giving bonds may at his option give a bond signed either by personal securities or by security companies.
>
> "Our conclusion is that the statute is unconstitutional and it is accordingly ordered and adjudged that the demurrer to the answer be sustained and a peremptory writ of mandamus allowed."

It would, therefore, appear from the above case that the legislature was without power to declare that only surety company bonds were to be given by public officers, and, consequently, I am of the opinion that since municipalities derive their powers only by delegation of the general assembly an ordinance of a municipality providing that only surety company bonds shall be given by its officers and employes is unconstitutional and therefore of no force and effect.

Coming now to answer specifically the three questions which you have submitted to me:

I am of the opinion, in answer to your first question so submitted that it is not a legal use of the public funds of the city that the same be used in the payment of premiums on official bonds of officers and employes of the city providing that the ordinance of the city require that said officers and employes give a surety company bond.

In answer to your second question I am of the opinion that if the said ordinance so provide, since such ordinances are unconstitutional and therefore void, it is not obligatory on said officers and employes to give surety company bonds, but they may give personal surety on their official bonds providing said surety be acceptable to the approving officer.

In answer to your third question I am of the opinion that even if no ordinance exists requiring that only surety company bonds be accepted from officers and employes the payment of the premium on such bonds would not be held to be legal even though appropriation had been made therefore by council, since such an appropriation would be for a purpose not recognized as a municipal purpose.

The statute authorizing the giving of surety company bonds by municipal officers is found in Sections 9571, 9572 and 9573 of the General Code. Prior to the adoption of the General Code said three sections of the statute were included within Section 3641*c* Revised States.

Section 9572, General Code, provides as follows:

> "A judge, court or officer, whose duty it is to pass upon the account of an assignee, trustee, receiver, guardian, executor, administrator or other fiduciary, required by law to give bond as such, whenever any fiduciary has given bond with a surety company as surety thereon, in the settlement of his account as such fiduciary, shall allow a reasonable sum paid such company authorized under the laws of this state so to do, for becoming his surety, not above half of one per cent. per annum on the amount of the bond; unless it is in double the amount of the liability of the fiduciary, when the sum so allowed must not exceed a fourth of one per cent. per annum. Such company must have complied and continued to comply with the laws of this state relative to it, and with requirements as to justification, prescribed by the head of the department, court, judge, or officer required to approve or accept the bond. The bond or recognizance also must be approved by the head of the department, court, judge or officer required to approve or accept it."

While said section provides for the allowance of a reasonable sum to be paid a surety company for becoming surety when the account of an assignee, trustee, receiver, guardian, executor, administrator or other fiduciary is passed upon, yet under the doctrine of *ejusdem generis* I am of the opinion that such word "fiduciary" must be read as other like fiduciary. In other words, a fiduciary similar to those specially set forth, which, of course, would not include the bond of an

officer for the faithful performance of his duty, and I am therefore, of the opinion that the premium upon the bond of such an officer cannot be paid by the municipality.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

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MUNICIPAL CORPORATIONS—CONTRACT OF DIRECTOR OF PUBLIC SERVICE FOR MEN TO TEST WATER MAINS—AUTHORIZATION OF COUNCIL AND ADVERTISEMENT FOR BIDS—EXPERT AND SKILLED SERVICES—PATENTED DEVICES—EMPLOYES OF DEPARTMENT.

Under Section 3809, *General Code, a contract with a company for the services of two men at* $50.00, *per day, in testing the water mains of a municipal waterworks plant, is not valid without the certificate of the auditor to the effect that there are moneys in the treasury, unappropriated for other purposes as provided in Section* 3806, *General Code.*

Under Section 4328, *General Code, when the certificate aforesaid has been provided, contracts may be entered into by the director of public service, without bids and without the authorization of council, when the total expenditure thereon does not exceed five hundred dollars. When the expenditure exceeds that amount, a contract must first be authorized by council, and must be let on advertisement and bids.*

If in the present case, the services required are skilled or expert services, advertisement and bids may be dispensed with. If the device required for testing is a patented article, the use of the same is not prohibited in accordance with Ohio authorities by the statute providing for advertisement and bids. Competitive bidding should be had, so far as such bids are practicable and available.

Such men do not fill positions provided by council and are, therefore, not employes in the department so as to come within the exception of Section 2328, *General Code.*

September 27, 1912.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of September 10, 1912, is received in which you inquire:

> "A superintendent of distribution lines of a municipal water works plant, with the consent of the service director, by letter accepted a proposition from a pitometer company for the services of two men at $50.00 per day, such services to be utilized in testing the water mains of the plant. Such agreement was entered into without a special authorization of council and without advertisement for competitive bids or certification of the city auditor as to the funds being in the treasury to meet the obligation arising from said contract or agreement.
>
> "May the city auditor legally pay claims presented for compensation under said agreement?
>
> "If said contract is not a valid and binding obligation of the city, what, if any, procedure on the part of the city may be taken to render

said contract a valid and enforcible obligation of the city and on which the city auditor may legally issue his warrant in payment thereof?"

The first question to be considered is the necessity of a certificate of the city auditor that the funds are in the treasury and not otherwise appropriated.

Section 3806, General Code, provides:

> "No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

Section 3807, General Code, provides:

> "All contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of the preceding section shall be void, and no person whatever shall have any claim or demand against the corporation thereunder, nor shall the council, or a board, officer, or commissioner of any municipal corporation, waive or qualify the limits fixed by such ordinance, resolution or order, or fasten upon the corporation any liability whatever for any excess of such limits, or release any part from an exact compliance with his contract under such ordinance, resolution or order.

Section 3809, General Code, makes certain exceptions to the provisions of Section 3806, supra, as to the necessity for a certificate of the auditor, as follows:

> "The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the water works plant, or both, of any person, firm or company therein situated, for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel."

The contract in question does not come within either of the foregoing exceptions. Although the contract is in reference to the water works of the city, it is not a contract for furnishing the city with water.

The provisions of Section 3806, General Code, as to the certificate of the auditor, applies to the employment of persons in the department.

In case of Pittinger vs. City of Wellsville, 75 Ohio St., 508, it is held:

> "The policy of our statutes respecting municipal corporations is that no debt shall be incurred for the ordinary expenses of the corporation unless an appropriation to meet it has been made by the city council, and the city auditor or clerk has certified to the city council that the money is in the treasury; and in the absence of such certificate, as required by Section 45 of the Municipal Code, the board of public service is without authority to employ a janitor for the city building, and a person so employed can not recover from the city for his services."

In order to make an obligation binding upon the city, the city auditor must certify that the money necessary to pay such obligation is in the treasury to the credit of the fund and not otherwise appropriated, unless the obligation comes within one of the exceptions found in Section 3809, General Code. The obligation in question does not come within any of said exceptions, and the certificate of the auditor is required to make its payment legal.

Next as to the requirement for bids and the authorization of council.

Section 4328, General Code, provides:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

For expenditures less than five hundred dollars the director of public service may contract without asking for bids and without the authorization of council. The total amount of the expenditure to be made by the contract in question is not stated. If it is less than five hundred dollars it may be entered into by the director of public service, without asking for bids, and without the direction and authorization of council. If the expenditure exceeds five hundred dollars council must first authorize and direct such expenditure.

The compensation of the persons employed in the department, is also excepted from the provision for competitive bidding, and as to the authorization and direction of council.

In order for a person to be employed in a department, a position therein must be regularly created, and the compensation therefor must be fixed by council under the authority given it by Section 4214, General Code, which reads:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

In the service department the director of public service is authorized to establish the positions under Section 4327, General Code, which provides:

> "The director of public service may establish such sub-department as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

The persons in question in this case are not employed directly by the city but are furnished by the company under its proposed contract with the city. No positions have been created, and no compensation has been fixed by council. Neither the contract in question nor the compensation to be paid the men, can come within the provision that the expenditure is for the compensation of employes in the department.

No doubt the services for which the contract is sought to make are such as to require skill, knowledge and experience. It is evident also that in addition to the men, the contract calls for the use of a patented device which is to be used by them in making the proposed tests. The contract then is for the use of a patented device and for the services of experienced men to use the device.

This situation raises two questions:

First. Does the requirement for competitive bidding include the employment of persons, who are employed because of their skill, experience and knowledge?

Second. Does the requirement for competitive bidding prevent the city from contracting for the use of a patented device?

The general rule is stated by Dillon in his work on Municipal Corporations at Section 802, page 1199, as follows:

> "It has been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not provide any advantage, but the nature of the supply requires that it be determined from inspection and test, which are made from personal examination and trial and depend upon special knowledge and judgment, or where the thing to be obtained is a monopoly, or the requirement is of personal skill or professional service, or it is practically impossible to obtain what is required and observe such forms, a statute requiring competitive bidding does not apply."

He further says at pages 1202 and 1203:

> "A practical monopoly of the subject matter of the contract is also regarded as furnishing a sufficient reason for an exception to a statutory requirement to advertise for bids.
>
> "Scientific knowledge or professional skill has also been regarded as furnishing a ground for an exception to the statutory rule. Thus it has been said that the services of a lawyer, of a physician, or of an architect or surveyor, are not embraced within a provision requiring the letting of contracts to the lowest bidder."

In case of Horgan and Slattery vs. City of New York, 100 N. Y. Supp. 68, it is held:

> "A contract between the armory board and an architect for the rendition of services by the latter, devising plans for an armory was not required to be in writing."

Houghton, J., says at page 71.

> "It was not necessary to let the contract for the preparation of plans and specifications for the proposed armory by competitive bidding. The services required scientific knowledge and skill, and that character of service need not be obtained by bids."

In O'Brien vs. City of Niagara Falls, 119 N. Y. Supp. 497, it is held:

> "The provision of a city charter that it shall be the duty of the city council, and of all boards, departments, and officers of the city, after public notice, to let to the lowest bidder contracts for any work or material, in excess of fifty dollars, for any such board, department, or officer, unless the board of estimate and apportionment unanimously determine it to be impracticable to procure the work or material by contract so let, does not apply to the professional and technical services of a court stenographer, so as to prevent the city council obtaining such services without competitive bids or the approval of the board of estimate and apportionment, for the purpose of conducting, pursuant to its power under the charter, an occasional investigation of the management of the city offices."

Pound, J., says at page 499:

> "That the services of a stenographer in reporting evidence call for technical and professional knowledge and skill not of a character ordinarily to be obtained to the best advantage by competitive bids, cannot be seriously questioned. It has been so held as to architects and engineers, physicians, lawyers, and artists."

Men of professional and technical knowledge and skill cannot be employed to advantage by competitive bidding. Such men are usually employed by personal selection, where opportunity is given to determine and judge the person's knowledge, skill, experience and ability. The value of the services of a person of professional and technical skill and knowledge cannot be determined at competitive bidding.

It would be impracticable and useless to ask for bids for the services of men to use a patented device, where such device requires skill and technical knowledge to operate the same. Such men may be employed without securing bids therefor.

The courts are not agreed as to the rule in the case of patented materials and devices. The authorities are in conflict and cannot be reconciled.

Dillon on Municipal Corporations discusses this at Section 803, as follows:

> "When no provision of the charter restricts the power of the municipality to contract, e. g., requiring all contracts to be let to the lowest bidder, municipality may contract for the use of a patented or monopolized article in a public improvement. When the statute or charter requires that contract for work or material shall be let by competition and after advertisement, a divergence in the views of the courts has arisen on the question whether a city can contract for the purchase or use of patented articles. In Michigan, New York, and some other states, it has been held that where the statute or charter provides that no contract shall be made by the city except with the lowest bidder after advertisement

for proposals, such provision was not intended to prevent the city from taking advantage of patented articles, and does not prohibit it from contracting for the use of an article or material although the article is patented, and the patent is owned and controlled by a single person. But on the other hand the Supreme Courts of Wisconsin, Louisiana, Illinois, and some other states have adopted the contrary view and hold that the statute intends that there shall be competitive bidding in all cases; that when an article is patented there cannot be competitive bidding, and that a specification calling for a patented article violates the implied requirement of a statute prohibiting the letting of contracts otherwise than by competition to the lowest bidder."

McQuillan on Municipal Corporations says at Section 1197:

"The prevailing and better opinion is that a provision of the charter or statutes that municipal contracts be let on competitive bids, does not preclude the proper authorities from specifying a patented article or process, which practically precludes competitive bidding. Therefore, it is generally held that if all the competition is permitted of which the situation allows, a patented article or process may be specified."

In the cases which do not except patented articles from the provisions of the charter or statute which provides for competitive bidding, it is usually held that this provision prevents the city from contracting for the patented material.

The courts of Ohio have permitted municipalities to use patented pavement in the improvement of a street.

In case of Hastings vs. Columbus, 42 Ohio St., 585, the sixth syllabus reads:

"The fact that a street improvement is to be made with a specific patented pavement, is no valid objection to an assessment for such improvement, if, before the contract was let, the city had acquired the right to permit any bidder who might be successful, to use, on reasonable terms, such patent in making the improvement."

In Holbrook vs. Toledo, 18 Cir. Dec., 284, it is held:

"Competitive bidding is not necessarily narrowed, but may be broadened, by admission to the competition of material which monopolized by reason of patents; and in the exercise of a sound discretion it is competent for the proper city authorities, in advertising for bids for a street improvement, to call for material which is covered, or the assembling of which is covered, by patents."

This case was affirmed without report in 73 Ohio St., 400. In this latter case it was contended that the city must first secure the right to use the patented article at a reasonable price before the city can specify such patented pavement for use. This contention was overruled by the court.

In summing up his conclusions, Wildman, J., says on page 296 of 18 Cir. Dec. 284, supra, as follows:

"In the absence of any provision in the Ohio statutes that a city may not let just such a contract as has been let here, in the absence of

any provision in this statute such as we find in the statute with reference to the city of Cincinnati, which was cited to us, containing the express terms upon which a patented improvement may be used, we are of one mind that we ought not to read into this law the restrictions and qualifications for which counsel for plaintiff contend. Wherever the exclusive right to a thing is owned or controlled, it has seemed to us that the people of a city ought not to be deprived of an opportunity to avail themselves of a useful and valuable thing simply because it is so controlled. And this kind of monopoly which we guard by the issuing of letters patents is a monopoly which has been encouraged, because it stimulates inventive genius and in the end results in great good to humanity."

In Saunders vs. City of Iowa City, 134 Iowa 132, it is held:

"A contract for a street improvement which is let to the lowest bidder is not in violation of the statute relating to competitive bidding by reason of the fact that the council, in its resolution authorizing the improvements and its advertisement for bids, required the use of a patented pavement."

Deemer, J., says at page 145:

"What is meant by this statute is that there must be competition where competition is possible. This is the construction usually given to statutes which are not prohibitive in character. If the material, or part of it, is monopolized by patents, there cannot, of course, be absolutely free competition, and where that is impossible, it surely was not the intent of the legislature that all improvements should cease, or that antiquated methods only should be adopted. All that the law means, as we view it, is that in all cases where competition may exist, such competition shall be allowed by receiving bids, and in the absence of expressed prohibition there is nothing to warrant the exclusion of patented articles."

The court here states what, in my opinion, is the correct rule. In Ohio the courts have recognized the right of a municipality to use patented pavements. A patented device or article of any kind is usually under the absolute control of the patentee or his assignees. He has a monopoly of this article, which has been given to him by the federal government. So far as the patented article is concerned there can be no competition. There may be, however, as in a paving contract, other things to be furnished in addition to the patented article. So far as the patented article is concerned there can be no competition, and bids upon that alone would be useless and worthless. The other features of the contract, however, may be subject to competition. As to these bids are required. So also there are several patented pavements, these may be placed in competition with each other.

In submitting plans for bids the entire contract, including the patented articles, should be submitted for bids. A patented article is usually for sale to all persons at the same price, although the price is to a certain extent arbitrary to the person who controls the patent.

Section 3811, General Code, provides:

"No municipal corporation shall adopt plans or specifications for

a public improvement required by law to be made by contract let after competitive bidding, which requires the exclusive use of a patented article or process, protected by a trade-mark, or an article or process wholly controlled by any person, firm or corporation or combination thereof."

This statute places a limitation upon the use of a patented article by a municipal corporation in making a public improvement. The purpose of the contract in question is not for the purpose of making a public improvement, but is for the purpose of testing the water pipes.

This section does not prohibit the use of a patented article or process, but it prohibits the adoption of plans and specifications for a public improvement which requires the exclusive use of the patented article or process. The purpose of the section is to require that other articles on processes shall be placed in competition with the patented article or process. The plans may call for the use of a patented article, provided other articles are placed in competition with it and may be substituted for the patented article in the letting of the contract.

In your case there are no plans and specification. The city desires the use of a patented article to test its water mains. It does not purchase the patented device but contracts for its use. It is not, in my opinion the purpose of this statute to prevent the city from using a patented device such as is to be contracted for in this case. Section 3811, General Code, does not control this question. It is declaratory, however, of the policy of the law as to the use of a patented article, where competitive bidding is required.

If there is but one device by which the water mains can be successfully tested, competition is unavailable. If, however, there is more than one device by which the test can be made, bids might be asked for. In that case a question would arise as to which was the better device or process. This would have to be taken into consideration in awarding the contract. The lowest bid alone would not of itself be controlling. The utility and other qualities of the device must also be taken into consideration. This would present a situation similar to that which is presented in the employment of persons of professional or technical skill and knowledge. Competitive bidding would not always be available, it would not always bring the desired result. Better results may be secured by negotiation than by competitive bidding. It is impossible to lay down a general rule to govern all cases.

The proper rule seems to be that where a patented article is to be used by a city, competitive bidding should be had so far as such bids are practicable and available. This must be determined by the particular facts of each case.

In the case you submit, two things are contracted for, to-wit: the patented device, and the services of the men to use the device. Competitive bidding as to both of these is to a great extent impracticable. The first is under the absolute control of the company, and second requires technical knowledge and skill. Competitive bidding is not required as to the second, and the facts submitted are not sufficient to determine definitely if it is required as to the first. Where bids are not required because they are impracticable, the requirement that council must first direct and authorize the expenditure is a check upon the power of the director of public safety.

The contract so far has not been legally entered into. The certificate of the auditor, in any event, is required. If the expenditure is in excess of five hundred dollars, council must first authorize such expenditure. More facts are required in order to determine if the same can be let without competitive bidding.

Respectfully,

TIMOTHY S. HOGAN.

Attorney General.

719.

JUSTICES OF THE PEACE NOT ABOLISHED BY CONSTITUTIONAL AMENDMENT.

As evidenced (1) *by the express statement of the committee, chosen by the constitutional convention, to report on the question of the abolition of Justices of the Peace,* (2), *by the action of the convention in providing in every instance of the abolition of offices for the continuation in office of present incumbents, until provision is made for their successors,* (3) *by the title to Proposal No.* 19, *which purported to abolish Justices of the Peace only in certain cities,* (4) *by the provision of proposal No.* 41, *that all laws then in force and not inconsistent with the constitution, shall continue in force until amended or repealed; it was clearly not the intention of the Constitution to abolish Justices of the Peace.*

Proposal No. 41, *must, therefore, be construed to leave unrepealed the statutory provisions relating to Justices of the Peace.*

November 18, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—In your letter of September 30th you ask me the following question:

> "Will the office of justice of the peace be abolished after January 1, 1913, by reason of the adoption of the constitutional amendments to Article IV of the Constitution of Ohio?"

In reply to your inquiry I beg to advise that this question has given me more trouble in arriving at a conclusion than any submitted to me since my incumbency in this office. Appreciating the fact that not only has there existed and do there exist opposite opinions among the very best lawyers of the State upon the effect of the constitutional amendments in respect to the continuance or the abolition of the office of the justice of the peace, but also the reasons for the position taken by the advocates of the one side or the other to the controversy are out of harmony, and in fact destructive of each other, I have sought the written opinions of two of the very ablest jurists who were members of the constitutional convention, to-wit: Honorable Hiram D. Peck, author of the Judicial Reform Proposals, and Honorable E. B. King; also, the written opinions of two other distinguished lawyers, Honorable Thomas H. Tracy of Toledo, and Honorable J. M. McGillivray, of Jackson, Special Counsel in this department; as well as the verbal opinion of a great number of other lawyers, and I must say I have never found a question looked at from so many different angles as the present one. The lawyers mentioned are all men of such high standing that I deem it proper to embody their respective views in this communication and to state my own conclusions as I go along.

Judge Hiram D. Peck forwarded to me on August 22, 1912, a copy of a communication which he had just prepared for publication, and the same is herein given, together with copy of his letter of August 22d:

"Cincinnati, August 22, 1912.

"DEAR MR. HOGAN:—Yours of the 21st is just at hand.

"I hand you herewith a copy of an article which I have just pre-

pared for publication on the subject mentioned by you. I have great confidence in the proposition stated, and have nothing more to add, except to say, that if anybody in the Convention had thought that they were abolishing the office of Justice of the Peace, the proposition would not have been passed in its present form.

"Yours truly,

H. D. PECK."

"AS TO JUSTICES OF THE PEACE.

"With reference to the contention that the proposed amendment to the Constitution of the State will result, if adopted, in the abolition of the office of Justice of the Peace, permit me to say that the Constitution now in force has two sections that bear on the subject. Section 1 of Article IV mentions Justices of the Peace as part of the Judiciary of the state, but does not prescribe them, where or how they shall be chosen, or fix their terms of office or jurisdiction. Section 9 of the same Article is the real source of the existence and powers of the Justice of the Peace. It is in these words:

"'Section 9. A competent number of justices of the peace shall be elected by the electors in each township in the several counties. Their term of office shall be three years and their powers and duties shall be regulated by law.'

"It will be observed that this section is mandatory; that it provides for a competent number of justices of the peace *in each township,* fixes the term of office, and directs the legislature to regulate their powers and duties. If there were no mention of Justices of the Peace in Section 1, Section 9 provides everything that is necessary for the existence of such Justices, so that if the mention in Section 1 omitted, and Section 9 continued in force, the office is duly provided for. Now, that is just what is provided for in the proposed amendments. The words, 'Justices of the Peace' are omitted from Section 1 of Article IV, and Section 9 of the same article is re-enacted as follows:

"'Section 9. A competent number of Justices of the Peace shall be elected by the electors in each township in the several counties, until otherwise provided by law. Their term of office shall be for four years, and their powers and duties shall be regulated by laws; provided that no justice of the peace shall be elected in any township in which a court other than a mayor's court is, or may thereafter be maintained with the jurisdiction of all causes of which justices of the peace have jurisdiction, and no justice of the peace shall have, or exercise jurisdiction, in such township.'

"The foregoing Section 9 is substituted by the proposed amendment for the original Section 9, and with this new section in force there is as clear and express provision for the office of Justice of the Peace as there was by the terms of the original section. The only difference is that the General Assembly may in the future abolish the office in places where it is not needed or desired—a power which it is eminently proper the General Assembly should have. The existence of the office and its functions are as clearly provided for as they were in original Section 9 and in the same mandatory words, and all that

part of the new section after the word 'provided' relates only to the City of Cleveland and does not affect the general question of the existence of Justices of the Peace.

"To put it briefly, the provisions of the constitution as to the office of Justices of the Peace will stand as follows, if the proposed amendments are adopted:

"'Section 9. *A competent number* of Justices of the Peace shall be elected by the electors in each township of the several counties, until otherwise provided by law.'

"If that does not provide for the continuance of the office, it is difficult to see how it could be done. The reference in the schedule of Proposal 21 is to original Section 9 of Article IV, for which the new Section 9 is substituted, and as the repeal of Section 1 and original Section 9 leaves the whole matter to rest on the provisions of the new Section 9, the amendment as to the City of Cleveland is unnecessary or 'of no effect,' as the schedule provides, because the new Section 9 leaves the whole matter within the discretion of the General Assembly, which can provide for Justices in Cleveland or not as may be found proper.

"Since writing the above my attention has been called to the fact that Sections 2 and 3 of Article XVII, which remain in force undisturbed by the new provisions, recognizes the existence of the office of Justices of the Peace and fixes their terms of office in these words:

"'The term of the office of Justice of the Peace shall be such even numbered years, not exceeding four years, as may be prescribed by the General Assembly.'

"'Section 3. Every elective officer holding office when this amendment is adopted shall continue to hold such office for the full term for which he was elected and until his successor shall be elected and qualified as provided by law.'

"If anything more were needed to show the intention of the Constitutional Convention to continue the existence of the office of Justice of the Peace, and to continue in office the men now holding that office, it is difficult for me to suggest what that should be."

Before going further it may be said that I fully concur with Judge Peck in his statement,—if there were no mention of Justices of the Peace in Section 1, Section 9 provides everything that is necessary for the existence of such justices. However, Judge Peck assumes that Section 9 as found in Proposal 21, or in Article IV of the New Constitution, remains in full force and effect. In my judgment, it will not do to assume this. The matter is very disputable, with the weight of reason being the other way. In fact, Judge King (as will hereinafter appear in his brief) differs from his associate in the Constitutional Convention, Judge Peck, on this material point.

Said Proposal 21 appears in the following way:

"NUMBER 21.

"ABOLITION OF JUSTICES OF THE PEACE IN CERTAIN CITIES.

ARTICLE IV.

"Section 9. A competent number of justices of the peace shall be elected by the electors in each township in the several counties, until

otherwise provided by law. Their term of office shall be for four years and their powers and duties shall be regulated by law; provided that no justice of the peace shall be elected in any township in which a court, other than a mayor's court, is, or may hereafter be, maintained with the jurisdiction of all causes of which justices of the peace have jurisdiction, and no justice of the peace shall have, or exercise, jurisdiction in such township.

"SCHEDULED.

"If the amendment to Article IV, Sections 1, 2 and 6 be adopted by the electors of this state and become a part of the constitution, then Section 9 of Article IV of the constitution is repealed, and the foregoing amendment, if adopted, shall be of no effect."

At this point it will be noted that the Constitutional Convention made the following explanation of Proposal 21:

"This amendment prohibits the election of justices of the peace in municipalities where municipal courts, other than mayor's courts, have been or may be established. It applies only to certain large cities."

If we assume that by the language,—"Section 9 of Article IV of the Constitution is repealed" that the whole Section 9 is referred to, we still have confronting us the following language of the schedule,—"and the foregoing amendment, if adopted, shall be of no effect."

The argument is made that by the language—"and the foregoing amendment, if adopted, shall be of no effect" is meant in reference only to the proviso in Section 9, to-wit: "provided that no justices of the peace shall be elected in any township in which a court other than, etc.," I cannot concur in this view. That might have been thought by some of the members of the Constitutional Convention, and might have, in a way, been intended, but amendment means amendment and not proviso.

Judge King's position in the matter is stated in his commission of October 8th. Judge King's communication is a very lucid and strong argument in support of the proposition that the office of Justice of the Peace in the State of Ohio has not been abolished. It will be noticed that Judge King does not rely upon the material proposition advanced by Judge Peck, and their different lines of reasoning, and the different premises moved me at times to the conclusion to submit this whole matter to the courts for determination. His letter of October 8th reads as follows:

"Sandusky, Ohio, October 8, 1912.

"DEAR SIR:—In reply to your favor of the 7th inst., I beg leave to enclose a printed copy of the circular prepared in accordance with the resolution of the convention upon the subject of the status of justices of the peace, and I also note in your letter that the question is giving you considerable trouble.

"Proposal No. 19, providing for the amendment to Sections 1, 2 and 6 was adopted by the convention with the understanding that Section 1, left out of the list of constitutionally created courts, justices of the peace. This was definitely done and done for the purpose of leaving

the justices of the peace a purely statutory office that might in the future be abolished entirely by the General Assembly either throughout the State or in such municipalities as might desire and acquire by general or special legislation a municipal court that would take the place of the justices of the peace.

"Proposal No. 21 was designed to fit a condition of affairs existing in the city of Cleveland more particularly providing that no justice of the peace should be elected in any township in which another court other than Mayor's court is, or may hereafter be, maintained.

"After the two had been adopted it was noted that if the amendments in Sections 1, 2 and 6 were ratified by the people that there would be a conflict with Section 9 because Section 9 is the section of the old constitution which provided that justices of the peace shall be elected in each township of the several counties of the state and if they were adopted and in effect, the adoption of the amendment to Section 1 would have no effect since Section 1 is a mere recitation that judicial power invested in certain named courts. Section 9 then was the important section in that article which established the justices of the peace court.

"Framers of the Constitution of 1851 did not mention Section 1 of Article IV as establishing a court of the justices of the peace or any other court, for they provided to establish a supreme court by Section 2, and by Section 3 a common pleas court, and by amendment to Section 6 a circuit court, and by section 7 a probate court, and by section 9 justices of the peace. Section 1 then was simply a declarative section of the vesting of judicial power, but Section 1, while it mentions a number of courts, might have omitted all of them or might have named only one, retaining the provision which is in the original section such other courts inferior to the supreme court as may from time to time be established by law.'

"The amendment recites the supreme court, courts of appeal, courts of common pleas, courts of probate and then such other courts inferior to courts of appeal as may from time to time be established by law.

"Now then, the report of the committee enclosed was prepared before the election. We could not know what action the voters might take but they not only adopted proposals 19 and 21, but they also adopted proposal 41, and it is upon that I now rely for the statement that justices of the peace are not abolished by the two amendments to the constitution, notwithstanding that the schedule attached to No. 21, Section 9, providing that if the amendment to article IV, Section 2 and 6 be adopted, then Section 9 of Article IV of the Constitution is repealed, and the foregoing amendment, if adopted, shall be of no effect, for the very evident reason that the provision in the schedule No. 41 'All laws then in force (January 1, 1913) not inconsistent therewith shall continue in force until amended or repealed.'

"Laws are in force establishing the office of justice of peace, providing for his election, the duties of his office and his jurisdiction. These are not inconsistent with the constitution because judicial power is vested in Ohio in the courts named in Article IV and in such other courts inferior to the court of appeals as may from time to time be established by law. Those statutes not being inconsistent with either of the amendments relating to the judicial system are still in force.

"There is no provision in the constitution prohibiting the election

of a justice of the peace or preventing the legislature from establishing the office, this having been done even previous to the adoption of the amendment, but not being inconsistent to the amendment, remains in force, and is as truly a law establishing the office of justice of the peace, and as truly within the terms of the present amended constitution as if it were a law enacted by the General Assembly subsequent to the adoption of the amendments to the constitution.

"If I doubted my own judgment upon this construction, I am sustained by the opinion of my colleagues in the convention whose attention was called to this question and who were men of legal experience as well as every other lawyer with whom I have discussed the question, excepting Mr. Tracy, of Toledo, who took an active interest in the defeat of most of the amendments to the constitution and who sought evidently to bring discredit upon the judicial amendment known as the 'Peck Proposal,' Sections 1, 2 and 6, by asserting that the office of Justice of the Peace was abolished in Ohio.

"My mind is so constituted that it can see but one side of this proposition. The constitution does not abolish the office; it simply says nothing about it. Its establishment is not contrary to any provision of the constitution, but, on the contrary, power is expressly conferred upon the General Assembly to establish it or any other judicial office and there, the situation and position of justice of the peace will remain after January 1, as they have been before, and when the terms of the present incumbents expire, their successors will be elected as before and all things shall go forward as before until such time as the General Assembly shall see fit to amend the statutes in relation to them.

"It is true that Section 9 is of no effect. Old Section 9 is repealed and the new one having been adopted by its own terms becomes of no effect, therefore the constitution does not provide as the amendment to Section 9 is intended to provide, for the abolishment of the office in townships in which a court is maintained having the same jurisdiction as justices of the peace. The subject proposed to be accomplished by the amendment to Section 9 is now turned over to the General Assembly."

After the Constitutional Convention had agreed upon the proposal and during the campaign in reference to the constitutional amendments there was much discussion throughout the state as to whether or not the office of justice of the peace would be abolished provided Proposal 21 was adopted. The Association of Justices held a meeting to consider the matter, and interest in the question became so intense that the Constitutional Convention assembled on the 26th of August, 1912, appointed a committee consisting of Judge Hiram D. Peck, Judge E. B. King and Judge D. J. Nye to prepare and have published a statement as to whether or not the adoption of Proposal 19 on the Constitutional amendment ballot would abolish the office of justice of the peace, and this committee reported as follows:

"JUSTICES OF THE PEACE.

"THEY ARE NOT ABOLISHED BY THE PROPOSED AMENDMENTS TO THE CONSTITUTION.

"Report of Special Committee Appointed by the Convention:

"The undersigned, appointed by the Fourth Constitutional Con-

vention at its session in Columbus August 26, 1912, as a committee to prepare and have published a statement as to whether or not the adoption of No. 19, on the constitutional amendments ballot, relating to change in the judicial system, will abolish the office of justice of the peace, beg leave to submit the following report:

"This office, by the existing constitution, is declared to be one of the courts in which judicial power is vested. But this section of Article IV, now in force, as well as amended Section 1, vests the judicial power in certain named courts and such other inferior courts as may from time to time be established by law. While the office of justice of the peace is recognized by the constitution as a judicial one, it is also established by law, for there exists on the statute books a provision for election of justices of the peace, their number in each township, the terms of their office, their jurisdiction and the manner of their compensation.

"Provision is made in the General Code for justices of the peace, as well as their election and duties, in Sections 1712-1806, and for their jurisdiction and powers in Sections 10223-10491, both inclusive; and none of these statutes will be repealed by the adoption of any of the constitutional amendments proposed.

"Section 15 of Article IV of the Constitution, both in the present constitution and in the amendment proposed, provides that 'any existing court heretofore created by law shall continue in existence until otherwise provided.' Section 1 of the original schedule and the schedule adopted by the convention known as amendment No. 41 on the ballot, provides that all laws in force, not inconsistent with these amendments 'shall continue in force until amended or repealed.' These two propositions of the constitution protect in office every official until the end of his term, and they protect forever, until repealed by the General Assembly, the statutes creating and regulating the jurisdiction of the office of justice of the peace, because it is not inconsistent with the constitutional provisions contained in Section 1 of Article IV. Section 1 is only declarative of the courts in which judicial power is vested. It omits to name several important courts now existing in Ohio, as for instance, the superior court of Cincinnati, the court of insolvency of Cuyahoga county, the municipal court of the city of Cleveland, and there may be others, all of which are created by statute and all of which will remain in existence until the statutes creating them are repealed or changed. This is so with justices of the peace. The justices now in office will continue until their terms expire, and they will continue to be elected until the General Assembly changes the law relating to them. It may be just as well said that the superior court of Cincinnati, the court of insolvency of Cuyahoga County, and the municipal court of Cleveland are abolished by these amendments; because they are not named in Section 1 as constitutional courts; yet no one would claim that these courts are interfered with.

"This, we believe to be the legal construction and effect of the proposed amendments that relate to the office of justice of the peace.

"HIRAM D. PECK,
"E. B. KING,
"D. J. NYE."

The report made by the committee was published throughout the state.

The position of Mr. Tracy is contained in his letter of August 27, 1912, to Judge King which is as follows:

"August 27, 1912.

"HONORABLE E. B. KING, *Sandusky, Ohio.*

"MY DEAR JUDGE:—I note from the morning paper that you and others have been appointed a committee by the late constitutional convention to inform the justices of the peace of the state that the adoption of Proposal No. 19 would not abolish the office of justice of the peace in the state of Ohio.

"I will esteem it a favor if you will promptly send me a copy of anything which you may sign and put out on this subject.

"In the meantime, I call your attention to the schedule, with which, of course, you are entirely familiar, which follows Section 9 of Article IV, and which reads as follows:

"'If the amendment to Article IV, Sections 1, 2 and 6, be adopted by the electors of this state and becomes a part of the constitution, then Section 9 of Article IV of the constitution is repealed, and the foregoing amendment, if adopted, shall be of no effect.'

"Amended Section 1 of Article IV, which is included in proposal No. 19, omits justices of the peace from its provisions, and the above quoted schedule expressly provides that if Proposal No. 19 is adopted, the Section 9 of the present constitution shall be repealed, and amended Section 9 shall be of no effect.

"Under these conditions, it has seemed to me that the office of justice of the peace, so far as the constitution is concerned, will be abolished if Proposal No. 19 is adopted. I do not want to mislead myself or any of the voters of the state, and I am sure you do not."

Also, in his letter of August 29th to Honorable E. B. King, which is in part as follows:

"Notwithstanding your statement that the position taken by myself and, I believe, a majority of the lawyers of the state who have considered the matter, 'is not supported by any kind of reason and certainly contrary to the truth," I am still unconvinced of the correctness of your position after reading your letter.

"You absolutely ignore the effect of the schedule following Section 9. If it had not been the intention to abolish the office of justice of the peace, why was the schedule following proposed Section 9 inserted? I have been told that it was the sentiment of a majority of the delegates to the constitutional convention that the office of justice of the peace should be abolished. You know whether this is correct or not. I am not in a position to know.

"The people undoubtedly have the right to vote, and should be given the opportunity to vote, if they desire, upon the question as to whether the office of justice of the peace should be abolished, but the members of the convention should inform them, and not mislead them, when the question is before them, as I believe it squarely is at this time.

"I wrote to Judge Peck substantially the same letter which I wrote you, and have received a reply, in which he gives entirely different reasons as to why the office is not abolished, and which reasons do not support your argument, but are, it seems to me, inconsistent with your argument.

"You correctly anticipate what any lawyer would say to the

sophistry contained in your suggestion, that the schedule, being Proposal No. 41, would retain in force all laws not inconsistent with the amendments, and properly answer, by saying that there is no assurance that proposal No. 41 will be adopted. You, however, state what is not true when you say 'the schedule of the original constitution provides that all laws in force, continue in force until amended or repealed.' Section 1 of the schedule to the original constitution provides, 'All laws of this state in force on the 1st day of September, 1851, not inconsistent with this constitution, shall continue in force, until amended or repealed,' whereas the facts are, that none of the sections of the statute which you cite, from 1712 to 1806, inclusive, and from 10233 to 10449, inclusive, and which you claim create and provide for the continuance of justices of the peace, were 'in force on the 1st day of September, 1851.'"

Mr. McGillivray responds to Judge King's brief with a brief of which the following is a copy:

"Section 1 of Article III of the Constitution of 1802 and of Article IV of the Constitution of 1851 both include Justices of the Peace among the constitutional offices of our judicial system. Proposal 19 leaves them out.

"Section 11 of Article III of the Constitution of 1802 and Section 9 of Article IV of that of 1851 provided for the election of Justices in each township of the several counties of the state. Section 9 is repealed by the schedule attached to proposal 21.

"This presents the whole question, except as to the effect of proposal 41.

"That Justices of the Peace were intentionally omitted from the list of constitutionally created courts is conceded. This is clearly stated by Judge King, with whom I agree that Section 1 of Article IV did not create the office of Justice of the Peace, but it was established by Section 9 of that Article. Such being the case, I take it that Judge King and I will also agree that with Section 9 repealed, Justices of the Peace are not established as a part of our judicial system by the Constitution, and are relegated to the class of 'such other courts inferior to the Supreme Court as may from time to time be established by law,' to use the language found in the Constitution of 1851, or 'inferior to the Courts of Appeals,' to adopt the language of proposal 19.

"Assuming that all agree as to this, about which there is no room for cavil, attention is called to proposal 41, which reads:

"'The several amendments passed and submitted by this convention when adopted at the election shall take effect on the first day of January, 1913, except as otherwise specifically provided in the schedule attached to any of said amendments. All laws then in force not inconsistent therewith, shall continue in force until amended or repealed,' etc.

"Two provisions are here to be noticed: 1. Schedules attached to amendments are given controlling effect, and, 2, 'All laws not inconsistent with the amendments shall remain in force until amended or repealed.'

"The first proposition fixes the status of the schedule attached to Proposal 21, and leaves it in control. The effect of the second is for consideration. I am ready to concede that if, prior to September 3, 1912, Justices of the Peace had been a statutory office created by the Legislature, it would survive under favor of this provision—but it is not.

Wherein Judge King and I differ is that I do not concur in his statement 'Laws are in force establishing the office of Justices of the Peace.' If such were the case, no question could be raised as to abolishing that office, but I cannot find such law, although I find laws fixing their jurisdiction, and to adopt the language of the Constitution of 1851, 'regulating their powers and duties.'

"This, then, presents the matter in a nut shell. That those offices named in Section 1 of Article IV of the Constitution of 1851, and provided for in Sections 2, 3, 6, 7, 8 and 9 of said Article were treated as constitutionally created offices must be conceded, and the Legislature in no instance did more than to provide for jurisdiction, election, compensation and the like.

"When it came to other offices, such as the Superior, Municipal, Insolvency Courts and the like, the Legislature has in *haec verba* 'established' courts. For instance, Section 1605, General Code, reads:

"'There shall be established in Hamilton County a court of record that shall be styled "The Court of Insolvency," etc.'

"Section 1559 of the General Code, specifically recognizes the former establishment of the Superior Court of Cincinnati, while Section 1 of the Act of May 10, 1910, 101 O. L., 364, reads:

"'Section 1. That there shall be and is hereby established in and for the city of Cleveland a Municipal court which shall be a court of record and shall be styled "The Municipal Court of Cleveland," etc.'

"These courts, the Superior Court of Cincinnati, The Court of Insolvency, and the Municipal Court of Cleveland, were all established under authority of Section 1 of Article IV of the Constitution of 1851, and as their creation and establishment are not inconsistent with any of the amendments, but would be a lawful exercise of the power to create other courts 'inferior to the Courts of Appeals,' the laws affecting them continue in force under the provisions of Proposal 41.

"But finding no such enactment relating to Justices of the Peace, and feeling the same would be unnecessary under Section 9 of Article IV of the Constitution of 1851, and the construction given it and the related sections of that article by the Legislature for sixty years, I am forced to the conclusion that Proposal 41 only goes far enough to authorize present justices of the peace to exercise their powers, as provided by laws in force on January 1, 1913, until the expiration of their respective terms of office, and at that time, unless provision is made establishing justices courts, there will be no authority to elect, not because there is no statutory direction to do so, but because there is no such office to fill, either statutory or constitutional.

"This results in the necessity of legislation creating the office of Justice of the Peace, and regulating powers and duties.

"Of an act of the Legislature can be found creating or establishing the office of Justice of the Peace, and not merely fixing the numbers thereof and prescribing their powers and duties, I might conclude otherwise, although confronted with the fact of no necessity for the same.

"To say that the schedule to Proposal 21 is an absurdity is to praise it. It is worse. It is a provision whereby the votes on Proposal 21 can only be effective in the event of Proposal 19 losing out."

To my mind a decision on this question turns upon the issue squarely drawn between Judge King and Mr. McGillivray upon the effect of Proposal 41. It will be noticed that Mr. McGillivray says "I am ready to concede that if, prior to

September 3, 1912, justices of the peace had been a statutory office created by the Legislature, it would survive under favor of this provision (Proposal 41)—but it is not. Wherein Judge King and I differ is that I do not concur in his statement 'Laws are in force establishing the office of Justice of the Peace.' If such were the case, no question could be raised as to abolishing that office, but I cannot find such law, although I find laws fixing their jurisdiction, and to adopt the language of the Constitution of 1851, 'regulating their powers and duties.'"

In a strictly logical sense counsel is perhaps correct in this statement, but in my view a liberal construction must be given the amendments to our constitution in relation to the old constitution and the laws passed pursuant thereto.

At this point it can be said at the expense of repetition that Section 9 of Article IV expressly authorizes their creation, and we have a number of sections of the General Code in reference to the justices of the peace, for instance, Section 1712 relating to the jurisdiction of the common pleas court to fix the number of new townships; Section 1713, the number of justices in a township may be increased or diminished; 1714, filling vacancies; 1715, election and term; 1716, fixing jurisdiction, and other sections, to-wit: 1717, 1718, 1719, 1720, 1721, et seq. in relation to the election and the duties of the justices of the peace. I have no doubt that if the constitution were silent in respect to justices of the peace, and there were provisions authorizing the Legislature to create inferior courts, and the Legislature passed only such sections of the General Code as we have in reference to justices of the peace, no one would question the creation or the existence of the office. When the Legislature provides for the election or appointment of an officer and prescribes his duties, fixes the terms of office and provides for other things as contained in the General Code in reference to justices of the peace, it creates the office.

Quoting from Proposal 41:

> "All laws then in force, not inconsistent therewith, shall continue in force until amended or repealed."

I think that the amendment to the constitution contemplates and embraces within that expression the laws we have in reference to justices of the peace because they are not inconsistent with the constitution. If they be inconsistent with the constitution, unquestionably the Legislature would be without power hereafter under the head of "inferior courts" to create the office of justices of the peace.

Moreover, at best, and without looking at extraneous aids, it is a disputable question whether by the language used in the amendment to the constitution it can be said the office of justices of the peace has been abolished. In this contention considerable weight is to be given to extraneous related matters. It will be kept in mind that in the amendment relating to the judicial reform, provision is made for taking over by the Supreme Court of the work of the old, and similar provision is made for the taking over of the work of the circuit court by the newly created court of appeals. The new constitution in the latter respect is as follows:

> "The courts of appeal shall continue the work of the respective circuit courts and all pending cases and proceedings in the circuit courts shall proceed to judgment and be determined by the respective courts of appeal, and the supreme court, as now provided by law, and cases brought into said court of appeals after the taking effect hereof shall be subject to the provisions hereof, *and the circuit courts shall be merged into,* and their work continued by, *the courts of appeals.*"

The jurisdiction of the common pleas courts remains the same under the new constitution as the old. It therefore appears that the constitutional convention provided for the care of the cases pending in the common pleas, circuit and supreme courts expressly—otherwise litigants might be deprived of their rights. Now, there is no provision whatever with reference to cases pending in the justices courts, and I do not believe that with this condition of affairs the people of the state on the 3d of September, 1912, believed that they were abolishing the justices of the peace courts. Certainly the constitutional convention did not so think, otherwise provision would have been made for the cases pending in the justices courts. Moreover, the committee appointed by the constitutional convention on August 26, 1912, reported that "the justices now in office will continue until their terms expire and they will continue to be elected until the General Assembly changes the law relating to them. This committee, comprising judges and men of high integrity, had the means of knowing the true intent of the delegates to the convention, and while we must judge of the intent of the constitutional convention by its language, yet we have a right to give great weight to its own interpretation of its own acts. This is doubly important because the interpretation was given prior to the election.

Attention might further be called to the form of the ballot used at the special election. As to Proposal 21, it was as follows:

> "Article IV, Section 9, Abolition of Justices of the Peace in certain cities."

Counsel do not concur with me in giving much weight to the form of the ballot. While it may not be necessary for the form of the ballot to indicate definitely the true character of the proposal, yet, in my judgment, the form of the ballot must not be misleading or calculated to work a fraud on the electorate. To hold that a ballot entitled "Abolition of Justices in certain cities" carries with it a proposal to abolish justices of the peace entirely is to make out of the law an instrument of fraud. I apprehend that a court would go very slow in ousting a justice of the peace from office in a back township through the instrumentality of a vote under the head of "justices in certain cities." Whether the courts would look to the form of the ballot in determining the question, I do not know, but the present controversy discloses the wisdom and necessity of the constitutional convention exercising the greatest care to the end that the form of the ballot may not be misleading to the voter. In any event, the form of the ballot may be assumed as indicative of the real intention of the constitutional convention.

Considering the great number of justices in the state, the importance of their work for the welfare of the state, the vast interests involved, the necessity for their existence especially outside of municipalities as is clear from the fact that the constitutional convention desired to leave the matter to the Legislature, I cannot bring myself to believe that the office has been in fact abolished.

After the constitutional convention finished its regular work it adjourned to re-convene on August 26th, 1912, at which latter date the convention had full knowledge of the doubt that had arisen with reference to the abolition of the office of the justices of the peace, and in reliance upon the accuracy of the report of the committee aforesaid, the convention adjourned without having changed the proposals.

For the foregoing reasons I am of the opinion that the office of justice of the peace has not been abolished by the amendments adopted on September 3, 1912. In any event this department will leave it to the courts to say to the contrary.

Very respectfully submitted,

TIMOTHY S. HOGAN,
Attorney General.

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TRAVELING EXPENSES OF MUNICIPAL OFFICIALS IN ATTENDING CONVENTIONS—DIRECTOR OF PUBLIC SAFETY, CHIEF OF FIRE DEPARTMENT, HEALTH OFFICER, PHYSICIAN OF HEALTH DEPARTMENT.

(1). *The director of public safety, the chief of the fire department, the general superintendent of the water works department, the health offier and the physician of the health department, may not be allowed their expenses incurred in attending conventions for the mere purposes of general education.*

(2). *The director of public safety and the chief of the fire department may be reimbursed for expenses incurred in attending fire chiefs' conventions, providing such a visit is the most economical and efficient method of promoting a purchase, held in immediate contemplation by the department of public safety.*

(4). *The superintendent of the water works department, under like conditions, with reference to purchases of the water works department, may be reimbursed for expenses to such conventions, incurred in a visit authorized by the director of public service.*

October 23, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Under favor of October 5, you request my opinion as follows:

> "Is it legal for the director of safety, chief of the fire department and the general superintendent of the water works department to attend the national fire chiefs' convention recently held at Denver, Col., at the expense of the city? The above officials attended said convention for the purpose of obtaining knowledge regarding machinery and mechanical devices necessary for the betterment of the fire system of city?
>
> "Is it legal for the health officer and a physician of the health department to attend the meeting of the American Public Health Association and the International Congress on Hygiene and Demography, held in Washington, D. C., from Sept. 18 to 28, 1912, at the expense of the city?"

The following is stated in Abbott's Municipal Corporations, Section 697:

> "A public official in performing the duties of his office may incur miscellaneous expenses which are a proper charge upon public funds and this is especially true where the expense was one incurred in the performance of a duty in which the public corporation has a direct and beneficial interest or one which rests upon it as a duty or as an agency of the sovereign. For such disbursements a public officer is clearly entitled as a matter of right to a reimbursement. If the expenses, however, are incurred in connection with services not authorized by law or in the performance of duties in excess of corporate powers, no right of indemnity or reimbursement exists.
>
> "Where the expense is incurred in a service which properly belongs to the public corporation as a governmental agent or as the sovereign itself, or is one in which it is directly and beneficially interested, the authorities are all agreed that while a public official may not as a matter of right be entitled to reimbursement for the necessary ex-

> penditures, yet, the corporation has the unquestioned power to provide for a reimbursement. Where, however, the disbursement was made in the rendition of a service in which the officer or individual alone is directly and beneficially interested and which cannot be considered as a duty resting upon the corporation to perform, the right of power of reimbursement does not exist for this would be equivalent to the appropriation or use of public moneys for private purposes."

In view of the well established principle that municipalities and statutory officers possess only such powers as are conferred by statute, and those which are necessary to carrying into effect the powers so conferred, I am unable to find any provisions of the General Code from which, by any implication, the expenses incurred, by the officers named, of attending national conventions for the purpose of merely general instructions or information with reference to the duties of their offices, could be made a charge against the city. The acquirement of a knowledge of the general affairs and detailed workings of his office is a responsibility resting upon the officer himself, not upon the city; and the possession of requisite skill and information is to be presumed.

The power to incur expense for the general education and enlightenment of its officers is not expense conferred upon municipalities by any statute nor is such a power anywhere granted to any of the officers named in your inquiry, and such a purpose is too remote as regards the powers conferred for the maintenance and operating of fire and health departments, to be regarded as a power actually necessary for the carrying into effect of those functions.

I take it that this rule disposes of your question with reference to the visits of the health officer and the physician of the health department.

The statement of your question with reference to the other officials, however, calls for a distinction. For as regards the necessary visits to other localities for the immediate purpose of acquiring information with reference to a *definite presently contemplated undertaking,* such as the purchase of machinery, the decisions permit of a modified application of the above rules, holding that such visits may be regarded as of sufficient necessity to the performance of a fixed duty to justify an allowance of the cost so incurred as an expense incurred for the *benefit of the municipality in the performance of a duty enjoined by law.*

Thus, in Mogel vs. Berks County, 154 Penna. State, 14, the state prison inspectors were contemplating the installation of a new system of identification, and a certain number of them made the trip outside of the county to determine the actual working of the system. There was no provision of law for the payment of such expenses, and yet the court held,

> "The authority to examine and investigate, so far as may be necessary to form an intelligent judgment upon the utility and value of the machine they were authorized to buy and the system they were authorized to adopt, is incidental to the power conferred."

Sections 4328 and 4371 provide as follows:

> "Section 4328. The director of public service may make any contract or *purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars.* When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder

after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

"Section 4371. The director of public safety may make all contracts and expenditures of money for acquiring lands for the erection or repairing of station houses, police stations, fire department buildingings, fire cisterns and plugs, that may be required and for the purchase of *engines, apparatus, and all other supplies necessary for the police and fire departments,* and for other undertakings and departments under his supervision, but no obligation involving an expenditure of more than five hundred dollars shall be created unless first authorized and directed by ordinance of council. In making, altering, or modifying such contracts, the director of public safety shall be governed by the provisions of the preceding chapter relating to public contracts, except that all bids shall be filed with and opened by him. He shall make no sale or disposition of any property belonging to the city without first being authorized by resolution or ordinance of council."

Under Section 4371, General Code, the director of public safety, who, by virtue of Sections 4246, 4368, 4375 and 4377, is made the executive head of the fire department and required to administer and manage its affairs, may make expenditures for the purchase of engines and apparatus and all other supplies necessary for the police and fire departments.

In view of the above stated rule, I am of the opinion that when machinery and mechanical devices are necessary for the betterment of the fire department system of the city and when the purchase of the same has been decided upon, and when the purchase cannot be so economically and so *judiciously* made without a visit such as that to the fire chiefs' convention, held at Denver, Colorado, the director of public safety may, under Section 4371, General Code, make the expenditure necessary for the transportation of himself and the fire chief to said convention, when the latter's co-operation is a necessary adjunct, for the purpose of furthering the prudence of the purchase.

I am furthermore of the opinion that if purchases are likewise contemplated by the waterworks department, whose economy and effectiveness would be promoted by a visit of the latter's superintendent to said convention, the director of public service, who, under Section 4326, is given the management of municipal water undertakings, may authorize such visits and may pay the expenses of the same, under Section 4328, General Code, providing for the purchase of supplies or materials for work under the supervision of his department, on the ground that the officers may be allowed the expenses necessarily incurred in the performance of a duty enjoined by law.

In direct answer to your inquiries, therefore,

1. The director of public safety, the chief of the fire department, the general superintendent of the water works department, the health officer and the physician of the health department, may not be allowed their expenses incurred in attending conventions for the mere purpose of general education.

2. The director of public safety and chief of the fire department may be reimbursed for expenses incurred in attending fire chiefs' conventions, providing such a visit is the most economical and efficient method of promoting a purchase, held in immediate contemplation by the department of public safety.

3. The superintendent of water works, under like conditions, with reference to purchases of the water works department may be reimbursed for expenses to such conventions, incurred in a visit authorized by the director of public service.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

731

COMPENSATION AND EXPENSE FORMERLY PROVIDED FOR INFIRMARY DIRECTORS CANNOT BE MADE TO COUNTY COMMISSIONERS WHEN FORMER ARE ABOLISHED.

Whilst the Act of 102, *O. L.* 433, *abolishes the infirmary directors and substantially places all their duties and powers upon the county commissioners, such act does not place the county commissioners in exact substitution for the infirmary directors.*

Section 3002, *General Code, therefore providing compensation for the infirmary directors, cannot be considered to apply to the county commissioners.*

November 20, 1912.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Under favor of November 12 you requested my opinion as follows:

> "The last general assembly, in abolishing the office of infirmary director, did not repeal Section 3002, G. C. Is the same now of any general effect and can it in any way be applied to the county commissioners after January 1, 1913?"

Section 3002, General Code, is as follows:

> "In addition to his actual traveling expenses, each *infirmary director* shall be allowed two dollars and fifty cents for each day employed in his official duties. He shall present an itemized account of such services and expenses to the board of directors at a regular meeting, which account after being approved by such board, shall be submitted to the board of county commissioners at a regular session and upon approval thereof, the county commissioners shall allow the account to be paid from the county fund on the warrant of the county auditor."

The title to the House Bill No. 204, appearing on page 433, 102 O. L., is as follows:

> "To abolish the county board of infirmary directors, to define the duties of the board of county commissioners respecting county infirmaries and to repeal Sections 2517 to 2521 inclusive of the General Code, and to amend (certain sections of the General Code enumerated)."

The intent of House Bill No. 204, as evidenced by its general provisions, and as expressly provided in this title, is to abolish the infirmary directors. It is true that their powers and duties are substantially all transferred to the county commissioners. The result is brought about, however, by separate provisions with reference to each range of duty and to each class of powers. There is no *express* provision, substituting in general terms, the county commissioners for the infirmary directors, and by no mode of reasoning can it be *implied* that the infirmary directors are substituted generally, as to duties, obligations, powers and recompense, by the county commissioners.

In short, the county commissioners are neither expressly nor impliedly placed in a position of exact substitution. Each power and each duty, added by the

change, to those formerly possessed by the county commissioners, is provided for by express separate provision.

Section 3002, therefore, providing for compensation of *infirmary directors,* cannot be said to apply to the *county commissioners,* and since infirmary directors have been abolished, said section is of no effect whatever.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

760

COMPENSATION—PER DIEM CANNOT BE CHANGED ON TWO OFFICIAL POSITIONS — COUNTY SURVEYOR — WORK REQUIRING ONLY FRACTION OF A DAY ENTITLES TO FULL PER DIEM.

It is an established rule of law that when compensation is fixed at a per diem allowance, the officer cannot have such an allowance on the same days for services in each of two or more offices held by him.

When, therefore, a county surveyor has drawn his per diem from the county and has received a per diem from any other public source for the same day or part thereof, he should be required to elect which of the per diems he will retain and a finding should be made against him for the other. He may, however, receive a compensation for work done for a private individual.

The law disregards fractions of a day and when a county surveyor in charge of ditch work is called to inspect and approve the work of a contractor and such work requires a substantial effort, even though the service requires only a fractional part of a day, the surveyor can legally receive compensation for the full day at the rate fixed by statute.

Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.

GENTLEMEN:—Under date of September 16 you inquire of me as follows:

> "1. If a county surveyor is found to have charged the county for a day's work and to have charged a private individual or a municipal corporation for all or part of the same day, what should be the finding of this department?"

Section 2822 of the General Code provides that a county surveyor "when employed by the day" shall receive five dollars for each day and his necessary actual expenses.

In the case of Commissioners vs. Bromley, 108 Ind. 158, it is held:

> "Where a township trustee during his term intermingled his services for the township and as overseer of the poor, and receives full compensation from the township fund for every day when he performed an official duty, he cannot recover compensation from the county for services as overseer, on the ground that he is liable to reimburse the township fund for the amount over-charged for other official services."

On page 162 of the opinion the court says:

> "We further interpret the section under consideration to mean that, as applicable to both classes of service, an allowance of only two dollars can be made for an actual day's service, without reference to

the manner in which the day may have been divided between the two classes of service, and that, consequently, a township trustee is not entitled to receive, out of any fund, more than two dollars for official services performed during any one day. * * * Having intermingled his services as overseer of the poor with his other official duties, and having received full compensation from the township fund for every day during which he performed any official duty, he is now precluded from recovering any further compensation from the county, or from any other fund."

"Where the compensation is a *per diem* allowance, the officer cannot have an allowance for the same day's service, in each of two or more offices held by him."

See Throop on Public Officers, Section 496; Mechem on Public Officers, Section 859.

Under the foregoing authorities I am of the opinion that when a county surveyor has charged the county for particular day's work he cannot receive compensation from any other public source for services performed on that day, or any part thereof. That is to say, he cannot receive a per diem from the county and a per diem from a city, village, or township for the same day. In case a county surveyor has drawn his per diem from the county, and has received a per diem from any other public source, for the same day or any part thereof, he should be required to elect which of the per diems he will retain; and a finding should be made against him for the other.

I know of no reason why a county surveyor should not be paid for work done for a private individual on the same day that he performs services and receives a per diem therefor from the county, provided he has done his full duty toward the county on that day.

You next inquire:

"If a county surveyor in charge of ditch work is called to inspect and approve the work of a contractor, and the service requires only a fractional part of a day, can the surveyor legally receive compensation for a full day at the rate fixed by statute?"

It is a well established principle that the law does not regard fractions of a day, and that if any substantial service is performed by a public officer on any day he is entitled to his per diem for the whole day. Upon this subject it was held, in the case of Smith vs. Commissioners of Jefferson County, 10 Colo. 17, that:

"The law does not recognize fractions of days. And when it provides a *per diem* compensation for the time necessarily devoted to duties of an office, the officer is entitled to his daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance."

I am of the opinion, therefore, in view of the principle above referred to, and of the decision in the Colorado case, that when a county surveyor, in charge of ditch work, is called in to inspect and approve the work of a contractor, which service requires only a part of a day, the surveyor is nevertheless entitled to the full per diem provided by Section 2822, supra.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Treasurer of State)

362.

STATE HIGHWAY COMMISSIONER—APPORTIONMENT OF FUND OBTAINED FROM REGISTRATION OF AUTOMOBILES BY SECRETARY OF STATE—INTER-COUNTY AND OTHER ROADS.

The moneys obtained by the Secretary of State from the registration of automobiles shall first be directed to carrying out the provisions of the chapter on automobiles, and any surplus thereafter shall be paid in to the state treasury to the credit of a fund which shall be expended as the state highway fund is apportioned.

This fund is divided among the counties and subject first to the application of the county commissioners, then to the application of the township trustees, and if neither of these applications are made, shall be applied to the construction, improvement, maintenance or repair of inter-county roads by the State Highway Commission.

When the inter-county highways have been improved to the standard fixed by the Highway Commissioner, the balance may be employed in the construction, improvement, maintenance or repair of any road within the county.

April 30, 1912.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 4th, enclosing a letter addressed to you by C. H. Barth, attorney at law, of Cincinnati, which is as follows:

> "The Pleasant Ridge Welfare Association of Pleasant Ridge, Ohio, has requested me as chairman of the law committee, to ascertain what can be done toward obtaining from the State Treasury from the fund created by Section 6309, New General Code, revenues derived by registration of automobiles, money to pay for the oiling of Ridge avenue, and Montgomery pike, both of which are important thoroughfares in this county."

Section 6309 of the General Code, cited by Mr. Barth, provides:

> "The revenues derived by registration fees provided for in this chapter, shall be applied by the secretary of state toward defraying the expenses incident to carrying out and enforcing the provisions of this chapter, and any surplus thereof shall be paid by him, monthly, into the state treasury. All such moneys coming into the state treasury shall be a separate fund for the improvement, maintenance and repair of the public roads and highways of this state, and be apportioned as the state highway fund is apportioned. (99 v. 545 33,34.)"

The following sections of the General Code, (Page and Anderson's edition,) are pertinent:

> "Section 1185. The commissioners of a county may make application to the state highway commissioner for aid from an appropriation by the state for the construction, improvement, maintenance, or repair of

highways. Such application shall be filed prior to May first of the year in which such appropriation may be made or become available. If the county commissioners have not made use of the apportionment to such county, in the year in which it is available, then the township trustees may make application prior to the first day of April of the succeeding year. And if the township trustees do not make use of the appropriation prior to the first day of July next succeeding, then the state highway commissioner shall have full power and authority to enter upon and construct, improve, maintain or repair any of the inter-county highways or parts thereof of said county, either by contract, force account, or in such manner as the state highway commissioner may deem for the best interests of the public, paying the full cost and expense thereof from the said apportionment of the appropriation to said county so unused as aforesaid. Any part of the apportionment to a county remaining unexpended shall remain to the credit of such county and be available for the succeeding year as herein provided."

"Section 1186. Each application for state aid in the construction, improvement, maintenance or repair of highways shall be accompanied by a proper certified resolution of the county commissioners or township trustees having jurisdiction of the road to be constructed, improved, maintained or repaired, stating that the public interest demands the improvement of the highway therein described; that the description does not include any portion of the highway in the limits of any municipality. Provided, also, that when all the inter-county highways within a county have been improved to the standard specified by the state highway commissioner, then the appropriation may be used, in the construction, improvement, maintenance or repair of any road within such county. Each application for state aid shall also contain an agreement on the part of the county commissioners or township trustees, having jurisdiction over the road, to pay one-half of the cost and expense of surveys and other expenses preliminary to the construction, improvement, maintenance or repair of said road."

"Section 1222. Moneys appropriated by the state for the purpose of carrying out the provisions of this chapter, shall not be used in any manner or for any purpose, except as provided herein. Moneys so appropriated shall be equally divided among the counties of the state, except such moneys as are appropriated for the use of the department and for surveys, plans and estimates of inter-county highways."

Section 1225 reads in part as follows:

"Highways improved or constructed under the provisions of any act providing for aid by the state shall be kept in repair and maintained by the state highway commissioner. The expense of such repair and maintenance shall be divided and payable twenty-five per cent. thereof by the state, fifty per cent. thereof by the county and twenty-five per cent. thereof by the township or townships. The state's share being payable from moneys appropriated by the general assembly for the purpose; the county and township shares from their respective road or road repair funds."

I am of the opinion that oiling a road would come under the term "maintenance" since it would tend to keep the road in good condition for travel.

Under Section 1222 above quoted the funds appropriated by the state pur-

suant to the highway law must be divided equally among the several counties of the state, and Section 1185 requires the county commissioners to make application to the state highway commissioner for the county's part of the apportionment for state aid in the construction, improvement, maintenance or repair of highways on or before May first of the year in which such appropriation becomes available, and in the event of their failure to make such application, the township trustees may do so prior to the first day of April of the succeeding year. If both the commissioners and trustees fail to apply, then the state highway commissioner may contract, improve, maintain or repair any of the inter-county highways and pay the whole cost thereof out of the county's apportionment of the appropriation for state aid.

Section 1186 provides that, "when all the inter-county highways within a county have been improved to the standard specified by the state highway commissioner, then the appropriation may be used in the construction, improvement, maintenance or repair of any road within such county."

I am of the opinion that if the two roads mentioned in Mr. Barth's inquiry are inter-county highways improved to the standard specified by the state highway commissioner they may be maintained by state aid, and if they are not inter-county highways they may nevertheless by so maintained providing all of the inter-county highways of the county have been first improved, repaired or maintained, the expense of such maintenance to be born by the state, county and township in the proportion designated in Section 1225 supra.

I trust the foregoing will clearly indicate to Mr. Barth the procedure necessary to procure the money about which he inquires.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

676

INSURANCE CORPORATION—RIGHT TO WITHDRAW DEPOSIT MADE TO EQUAL DEPOSIT MADE IN NEW YORK FOR RIGHT TO DO BUSINESS THEREIN—BANKERS' SURETY COMPANY OF OHIO—PERSONAL INJURY INSURERS.

The Bankers' Surety Company, an Ohio corporation organized for the transaction of "Fidelity and Surety Insurance" deposited $200,000 *with the state superintendent of insurance under* 9568, *General Code. Upon application to do business in New York said company was obliged, under the assumption that it was engaged in three kinds of insurance business, to deposit* $250,000 *with the New York Commissioner, to comply with the New York law requiring an amount equal to the amount deposited in New York to be deposited in the home state said company de-deposited in New York to be deposited in the home state said company deposited an additional* $50,000 *with the Ohio insurance commissioner acting presumably under* 9543 *General Code. In fact said company was engaged in only one form of insurance business in New York.*

The company, which has ceased business in New York, now desires to dissolve, is solvent and wishes to have returned the fifty thousand additional deposit.

Held:

The deposit of the fifty thousand dollars was unauthorized by Section 9543, *General Code, as such section applies only to insurers against accidental personal injury, and is in excess of the amount required to be deposited and should be returned.*

Even though the deposit was authorized the requirement of Section 9543 *permitting the withdrawal of deposits therein authorized upon the cessation of business in the outside state is conclusive.*

October 15, 1912.

HON. D. S. CREAMER, *Treasurer of State,*

and

E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

GENTLEMEN:—I am in receipt of a copy of an application made to you jointly by The Bankers' Surety Company, of Cleveland, Ohio, to withdraw fifty thousand dollars ($50,000) in securities deposited with the Treasurer of State on July 15, 1902; and I am also in receipt of a letter from the Treasurer of State, dated September 19, 1912, asking for my opinion as to whether said application should be granted or not. You have also submitted to me various affidavits relative to this matter.

The facts, as I gather them from the data submitted to me, are as follows:

The Bankers' Surety Company is an Ohio corporation, organized for the purpose of transacting what is known as "fidelity and surety insurance." At the time the superintendent of insurance licensed the said Bankers' Surety Company to transact surety business in this state, this company made a deposit of two hundred thousand dollars ($200,000.00) with the superintendent of insurance, as required by Section 9568 of the General Code (formerly R. S., 3641).

Subsequently this company applied for a license to transact business in the state of New York. The New York laws require a deposit of one hundred thousand dollars ($100,000.00) for a domestic insurance company if organized for one kind of insurance only, but if organized for two or more separate classes of insurance, then, it is required to deposit the same amount as if it had been separately formed for such purposes, the total amount of such deposit, however, not to exceed two hundred and fifty thousand dollars. The laws of New York also require a company of another state, desiring to do business in New York, to keep on deposit

in its own state the same amount of securities which the New York laws require of domestic companies. The superintendent of insurance of New York held that the charter of The Bankers' Surety Company authorized it to transact three kinds of business, and he, therefore, required that the company make a deposit of fifty thousand dollars ($50,000.00) with the superintendent of insurance of Ohio, in addition to the two hundred thousand dollars already deposited by the said company, so that the company would have on deposit in Ohio a total of two hundred and fifty thousand dollars.

It appears further from a letter dated July 15, 1902, that the superintendent of insurance of Ohio issued to The Bankers' Surety Company two certificates certifying that it had deposited with him fifty thousand dollars, and two hundred thousand dollars of securities for the benefit of its policyholders. It appears from this letter that the two hundred thousand dollars was deposited first, and the fifty thousand dollars subsequently, and that the fifty thousand dollars were to be held pending the application of the company for a license to transact business in the state of New York, that if such license were issued, then said fifty thousand dollars, as well as the two hundred thousand dollars, were to remain as an aggregate deposit of two hundred and fifty thousand dollars for the benefit of policyholders, but that if such license were refused by the state of New York, then said fifty thousand dollar deposit was to be returned to the said company.

In a letter of December 15, 1902, from the superintendent of insurance to The Bankers' Surety Company, the following statement appears:

> "Issue of the two certificates of deposit requested has been and will be for the time deferred, pending receipt of further information. At the time of the issue by this department to the company of license and authority to commence business, there was deposited with the department $200,000.00 in designated securities in pursuance of Section 3641, paragraph fourth, Revised Statutes. Subsequently, and on July 15, 1902, the company made a further tentative deposit of $50,000.00 in approved securities under Section 3670, Revised Statutes, with a view to applying for admission to transact business in the state of New York. The department is advised but has been officially notified that the company has since been admitted in the state of New York and is now transacting business therein, and a formal notification is requested as to whether or not it has been so admitted into New York state. If license by the New York department of insurance has been issued to the company, the certificates of deposit will recite and show the deposit of $250,000.00. If not so admitted, the certificate will show a deposit of $200,000.00 as heretofore."

It appears from the above that the deposit of the two hundred thousand dollars was made under Section 9568 of the General Code (R. S. 3641), and the deposit of fifty thousand dollars, under section 9543 of the General Code (R. S. 3670).

It further appears that The Bankers' Surety Company was only authorized to transact the business of "fidelity and surety insurance" in the state of New York, and to transact no other class of insurance. It further appears that The Bankers' Surety Company never transacted any accident or liability business, or any insurance business other than surety business.

It further appears that the company has discontinued all insurance business in the state of New York, and has entirely discontinued all insurance business, and is now engaged in collecting its assets and paying its liabilities, with a view to the dissolution of the corporation, and that the company is solvent.

Section 9568 of the General Code, under which the deposit of two hundred thousand dollars was made, is as follows:

> "No company organized under the laws of this state to transact the business of guaranteeing the fidelity of persons holding places of public or private trust, who are required to or in their trust capacity do receive, hold, control, disburse public or private property, and guaranteeing the performance of contracts other than insurance policies, or of executing or guaranteeing bonds or undertakings required or permitted in actions, proceedings or by law allowed, shall commence business until it has deposited with the superintendent of insurance two hundred thousand dollars in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen, which shall be held for the benefit and security of all policyholders of the company, and not be received by him at a rate above their par value."

Sections 9542 and 9543 of the General Code, under which the deposit of fifty thousand dollars is claimed to have been made, are as follows:

> "Section 9542. Companies may be organized for the special purpose of insuring persons against accidental personal injury or loss of life, while traveling by railroad, steamboat, or other mode of conveyance, and making all and every insurance connected with accidental loss of life, or personal injury caused by accident, of any description; against expenses and loss of time occasioned by sickness or other disability, on such terms and conditions for such periods of time, and confined to such countries, localities, and persons, as may be provided for in the by-laws of the company."
>
> "Section 9543. When a company so organized desires to do business in another state, by the laws of which, to qualify it therefor, it is required to make a deposit of securities assigned in trust for the benefit of its policyholders with an officer of this state, the state treasurer shall receive such deposit, and issue therefor to the company his receipt, giving a pertinent description of the securities and a certificate of the market value thereof. He also shall issue a life certificate to the superintendent of insurance, who shall place it on file in his office. Such company may exchange these securities for other like securities, in whole or in part, as far as its business requires, and wholly withdraw them if it discontinues business in such other state. Such changes or withdrawals of securities at once shall be duly certified by the treasurer to the superintendent of insurance."

These sections might possibly be looked at from many different angles, but from the facts as given to me, the right of the company to withdraw this deposit of fifty thousand dollars seems so clear that it is unnecessary to enter into a prolonged discussion of the matter. In the first place, I find no authority for this deposit of fifty thousand dollars with the superintendent of insurance. Sections 9542 and 9543 of the General Code provide for a deposit with the treasurer of state by companies organized for the special purpose of insuring persons against accidental personal injury, etc., when such company desires to do business in another state.

This deposit was made with the superintendent of insurance, and was by him turned over to the treasurer of state, together with the deposit of two hundred thousand dollars, so that the books of the treasurer of state show that this com-

pany has on deposit two hundred and fifty thousand dollars of securities as a liability deposit received from the superintendent of insurance. The only requirement for a deposit by this company with the superintendent of insurance is under Section 9568, which provides for the two hundred thousand dollars to be so deposited. There is no provision in Section 9568 or subsequent sections authorizing additional deposits by surety companies in order to do business in other states, and, therefore, this company has now, and has had at all times, the full amount required to be deposited by it with the superintendent of insurance of Ohio, and the fifty thousand dollars are simply an excess deposit; but if it is taken that there was authority for this additional deposit, and that the state of Ohio, having accepted the same is bound to maintain it, then it can only be maintained in accordance with Section 9543 of the General Code, whether said section gives authority for such deposit or not. This section contains the provision that:

> "Such company may * * * wholly withdraw them (the additional securities) if it discontinues business in such other state. * *"

Therefore, as it appears from the data furnished me, that The Bankers' Surety Company has entirely discontinued business in the state of New York, under this section it would be entitled to withdraw said additional deposit of fifty thousand dollars of securities, and this would leave the full amount required by the laws of Ohio still on deposit with the treasurer of state through the insurance department.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

726.

BONDS OF DISTRICT OF COLUMBIA NOT UNITED STATES BONDS—MAY NOT BE ACCEPTED BY TREASURER OF STATE AS SECURITY FOR DEPOSIT OF STATE FUNDS.

"Although bonds issued by the District of Columbia must be authorized by Congress, they are not "United States Government Bonds" within the meaning of the act providing for the deposit of bonds by state depositories with the Treasurer of State, and as the District of Columbia is not a state or territory, its bonds are not included within said act.

Bonds of the District of Columbia may not, therefore, be deposited with the Treasurer of State as security for the deposit of state funds.

October 10, 1912.

HON. DAVID S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—You have asked for my construction of that part of Section 14 of the Act passed March 7, 1911, entitled "An Act to provide a state depository for state funds," found in 102 O. L., 33, specifying the securities which must be deposited with you by banks or trust companies which have been designated as depositories for state funds. This section requires that there must be deposited with you by every approved bank or trust company, before making a deposit with it, "United States Government bonds, bonds of this state, county, township, school district, road district, or municipal bonds of this state * * *," and your particular inquiry is whether the term "United States Bonds" would include bonds of the

District of Columbia, issued under the authority of the United States, and for the payment of which the faith of the United States is pledged.

The National Banking Act of the United States, Section 5158, United States Revised Statutes, defines the term "United States Bonds" as follows:

> "The term 'United States Bonds' as used throughout this chapter shall be construed to mean registered bonds of the United States."

The District of Columbia is not a territory nor a department of the United States government; its political status, as defined by Cyc, is as follows:

> "The District of Columbia, under its present form of government, is neither a sovereignty, a territory, nor a department of the United States government; it is simply a municipal corporation, with such powers and liabilities as are common to municipal corporations in general, except insofar as it may be affected by acts of Congress."

Bonds of the District of Columbia can only be issued under authority of an act of Congress. Various issues of such bonds have been authorized from time to time, and when the government guarantees the payment of such bonds, of course they are just as good as bonds issued primarily by the United States government.

But from the language used in our depository act, my opinion is that only bonds issued by the United States government are intended, and that the language does not contemplate bonds issued by the District of Columbia, or by other political entities under authority of the United States government, whether the payment of such bonds is guaranteed by the government or not. If this had been the intention of the Legislature, it would have been a simple matter to have added the words "or bonds for the payment of which the faith of the United States is pledged" immediately after the words "United States Government bonds" as they appear in the act. Therefore, while there is no question whatever as to the validity of such bonds, I think that it is necessary to interpret the provisions as to the securities to be furnished by depositories strictly, and that you should, therefor, decline to receive as securities any bonds which are not clearly specified by the Act.

Very respectfully,

TIMOTHY S. HOGAN,
Attorney General.

(To the Board of Public Works)

109.

STATE CANALS—DAMS—EMINENT DOMAIN—POWER OF DISPOSAL—FEE SIMPLE RIGHT AND EASEMENT.

When the State has maintained a dam as part of one of its canals for the purpose of maintaining a pool of slack water from which the canal was furnished with water for navigation purposes, and the canal was abandoned by legislative act and permission given by the same act to either lease or sell the canal lands, held:

Whatever land is actually appropriated for canal purposes necessarily vests in the state in fee simple, and the state may dispose of the same as it sees fit.

When the possession and use of the state, however, is not an out and out, notorious appropriation, but a mere incidental or indirect and not necessarily exclusive usage, such as the mere backing up or overflow of water, the interest of the state is merely that of an easement, which was acquired for a public use from which it cannot be diverted to a merely private use.

Under these rules as the state has the absolute fee simple in the lands covered by the dam and only an easement in the lands overflowed by reason of the erection of said dam therefore the State may sell or lease the dam and land upon which it is situated, but cannot grant any right or easement in the land and water above the dam.

From the premises the Board of Public Works cannot maintain this dam for the purpose of renting water to private enterprises.

COLUMBUS, OHIO, February 8, 1912.

HON. JOHN I. MILLER, *Chief Engineer, Board of Public Works, Columbus, Ohio.*

DEAR SIR:—Under favor of November 16, 1911, you ask an opinion of this department upon the following:

> "The state of Ohio has maintained for many years, a dam across the Scioto river about two miles below the city of Circleville in Ross County, Ohio. This dam was a part of the Ohio Canal System and its use was to make a pool of slack-water from which the said canal was furnished with water for navigation purposes.
>
> "This canal has been abandoned by Act of Legislature, and by the same Act, the Board of Public Works, after certain arrangements specified in the enactment are perfected, may either lease or sell the lands belonging to the said canal.
>
> "Query 1. Does this give authority to the Board of Public Works to sell or lease the state dam in the Scioto river below Circleville?
>
> "Query 2. Or can the state maintain the dam and charge rental to parties using the water so impounded?"

The Act abandoning this part of the canal is found in 102 Ohio Laws, page 293, et seq.

Section 1 of said Act provides:

> "That the portion of the Ohio Canal commencing at the junction of said canal with what is known as the Dresden Side Cut near Trin-

way in Muskingum county, Ohio, and extending thence southwesterly to the southerly end of the aqueduct across Raccoon creek in West Newark, Licking county, Ohio, also that portion of said Ohio canal commencing at the flume that connects Buckeye lake with said Ohio canal at the west end of said reservoir in Fairfield county, Ohio, and extending thence southwesterly and southerly with the line of said Ohio canal to its junction with the Ohio river, near Portsmouth in Scioto county, Ohio, be and the same is hereby abandoned for canal purposes."

Section 3 of said Act provides:

"As soon as such surveys and plats have been completed, the state board of public works and the chief engineer of public works, acting as a joint board, shall proceed to appraise, *and lease or sell, as they may deem for the best interest of the state, subject to the approval of the governor and attorney general, said canal lands,* except as hereinafter noted, in strict conformity with the various provisions of the statutes of Ohio relating to the leasing and selling of state canal lands, except that the grant of such leases shall be for a term of not less than fifteen nor more than twenty-five years, and that the bed and banks of said abandoned canal property may be included in any lease of such canal lands."

Section 8 of said Act provides:

"Nothing in this act shall interfere with any leases, rights or privileges heretofore granted by the state of Ohio and in force at the date of approval of this act."

As stated in your inquiry the dam in question is a part of the Ohio canal system, and was used for the purpose of securing a water supply for the canal. The canal is now abandoned and the use of the dam for canal purposes is at an end.

Your first question is as to the right of the Board of Public Works to lease or sell this dam. Its sale or lease would mean that the dam and the water held by it would be used for a private purpose, instead of for a public purpose as formerly used.

The first question to determine is the title of the state to the dam and to the land covered by the back water.

In Malone vs. City of Toledo, 34 Ohio St., 541, the syllabus is as follows:

"Under the constitution of 1802, the legislature, in the exercise of the right of eminent domain, possessed the power to appropriate to public use the fee simple title to lands, where, in its judgment, the public necessities required it; and the title acquired *by the state by the appropriation of lands for canal purposes, under the eighth section of the act of February* 4, 1825, (2 *Chase,* 1472,) *was an absolute estate in fee.*"

In the case of Ohio vs. Railway Company, 53 Ohio St., 189, the third syllabus reads:

"By force of the provision of Section 8 of the act to provide for "the internal improvement of the state of Ohio by navigable canals,"

23 O. L., 57, *whenever the state actually occupied a parcel of land for canal purposes, a fee-simple title thereto at once and by virtue, alone, of such occupancy, vested in the state.*"

On page 243 of the opinion, Bradbury, J., says:

"That the title of the state to its canal lands is one in fee simple, is a question of law. The only fact to be ascertained is whether the lands were in fact a portion of the canal system. How the acquisition was made is not material. The mere seizure and appropriation of a parcel of land for canal purposes, by force, of the statute under which our canals were constructed, was alone sufficient to vest in the state a fee simple title to them. Nor could any other title than one in fee simple be received by the state for lands to be devoted to a canal. A mere occupation of lands by the state for canal purposes, was a seizure and appropriation of it to that purpose, and to be devoted to that purpose was to give the state a fee simple title thereto. No conveyance was necessary; the seizure and occupation transferred to the state the entire estate in the lands so seized and occupied, leaving to the former owner simply a claim for compensation."

In State vs. Grifther, 61 Ohio St., 201, the first and second syllabi reads:

"The title acquired by the state to lands which it appropriated and used in the construction and operation of canals under the act of February 4, 1825, 23 O. L. 50, is a fee simple, and the former owners of such lands, by reason of such appropriation, parted with all their title and interest in such lands.

"The fee simple title to such lands remains in the state after it ceases to use such lands for canal purposes, and the statute of limitations does not run against the state as to such lands."

The dam in question was part of the canal system, used to furnish a supply of water for the canals. The land upon which this dam was built was actually appropriated by the state for canal purposes. The state, thereby, took an absolute fee simple title in the land upon which the dam was constructed. Having an absolute fee the state has the right to dispose of its title thereto in any manner in which it sees fit.

A further question arises. What is the nature of the right of the state in the land covered by the back water caused by the construction of the dam. Did the state take a fee or an easement in this land? There is no evidence before us to show whether the state actually purchased the fee to this land, or that it has paid any compensation therefor. In the absence of such proof it is to be presumed that the state has only such right or title thereto as was necessary to carry out the purpose for which the dam was built. This title must be determined by the nature of the state's occupancy of the land in question.

In case of Smith vs. State of Ohio, 59 Ohio St., 278, the first syllabus reads:

"It is the purpose of the act of February 4, 1825, (25 O. L. 57), to award compensation to owners of private lands taken for canal purposes, where they have not been donated, and where the loss or damage exceeds the benefits, and to afford opportunity to such owners to make demand

for appraisal of such damages. *Hence, in order to the acquisition of title to lands for canal purposes by the state under the above act, by occupancy and use, it is necessary that the occupancy by the state be exclusive, and that it be so open and notorious as to put the owner on notice that the property has been taken by the state for its own, with the purpose of incorporating it as a part of its canal system."*

The syllabi in the case of Miller vs. Wisenberger, 61 Ohio St., 561, are as follows:

"Where the possession and use of lands or streams in the construction of the Ohio canal system were merely incidental, constructive or indirect, and not of a character to fairly apprise both the officers of the state and the owners of the lands, that such lands or streams were appropriated and used in the construction of the canals, no fee to such lands or streams vested in the state.

"Section 8 of the canal act of 1825 should be so construed as to fairly carry out the intention and understanding of the officers of the state on the one hand, and the land owner on the other, in each case, as near as the same can be ascertained from what was done, and the situation and surroundings of the premises in question.

"The mere incidental backing of water up a stream caused by the erection of a dam across a river, used as a part of the canal system, such stream flowing into said river and remaining in a state of nature, except as slightly raised by such back water, does not constitute such an appropriation and use of the bed of the stream for canal purposes as to vest the fee of such stream in the state."

Burket, J., on page 584 of the opinion says:

"The above cases clearly point out the rule by which the state could acquire the fee to lands for canal purposes. If the entry, use and possession by the state were open and notorious so as to inform the land owner that his land had been taken by the state for canal purposes, a fee vested in the state. But if the entry, possession or use was merely incidental, constructive or indirect, and not of such a character as to apprise the canal commissioners that they were making the state liable, nor the land owner that his lands were so appropriated as to give him a claim against the state for taking and using the same for canal purposes, no title or fee vested in the state."

Also on page 585, Burkett, J., says:

"The mere backing up of water in a river, creek, run or ravine to an extent insufficient to seriously interfere with the use of the lands by the owner, could not have regarded in those days, either by the officers of the state or the land owners, as an appropriation and use of such river, creek, run or ravine for canal purposes. What must have then been understood as an appropriation and use of lands and streams was an actual physical possession and use in the construction of the canals and feeders, dykes, locks and dams connected therewith so as to become a part of the canal system of the state. Such an appropriation was open and public notice to the land owner that he had been deprived of his property and an invitation to him to make application for compensation."

The dam in question is five feet high. The report of the engineer submitted does not give the elevation of the banks of the river along where the back water stands and where the water in the river is raised by the dam. Nor does the report show that the back water, at its ordinary stage, overflows any land, or that it interferes with the use of the land in any respect.

From the principles laid down in the foregoing decisions, if the raising of the water of the river by the dam did not cause an overflow upon the land and interfere with the use thereof, there was not such a nortorious taking of the land by the construction of the dam so as to notify the owners of the fee that the state had appropriated their lands for canal purposes, and that he would have a right of compensation for the state for damages sustained. The mere raising of the water of the river within its banks was an incidental and indirect taking of the land and was not sufficient to appropriate the fee of the land.

The right of the state, therefore, to the land covered by the back water is that of an easement, to use it for the public purpose of promoting its canals. This was a public use. The leasing or selling of the dam to private parties to carry on private enterprises would change this use from a public to a private use. The question arises: Is that change from a public to a private use an additional burden upon the lands, for which the owner of the fee will be entitled to additional compensation?

In such case, the rights of the riparian owner and of the lessee or grantee of the dam would be a private matter to be determined between themselves, and would be rights with which the state would have no concern. Yet as the state is called upon to sell or lease the dam, the question will be as to what the state can actually grant by its conveyance. It is not the purpose of this department to settle private contriversies. This question is only considered in order to determine the rights which can be conveyed by the state.

The state appropriated this property by its right of eminent domain.

Article 1, Section 19 of the Constitution of Ohio, provides in part:

> "Private property shall be held inviolate, but subservient to the public welfare. * * *"

Lane, J., in case of Cooper vs. Williams, 4 Ohio, 253, says on page 287 of the opinion:

> "It is upon these rights the state has presumed to act, by virtue of its transendent sovereignity (dominum eminens), a power to appropriate private property for public uses, for the purpose of promoting the general welfare. *This power is inherent in every government; but it should be exercised in cases, and for objects strictly public;* and, in our country, the constitution of the United States and of the state of Ohio, insure that principle of natural justice, which requires compensation to be made to the individual reprived of his property."

In case of Giesy vs. Cincinnati, etc., Railroad Company, 4 Ohio St., 308, part of the syllabi reads:

> "The power of eminent domain is not conferred by either of these sections; they simply prescribe modes for, and limitations upon, its exercise.
>
> *"The power rests upon the public necessity, and can only be exercised where such necessity exists.*

"Only such interest as will answer the public wants can be taken; and it can be held only so long as it is used by the public, and cannot be diverted to any other purpose."

It is a uniform rule, well established, that private property can be appropriated only for a public use and not for private uses.

The case of Hatch vs. Cincinnati, etc., Railroad Company, 18 Ohio St., 92, the second syllabus reads:

"Where, in such case, the owner of the fee simple title to the lands covered by the easement, though denying the right to have made it, yet recognizing the appropriation by the railroad company as an accomplished fact, brings his action against the railroad company to recover damages as for a permanent appropriation, he is entitled to recover the full value of lands, if any, taken by the railroad company, and not recovered by the former appropriation by the canal company; and, also, a full and fair compensation for such additional burdens and inconveniences, not common to the general public, as accrue to him and his entire tract on which the easement is imposed, by reason of the change of uses to which the lands appropriated have been subjected."

The sixth syllabus in case of Vough vs. Railroad Company, 58 Ohio St., 123, reads:

"Where, however, the land is only abandoned by the state for canal purposes, and is at the same time leased or conveyed to a railroad company for the construction and operation of a railroad thereon, the owner is only entitled to compensation for such additional burthen thereby imposed on the land, and such damages as may result from the new use Hatch vs. Railroad Co., 18 Ohio St., 92.

In this latter case the state had only an easement and not the fee to the canal lands.

Wright, J., delivering the opinion in case of Malone vs. City of Toledo, 28 Ohio St., 643, says at page 660:

"However it may be elsewhere, it appears to us to be the law in this state, that when property has been appropriated for one public purpose, it may be applied to another, not substantially different, and it is still subserving its original uses. Further, that such a change does not afford ground of complaint that the property is wholly forfeited, or the public rights extinguished.

A change that involves a cessation of all public uses, such as the selling out of public property to private parties, for private ends, would be governed by different considerations, and where such a case arises, it would be controlled by those considerations."

The syllabus in case of McCombs vs. Stewart, 40, Ohio St., 647, reads as follows:

"A canal company, incorporated under the act of January 10, 1827 (25 Ohio L., 3), erected across a river a dam to the height of fourteen feet, causing the water to flow back upon the lands of a proprietor

above the dam on the same stream. The company owned in fee simple, by purchase, the land on which the south half of the dam was built, but none of the land on which the north half was built; and conveyed, in fee simple to certain mill owners, the land it thus owned, and granted to them and their heirs the privilege of using the surplus water of the dam not required for canal purposes.

"Held: *The right of the company acquired by appropriation, to flow the lands of such proprietor by maintaining a dam of such height, did not, by virtue of the company's conveyance and grant to the mill owners, survive and vest in them after the dissolution of the corporation.*"

Dickman, J., says on page 664:

But a different rule prevails where lands and easements are acquired by appropriation or proceedings in invitum. The Pennsylvania and Ohio Canal Company had the undoubted right to take and hold lands in fee, but such taking was to be by gift or purchase, and not by right of eminent domain. The right derived under Section 3 "to enter upon, take possession of, and use "lands, real estates, and streams, cannot be enlarged by implication into an estate beyond the corporate existence of, the company. *The property being taken for public use, when that use ceases, it must revert to the owner of the soil from whom it was taken, relieved of the burden or easement which the sovereign power has imposed.*"

Also on page 668, Dickman, J., says:

"* * * As long as the canal company kept the canal in repair, in compliance with the requirement of its charter, and until the corporation was dissolved, the mill owners were entitled to the surplus water, and Stewart had no legal ground of complaint, on account of the height of the dam or the burden imposed upon his land by flowage. *But the canal company had no power to transmit to others, in perpetuity, privileges and franchises which it derived from the state for public use only, and not to be continued when the consideration for which they were granted no longer existed.*"

Also on page 669, Dickman, J., further says:

"* * * *Property taken in the name of the public, for public and general use, could not be diverted to private and individual uses.*"

The easement of the state to raise the water in the river by the construction of the dam in question, was secured by it through its right of eminent domain. The use was a public use.

The state, through the Legislature, has abandoned the canal and the public use of the dam has been thereby terminated. The public necessity no longer exists to maintain this dam. If maintained it will be to promote private interests. In McCombs vs. Stewart, 40 Ohio St., 647, Supra, it is held that an easement secured by appropriation for a public use cannot be diverted to a private use. The authorities further hold that where the use is changed from one public use to another public use, the owner of the fee is entitled to additional compensation

for any additional burden placed upon his lands. The same would be true when the change is from a public to a private use, where the same can be legally done.

Section 3 of the act abandoning this part of the canal, authorizes the board of public works to "lease or sell, as they may deem for the best interest of the state" and said canal lands subject of the Governor and Attorney General. This authority to sell or lease extends to all parts of the canal system and will include the dam in question.

We have seen that the state owns the absolute fee simple in the lands occupied by the dam. By virtue of the authority vested in it by Section 3 of the above act the board of public works can lease or sell this dam and the land upon which situated. They could not, however, sell or lease the easement which the state had in the lands covered by the back water, nor its right to raise the water in the river above its normal stage.

Neither can the state maintain this dam for the purpose of leasing water and charging rental therefor. The right to lease and sell water is an incident to the public use for which the public works were constructed. Where the state only has an easement, as in this case, the abandonment of the public use, will constitute an abandonment of its incidental right to lease surplus water. Upon such abandonment the property reverts to the owner of the fee freed of the public easement. Where the state has the fee simple to the land, the rule will be different.

It is my conclusion that the state may sell or lease the dam and land upon which it is situated, but cannot grant any right or easement in the land and water above the same.

The board of public works cannot maintain this dam for the rental of water to private enterprises.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

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SECRETARY OF STATE BOARD OF PUBLIC WORKS—EXTRA COMPENSATION FOR PERFORMANCE OF DUTIES FORMERLY RESTING IN OHIO CANAL COMMISSION.

The secretary of the board of public works is obliged to perform certain extra duties which formerly devolved upon the Ohio Canal Commission. The board is authorized by express statutory provisions to expend $4,000 to meet the expenses of salaries, employes and other needs for the performance of the duties formerly performed by the canal commission.

Held, that out of said $4,000, the secretary of the board can be allowed, not as extra salary, but as compensation for extra and independent duties for the performance of the added work aforesaid, though the general appropriation ordinance for the board of public works provides only "receipts and balances for maintenance and improvements" of certain canals, and further expressly provides that no bills shall be paid for extra clerk hire in favor of any clerk drawing a salary from the state.

The special provision for $4,000 allowance for expenses for said extra duties, overrides the general provisions of the appropriation act, and the secretary is not to be considered a clerk nor are expenses for the performance of duties formerly resting upon the canal commission to be considered "clerk hire."

March 12, 1912.

Board of Public Works, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 26 requesting my opinion upon the following questions:

> "By the act of April 2, 1906, O. L. 306, the powers and duties theretofore conferred on the Ohio Canal Commission were conferred upon and invested in the board of public works, and the board was expressly authorized to expend out of the canal earnings of the state an amount not exceeding $4,000 per annum to meet the salaries and necessary expenses of employes of the board in the discharge of the additional duties devolving upon them and theretofore imposed upon the canal commission.
>
> "By reason of the revolution of the powers and duties effected by this act a number of distinct duties were by action of the board imposed upon its secretary. That is to say, the board required its secretary, without additional compensation, to perform the service theretofore performed by the secretary of the canal commission who received a salary of $1,350 per annum.
>
> "The board feels that in justice to its secretary it ought to allow him, if possible under the law, additional compensation for the additional and independent duties performed by him, growing out of the assumption of the board of the powers and duties of the canal commission.
>
> "May the board legally do this?"

The following provisions of law must be considered in answering your question:

Section 408 (as amended) 101 O. L. 360:

> "The board of public works shall organize by the election of a member as president and the appointment of a secretary and clerk. The

secretary shall receive a salary not to exceed fifteen hundred dollars per annum. The clerk shall receive such compensation as the board directs, not to exceed nine hundred dollars each year, to be paid upon the order of the board from moneys appropriated for that purpose."

Section 464 General Code (formerly Section 3 of the act of 1906, 98 O. L. 306).

"In addition to the powers and duties herein conferred upon the board of public works, the board shall exercise all powers and duties heretofore conferred by law upon the Ohio Canal commission, but no land lease, or sale of canal or state lands shall be made except upon the written approval of the governor and attorney general."

Section 466 General Code (formerly Section 4 of the act of 1906, 98 O. L. 306).

"The board of public works may expend from the canal earnings of the state, an amount not exceeding four thousand dollars each year for the payment of salaries and necessary expenses of employes of the board while engaged in the discharge of duties heretofore imposed upon the canal commission."

The appropriation act for the year 1912, 102 O. S. 393, Section 1:

"That the following sums for the purposes hereinafter specified be and the same are hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund, not otherwise appropriated, to-wit:

* * * * * * * * *

BOARD OF PUBLIC WORKS.

Salary of secretary ----------$1,500.00

* * * * * * * * *

Miami and Erie canal for maintenance and improvements, receipts and balances.

Ohio canal for maintenance and improvements, receipts and balances.

* * * * * * * * *

"Sec. 2. The moneys appropriated in the preceding section shall * * * * * (not) be used or paid out for purposes other than those for which said sums are specifically appropriated as aforesaid.

"Sec. 3. No bills for extra clerk hire in favor of any clerk or clerks while drawing salaries from the state shall be allowed from any amount herein appropriated."

I have quoted all of the provisions of law in any way applicable, or which might be considered applicable to the question at hand.

Section 4 of the act of 1906 which has, as above stated, become Section 466, General Code, clearly vested in the board of public works authority to pay its own employes out of the canal earnings of the state additional compensation for the additional services which might devolve upon them by virtue of the other provisions of that act. The secretary of the board is not mentioned in this section, and it might be contended, with some show of reason, that he is not, strictly speaking, "an employe" of the board. Inasmuch, however, as he has no definite term of

office but serves at the pleasure of the board, it appears that his practical status is that of an employe, and I am convinced that the use of the word "employe" in section 466 is not to be regarded as restricted or technical.

I am, therefore, of the opinion that the secretary of the board of public works is within the intendment of Section 4 of the act of 1906, now Section 466, General Code.

Now the salary of the secretary is fixed by law—or rather the maximum salary so payable to him is so fixed—and the board of public works is without authority to increase that salary. No time need be spent in demonstration of this point.

As I understand your request, the board is not contemplating increasing the salary of the secretary as such, but rather paying him certain specified compensation for certain defined services which the board deems not to be within the scope of the duties of the secretary of the board as such, and clearly to be within the purview of the "additional duties" mentioned in Section 466 of the General Code. This would not be an increase of the secretary's salary in the strict sense of the word, but rather the payment of compensation of the secretary for independent duties which might be lawfully imposed upon him.

I am of the opinion that the board of public works may lawfully recognize the fact that under the law of 1906 some of the duties now being performed by the secretary of the board of public works are not germane to that position as such but must be regarded as "additional duties" within the meaning of Section 4 of that act; and that the board may attach to such "additional duties" a separate and specific compensation payable out of the $4,000 authorized to be devoted to this and similar purposes from the canal earnings of the state.

A number of collateral questions are here suggested and ought to be disposed of. In the first place, the sole authority of the board of public works to expended any money out of the canal earnings—that is the authority of the board to withdraw such money from the state treasury—is derived from the appropriation above quoted of "receipts and balances" of the two canals therein mentioned.

Section 2 of the appropriation law expressly provides that money appropriated in Section 1 shall not be expended for any purpose other than that for which it is appropriated. The purpose for which receipts and balances are appropriated is the "maintenance and improvement" of the canals. I do not regard this point as of great weight, however, because the legislature in making an appropriation of "receipts and balances" must be deemed to intend that the moneys thus appropriated shall be used for purposes for which they may be used under general and permanent statutes. This amounts to holding that in law the setting aside the sum of $4,000 or any lesser sum from the canal revenues for the purpose of paying additional compensation to employes of the board under Section 466, General Code, is a proper charge against "maintenance and improvement" of the canals.

The further question here suggested as to which of these two appropriations of "receipts and balances" the $4,000 ought to be set aside from is not directly raised and is not of sufficient importance for consideration here.

Another possible objection to the conclusion which I have already reached is raised by consideration of Section 3 of the appropriation law, which provides, as above quoted, that no bills for extra clerk hire shall be paid to any clerk from any of the appropriations while such clerk is drawing a salary from the state.

I do not think this possible objection to be of weight for three reasons. In the first place I question whether the secretary is a "clerk" within the meaning of this provision. The position of secretary, while in a sense clerical, is clearly to be distinguished from that of clerk of the board which is provided for in the same section which authorizes the appointment of a secretary. It is my opinion that the secretary is not a "clerk" within the meaning of the appropriation. In the

second place I am of the opinion that the extra compensation, concerning which you are inquiring, is not "extra clerk hire" within the meaning of the provision above referred to. The specific recognition of the additional duties imposed upon employes of the board by Section 466, General Code, is sufficient, in my judgment, to take the case out of the operation of general provisions like those found in the appropriation bills passed during the last few years at any rate. That is to say, services thus expressly recognized by statute are not, in my judgment, to be regarded as in the nature of "extra clerk hire," compensation for which may not be paid to a clerk receiving a salary from the state. In the third place the appropriation bill, while a law of equal dignity with that of other laws of the state, yields, in my judgment, to a general and permanent statute in case of inconsistencies between the appropriation law and such permanent statute, in the sense at least, that general language in the appropriation bill must be construed in the light of possible exceptions in the general law. Putting it in another way, if the appropriation bill limits the use of money appropriated therein for all departments in a certain way, and the general law specifically authorizes a certain department to make a certain specific expenditure which might seem to be violative of the general restrictions of the appropriation law, then that specific case must be regarded as having been excepted in the mind of the legislature from the general rule prescribed in the appropriation law.

This is the same as holding that the sentence above quoted from section 3 of the appropriation law should be interpreted to mean that no bills for extra clerk hire should be paid to any clerk or clerks out of any of the appropriations made in Section 1 of the act in case such clerk or clerks are receiving a salary from the state, unless some general statute specifically authorizes the head of the department to pay such extra clerk hire out of some particular appropriation.

For all the foregoing reasons I am of the opinion that while the board of public works may not increase the salary of its secretary as such, it may recognize the existence of certain independent duties which the board has imposed upon him, and may provide out of the $4,000 authorized to be devoted to this purpose from canal revenues, a separate salary or compensation for the secretary in the discharge of such independent duties, and that the secretary may receive such compensation so provided in addition to the $1,500 per annum which he is entitled to receive as secretary of the board.

It seems to me that in addition to the plain intendment of the statute, the distinctions of which I have before spoken, are clearly recognized in the common law of public officers. State ex rel. vs. Lewis, 21 O. C. C. 410.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

247.

BOARD OF PUBLIC WORKS—POWER TO PAY EXTRA COMPENSATION TO CLERKS AND ASSISTANT ENGINEER FOR EXTRA SERVICE IN CANAL LAND DEPARTMENT.

The Board of Public Works may lawfully pay to the clerk of the board and to the assistant engineer, additional compensation for the performance of duties, which formerly rested upon the Canal Commission.

April 5, 1912.

Board of Public Works, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter ot recent date, supplementing your previous letter of February 26th and requesting my opinion upon the right of the Board of Public Works to pay additional compensation to certain of its employes for services devolving upon its employes under the act of April 2, 1906, 98 O. L. 306, now Section 456 of the General Code.

The first case concerning which you now desire to be advised is that of the assistant engineer of the public works, who is desired by the engineer of the canal land department as his assistant, the understanding being that he is to give a part of his time to the work of the land department in consideration of the additional services to be imposed upon him by the board in finishing the work of the canal commission, a good share of which has fallen to the lot of the land department.

The other case is that of the clerk of the Board of Public Works, who is asked to perform a great deal of stenographic work for the canal land department, which work has devolved upon her by virtue of the act of April 2, 1906, transferring the duties of the canal commission to the board of public works.

It will be unnecessary for me to repeat the reasoning which I have embodied in my opinion to you under date of March 12th. I feel, however, that it is necessary for me to mention the fact that the canal land department of the Board of Public Works, so-called, does not exist by virtue of any special statute, but in fact is that department of the board's activities which pertains more especially to the work which was formerly within the province of the canal commission.

The cases of the assistant engineer and clerk of the board are, of course, not to be regarded as in all respects similar to that of the secretary, covered by my letter of March 12th; the former holds his office under Section 420, General Code, which is as follows:

> "The board of public works may appoint an assistant engineer of public works, who shall be a practical civil engineer, hold his office for a term of two years, unless sooner removed by the board, and be subject to such rules and regulations as the board prescribes. The assistant engineer shall receive such salary as the board directs, not to exceed sixteen hundred dollars each year, and necessary expenses incurred in the discharge of his official duties, which shall be paid upon the order of the board and the warrant of the auditor of state."

It is apparent, I think, that inasmuch as the assistant engineer is appointed by the Board of Public Works and not by the Governor, as is the case with the chief engineer, he is an "employe" within the meaning of the act of 1906, just as I have held the secretary of the board to be.

Otherwise, the opinion of March 12, 1912, applies to the case of the assistant engineer of the public works in its entirety.

The same reasoning applies to the case of the clerk of the Board of Public

Works. Of course, the entire opinion of March 12, 1912, does not apply to the clerk, for the reason that it was pointed out therein that the secretary of the board could not be considered a "clerk" within the meaning of Section 3 of the Appropriation Bill of 1912. Undoubtedly, if said Section 3 applies at all to this case, the clerk of the Board of Public Works would have to be regarded as a clerk within the meaning of this provision.

I pointed out further, on page 5 of the previous opinion, that extra compensation paid to an employe of the Board of Public Works under and by virtue of Section 466, General Code, would not be regarded as "extra clerk hire" within the meaning of the appropriation bill. For this reason alone, then, I am of the opinion that the board may lawfully pay to the clerk of the board, as well as to the assistant engineer of the public works, additional compensation for performing duties outside of their regular employments, which said duties have been imposed upon them because of the devolution of the powers and duties of the canal commission upon the board of public works.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

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LEASE BY BOARD OF PUBLIC WORKS TO ENDWELL OIL & GAS COMPANY—NO RIGHT OF SAID COMPANY TO OUTPUT OF OHIO FUEL & GAS COMPANY.

Under the terms of the lease granted to the Endwell Oil & Gas Well Company by the board of public works, the latter company was entitled only to seven-eighths of the output of wells drilled by itself. Said company was, therefore, not entitled to any royalties for gas taken by another company, namely, the Ohio Fuel & Gas Company from wells formerly drilled by that company and operated by it after the date of the lease to the Endwell company.

Inasmuch also as the lease made provision for a return of the $200.00 *deposited by the Endwell company by a deduction of said amount from the one-eighth return from actual output of the company's own wells, said company is not entitled to a return of said* $200.00 *under any other conditions.*

State Board of Public Works, Columbus, Ohio.

GENTLEMEN:—Your communcation of some time ago, written by Mr. E. E. Booton, engineer of the canal land department, in which he states that the officers of The Endwell Oil & Gas Company of Sugar Grove, Ohio, had expressed their dissatisfaction with an opinion rendered by me on September 11, 1911, to your board relative to the right of said company to participate or share in certain revenues collected from The Ohio Fuel Supply Company for gas taken from certain wells located on the Hocking canal lands owned by the state, but held under a lease to the said The Endwell Oil & Gas Company, believing that Mr. Booton had misstated the facts in regard to the lease, was duly received.

I want to state to your board that said opinion was rendered by me under a musunderstanding of the facts, but Mr. Booton had not misstated the facts at all. Mr. Booten's last communication gives a complete statement of the facts as follows:

> "On December 2, 1898, the canal commission and board of public works granted three leases to E. M. Poston, W. H. Jennings and L. D. Lampman respectively, covering the lands later leased to the Endwell

Oil & Gas Company and other lands in addition thereto for the term of ten years, the aggregate rental being $25,000.00, which was paid in advance.

"Shortly after these leases were taken out, they were assigned to The Federal Gas & Fuel Company and the assignment was duly approved by the board of public works as required by the terms of the lease. At a later date these leases appear to have been acquired in some way by the Ohio Fuel Supply Company, but the assignment was never approved by the board of public works.

"Sometime before the leases expired, an application was filed requesting a renewal of their pipe line lease, and when they were requested to renew the lease for gas and oil, they replied that the field was exhausted and that they were preparing to draw their casings, with a view to abandoning all their canal leases. Having no reason to doubt their statement, the board of public works granted The Ohio Fuel Supply Company a renewal of its pipe line leases, and some six months after the expiration of the original leases, a lease was granted to The Endwell Oil & Gas Company for a portion of the territory for the purpose of drilling thereon for oil and gas, the strip leased being the berme bank of the Hocking canal between Maple street, in Lancaster, Ohio, and the canal bridge at Enterprise.

"When the Endwell people went on the ground, they found the Ohio Fuel Supply Company operating four wells upon the canal property.

"This fact they reported to the land department and expressed a desire to secure these wells in order to drill them deeper in hopes of striking oil.

"The facts were laid before the board of public works and I was directed to place the facts before Mr. Alburn, second assistant attorney general, with the request that he take steps to secure a settlement for the gas. Mr. Alburn was very busy with other matters and the matter was delayed until it was reported that The Ohio Fuel Supply Company was pulling the wells. He was urged to bring an injunction to stop this, but the work was practically completed when he and I visited the fourth well.

"Mr. Alburn endeavored to have the Ohio fuel people discontinue work on the last well until some understanding could be arranged between the state and the company, but by some misunderstanding (possibly intentional on the part of some one representing the company) the work continued over Sunday, the casing was drawn and the well plugged.

"Shortly after this the board of public works notified The Ohio Fuel Supply Company to appear before the board and render an account of the gas taken from the state property. A representative met the board on at least two occasions and on the last occasion furnished the board with a statement taken, as he said from the books of the company, showing that so many thousand cubic feet of gas had been produced from these wells since the expiration of the original lease to Poston and others.

"He also stated the price the company was paying others for gas in this locality.

"On this basis it was found that the state on a one-eighth royalty was entitled to something like $200.00 and settlement was made for this amount.

"Now the Endwell people contend that the amount reported by

> The Ohio Fuel Supply Company was a mere fraction of the actual amount produced, and that the actual value of the output of these four wells was at least $16,000.00, of which The Endwell Oil & Gas Company was entitled to seven-eighths."

And have been approved as set forth therein by the president and secretary of The Endwell Oil & Gas Company, for the consideration of the same by me.

Your board request me to render it an opinion upon the following matters relative to said controversy, viz:

> "First. Whether or not The Endwell Oil & Gas Company is entitled to seven-eighths of the rental collected by the state and a like proportion of any further amount that may be collected from The Ohio Fuel Supply Company in case the charges made by The Endwell Oil & Gas Company are substantiated.
>
> "Second. Whether or not The Endwell Oil & Gas Company are entitled to receive back from the state the $200.00, the advanced payment made by it under its lease, in case it is not entitled to participate in the rentals already collected or that may hereafter be collected by the state from The Ohio Fuel Supply Company.
>
> "Third. Whether the board of public works could legally pay to The Endwell Oil & Gas Company any portion of the money already collected or that may hereafter be collected from either company without a special act of the General Assembly authorizing the same."

In order to answer your first question and properly determine the rights of The Endwell Oil & Gas Company it is necessary to look to the lease executed by your board to said company, a copy of which you attached to your communication, and upon examination of said lease I find that said lease contained the following:

> "The party of the first part (the board of public works) hereby leases to the party of the second part (The Endwell Oil & Gas Company), its successors and assigns the following described positions of the berme embankment of the Ohio canal *with the right to said second party, its successors and assigns, to enter upon, occupy and use said lands for the purpose of drilling therein for gas and oil, laying therein the pipes necessary for transporting the same and erecting and maintaining tanks and other equipment and machinery necessary for storing and handling the oil and gas therein discovered.*"

and the clause reciting the consideration for said lease is in part as follows:

> "Now, therefore, in consideration of the payment by the party of the second part of $200.00 in advance, and in consideration of the other rents and royalties herein provided and the conditions and stipulations herein contained it is hereby agreed."

It is plain to be seen from the above quoted stipulations in the lease from your board to The Endwell Oil & Gas Company that all that was granted to the said company by said lease was:

> *"The right to enter upon, occupy and use said lands for the purpose of 'drilling' therein for gas and oil and laying the necessary pipes*

to transport the same and erecting and maintaining tanks and other equipment and machinery necessary for storing and handling the oil and gas therein discovered."

There were no other rights acquired by said lessee under said lease and it is significant that nothing in said lease referred directly or indirectly to any gas or oil either to be transported, tanked or a royalty paid for to state "except such as discovered by said company in drilling the wells it agreed to drill in said lands."

From the facts above stated and a careful consideration of the said lease, I am of the legal opinion that the only vested rights held by The Endwell Oil & Gas Company, lessee, under its lease, during the time the gas in question was taken from the four wells by The Ohio Fuel Supply Company was as above stated and *"not to have the output of"* any well or wells not drilled by it under the terms of its lease.

There is nothing exclusive granted to said lessee under said lease other than as above indicated, therefore, I am of the opinion that The Endwell Oil & Gas Company is not entitled to the seven-eighths (7/8) of the rental already collected by the state nor a like proportion of any further amount that may be collected from The Ohio Fuel Supply Company.

In answer to your second question I desire to say that the $200.00 which The Endwell Oil & Gas Company paid in advance as part of the consideration for said lease, was to be paid to said company upon certain conditions set forth in said lease which were as follows:

> "The party of the second part agrees to properly care for output of said wells, to deliver all of such output free of cost to the party of the first part as security for payments due such party of the first part, into the pipe lines of its company with which second party may connect its said wells where such output shall be divided so that the first party shall receive credit for one-eighth of such output of gas or oil, so delivered and said second party seven-eighths (7/8) and to pay such first party *as royalty* the purchase price of one-eighth (1/8) of such entire output. *Provided, however,* that ten (10) per cent. shall be deducted from the one-eighth (1/8) royalty each year until the amount so deducted shall equal $200.00 and thereafter the state shall receive *the full one-eighth* (1/8) *royalty."*

There having been no breach of the lease by the state, and the terms of said lease being as just above set forth, I am of the legal opinion that the state should not and could not return the said $200.00 to said lessee under no other circumstances than a credit on any royalty due the state for gas or oil that may be produced from wells drilled on said lands by said lessee as provided in said lease.

As to your third and last question it is not necessary to go into the matter as to whether or not the board of public works could legally pay The Endwell Oil & Gas Company any portion of the money collected from the other company without a special act of the general assembly authorizing the same, in view of the answer to your first and second questions wherein I hold that said The Endwell Oil & Gas Company are not entitled to participate in any revenue collected as a royalty from gas produced from wells it did not drill under the terms of its lease.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

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ABANDONED CANAL LANDS—EXPENDITURES OF SURVEY, PLATTING, MONUMENTING AND SELLING MAY BE PAID FROM CANAL FUNDS AND RECEIPTS OF SALE BE CREDITED BACK.

Section 7 of the Act of 102 *Ohio Laws,* 293, *providing for the abandonment of certain portions of the Ohio canal, and Section* 5 *of the Act of* 102, *Ohio Laws,* 49__, *providing for the abandonment of a certain portion of the Hocking Canal, each provide that all expenses of surveying, platting, monumenting and selling or leasing said abandoned canal lands, shall be paid out of the "canal funds or other funds provided for the surveying of canal lands," and further provide for the crediting back to such funds a like amount from the receipts of sale.*

The words "provided for the sale of canal lands" as employed in the above sections, apply only to "or other funds" and do not limit or qualify the words "canal funds" and it is not the purpose of the Legislature to limit the fund from which the enumerated expenditures could be made to the fund specifically provided for the survey of canal lands.

Such expenditures may therefore be made from the funds appropriated for the survey of canal lands or from any other canal funds.

October 7, 1912.

State Board of Public Works, Columbus, Ohio.

GENTLEMEN:—Your favor of October 4, 1912, through Hon. E. E. Booton, Engineer Canal Land Department, has been received, in which it is stated:

> "The acts passed by the seventy-ninth general assembly, providing for the abandonment of certain portions of the Ohio canal and for the abanbonment of the Hocking canal authorized the state board of public works and the chief engineer of the public works, acting jointly, to cause such surveys to be made of said canal property as in their judgment is necessary for the purpose of carrying out the provisions of this act, together with such maps and plats of the same as will facilitate the selling and leasing of said canal lands. Section 7 of the act to abandon the Ohio canal (O. L. 102, p. 294) and Section 5 of the act to abandon the Hocking canal (O. L. 102, p. 491) provides that all accounts of expenses incident to surveying, platting and monumenting said abandoned canal lands, together with the necessary expenses of advertising, selling or leasing the same, shall be verified and approved by the chief engineer and the board of public works, and paid out of the canal funds, or other funds provided for the survey of canal lands, and the auditor of state is hereby directed to credit back to the fund or funds from which such payments are made, the like amount in any sum not to exceed twenty thousand dollars from the receipts derived from the sale and leases on the Ohio canal, and a like amount in any sum not to exceed five thousand dollars from the receipts derived from the sale and leases of said Hocking canal lands.
>
> "In carrying out the provisions of these two acts surveying and platting of the lands on these canals has been in progress for the past fifteen months. The joint board had hoped to makes sales of a portion of these lands prior to the first of September, 1912, but owing to injunction suits, brought by the city of Newark and the owners of property

abutting on said canal lands, in said city, we have been prevented from making the proposed sales. The result is that the special appropriation for making surveys and credited to the canal land department will be exhausted possibly before these sales can be consummated.

"Sections 5 and 7, referred to above, provide that the expenses shall be paid out of the canal funds. This is the regular fund accredited to the board of public works from appropriations and earnings from leases of land and water power and is always accredited to the canal repair fund simply as a convenience for keeping the funds separate from the appropriations made to the canal land department. So far all of the expenses have been paid out of the appropriations made to the canal land department. As we interpret the law, we can, if necessary, pay out of the canal funds temporarily sufficient to carry on this work until sales can be made from which the amount can be repaid from the fund from which such payments were made.

"Will you kindly advise us whether or not we are correct in our interpretation of these statutes and whether or not these payments may be made for temporary purposes from the regular canal funds?"

Upon inquiry at your office it appears that the amount expended for platting and surveying the canal lands in question, amounts to about $12,700.00.

There are two acts to be construed in this opinion. The one found in 102 Ohio Laws, 293, provides for the abandonment of certain portions of the Ohio canal. The other, found in 102 Ohio Laws, 490, provides for the abandonment of a portion of the Hocking canal. The provisions of these two acts to be considered are similar.

Sections 2, 3 and 7 of the act in 102 Ohio Laws 293, provides:

"That the state board of public works and the chief engineer of the public works, acting jointly, shall cause such surveys to be made of said canal property as in their judgment is necessary for the purpose of carrying out the provisions of this act, together with such maps and plats of the same as will facilitate the selling or leasing of said canal lands, which plats shall be preserved as permanent records in the office of the state board of public works.

"Section 3. As soon as such surveys and plats have been completed, the state board of public works and the chief engineer of public works, acting as a joint board, shall proceed to appraise, and lease or sell, as they may deem for the best interest of the state, subject to the approval of the governor and attorney general, said canal lands, except as hereinafter noted, in strict conformity with the various provisions of the statutes of Ohio relating to the leasing and selling of state canal lands, except that the grant of such leases shall be for a term of not less than fifteen nor more than twenty-five years, and that the bed and banks of said abandoned canal property may be included in any lease of such canal lands.

"Section 7. All accounts of expenses incident to surveying, platting and monumenting said abandoned canal lands, together with the necessary expenses of advertising, selling or leasing the same, shall be verified and approved by the chief engineer and the board of public works, *and paid out of the canal funds, or other funds provided for the survey of canal lands, and the auditor of state is hereby directed to credit back to the fund or funds from which such payments are made,*

a like amount in any sum not to exceed twenty thousand dollars ($20,000.00) *from the receipts derived from the sale and leases of said lands."*

Sections 2, 3 and 5 of the act of 102 Ohio Laws, 490, provides:

"Section 2. That the state board of public works and the chief engineer of the public works, acting jointly, shall cause such surveys to be made of said canal property as in their judgment is necessary for the purpose of carrying out the provisions of this act, together with such maps and plats of the same as will facilitate the selling or leasing of said canal lands, which plats shall be preserved as permanent records in the office of the state board of public works.

"Section 3. As soon as such surveys and plats have been completed, the state board of public works and the chief engineer of the public works, acting as a joint board, shall proceed to appraise, and lease or sell, as they may deem for the best interest of the state, subject to the approval of the governor and attorney general, said canal lands in strict conformity with the various provisions of the statutes of Ohio relating to the leasing and selling of state canal lands, except that the grant of such leases shall be for a term of not less than fifteen nor more than twenty-five years, and that the bed and banks of said abandoned canal property may be included in any lease of such canal lands.

"Section 5. All accounts of expenses, incident to surveying, platting and monumenting said abandoned canal lands, together with the necessary expenses of advertising, selling or leasing the same, shall be verified and approved by the chief engineer and the board of public works, *and paid out of the canal funds, or other funds provided for the survey of canal lands, and the auditor of state is hereby directed to credit back to the fund or funds from which such payments are made, a like amount in any sum not to exceed five thousand* ($5,000.00) *dollars from the receipts derived from the sales and leases of said lands."*

These acts do not make a specific appropriation of any sum or sums to be expended for the purpose of platting, surveying and monumenting the several parts of the abandoned canals. The acts authorize the expenses of plating, surveying and monumenting said lands, and the expenses of advertising, selling and leasing the same to be "paid out of the canal funds, or other funds provided for the surveying of canal lands." They further direct the auditor of state to credit back to the "fund or funds from which such payments are made" a like amount from the receipts derived from the sale and lease of said lands, in any sum not to exceed $20,000.00 for the Ohio canal, and not to exceed $5,000.00 in the act pertaining to the Hocking canal. It appears that to date $12,700.00 has been expended for these purposes. This is but a little more than half of the aggregate amount that may be credited back to the fund or funds from the receipts to be derived from the sale and lease of said canal lands.

The acts do not fix any one specific fund from which payment of such expenses may be made in the first instance. The acts, in fact, contemplate that such payments may be made from one or more funds.

It appears that the expenditures to date have been made from the special fund appropriated for the survey of canal lands and that this fund is now nearly exhausted. It appears further that your department has a canal repair fund which is derived from appropriations and earnings from leases of land and water power. This is the general canal fund.

It was not the purpose of the legislature, in my opinion, to limit the fund

from which the enumerated expenditures could be made, to the fund specifically provided for the survey of canal lands.

The phrase is that such expenditures shall be "paid out of the canal funds, or other funds provided for the survey of canal lands." The latter part of this phrase makes the meaning not entirely clear. The words "provided for the survey of canal lands" applies only to the words immediately preceding them, to-wit, "or other funds" and does not limit or qualify the words "canal funds." A construction making these words limit both "or other funds" and "canal funds" would eliminate the general canal funds as one of the funds from which such payments could be made. This was not in my opinion the intention of the legislature in enacting this provision.

Ultimately such expenses are to be paid from the receipts derived from the sale and lease of said abandoned canal lands. Until such sales or leases can be made it is provided that the expenditures required to plat, survey and sell or lease the land should be advanced from funds available for canal purposes. The fund or funds from which such advance payments are made, are to be reimbursed from the receipts derived from the sale and lease of said lands.

I am, therefore, of the opinion that the expenditures required for the platting, surveying and monumenting of said canal lands, and for advertising, selling or leasing the same, as provided for in the acts of 102 Ohio Laws, 293, and 102 Ohio Laws, 490, may be made from funds appropriated for the survey of canal lands or from any other canal funds.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

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LEASES OF SURPLUS CANAL WATER TO AKRON WATER WORKS COMPANY—ASSIGNMENT TO CITY OF AKRON—RIGHTS OF STATE TO WATER RENTAL FROM CITY—EFFECT OF GRANT OF 102 O. L. 175, TO CITY OF AKRON OF WATER FROM CERTAIN RIVERS—RIGHTS OF CITY AND STATE.

The city of Akron purchased from the Akron Water Works Company, two leases granted to the latter by the state of Ohio to a certain amount of water from Summit Lake, Long Lake and Nessmith Lake. Subsequently, the legislature by act of 102 *O. L.,* 175 *granted to the city of Akron the right to divert and use forever, for the purpose of supplying water to said city of Akron and the inhabitants thereof, the Tuscarawas, the Big Cuyahoga, and the Little Cuyahoga rivers, subject to canal navigation uses and upon the condition that the city shall at all times save "the state harmless from all claims arising from such grant and construction thereunder.*

Held: The lessee and the assignee of the leases take subject to the right of the state to abandon the canals and the "leases imposed no obligation whatever to furnish or supply the city with water." They did nothing more than confer on the (lessees and assignees) the privilege of using the surplus water whenever and so long as there would be a surplus above that employed in navigation. The leases contain the implied covenant of quiet enjoyment to the effect that "so long as the canal was used for purposes of navigation and while there was during the period it was so used, a surplus of water above that which was required for navigation, the lessors agreed that they would do no such acts as would deprive the lessees or assignees of its enjoyment."

The leases were executed and delivered before the passage of the act in 102 *O. L.,* 175, *under which the city of Akron claims to hold. The grant of said act was subject to the prior rights of the lessees and assignees.*

The city of Akron chose to purchase the leases and if it does not pay the rentals, it is not saving the state harmless by virtue of the grant of 102 *O. L.,* 175, *when it seeks to take advantage of it.*

The state may sue either or both the lessee under the leases, or the assignee, since the lease did not contain any restrictions against assignment. But one recovery may be had, however.

The agreement in the lease to pay rent amounts to a covenant, which the city of Akron as assignee assumes.

A grant by the government is construed strictly against the grant of privilege and though this rule is relaxed in most masses where a consideration is paid, the relaxation does not apply when the grant is one of rights and which the state holds in trust for public uses, such as the control of navigable waters. The city receives the grant only in its governmental capacity and reserves only what is granted in clear and explicit terms.

Under the act in question, therefore, the state gets a right only to use or divert the waters of the rivers and their tributaries named and since Summit Lake is not a tributary, it is not a grant of a right to use or divert the waters in the canals of which Summit Lake is a part.

Though the lease provides for the shutting off of water when rent is not paid, the better procedure would be for the state to sue for rent due under the leases.

December 21, 1912.

Board of Public Works, Columbus, Ohio.

GENTLEMEN:—You have referred to me for consideration the matter of the

claim of the state of Ohio against the city of Akron for water rent as the assignee of two leases given to the Akron Water Works Company by the state of Ohio for surplus water to be taken from certain lakes in Summit county.

The first lease was entered into on September 30, 1902, and is to run until December 31, 1918, and calls for an annual rental of $1,500.00, payable semi-annually in advance on the first days of May and November of each year. The second lease was entered into on February 12, 1910, and is to end on April 16, 1914, and calls for an annual rental of $4,500.00, payable semi-annually in advance on the first days of May and November. The second lease is made as an additional lease to the first. The Akron Water Works Company took possession under these leases and was in possession at the time it transferred its plant to the city of Akron.

On October 16, 1911, the Akron Water Works Company gave an option to the city of Akron to purchase its entire plant including all easements and rights possessed by it. The city of Akron exercised its option and purchased said plant. The actual transfer was made to begin with April 1, 1912, and was made in accordance with the terms of the option.

The fifth clause of this option read as follows:

> "Said the Akron Water Works Company will, within sixty (60) days after the receipt by it of said written notice from the said city of Akron of its intention to exercise said option and making by said city of its first payment, furnish to said city for examination full and complete abstracts showing a good and sufficient title of record to all of the real estate held by it in fee and showing further the RIGHTS and EASEMENTS held by it under certain grants, and upon payment of the remainder of said purchase price and the actual cost of said extensions and improvements, supplies, materials and personal property on hand, which payment must be made or secured to the satisfaction of said The Akron Water Works Company on or before the first day of May, 1912, upon the terms and in the manner above stated, will transfer and convey, or cause to be transferred and conveyed to said city of Akron, by appropriate instruments in writing, a good and sufficient title to all the property, both real and personal and mixed, as hereinbefore mentioned and on the terms and conditions herein stated, free and clear from all encumbrances whatsoever, *save and except that such EASEMENTS and RIGHTS or other interests in real estate owned by said company but not held by it in fee, shall be transferred and conveyed to said city of Akron under the same restrictions, terms and conditions upon and under which said EASEMENTS and RIGHTS are held by said company.*"

By virtue of this provision of the option and the final purchase by the city of Akron, said city of Akron became the assignee of the Akron Water Works Company in the two leases in question. The city of Akron now refuses to pay the rental and your honorable board desires to know the proper course for it to pursue in the premises.

The city of Akron maintains that it is not required to pay said rental and is exempted therefrom by the provisions of the act of 102 Ohio Laws, 175.

This act provides in full as follows:

> "Section 1. That there is hereby granted to the city of Akron, in the county of Summit, and state of Ohio, the right to divert and use forever for the purpose of supplying water to said city of Akron and

the inhabitants thereof, *the Tuscarawas river, the big Cuyahoga and little Cuyahoga rivers, and the tributaries thereto, now wholly* or partly owned or controlled by the state and used for the purpose of supplying water to the northern division of the Ohio canal, provided, however, and this grant is upon the condition that at no time shall said city use the waters of any such stream, to such extent or in such manner as to diminish or lessen the supply now necessary, to maintain the flow in and through the canal as said canal now exists or as hereafter may become necessary for navigation purposes for an enlarged canal *and upon the further condition that the city of Akron shall at all times save the state harmless from all claims arising from such grant and construction thereunder.*

"Section 2. There is hereby granted to said city of Akron for the water works purposes as aforesaid the right to enter in and upon and occupy the lands of the state in said Summit county to develop additional storage either by the construction of new reservoirs or dams, or the enlargement of those already constructed by the state on said rivers, always provided that said construction or enlargement will not result in any interference with or diminution of the supply now necessary for said canal for navigation purposes. And, provided further, that before any such construction of reservoirs or dams, or enlargement of reservoirs or dams now existing shall be commenced, the plans and specifications therefor be first approved by the chief engineer of the state board of public works. And further provided, that any diversion or impounding on the lands of the state of said Tuscarawas river and the tributaries thereto, by said city of Akron shall be east of highway known as South Main street extended south. And if the waters of said Tuscarawas river are impounded, used or diverted by said city, the amount of the flow as now or hereafter used and controlled by the state shall not be diminished by such impounding, use or diversion by said city during the months of June, July, August, September, October and November; and at no time shall said city of Akron take or use from any reservoir constructed on the Tuscarawas river an amount of water in excess of an annual average of fifteen million gallons per day, unless with the approval of the board of public works, and upon such terms and conditions as may be agreed upon between the said board of public works and said city of Akron, and the chief engineer of the said board of public works shall at all times have access to said property for the purpose of ascertaining the amount of water that is being used by said city of Akron.

"The governor shall appoint a commission of three arbitrators to fix the compensation to be paid the state by the city of Akron for any lands or property, exclusive of water, taken by the city of Akron under the provisions of this act.

"Provided that any money accruing to the state under this act shall be paid into the state treasury to the credit of the general revenue fund.

"Section 3. The governor, upon behalf of the state shall execute and deliver to the city of Akron, Summit county, Ohio, a grant of the right to use forever the waters of such streams, as herein provided, under the provisions herein set forth and for the purposes herein stated.

"The attorney general shall prepare the form of said grant."

This act does not refer in any manner to the leases of The Akron Water Works Company. Said company was exercising its rights under said leases at the time of the passage of said act and continued to exercise said rights and to

pay the rental therein provided up to the time of the assignment of the leases to the city of Akron, to-wit, to April 1, 1912.

The above act grants to the city of Akron,

> "the right to divert and use forever for the purpose of supplying water to said city of Akron and the inhabitants thereof, the Tuscarawas river, the big Cuyahoga and little Cuyahoga rivers, and the tributaries thereto, now wholly or partly owned or controlled by the state and used for the purpose of supplying water to the northern division of the Ohio canal."

In the first lease above mentioned the right was to draw water from Summit lake, as is shown by the following provision thereof:

> "It is agreed, that subject to the restrictions, limitations and conditions herein contained, the said party of the first part does hereby grant unto the said party of the second part, its successors and assigns, the right to draw water from said *Summit Lake* in such quantity as will pass through a pipe eight inches in diameter in accordance with the mode described in said petition, and in the manner shown by the said plans and profiles, said water to be used for water works purposes."

The second gives the lessee the right to draw water from Summit Lake, Long Lake or Nesmith Lake, as is provided in the second paragraph thereof, which reads:

> "That the party of the first part, *in consideration of the rents hereinafter stipulated, and upon the express condition that the party of the second part shall, during the whole term of this agreement, comply with the conditions and limitations hereinafter contained,* agrees to permit said party of the second part to draw, during the term of this agreement, from *Summit Lake, Long Lake or Nesmith Lake,* by pipes or other suitable means, such quantity of water as it, The Akron Water Works Company, may from time to time need or require for its water works purposes during the term of this agreement, not exceeding an average daily maximum of ten million gallons; including the quantity permitted to be taken or drawn under said agreement dated September 30, 1902, hereinafter mentioned; by the amount of water hereby permitted to be drawn shall be subject to the quantity required by the state of Ohio for navigation and the lockage of boats from what is known as the Summit Lake level."

The next paragraph of said second lease reads:

> "Said party of the first part hereby agrees to permit said party of the second part to lay upon the banks of the Ohio canal and the lands belonging to said party of the first part such pipes, and to construct thereon such other appliances, as may be necessary for said party of the second part to construct and maintain for the purpose of taking the water as herein provided from either or all of said lakes."

It will be observed that the second lease contained an express stipulation that the lessee should comply with the terms of said lease "during the whole term of this agreement."

The rights of the state of Ohio against The Akron Water Works Company will be first considered.

Said leases are for surplus water only. If all of the water in said lakes is required for the purposes of navigation, the lessee could not use any of the water. It is also held and firmly established in this state and other states that leases for surplus water of the state's canals are taken subject to the right of the state to abandon said canals.

In Hubbard vs. Toledo, 21 Ohio St., 379, it is held:

> "The abandonment of her public canals by the state, creates no liability on her part to respond in damages resulting therefrom to parties holding leases of 'surplus water,' under the act of March 23, 1840, 'to provide for the protection of the canals of the state of Ohio, the regulation of the navigation thereof, and the collection of tolls.'"

The lessees of surplus water of the canals of the state of Ohio take their leases subject to the right of the state to resume the water for the use of navigation in its canals and also subject to the right of the state to abandon its canals. If the state resumes all the water or abandons the canal, the lease for surplus water is terminated and the lessee has no further rights under the lease and has no right of action against the state because of the lease having been ended before the term for which the lease was made.

In this case the state has not exercised either of the above privileges. It still has surplus water to dispose of. So long as the state has surplus water, can it enforce said leases during the terms and compel the lessee to pay the rental therein stipulated and covenanted to be paid?

At Section 352*a* of Jones on Landlord and Tenant it is said:

> "On the lease of the surplus water in a canal, the covenant for quiet enjoyment which the law annexed to the lease was that so long as the canal was used for purposes of navigation and while there was a surplus of water, the lessors agreed that they would do no acts to interrupt or deprive the lessee of its enjoyment. On the abandonment of the canal for navigation, the lessors were under no obligation to continue to keep it in repair."

In Commonwealth vs. The Pennsylvania Railroad Company, 51 Pa. St. 351, Strong, J., says at page 355:

> "It would have been no breach of faith in her at any time to construct her canal along another route and abandon all her works on the Kiskiminetas, making no other compensation to her lessee of surplus water than a relinquishment of the rent reserved. It was only while she chose to maintain those works, and had surplus water at dam No. 2, water which she did not use for purposes of navigation, that Speer had any right against her under the demise."

In case of Hoagland vs. The New York, Chicago & St. Louis Railway Company, 111 Ind., 443, it is held:

> "A covenant for quiet enjoyment is implied in every mutual contract for leasing land, by whatever form of words the agreement is made.
>
> "Under a lease made by the state of the use of so much of the surplus water, not required for navigation, of the Wabash and Erie Canal as would be sufficient to propel certain machinery in the lessee's mills, the

implied convenant for quiet enjoyment was such that, so long as the canal was used for purposes of navigation, and while there was during that period, a surplus of water, the lessor agreed to do no acts which would interrupt or deprive the lessee of its enjoyment.

"The contract in such case did not impose upon the lessor or its grantees any obligation to keep the canal in repair, or to maintain it in such a condition that a surplus of water would be available, or to supply the lessee with any water whatever, but the latter took the lease subject to all the vicissitudes which might attend a public work of that character, and to the right of the lessor or its grantees to abandon the canal for purposes of navigation and to appropriate it to other uses including the construction of a railroad on the line occupied by it, thereby filling up the channel."

The matter is fully discussed in the opinion and it will be liberally quoted from. On page 447, Mitchell, J., says:

"The decisions of this and other courts establish beyond question, that the lessor, by the terms of the lease in question, assumed no obligation to maintain the canal in repair, or to keep it in such a condition as that a surplus of water above that needed for navigation should be available. The lease imposed no obligation whatever to furnish or supply the lessees with water. It did nothing more than confer upon them the privilege of using the surplus water whenever and so long as there should be a surplus above that employed in navigation. Indeed, it is apparent from the face of the lease, that both parties contemplated that the supply of water might become partially or wholly inadequate. In the event of such a contingency, the lease made provision for a corresponding reduction or suspension of rent."

Also on page 448, he further says:

"By their lease, the lessees simply obtained the privilege of using for motive power at their mill wheels so much of the surplus water, passing through the canal, as was not necessary to carry out the primary purpose for which the work was constructed. The state and its grantees, who succeeded to its rights and liabilities, had the right to resume the use of all the water, or to abandon the canal entirely at pleasure. Whether they exercised the right of abandonment, or resumption, the effect upon the privilege granted to the lessees was the same. In neither event did the lessor become liable to any other consequence than the inability to collect rent from the lessees."

Mitchell, J., further says on pages 488 and 449:

"The covenant for quiet enjoyment, which the law annexed to the lease in controversy, was, therefore, *such that so long as the canal was used for purposes of navigation, and while there was during the period it was so used, a surplus of water above that which was required for navigation, the lessors agreed that they would do no such acts as would interrupt or deprive the lessees of its enjoyment. This was the extent of the covenant, because the privilege granted, and to which the covenant related, extended no further. So long,* therefore, as the owners

do not act in violation of this covenant they cannot be liable for a breach of the covenant of quiet enjoyment."

This case was again considered upon a motion for rehearing and Elliot, J., delivered the opinion of the court affirming its former holding.

He says on pages 452 and 453 of the same report as follows:

"When the canal was abandoned, there was no subject upon which the lease could operate, and it ceased to be effective. This result, as the decisions referred to in the original opinion clearly show, the lessor was not bound to prevent. There was no obligation, express or implied, that water should always be supplied, nor that the canal should be so maintained as that the lease should remain operative. *On the contrary, the clear implication is, that when the subject of the lease ceased to exist, the rights of the parties under it terminated fully and completely.*

"The appellants did not acquire any corporeal property; all that they acquired was an incorporeal right. Their right was to use the water, for they did not acquire any right to the corpus of the water, much less to any of the land. Angell Water Course, Section 90. The incorporeal right which they acquired was to the use of surplus water, and when the abandonment of the canal for the purposes of navigation made it impossible that there should be surplus water, the incorporeal property which formed the subject of the lease ceased to exist. If the subject of the lease—that is, the incorporeal right to the use of the surplus water—ceased to exist when the canal was abandoned, then the appellants had no longer any right in the canal or its appurtenances, because the only property on which their lease could operate was gone."

The subject of the leases now in question is the surplus water. There is no obligation or covenant upon the part of the state to maintain a supply of surplus water. The subject matter of the lease is liable to be extinguished by the resumption of the water for navigation purposes, or by the abandonment of the canal. The lessee takes the lease for surplus water subject to extinguishment of the subject matter of the lease by either of the above means.

In the case now under consideration the subject matter of the lease has not been extinguished. The state still has surplus water and so long as it has surplus water it is under obligations to furnish it to the lessee as provided in the leases.

The leases do not contain a covenant for quiet enjoyment, but as held in Hoagland vs. Railway Co., 111 Ind. 443, supra, a covenant for quiet enjoyment is implied so long as the subject matter is in existence.

Therefore, so long as the state has surplus water it cannot release itself from the obligations of the lease without the consent of the lessee or its assignee.

The leases in this case were executed and delivered before the passage of the act in 102, Ohio Laws 175, under which the city of Akron now claims to hold. This grant was subject to all prior rights of lessees to the use of the surplus water. The leases were binding upon the state of Ohio, and it could not, after the execution and delivery of the leases and while they were in effect, make a further lease or grant which would interfere with the rights of the lessees under said leases.

In case of Board of Trustees vs. Reinhart, 22 Ind. 463, it is held:

"Where successive leases of water power on the Wabash & Erie Canal are executed by the trustees thereof to different persons, and

the water in the canal proves insufficient to supply the requisite amount to all the lessees, but is sufficient to supply some of them, the lessees should be supplied in the order in which the leases are executed."

In Detwiler vs. Toledo, 3 Cir. Dec. 177, it is held:

"D. having by lease from the State Canal Commissioners, the prior right, for the purposes of running his mill, to draw from a certain level of the Miami & Erie Canal, surplus water not necessary for the use of navigation, to the amount of 1,800 cubic feet of water per minute, may maintain an injunction against a subsequent lessee of said Commissioners, restraining such subsequent lessee from drawing water from said level at such times or in such manner as to interfere with D's prior right thereto, D's right to draw some water from said level being admitted, and the controversy between the parties being as to the extent and priority of their respective rights to such surplus water."

The Akron Water Works Company, by virtue of their leases, had a prior right to the surplus water and the act of 102 Ohio Laws 175, could not deprive it of the rights which it possessed under its leases. The act does not refer to said leases and does not authorize the board of public works to cancel said leases. The act specifically provides that the grant shall be taken

"upon the further condition that the city of Akron shall at all times save the state harmless from all claims arising from such grant and construction thereunder."

Under the grant given to it by the act of 102 Ohio Laws 175, the city of Akron has the right to use the waters of the big Cuyahoga, little Cuyahoga and Tuscarawas rivers and their tributaries, for the purpose of supplying water to said city and its inhabitants, subject to prior rights of any and all lessees to such water. Instead of taking the water subject to the rights of all prior lessees, it chose to purchase and become the assignee of a prior lessee of the surplus water, to-wit, of The Akron Water Works Company. It is now using the water by virtue of the plant of The Akron Water Works Company and under said leases, and not by virtue of the grant given it by act of 102, Ohio Laws, 175. By assuming said leases and then refusing to pay the rental thereof it is not saving the state harmless by virtue of its grant, but is depriving the state of an annual revenue of six thousand dollars.

The state has not released the lessees from their obligations under the lease, nor has the lessee released the state from its obligation thereunder. The leases are still in operation and are binding upon the parties thereto.

The city of Akron is the assignee of the leases and is in possession thereunder.

The rights of the lessor as against the lessee and its assignee is determined in Sutliff vs. Atwood, 15 Ohio St., 186, wherein it is held:

"Where a lease was made of a 'dairy farm,' with certain stock thereon, for a term of years at a stipulated 'annual rent,' the contract for rent runs with the land; and the assignees of the term are bound for its payment; whether they be such by the voluntary assignment of the lessee, or by purchase at sheriff's sale.

"An express contract of the lessee fixes his liabilities for the whole term; but that of the assignee is limited to the rent accruing during the

continuance of his interest. The lessor may, at his election, pursue either or both for payment.

"It is the legal duty of the assignee to pay the rent while he enjoys the estate; and the personal liability of the lessee is in the nature of a security as between him and the assignee, and, in the absence of agreement between them, the latter is primarily liable."

On page 194, White, J., says:

"But the liability of the lessee, arising from express contract, is so permanently fixed during the whole term, that no act of his own can absolve him from the lessor's demands in respect to it. An assignment with the lessor's concurrence, and his subsequent receipt of rent from the assignee will be ineffectual for this purpose. The lessor, where there is an express agreement of the lessee, may sue, at his election, either the lessee or the assignee, or may pursue his remedy against both at the same time, though he can have, of course, but one satisfaction."

This case has been followed by later decisions of the Supreme Court of Ohio. In Smith vs. Harrison, 42 Ohio St. 180, it is held:

"The lessee of a perpetual leasehold estate is liable, upon an express covenant to pay rent to the lessor, his heirs and assigns during the term, in an action by the assignee of the reversion for accruing rents, whether such rents accrue before or after an assignment by the lessee of all his interest in the leasehold estate."

For the recovery of the unpaid rent under the leases in question the state of Ohio may sue either the city of Akron or The Akron Water Works Company, or, if it chooses, it may sue both in the same action. It can have, however, only one recovery or payment of the rent.

In this case the lessor has not consented to the assignment of the leases. The leases do not contain any provision limiting in any way the right of the lessee to assign its interest in the leases.

The rule is stated at Section 108 of Taylor on Landlord and Tenant, as follows:

"The tenant of the original lessor so long as his interest lasts, has a right to underlet to any person; for, while his interest in the premises continue, he has the absolute disposition of it, unless some covenant between him and the landlord limits his power so to do."

There is an express agreement of the lessee to pay the rent stipulated to be paid in the two leases.

In the lease of September 30, 1902, it is provided:

"In consideration whereof the said party of the second part, for itself, its successors and assigns, hereby agrees to pay to the Collector of Rents and Tolls at Akron, O., or such other agents as the State may authorize to receive the same, an annual rental of fifteen hundred dollars ($1,500.00), said rental to be paid semi-annually in advance on the first day of May and November of each and every year during the continuance of this lease, in two equal installments of seven hundred and fifty dollars ($750.00) each."

In the second lease it is agreed:

> "And the said party of the second part, for and in consideration of the right to the use and occupation of the water hereby leased, agree to pay to the state the yearly rent or sum of four thousand five hundred dollars ($4,500.00) * * * * *
>
> "It is hereby understood and agreed that the rent herein stipulated shall be paid semi-annually in advance, on the first days of May and November in each and every year during the continuance of this lease, to the Collector of Canal Tolls at Akron, Ohio, or other agent of the state authorized to receive the same."

This is an express covenant to pay the rental. And as held in Sutliff vs. Atwood, 15 Ohio St. 186, supra, the lessee cannot release itself from liability under an express covenant, without the consent of the lessor.

In order to make an express covenant the use of the word "covenant" is not necessary. Any word which signifies an agreement to do some particular act in a deed or lease will constitute a covenant.

At Section 883 of Devlin on Real Estate, it is said:

> "A covenant may be created by any language showing the intention of the parties to bind themselves. No particular form is required, nor is it necessary to use any particular word. A covenant may be created without using the word 'covenant' in the clause containing the stipulation."

At Section 881, Devlin on Real Estate defines a covenant:

> "Covenants in deeds are those clauses or agreements whereby one party stipulates that certain facts are true, or obligates himself to perform or forbear doing something to or for the other."

In the leases now in question there is an express covenant to pay the rent stipulated therein.

As set forth in the option under which the purchase was made the city took the leases under the following conditions:

> "save and except that such easements and rights or other interests in real estate owned by said company but not held by it in fee, shall be transferred and conveyed to said city of Akron under the same restrictions, terms and conditions upon and under which said easements and rights are held by said company."

An assignment of an oil lease made in similar terms was passed upon in the case of Woodland Oil Co., vs. Crawford, 55 Ohio St. 161, wherein it is held:

> "U. assigned the lease to the oil company, and in such assignment stipulated that the oil company should have and hold the lease under the terms thereof, and under and subject to the rents and covenants therein reserved and contained, on part of the lessee to be paid, kept, done and performed, and the oil company accepted the assignment and received the lease thereunder. Held: That thereby the oil company stepped into the shoes of U., and assumed his obligations, and became liable for the rentals due under the lease."

When the city of Akron accepted the assignment of the leases upon the conditions expressed in the option, it assumed the obligation to pay to the state of Ohio the rental therein stipulated to be paid by the Akron Water Works Company.

It is urged that the act of 102 Ohio Laws 175 exempts the city of Akron from paying the rental under said leases.

Section one of this act granted to the city of Akron the right to use the waters of the big Cuyahoga, little Cuyahoga and Tuscarawas rivers and their tributaries.

The right of the city of Akron under this grant extends to the waters of these rivers and their tributaries. The leases grant the right to take water from Summit lake, Long lake or Nesmith lake. The lessee has been taking its water solely from Summit lake, and the city of Akron is now taking its water from said Summit lake and in the same manner as its assignee took its water.

Summit lake is a part of the canal. The canal passes directly through said Summit lake. Summit lake has not now a direct outlet or inlet to either of the rivers mentioned in the act of 102 Ohio Laws 175, or to any of their natural tributaries. It is a part of the canal. Its water comes into it from the canal and goes out through the canal. It has been in this status for probably seventy-five years. It is not a part of either of the rivers mentioned in the special grant, and it is not a tributary to either of them.

A tributary is defined at page 1993 of Volume 38 of Cyc.:

> "A running natural stream which empties into another stream; in ordinary language, a stream running into another stream."

Summit lake does not come within the above definition of a tributary. It has been appropriated by the state and is in fact a part of the canal and is not a part of the rivers or their tributaries.

A grant by the government is construed strictly and where the language used is uncertain or is ambiguous, it is construed in favor of the state and against the grantee.

In Dermott vs. State, 99 N. Y. 101, it is held:

> "While the rule requiring a strict construction, as against the grantee, of a grant from the state does not apply in all of its severity, and in all cases where the grant is for a good consideration, it may not be relaxed when the grant relates to rights, which the state holds in trust for the public use, such as the supervision of public highways and the control of navigable waters."

At Section 36 of Gould on Waters it is said:

> "The state may grant to individuals or corporations the soil of public navigable waters, or exclusive rights of fishery in them. If the terms of the grant are doubtful, that construction will be adopted which least restricts the rights of the state and of the public, inasmuch as public grants, whether made by the crown, or by congress, or by a state, are construed strictly, and pass only what appears by express words or necessary implication."

Justice Gray says at page 49 of Central Transportation Co., vs. Pullman Palace Co., 134 U. S. 24, as follows:

"By a familiar rule, every public grant of property, or of privileges or franchise, if ambiguous, is to be continued against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms."

At Section 548 of Sutherland on Statutory Construction the rule is stated:

"The words of a private grant are taken most strongly against the grantor, though if the meaning cannot be discovered the instrument is void. But this rule is reversed in case of public grants. They are construed strictly in favor of the government on grounds of public policy. If the meaning of the words be doubtful in a grant designed to be of general benefit to the public, they will be taken most strongly against the grantee and for the government, and therefore should not be extended by implication in favor of the former beyond the natural and obvious meaning of the words employed. * * *

"Any ambiguity in the terms must operate in favor of the government. Whatever is not unequivocally granted is taken to be withheld. Whether the grant be of property, franchises or privileges, it is construed strictly in favor of the public; nothing passes but what is granted in clear and explicit terms, but it will be construed reasonably for the purpose the act contemplates."

The grant now under consideration is not made to a private person or corporation, it is made to a public corporation, a municipality, which is the agent of the state in many of its governmental duties.

Municipal corporations act in two capacities: governmental, and proprietary or municipal. In establishing a waterworks and furnishing its inhabitants with water it acts in its proprietary capacity and not in its governmental capacity.

At pages 268 and 269 of 28 Cyc. the municipal functions are given as follows:

"All functions of a municipal corporation, not governmental, are strictly municipal. They are sometimes called private, just as the governmental are called public; but this terminology is unfortunate, since all municipal functions are public, as pertaining to the public nature of the corporation. Under this class of functions are included, in most jurisdictions, the proper care of streets and alleys, parks and other public places, and the erection and maintenance of public utilities and improvements generally. Logically all those are strictly municipal functions which specially and peculiarly promote the comfort, convenience, safety, and happiness of the citizens of the municipality, rather than the welfare of the general public.

The grant in this case is for the special benefit of the people of the city of Akron. The state of Ohio as a whole is interested in its canals and this grant gave to a particular portion of the inhabitants of Ohio special privilege to use

and divert water of the state. The city of Akron can only take what is granted in clear and explicit terms.

The language of the grant is not ambiguous or uncertain. It is a grant of the right to use or divert the waters of the rivers named, and is not a grant of the right to use or divert the waters in the canals of which Summit lake is a part.

By virtue of the second section of said act it is apparently contemplated that the city should construct additional dams and reservoirs, or enlarge the dams and reservoirs of the state, in order to secure its supply of water.

This act clearly contemplates that the city of Akron shall build dams or reservoirs or both to provide a supply of water. It does not contemplate that it shall use the water of the canals of the state which has been provided by the public works of the state.

The city of Akron has not acted in accordance with the grant given it by act of 102 Ohio Laws 175. Instead of acting under said grant it chose to purchase the leases of The Akron Water Works Company, and in purchasing said leases it has assumed the obligations thereof.

I am, therefore, of the opinion that the city of Akron is liable to the state of Ohio under said leases in accordance with the terms and conditions thereof from the time it took possession under the assignment of said leases to it.

The city of Akron took possession on April 1, 1912. The Akron Water Works Company has paid the rental up to said April, 1912. Since said date no rental has been paid. The rent is payable on the first of May and November of each year in advance. The city of Akron now owes $500.00 for the month of April, 1912, and on May 1, 1912, there was due $3,000.00 for the ensuing six months, and on November 1, 1912, an additional sum of $3,000.00 was due for the six months ending May 1, 1913. The total amount now due the state of Ohio from the city of Akron is $6,500.00.

The leases provide for shutting off the water in case of non-payment of rent. As the water is supplied to the city of Akron and its inhabitants a summary proceeding to shut off the water is not desirable.

The action, if one is necessary, should be for the recovery of the rental now due. The action should be brought against both the lessee and assignee of the lease. The city of Akron and The Akron Water Works Company should each be made parties defendant.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

(To the Dairy and Food Commission)

82.

CITY AND COUNTY SEALERS OF WEIGHTS AND MEASURES—JURISDICTION CONCURRENT—CONFLICT OF JURISDICTION.

City and county sealers have concurrent jurisdiction in cities. In case of conflict, the sealer who first assumes jurisdiction, i. e. in sealing the weights, etc., should maintain control.

COLUMBUS, OHIO, January 19, 1912.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 12, 1911, wherein you state:

> "On June 28th we addressed you a letter for opinions on certain matters relating to enforcement of weights and measures laws. One of the questions (No. 2) was, 'Do the city sealer and county sealer and his deputy have concurrent jurisdiction in municipalities?' Your opinion was that they did have concurrent jurisdiction.
>
> "Now this question has arisen and we will be glad to receive your opinion: In a case of conflict of authority between the city sealer and the county sealer or his deputy, which is first in authority, the city or the county sealer?"

While the term "concurrent jurisdiction" is probably more properly applied to courts or states, it expresses the intended meaning when applied to officers. As you state, I did hold that the city sealer and the county sealer (and his deputy) have concurrent jurisdiction in municipalities, owing to the fact that the jurisdiction of the county sealer is co-extensive with his county. I am inclined to the belief that the same principle would apply to a conflict of authority between officers like the ones in question as applies to courts. It is elementary that of two courts having concurrent jurisdiction, the one assuming jurisdiction in the first instance has jurisdiction of the matter to its final determination, to the exclusion of the other. So, likewise, it is my view that whichever of the two officers assumes the jurisdiction he would retain the same to the exclusion of the other.

The provisions of Section 2616, General Code, as amended May 10, 1910, bear out this view. Such section provides as follows:

> "* * * No weight, measure, balance or other weighing or measuring device shall be used or maintained for weighing and measuring in this state unless such weight, measure, balance or other weighing or measuring device has been sealed or marked by the state dairy and food commissioner, or any employee of said commissioner detailed for that purpose, or by the county sealer or by the sealer of the city or village in which the same is used or maintained, by stamping upon each the letter 'O' and the last two figures of the year in which it has been compared with legal standards, adjusted and found or made to conform to said standards, with seals to be provided by said dairy and food commissioner for that purpose. Whoever violates any of the provisions of this section shall be fined, etc."

The unlawfulness is in the use of a weight, etc., not sealed by one of the

officers therein named, and, of course, that officer who first sealed the weight, etc., would have made it comply with the law. There is no question of "first in authority," as between the officers named, because, since their jurisdiction is concurrent, the first in the exercise of the authority would retain it to the exclusion of any of the other officers.

I trust that the foregoing fully answers your inquiry.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

212.

OFFICES COMPATIBLE—TOWNSHIP CLERK, MEMBER OF BOARD OF EDUCATION, AND DEPUTY COUNTY SEALER OF WEIGHTS AND MEASURES.

As there is no express statutory prohibition against the same and as the offices in themselves are not incompatible, a person who holds both the positions of township clerk and member of the board of education may be appointed to the additional office of deputy county sealer of weights and measures.

COLUMBUS, OHIO, March 16, 1912.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—Your favor of February 9, 1912, is received in which you inquire as follows:

> "The following question has been submitted to this department, which we refer to you for an opinion as promptly as you can render the same:
>
> "'Can the auditor of a county, who is county sealer by virtue of his office, appoint as his deputy one who is already a township clerk and a member of the board of education?'
>
> "We presume the question is whether one already holding a public office can be appointed a deputy county sealer."

Section 2622, General Code, 102 Ohio Laws 426, provides for the appointment of a deputy county sealer of weights and measures, and prescribes the duties of the position as follows:

> "Each county sealer of weights and measures shall appoint by writing under his hand and seal, a deputy who shall compare weights and measures wherever the same are used or maintained for use within his county, or which are brought to the office of the county sealer for that purpose, with the copies of the original standards in the possession of the county sealer, who shall receive a salary fixed by the county commissioners, to be paid by the county, which salary shall be instead of all fees or charges otherwise allowed by law. Such deputy shall also be employed by the county sealer to assist in the prosecution of all violations of laws relating to weights and measures."

There is no statute prohibiting any other officer from being appointed as deputy county sealer of weights and measures. Where there is no constitutional or

statutory inhibition, a person may hold two or more positions at the same time if such positions are not incompatible.

The rule of incompatibility is set forth in the case of State ex rel, vs. Gebert, 12 Cir., Ct. N. S., 274, by Dustin, J., on page 275, of the opinion, when he says:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

Whether it is physically possible for the same person to fill two particular positions must be determined by the circumstances of each case.

The deputy county sealer of weights and measures is not subordinate to, nor in any way a check upon the clerk of the township, or upon the members of the board of education. The duties of the first position are independent of the duties of the latter positions. Such positions may be filled by the same person, if it is physically possible for such person to perform the duties of each position.

A clerk of a township, or a member of the board of education may be appointed deputy county sealer of weights and measures.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

732.

WEIGHTS AND MEASURES—SEALER MAY ADOPT BUT ONE STANDARD FOR PECK, QUARTER PECK, QUART AND PINT DRY MEASURE—PROPORTIONATE CONFORMITY TO WEIGHT AND DIAMETER—STANDARD HALF BUSHEL.

Section 6414, *General Code, creates the standard half bushel measure and requires that it shall have a certain height and diameter. Section* 6415, *General Code, provides that the peck, half peck, quarter peck and quart shall be derived from the standard half bushel by dividing it and each successive measure by two.*

In view of Section 6416, *General Code, requiring articles sold by heaped measures to be heaped as high as the articles will permit, and in view of* 2616 *General Code, permitting the sealer to seal only such measures as are made to conform to standards in his possession, Section* 2615, *General Code, must be construed to require that only one standard may be adopted by the State Sealer for each of the measures enumerated, and that such standard must maintain such proportion in height and diameter to the standard half bushel measure as will permit the measure to be so heaped as to maintain the proportion specified with respect to the quantity sold as well as with respect to the cubic capacity of the measure.*

November 23, 1912.

HON. S. E. STRODE, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—Under date of May 29, 1911, you submitted for my opinion the following question:

> "Section 6414, General Code, creates the standard half bushel measure and requires that it shall conform to a certain height and diameter. Section 6415 provides that the peck, half peck, quarter peck and quart shall be derived from the standard half bushel by dividing it and

each successive measure by two. Does that mean that the peck, half peck, quarter peck and quart shall conform in height and diameter to standard half bushel as well as conform to it in cubic inches?"

Sections 6414, 6415 and 6416 of the General Code, provide as follows:
Section 6414.

"The unit or standard measure of capacity for substances other than liquids, from which all other measures of such substances shall be derived and ascertained, shall be the standard half-bushel measure furnished this state by the government of the United States, the interior diameter of which is thirteen inches and thirty-nine-fortieths of an inch, and the depth is seven inches and one twenty-fourth of an inch."

Section 6415.

"The peck, half-peck, quarter-peck, quart and pint measures for measuring commodities other than liquids, shall be derived from the half-bushel measure by dividing it and each successive measure by two. (R. S. Sec. 4440.)"

Section 6416.

"Articles usually sold by heaped measures shall be heaped in a conical form as high as such articles permit. (R. S. Sec. 4441)"

Section 6415 does not make any express limitations with reference to the slope of the measures therein provided for, and the purport of your inquiry is, whether or not, under that section, dealers may be permitted to use measures of various shapes and forms, so long as they maintain, with respect to their cubic capacity, the proportions prescribed in this section.

The advantage to be derived by a dealer in using a peck or pint or other measure which is tall and narrow, over a measure of like capacity, which is low and wide, is readily manifest in contemplation of Section 6416. General Code, requiring articles sold in heaped measures, to be heaped in a conical form as high as such articles permit.

It is clear that to hold that dealers might use any arbitrary shape, so long as cubic capacity was maintained, would be to permit the law to work inequality, and I am of the opinion that these sections should, if possible, be construed to prevent such a contingency, which would be manifestly out of touch with the spirit of these laws.

Section 2616, General Code, provides as follows:

"The county sealer shall compare all weights and measures, brought to him for that purpose, with the copies of standards in his possession. When they are made to conform to the legal standards, the officer comparing them shall seal and mark such weights and measures. * * * * *"

I am of the opinion that this statute contemplates that the county sealer shall have but one standard for each measure recognized by the law. To hold otherwise would require him to have an infinite number of forms, inasmuch as he can only seal such measures as conform to his legal standard, and if a dealer

could adopt any shape in the measure he used, there would be no end to the number of forms which he would be required to have on hand.

The object of Section 6416, General Code, is to require that the peck, one-half peck, one-quarter peck, quart and pint measures used by dealers should have respectively one-half the *quantity* of the one-half bushel, and each preceding measure respectively enumerated in Section 6415, General Code.

The state sealer, therefore, under this section, and having in view Section 2616, General Code, shall adopt one standard which shall bear proportions as to cubic capacity, which are prescribed in Section 6415, General Code, for each measure therein enumerated. In adopting such standards, he shall be guided by the rule that the proportions as to quantity must be based upon the heaped one-half bushel measure and must be maintained as to each of the lesser measures. The standards adopted by him, therefore, will be such as will permit of the necessary heaping to sustain this proportion.

In conclusion, therefore, I am of the opinion that the state sealer may adopt as a standard but one uniform form of measure enumerated in Section 6415, General Code, which standard must maintain such proper proportions as to height and diameter as will enable the proportions specified in Section 6415, General Code, to apply to the *quantity* sold, as well as to the *cubic capacity* of the measure.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Commissioner of Common Schools)

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JOINT SCHOOL SUB-DISTRICT—ABOLITION OF—DISPOSITION OF TERRITORY—EXPENSE OF INSTRUCTION—EFFECT OF FAILURE OF TOWNSHIP TO MAKE AND FILE MAPS WITH COUNTY AUDITOR—SUNFISH AND BENTON TOWNSHIPS.

When a joint sub-district has been abolished and the township to which the territory consequently accrued has failed to have a map of said territory made and filed with the county auditor as provided by Section 4724, General Code, and by reason of the failure to perform this ministerial act the township burdened with the expense of instruction of the pupils of the attached territory did not receive the money for the enumeration of the pupils thereof nor the taxes upon the property therein; held:

That the adjoining township would be obliged to account to the first township for the amount received by reason of the enumeration of the pupils which had been schooled by the first township and for the revenues collected as school tax in the attached territory, the failure to perform a mere ministerial duty not being sufficient to enable the township which had received the benefits to also retain the moneys intended for their expense.

COLUMBUS, Ohio, February 3, 1912.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your communication of November 10th is received wherein you state:

> "We have today received the following communication of a contention between Sunfish and Benton townships, Pike county:
>
> "'There was located between Sunfish and Benton townships, a joint sub-district. This joint sub-district was abolished by Section 4723 of the General Code. After this joint district was abolished Sunfish township neglected to have a map of such territory made according to Section 4724. When such map was not made and filed with the auditor of the county, Sunfish township ceased to receive the money for the enumeration of the pupils in the Benton township part of this school district. Benton township also received the school tax of the property of this district that was located within the township. Pupils in Benton township and within this district continued to go to the school located in Sunfish township. Benton township refuses to pay Sunfish township any money that they have collected as money from this portion of the former joint district that is located in Benton township.'
>
> "Question. Is Sunfish township entitled to the money that Benton township has collected from the enumeration and school taxes of the portion of this former joint district that is located in Benton township?"

Section 4735 of the General Code provides:

> "Joint sub-districts are abolished and the territory of such districts situated in the township in which the school house of the joint district is not located shall be attached for school purposes to the township

school district in which such school house is located. Such territory shall constitute a part of such township school district, and the title of all school property located therein is vested in the board of education of the township to which the territory is attached."

Section 4724 of the General Code provides:

"A map of such attached territory shall be prepared under the direction of the board of education of the township district to which the territory is attached and made a part of the records of the board. A copy of such map shall be filed with the auditor of the county in which such territory is situated, or, if the territory is in two or more counties, it shall be filed with the auditor of each county."

Under Section 4723 the territory situated in Benton township remained attached for school purposes to Sunfish township where the school house was situated. It was undoubtedly the duty of the board of education of Sunfish township to prepare a map of the attached territory and file a copy of the same with the auditor as well as to record said map in the minutes as provided by Section 4724, *supra,* and if they have failed and neglected so to do until this time they are not thereby released from their duty but should perform the same at the earliest opportunity. Nor does it seem to me that the mere failure of performing this ministerial act, to-wit, the preparing of the map, etc., under the facts stated by you, releases Benton township from the obligation of accounting for the moneys received for the enumeration of pupils in the attached territory, and also of school taxes collected on the property in that portion of the school district. The pupils of Benton township have been cared for; the burden and cost of their education has been borne by Sunfish township, and all things else have been done as far as Sunfish township is concerned the same as if the map had been prepared and properly filed and recorded. Can Benton township now be heard to say that it will retain the moneys received by reason of the enumeration of the very pupils who have been schooled by Sunfish township, and further that it will keep the revenue collected as school tax in the attached territory merely because of the technicality of the failure to perform a purely ministerial duty? The authorities are practically unanimous that the failure to perform a ministerial duty enjoined upon an officer will not be allowed to work a hardship.

Common conscience and equity will not permit this; the same code of morals applies to the sub-division of the state as controls the acts of individuals. The amount of the enumeration moneys is easily ascertainable; the amount of the school tax collected can readily be calculated; Benton township has raised the money for the enumeration to the use of the district wherein the enumerated pupils reside and are schooled and the school tax has been collected in the attached territory for school purposes for the district of which the attached territory is a part. The township should at once settle their differences according to law and right and *ex quo et bono,* Benton township is called upon to render to Sunfish township its dues.

It is my opinion, therefore, that Sunfish township *is* entitled to the money that Benton township has collected from the enumeration and school taxes of the portion of this former joint district that is located in Benton township.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

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LEGAL ADVISER—BOARDS OF EDUCATION OF CITY, VILLAGE AND COUNTY—PROSECUTING ATTORNEYS AND CITY SOLICITORS—VILLAGE SOLICITOR NOT AN "OFFICIAL."

Section 4761, *General Code, beyond dispute, makes the city solicitor the legal advisor of city school districts. Also, by provision of Section* 4761, *the prosecuting attorney is made the legal adviser of all school boards within the county with the single exception of boards of education which are engaged in civil actions with one another.*

The village solicitor being appointed by contract, fulfilling only contractual duties, serving for an indefinite term and not being obligated to take oath or give bonds, is not an "official" within the meaning of Section 4762, *General Code, which stipulates that these duties shall fall upon "any official serving in a similar capacity" to that of prosecuting attorney or city solicitor. This language refers to "county solicitors," "directors of law" and "corporation counsel" (all of which offices existed at the time of the passage of Section* 4762, *General Code) and to such other similar offices as might be created in the future.*

At the present time, therefore, the legal duties necessitated by village board of education also fall upon the prosecuting attorney.

COLUMBUS, OHIO, March 2, 1912.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—For some time past this department has been deluged with requests from all over the state, emanating from boards of education and officers thereof, seeking opinions on various matters pertaining to their affairs and duties, and deeming it wise and proper to finally determine what officer is the legal adviser of the boards of education of the different school districts, that all might know to whom the requests above mentioned should be referred, I have concluded to address this opinion to you.

As far as city school boards are concerned the matter is of easy solution, for the general assembly has fixed this beyond dispute, in the following language of the General Code, Section 4761:

> " * * * In city school districts the city solicitor shall be the legal adviser and attorney for the board of education thereof and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education of the county."

Therefore, all matters of the board of education of city districts, requiring legal advice or attention, must be submitted to the respective city solicitor, who is made by law the legal adviser of such boards; and it is neither the province, function nor duty of the prosecuting attorney or the attorney general to act as counsel or attorney for such boards.

Further quoting from Section 4761:

> "Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. * * * he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same

> county the prosecuting attorney shall not be required to act for either of them * * *"

This section, standing by itself, makes the prosecuting attorney of each county the legal adviser of all boards of education in school districts of his county, other than city school districts, with the single exception, that when an action is brought by one board against another board in the same county the prosecuting attorney shall not be required to act for either.

The reasonableness of the latter exception is readily apparent, since he could not act for both boards, nor in action where their contentions were adverse should he be compelled to make a selection.

There would be no trouble if Section 4761 were the only section pertaining to the proper legal advisers of boards of education. The language is clear and concise; no contention could be made against the manifest meaning of the statute which specificially makes city solicitors advisers of boards of education of city school districts and the prosecuting attorney the legal adviser of all other boards outside of city districts, excepting in the instance where two boards might be adverse litigants. But the provisions of the section immediately following, and closely related thereto (Sec. 4761) has made the confusion. Different interpretations have been placed upon the phrase "serving in a similar capacity," and this department, as first, was inclined to a view different from the one herein expressed; but after a full and careful consideration the conclusion I have reached appears to me to be the most reasonable, the most satisfactory, and beyond any question must have been the intention of the general assembly in enacting the statute. Section 4762 provides:

> "The duties prescribed by the preceding section shall devolve upon any official serving in a capacity similar to that of prosecuting attorney or city solicitor for the territory wherein a school district is situated, regardless of his official designation. No prosecuting attorney, city solicitor or other official acting in a similar capacity shall be a member of the board of education. No compensation in addition to such officer's regular salary shall be allowed for such services."

Since the statute just quoted provides that the duties of the prosecuting attorney and city solicitor, as prescribed by Section 4761, should devolve upon "any official serving in a capacity similar to that of prosecuting attorney or city solicitor for the territory wherein a school district is situated, regardless of his official designation" there has been considerable contention that any person acting as legal counsel of a village, under the provisioins of Section 4220, would be such "official," and therefore, the adviser of the school district in which such village might be situated.

I am free to confess that this department, when the matter was first submitted, inclined to this view, and very forcible were the many arguments in its favor; but after a most careful and mature deliberation I am constrained to hold, under the authorities and better reasoning, that the legal counsel spoken of in Section 4220, supra, is not, and as such cannot be, the adviser of the village district.

Section 4220 provides:

> "When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

So, whether the village "provides" (and since he is not an officer enumerated in Section 4248 they could only *provide* by *employing*) a legal adviser, either for the village or for any department or official thereof, it is a mere hiring, and such legal advisor, so hired, is but an employe. The contract entered into by the village and the legal counsel, either specificially or impliedly, contains all the provisions of the employment. The legal counsel is only bound to the performance of the things he has contracted to do and perform, and he is justified in relying on the letter of his contract. He would have no official *duties* for no matter how similar to the work of a city solicitor his obligations are *contractual.*

As stated by Gilmore, J., in State vs. Wilson, 29 O. S., 345, let us examine to determine whether "some of the indicia" of an officer may be found. Is he appointed for a definite term? No he is hired by contract and the hiring may be for one case, or for one month, or for any other time, so long as it does not exceed the limitation two years fixed by law. Must he take an oath of office or give a bond? No, no more than any other mere employe of the village. Must he be an elector of the village? Not at all; many cases have come to my notice where, by reason of there being no attorney at law in a village, or for some other good and sufficient cause, legal counsel have been employed from neighboring jurisdictions. In fact, I cannot find any legal necessity for his being an elector at all, nor (though I do not pass upon the question) would I see any objection to the employment of an alien or a woman counsel, if the village council saw fit. It does not appear to me that this position is such an "office" as, under article 15, Section 4, of the constitution, would render it necessary for the person to be possessed of the qualifications of an elector. The duties of village counsel are not prescribed by statute but fixed by contract. If he die or resign his duties are not cast upon a successor; a new contract is necessary, with a new party.

So, I conclude that the legal counsel of the village is not an official in the true sense of the word, and was not contemplated under the provisions of Section 4762, General Code.

A glance at the history of prior legislation along this line is conclusive on the question and dissipates whatever obscurity attaches to the provisions of Section 4762.

Section 69 of the act for the reorganization and maintenance of common schools, found in Vol. 70, O. L. at page 216, provides:

> "It is hereby made the duty of the prosecuting attorney of the proper county, or in case of the city district, the city solicitor, to prosecute all actions which by this act may be brought against any member or officer of any school board, in his individual capacity; and to act in his official capacity as such prosecutor, as the legal counsel of such boards or officers in all civil actions brought by them or against them in their corporate or official capacity; provided, no prosecuting attorney or city solicitor shall be a member of the board of education."

This section later became Section 3977 of the Revised Statutes (now Sections 4761 and 4762 of the General Code). Subsequently, and after a law had been passed authorizing certain counties to have "county solicitors," the foregoing section was amended as follows:

> "Provided that a county having a county solicitor, such officer shall prosecute all actions which may be brought against any member or officer of the school board in his individual capacity and perform all other duties herein required of the prosecuting attorney as to the schools, school board and officers of schools of the county outside of

said city; but for such services he shall receive no additional compensation."

When the School Code of April 25, 1904, was passed, Section 3977, Revised Statutes (97 O. L., page 355) appeared the following language:

> "The prosecuting attorney shall be the legal adviser of all boards of education in the county in which he is serving, except in city school districts, he shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, he shall be the legal counsel of said boards or the officers thereof in all civil actions brought by or against them and shall conduct the same in his official capacity; provided, that when said civil action is between two or more boards of education in the same county said prosecuting attorney shall not be required to act for either of them. In city school districts the city solicitor shall be the legal adviser and attorney for the board of education and shall perform the same services for said board of education as is herein required of prosecuting attorneys for other boards of education. The duties herein prescribed shall devolve upon any official serving in a capacity similar to that of prosecuting attorney or city solicitor for the territory wherein a school district is situated, regardless of his official designation. No prosecuting attorney, city solicitor or other official acting in a similar capacity shall be a member of the board of education. No compensation in addition to such officer's regular salary shall be allowed for such services."

Section 845 of the Revised Statutes authorized the county commissioners to employ legal counsel, or the county solicitors above mentioned, and that section also provided that said legal counsel, among other duties, "shall also perform such duties and services as are now required to be performed by the prosecuting attorney" under Section 3977. Said Section 845 was amended May 9, 1908, which was a modification in accordance with State ex rel vs. Kennon, Law Bulletin, July 5, 1909, affirmed by the Supreme Court, June 25, 1909. It was on the statute books at the time of the codification.

In Brewster vs. Anderson it was held that "in a proper case the *county solicitor* could waive the service of process or summons," thus designating the legal counsel whom commissioners might employ under Revised States, Section 845, before that part of that section was declared unconstitutional.

Section 1011-3, Revised Statutes (repealed, 97 O. L., 306), authorized the *county solicitor* of Hamilton county to act in certain instances.

It readily appears that, at that time, there was an official other than the prosecuting attorney who had similar duties and probably the general assembly was mindful of the fact that some future legislature might see fit to designate the officer by a still different name, whose duty would be similar to that of the prosecuting attorney.

So, too, it has happened in certain cities, under a semi-federal or other plan of government, instead of city solicitors the duties of that office devolved upon what was known as "a director of law." In other municipalities the legal officer was known as "corporation counsel."

And, thus, it is readily seen that it could not be foretold what new name might not be attached to the law department; and, seeking to have the duties pertaining to school boards to attach to that office, the legislature was wise in providing that any official serving in a capacity similar to that of prosecuting attorney or city solicitor, regardless of the official designation, was required to perform the duties theretofore referred to.

In conclusion, then, I hold that the prosecuting attorney of the county is the legal adviser of the school boards of all the districts in the county, excepting city districts; hence, he is the legal adviser of village districts; also, that is the legal duty of these officers to duly advise in all proper matters, the respective school boards; that there is a corresponding obligation upon these boards to submit their questions to their respective legal advisers and to be guided and bound by the advice received; that this department, being only adviser to prosecuting attorneys and city solicitors, should in no instance be called upon by the boards in question to solve their legal problems, for these, in every case, should be submitted to the prosecuting attorney or city solicitor, as the case might be.

Strict adherence to the above holding will save time, trouble and misunderstanding.

I need not state that I stand ever ready and willing, in season and out of season, to respond to requests from legal departments heretofore referred to in all proper matters; but this department has grown so rapidly, and the volume of business of the office has become so enormous that even with an increased force, working extra hours and holidays, it has been impossible to keep the work up as close as I would wish. So attention is again called to the ethics and simple courtesy that demand that the school boards submit all of their matters to their respective legal advisers and be guided by such advice when their adviser is free from doubt; if he is in doubt I will be glad to be of such assistance as I can upon request. And I again urge that whenever the prosecutor or solicitor refers any matters to this department, their requests should be accompanied by the officer's own opinion on the matter, with such memorandum of authorities as he can furnish. This will aid and facilitate the department and will be greatly appreciated.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

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BOARD OF EDUCATION—MAY NOT ALLOW SUPERINTENDENT OF SCHOOL, IN ADDITION TO SALARY, ALL TUITIONS OF NON-RESIDENT PUPILS.

A board of education may not provide that the superintendent of schools shall receive, in addition to a stated salary, all funds received for tuition of non-resident pupils, for the reason that such payment would not be a "fixed" salary as intended by Section 7690, General Code.

Furthermore, such would be in contravention to Section 7603, General Code, which provides special distribution for the respective funds under the control of the board.

April 30,1912.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I herewith desire to acknowledge receipt of your letter of March 19, 1912, wherein you inquire as follows:

> "Can a board of education legally employ a superintendent of schools at a stated salary per month and in addition give him the tuition from the non-resident pupils as a part of his salary, if the school board so desires?"

In reply thereto, I desire to say that Section 7690 of the General Code pro-

vides that the board of education shall have the management, control and hiring of the superintendents, teachers and other employes of the schools of their respective school districts as follows:

> "Each board of education shall have the management and control of all the schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. If deemed essential for the best benefits of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings, and such other employes as it deems necessary, and fix their salaries. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

Said section specifically states that the board of education shall appoint a superintendent of schools and *fix* his salary. I believe that said section is to be strictly construed, and that the section means that such superintendent's salary shall be fixed definitely as to amount. There might be any number of non-resident pupils attending such schools who would pay tuition, and there might not be any such pupils, which would result in the superintendent's salary being indefinite and uncertain, and this, I believe, would be contrary to the construction which should be placed upon said section, to-wit, 7690 of the General Code, above quoted.

Furthermore, I desire to say that Section 7603 of the General Code, creates and designates the various funds into which moneys raised by taxation shall be placed, and further provides that funds raised other than by taxation shall be placed in the contingent fund, as follows:

> "The certificate of apportionment furnished by the county auditor to the treasurer and clerk of each school district must exhibit the amount of money received by each district from the state, the amount received from any special tax levy made for a particular purpose, and the amount received from local taxation of a general nature. The amount received from the state common school fund and the common school fund shall be designated the 'tuition fund' and be appropriated only for the payment of superintendents and teachers. Funds received from special levies must be designated in accordance with the purpose for which the special levy was made and be paid out only for such purpose, except that when a balance remains in such fund after all expenses incident to the purpose for which it was raised have been paid such balance will become a part of the contingent fund and the board of education shall make such transfer by resolution. Funds received from the local levy for general purposes must be designated so as to correspond to the particular purpose for which the levy was made. Moneys coming from sources not enumerated herein shall be placed in the contingent fund."

It follows, therefore, that it would be contrary to the provisions contained in the said section if the board of education were to give the tuition from non-resident pupils to the superintendent as part of and in addition to his regular salary.

For the foregoing reasons, I am of the opinion that the board of education

cannot legally give to the superintendent of schools the tuition of any non-resident pupils attending such schools in addition to his stated salary as fixed by the board of education.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

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BOARD OF EDUCATION—MAY RESERVE RIGHT TO REJECT ANY AND ALL BIDS IN SALE OF REAL PROPERTY AT AUCTION.

Section 4750, General Code, providing for the sale of real estate valued in excess of $300.00 at auction does not compel the board of education to dispose of the property to the highest bidder and the board in its notice of sale may reserve the right to reject any and all bids.

June 3, 1912.

HON. F. W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of May 1, you submitted the following matter for my consideration:

> "A board of education has centralized schools, and abandoned the school districts of the township. The board of education desires to sell the real estate in the different sub-districts of the township. This board has a warranty deed for the different tracts of land they desire to sell. Section 4756 of the General Code provides the manner in which the board of education sells real property.
>
> "When such property is advertised according to the above mentioned section, is it necessary for the board of education to accept the bid of the highest bidder, if such bid is trivial in the estimation of the board and does not represent the true value of the property to be sold?"

Section 4749, General Code, provides:

> "The board of education of each school district, organized under the provisions of this title, shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant, or devise of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred by this title and the laws relating to the public schools of this state."

Section 4756, General Code, provides:

> "When a board of education decides to dispose of real or personal property, held by it in its corporate capacity, exceeding in value three hundred dollars, it shall sell such property at public auction after giving at least thirty days' notice thereof by publication in a newspaper of general circulation or by posting notices thereof in five of the most public places in the district in which such property is situated. When the board has twice so offered a tract of real estate for sale at public auction

and it is not sold, the board may sell it at private sale, either as an entire tract or in parcels, as the board deems best. The president and secretary of the board shall execute and deliver deeds necessary to complete such sale."

The word "auction" is defined in Century Dictionary as:

"A public sale in which each bidder offers an increase on the previous bid, the highest bidder becoming the purchaser."

The word "auction" is defined by Webster as:

"A public sale of property to the highest bidder as where successive increased bids are made."

While the word "auction" has been defined to be a public sale to the highest bidder I can find no statement in the law that the property must at all events be knocked down to the person making such highest bid. When the board of education determines that the property which it seeks to sell under Section 4756, *supra,* exceeds in value $300.00 it shall sell such property at public auction after giving the requisite notice provided for in such section. Such section, however, does not contain any provision for appraisement of such property so sought to be sold, nor does it specify any price at which such property must be sold. However, Section 4749, *supra,* provides that the board of education shall be a body politic and corporate and is given the power of disposing of real and personal property belonging to it. Being such body politic and corporate, and there being no provision in Section 4746, *supra,* defining the terms under which the property shall be sold, I am of the opinion that the board of education may provide in its notice for sale that it reserves the right to reject any and all bids, and if it does so in its said notice, it can, if in its judgment the amount paid for such property is trivial and does not represent the true value of the property to be sold, reject such bid and re-advertise said property.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

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TEACHERS' INSTITUTES—CANNOT COMPEL REGISTRATION FEE—TEACHERS MAY VOLUNTARILY CONTRIBUTE.

There is no provision in the statutes for the payment of a registration fee by teachers who attend a county institute and none can therefore be compelled. Registration may be required by the rule of the institute however, and there is no objection to the payment of a voluntary fee therefore, should teachers desire to contribute the same.

August 6th, 1912.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

MY DEAR MR. MILLER:—I have your letter of August 6 wherein you advise:

"Last year during the institute season the report was spread among the teachers of Ohio that you had ruled concerning the compulsory registration of teachers in order that said teachers receive their card for attendance. This card is necessary before the teachers receive pay

from their boards of education for institute attendance. Please advise me concerning your opinion of teachers being required to register and pay a registration fee before such teachers receive their card for attendance. Also, is it not possible for the teachers that desire their card of attendance without registering to receive this card when they have attended regularly the sessions of the institute? I desire to inform the teachers of your opinion while they are in session at their institutes this month and would appreciate a prompt reply."

County teachers' institutes are provided for by the General Code of Ohio by Sections 7859 to 7870, inclusive.

Section 7859 provides for the organization of county teachers' institutes. Section 7860 provides for the election of officers and their terms. The officers provided for are president, secretary and an executive committee consisting of three members. By virtue of Section 7860, the president and secretary of the institute shall be ex-officio members of the executive committee and act as chairman and secretary thereof.

Section 7861 provides when the election is to be held.

Section 7862 relates to vacancies.

Section 7863 is in relation to the duties of the executive committee, and is as follows:

"Such executive committee shall manage the affairs of the institute. The committee must enter into a bond, payable to the state, with sufficient surety, to be approved by the county auditor, in double the amount of the institute fund in the county treasury, for the benefit of the institute fund of the county, and conditioned that the committee shall account faithfully for the money which comes into its possession, and make the report to the commissioner of common schools, required in Section seventy-eight hundred and sixty-five."

Section 7865 is as follows:

"Within five days after the adjournment of the institute, its secretary shall report to the state commissioner of common schools the number of teachers in attendance, the names of instructors and lecturers attending, the amount of money received and disbursed by the committee, and such other information relating to the institute as the commissioner requires."

Section 7869 provides as follows:

"All teachers and superintendents of the public schools within any county in which a county institute is held while the schools are in session, may dismiss their schools for one week for the purpose of attending such institute."

Section 7869 is of importance in determining the question which you submit, as is likewise Section 7870, which reads:

"The boards of education of all school districts are required to pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers' or superintendents' presenting certificates of full regular daily atten-

dance, signed by the president and secretary of such institute. If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual daily attendance as certified by the president and secretary of such institute, for not less than four, nor more than six days of actual attendance, to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed. In case he or she is unemployed at the time of the institute, such salary shall be paid by the board next employing such teacher or superintendent, if the term of employment begins within three months after the institute closes."

The support of the county teachers' institute is covered by Section 7820 of the General Code which is as follows:

"The clerk of the board of county school examiners must promptly collect all fees from applicants at each examination and pay them into the county treasury quarterly. He shall file with the county auditor a written statement of the amount, and the number of applicants, male and female, examined during the quarter. All money thus received must be set apart by the auditor for the support of county teachers' institutes, to be applied as provided for in chapter eight of this title."

It will appear from a consideration of the section cited and quoted that the teachers' institute is entirely an organization created and provided for by the statutes, and no teacher is bound, in respect to the privileges which he enjoys, by any condition not found therein.

You will observe that Section 7869 provides that teachers and superintendents of public schools within any county in which a teachers' institute is held while their schools are in session may dismiss their schools for one week for the purpose of attending such institute. This discloses the great importance of attendance upon the institute, and without deciding here whether or not such attendance is obligatory, the purpose of the legislature in giving the teacher the right is very significant.

By virtue of Section 7870, boards of education are called upon to pay teachers and superintendents of their respective districts their regular salaries for the week they attend the institute upon the teachers' and superintendents' presenting certificates of full regular daily attendance signed by the president and secretary of such institute. If the institute is held when the public schools are not in session, such teachers and superintendents shall be paid $2.00 per day for actual daily attendance as certified by the president and secretary of the institute. for not less than four nor more than six days of actual attendance, to be paid in addition to the first month's salary after the institute by the board of education by which such teacher or superintendent is then employed.

You will observe that the only condition imposed upon the teacher in order to entitle him to compensation is a certificate of daily attendance required by the statutes, and this to be signed by the president and secretary of the institute. Of course the teacher is required to comply with all of the rules and regulations of the institute according to the constitution and by-laws of the organization, and such other reasonable requirements as the institute in its judgment deems proper. This, however, does not relate to financial matters. It is entirely proper to require registration in order that a proper record of attendance may be kept, but it is not lawful to require a registration fee. I am of the opinion that substantially all the teachers understand this, and that in fact what is denominated by some

teachers as a "registration fee" is in reality a voluntary contribution made by them. I see no obligation to officers of institutes receiving from teachers who voluntarily desire to make a contribution in order to provide for a greater number of instructors, better means of instruction, or a continuance of the institute over a greater period. This, however, should be explained to the teachers in advance. At any rate, this department will have no objection to such voluntary contributions made by the teachers for the purposes aforesaid.

Your request brings to mind a related subject, and that is the statutory requirement for holding and concluding teachers' examinations in one day. Unquestionably, in consideration of the number of subjects upon which applicants for teachers' certificates are required to pass, it works a great hardship upon both the teachers and the examiners to undertake the performance of the task in one day. Legislation is needed here to remedy the defect. Applicants for teachers' certificates should be given two days in which to take the examinations, and I am sure they would not object to paying a greater examination fee. In this way the fund for the maintenance of teachers' institutes could and would be enlarged, and doubtless could be made entirely ample to meet the deficiency which has heretofore been made up by voluntary contributions. At any rate, better provisions should be made by the legislature for the fund for the maintenance of county teachers' institutes. Teachers are paid little enough, and while economy should be practiced all along the line in governmental work, its hardships should not be visited upon those entrusted with the great responsibility of educating the youth of the state.

Very respectfully yours,
TIMOTHY S. HOGAN,
Attorney General.

634.

BOARD OF EDUCATION—CONSOLIDATION OF TWO SUBDISTRICTS—TRANSPORTATION OF PUPILS NOT PROVIDED FOR.

Under 4716, *General Code, a board of education of a township may consolidate two school subdistricts into one and there are no statutory provisions enabling the people of such subdistricts to object to or prevent such action.*

When such consolidation is carried out, the board is not required by the statutes to provide transportation for pupils attending the consolidated school.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I herewith acknowledge the receipt of your communication of the date of July 18, 1912, wherein you inquire as follows:

> "1. Can board of education of a township consolidate two school districts into one, if the majority of the people of said sub-districts object?
>
> "2. If the above mentioned majority can prevent such action on the part of the board of education, how will they proceed to do it?
>
> "3. In case the board of education has the right to consolidate as indicated in question 1, are they obliged to transport all pupils who attend the consolidation school but who live over one and one-half miles from said school."

In answer to your first question, I desire to say that Section 4716, General Code, provides as follows:

"The division of township school districts into sub-districts as they exist shall continue and be recognized for the purpose of school attendance, but the board of education may increase or diminish the number or change the boundaries of the sub-districts at any regular meeting. A map designating such changes shall be entered upon the records of the board."

Said section is the only one which provides for the consolidation of sub-districts of a township, and the matter of such consolidation is left entirely to the discretion of the board of education of such township, and the people residing in the consolidated sub-districts have no voice in the matter. Therefore, in conclusion, I am of the opinion that the board of education of a township can consolidate two sub-districts in said township into one sub-district, even if a majority of the people living in said sub-district object to such consolidation.

My answer to your first question also answers your second question.

Section 7731 of the General Code provides for transportation of pupils living in townships, only in case of centralization of the school of such township as follows:

"No township schools shall be centralized under the next preceding section by the board of education of the township until after sixty days' notice has been given by the board, such notices to be posted in a conspicuous place in each sub-district of the township. When transportation of pupils is provided for, the conveyance must pass within at least the distance of one-half of a mile from the respective residences of all pupils, except when such residences are situated more than one-half of a mile from the public road. But transportation for pupils living less than one and one-half miles, by the most direct public highway, from the schoolhouse shall be optional with the board of education."

Section 7732 of the General Code provides for the conveyance of pupils living in special districts as follows:

"Boards of education of special school districts may provide for the conveyance of the pupils of such districts to the school or schools of the districts or to a school of any adjoining district, the expense of such conveyance to be paid from the school fund of the special school districts. But boards of education of such districts as provide transportation for the pupils thereof, shall not be required to transport pupils living less than one mile from the schoolhouse; and such boards of education shall not discriminate between different portions of said districts or between pupils of similar ages or residing at similar distances from the schoolhouse."

Section 7733 of the General Code provides for the conveyance of pupils living in village school districts as follows:

"At its option, the board of education in any village school district may provide for the conveyance of the pupils of the district or any adjoining district, to the school or schools of the district, the expense of conveyance to be paid from the school funds of the district in which

such pupils reside. But such boards as so provide transportation, shall not be required to transport pupils living less than one mile from the schoolhouse or houses."

Section 7748 of the General Code provides that in certain instances the board of education may pay for the transportation of its high school pupils as follows:

"A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a township or special district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a Boxwell-Patterson graduate."

Section 7749 of the General Code provides for the transportation of pupils to a township high school, when the elementary schools of such township have been centralized, as follows:

"When the elementary schools of any township school district in which a high school is maintained are centralized and transportation of pupils is provided, all pupils resident of the township school districts holding diplomas shall be entitled to transportation to the high school of such township district, and the board of education thereof shall be exempt from the payment of the tuition of such pupils in any other high school for such a portion of four years as the course of study in the high school maintained by the board of education includes."

None of the above quoted sections of the school code apply to the case you cite in your inquiry, to-wit: the consolidation of two sub-districts in a township.

Therefore in direct answer to your third question, it is my conclusion that

the board of education is not obliged to transport all pupils who attend such consolidated schools, even though they live over one mile and one-half from said school.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

762.

AGE AND SCHOOLING CERTIFICATE—DUTY OF SUPERINTENDENT OF SCHOOLS OR AUTHORIZED PERSON TO ISSUE TO CHILD OVER FOURTEEN—CERTIFICATE OF BOARD OF HEALTH IF DOUBT AS TO NORMAL DEVELOPMENT EXISTS.

Under Section 7766, General Code the superintendent of schools or the person authorized by him when the parent so demands, is legally bound, if all the conditions imposed by said section are complied with to issue the age and schooling certificate therein provided to a child, upon satisfactory proof that such child is over fourteen years of age and passed a satisfactory fifth grade test in the studies enumerated in Section 7762 and is engaged in some regular employment, unless a "reasonable doubt exists in the mind of the superintendent or the person authorized by him that the child has not reached the normal development of a child of its age and is not in sound health and physically able to perform the work which it intends to do".

If such doubt exists, the parent or guardian must be required to procure a certificate from the board of health showing that the child is able to perform the work he is to be employed at.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of inquiry, of the date of October 30, 1912, wherein you inquire as follows:

> "In case the parent so demands, is the superintendent of schools, or the person authorized by him, compelled to issue an age and schooling certificate to a child upon satisfactory proof that such child is over fourteen years of age, and passed a satisfactory fifth grade test in the studies enumerated in Section seventy-seven hundred and sixty-two, and in engaged in some regular employment?"

In reply thereto I desire to say that Section 7765 of the General Code, as amended (101 O. L. 310), provides for the issuing of age and schooling certificates, as follows:

Section 7766.

> "An age and schooling certificate shall be approved only by the superintendent of schools, or by a person authorized by him, in city or other districts having such superintendent, or by the clerk of the board of education in village, special and township districts not having such a superintendent, upon satisfactory proof that such child is over fourteen years of age, and that such child has been examined and passed a satisfactory fifth grade test in the studies enumerated in Section seventy-seven hundred and sixty-two; provided, that residents of other states who work in Ohio must qualify as aforesaid with the proper school

authority in the school district in which the establishment is located, as a condition of employment or service, and that the employment contemplated by the child is not prohibited by any law regulating the employment of children under sixteen years of age. Every such age and schooling certificate shall be signed in the presence of the officer issuing the same, by the child in whose name it is issued. The age and schooling certificate must be formulated by the state commissioner of common schools and furnished, in blank, by the clerk of the board of education. Any child between fourteen and sixteen years of age, who shall cease to work for any cause whatever shall report the fact and cause at once to the superintendent of schools, or by a person authorized by him, in city or other districts having such superintendent, or to the clerk of the board of education in village, township or special districts not having such superintendent; said child shall be required to return to school within two weeks, provided other employment is not secured within such time; provided, that should a child in the opinion of the superintendent or person authorized by him in cities and districts having such superintendent or the clerk of the board of education in village, township, or special districts lose his employment by reason of persistent, wilful misconduct or continuous inconstancy, he may be placed in school until the close of the current school year. The superintendent of schools, or the person authorized by him to issue age and schooling certificates, shall not issue such certificate until he has received, examined and approved and filed the following papers duly executed: (1) The written pledge or promise of the person, partnership or corporation to legally employ the child, also the written agreement to return to the superintendent of schools or to the person authorized by the superintendent of school to issue such certificate, the age and schooling certificate of the child, within two days from the date of the child's withdrawal or dismissal from the service of the person, partnership or corporation, giving the reason for such withdrawal or dismissal; (2) The school record of such child properly filled out and signed by the principal or other person in charge of the school which such child last attended, giving the name, age, address, standing in studies enumerated in Section seven thousand seven hundred and sixty-two and number of weeks' attendance in school during the year previous to applying for such school record, and general conduct; (3) A passport or duly attested transcript of the certificate of birth or baptism or other religious record, showing the date and place of birth of such child; a duly attested transcript of the birth certificate filed according to law with a registrar of vital statistics, or other officer charged with the duty of recording births, shall be conclusive evidence of the age of the child; or the affidavit of the parent or guardian or custodian of the child applying for an age and schooling certificate showing the place and date of birth of such child, which affidavit must be taken before the officer issuing the age and schooling certificate, who is hereby authorized and required to administer such oath, and who shall not receive or demand a fee therefor; (4) When a reasonable doubt exists in the mind of the superintendent or the person authorized by him that the child has not reached the normal development of a child of its age and is not in sound health and physically able to perform the work which it intends to do, he shall require of the parent or guardian a certificate from the board of health showing that the child is able to perform the work he is to be employed at."

From the language employed in said section, to-wit; "an age and schooling certificate shall be approved only by the superintendent of schools, or by a person authorized by him in city or other districts having such superintendent, or by the clerk of the board of education in village, special and township districts not having such superintendent;" also the following language "the superintendent of schools or person authorized by him to issue age and schooling certificates shall not issue such certificate until he has received, examined and approved and filed the following papers", etc. I have come to the conclusion that the superintendent of schools, or the person authorized by him in the premises, has the sole authority to issue the age and schooling certificates prescribed in said section. If all the conditions imposed by said statute are complied with and fulfilled by such pupil, then I believe the superintendent is legally bound to issue the age and schooling certificate therein provided, unless "a reasonable doubt exists in the mind of the superintendent, or the person authorized by him that the child has not reached the normal development of a child of its age and is not in sound health and physically able to perform the work which it intends to do." If the superintendent, or the person authorized to act for him, entertains such reasonable doubt, then "he shall require of the parent or guardian a certificate from the board of health showing that the child is able to perform the work he is to be employed at".

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Various Appointive State Officers)

(To the Adjutant General)

138

POWER OF ADJUTANT GENERAL TO EMPLOY ENGINEER TO CARE FOR HEATING APPARATUS OF THE STATE HOUSE—DUTIES OF THE STATE HOUSE—DUTIES COMPATIBLE—APPROPRIATION FOR PURPOSE—DUTIES GERMANE AND INCIDENTAL.

The adjutant general, out of the funds appropriated for "care and repair heating apparatus," may pay a man $200.00 a year for caring for and repairing the heating apparatus of the state house and he may designate the engineer to do the work for this amount provided the duties are independent from and not germane or incidental to the ordinary work of that official and not of such a nature as to interfere with such official duties.

COLUMBUS, OHIO, February 14, 1912.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 26, 1912, wherein you state:

> "I respectfully submit the following questions and ask for a ruling thereon. Under 'State House and Grounds' we have an appropriation of 'Care and repair heating apparatus.'
> 1. Would it be possible for me to pay a man $200 per year, payable quarterly, out of this fund for taking care of and repairing the heating apparatus?
> 2. In case this is a proper charge, could this department designate the engineer to do this work and pay him the $200 a year, he doing the work at times other than his regular working hours?"

Answering your first inquiry it is my opinion that you could pay a man $200 per year, payable quarterly, out of the "care and repair heating apparatus" fund or such other sum within the appropriation for the performance of the work provided for.

Section 146 of the General Code makes the Abjutant General by virtue of his office superintendent of the State House, and gives him "supervision and control of the State House and heating plant therein * *".

The duty imposed by the statute to supervise and control the State house and heating plant therein not only authorizes but requires him to preserve and care for same, while the appropriation for "Care and repair of heating apparatus" furnishes him a fund, fixing the maximum amount that may be used for that purpose. The duty imposed by the statute does not require the personal attention of the Adjutant General, but does require his supervision and makes it his duty to see that it is done. This necessarily implies the employment of assistants and employes to do this work, and I see no reason why a contract cannot be entered into for the sum named in your question, and payable as therein stated for the work of caring for and repairing the heating apparatus.

Regarding your second inquiry, I am of the opinion that you could legally enter into a contract with a person already employed as an engineer in your department to do the work for the compensation, and payable as stated in your

first inquiry. Of course while it is the contract and not the appropriation that fixes the amount of compensation payable to an employe, yet under Section 147 no contract shall exceed the amount appropriated by law applicable to the particular purpose, and of course since the appropriation for the engineer is limited to $1,000 he could be paid no more for his services as engineer, but if the work of caring for and repairing the heating apparatus was entirely different from and not germane to his duties as engineer, there is no reason, as I view it, why he could not be employed to do the extra work so long as it did not interfere with his work as engineer, and especially as stated in your second question, when the work on the care and repair of the heating apparatus was done and performed at other and different times than his regular working hours. Of course this should be a separate contract, and executed as other contracts made by your department for work and materials.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

304.

ABSTRACT OF TITLE—PROPERTY OF ARTEBENES KIRK—DEFECTS AND OMISSIONS.

April 20, 1912.

HON. CHARLES C. WEYBRECH, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of an abstract of title and deeds from the executors of the last will and testament of Artebenes Kirk, deceased, and from the heirs of said Artebenes Kirk, for the following promises:

> "Situated in the Township of Erie, County of Ottawa and State of Ohio, and known as and being the north half (½) of the Northwestern Quarter (¼) of the Northwest Quarter (¼) of Section Twenty-eight (28), Town Seven (7), North range Sixteen (16), East, containing twenty (20) acres of land, be the same more or less. Also the North half (½) of the South half (½) of the Northwest Quarter (¼) of the Northern Quarter (¼) of Section Twenty-eight (28), Town Seven (7), North Range Sixteen (16) east, containing Ten (10) acres of land to be the same more or less."

The transcript of the wills of John Kirk and of Immer L. Kirk, and proceedings had thereunder, and the oil and gas lease from the last named to W. H. Murphy, should not be included in the abstract, for the reason that they do not affect the land described in the deeds.

I would suggest, that the abstract be supplemented so as to show the following:

Copy of the patent from the United States government to Henry McCallum; the discrepancy between the statement in the deeds that the land to be conveyed is in range 16 *East* and the omission of the word *East* in the recital of the entry by Henry McCallum should be cleared; completion of the record of the settlement of the estate of Elias Haines; affidavits that Elizabeth H. Broadwell and Josephine R. Foster are the same persons mentioned in the will of Elias Haines as Elizabeth H. Little and Josephine R. Little, respectively; an affidavit showing the date of the death of Artebenes Kirk, his residence at the time of his death,

the names of his surviving heirs and their relationship to him; a certificate of the clerk of the United States Court for the district in which the land is situated as to the pendency of executions, foreign or domestic, suits or judgments in such court against said grantors, or any of them.

No liens are disclosed by the abstract. The statement in the certificate that there are no overdue taxes, which are a lien against said premises, is not sufficiently broad to include the taxes and assessments due and payable June 20, 1912. If the same have not been paid they constitute a lien against said premises and should be paid before the title finally passes.

Subject to the foregoing, I am of the opinion that the State of Ohio will acquire a good and sufficient title in fee simple.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

652.

TRAVELING EXPENSES—TRANSPORTATION OF MEDICAL OFFICERS OF OHIO NATIONAL GUARD TO MEETING OF ASSOCIATION OF MILITARY SURGEONS UNAUTHORIZED.

Inasmuch as the payment of the transportation of medical officers of The Ohio National Guard to the meeting of the Association of Military Surgeons is unauthorized by law, the same may not be paid from state funds.

GENERAL CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—The following letter under date of August 13, 1912, was referred to me by the Auditor of State for an opinion as to your powers with respect to the purposes therein contemplated:

> "The Adjutant General, State of Ohio, Columbus.
> SIR:
> I have the honor to inform you that the twenty-first Annual meeting of the Association of Military Surgeons of the United States will be held in Baltimore, Maryland, October 1 to 4, 1912.
> "The membership of this association is confined to medical officers of the Army, the Navy, the Public Health and Marine Hospital Service and the National Guard of the United States. Foreign countries also send medical officers of their military service as visiting delegates. The meetings of this association have always been of exceptional interest, and are valuable schools of instruction.
> "While federal funds are unauthorized to meet the expense of attendance for National Guard officers, it is hoped that you will find it practicable, through your governor, to send as many of your medical officers as possible at state expense, as the papers and discussions presented from this and foreign countries afford exceptional opportunity for improvement and increased efficiency in the military sanitary service. It is hoped that your state will be liberally represented at this meeting.
> Very respectfully,
> Wm. J. Snow,
> Major, Acting Chief, Division of Militia Affairs."

It is well settled that public funds may be expended only as they have been

appropriated and as their payment has been expressly authorized or directed by law. The only statutes I find which have a possible relation to your inquiry are the following:

Section 5265, General Code.

"The auditor of state shall credit to the 'state military fund' from the general revenues of the state, a sum equal to ten cents for each person who was a resident of the state, as shown by each last preceding federal census. Such fund shall be a continuous fund and available only for the support of the organized militia. It shall not be diverted to any other fund or used for any other purpose."

Section 5266, General Code.

"The general assembly shall appropriate annually, and divide into two funds, the amount authorized by the preceding section. Such funds shall be respectively know as the 'state armory fund' and 'maintenance Ohio national guard fund.'"

Section 5267, General Code.

"From the 'maintenance Ohio national guard fund', the adjutant general shall pay the per diem, *transportation, subsistence* and incidental expenses of *militia companies,* inspection and incidental expenses of camp, including horses' hire, fuel, lumber, forage of horses, and medical supplies."

Section 5269, General Code.

"All bills authorized by contracts made and approved by the board, shall be paid upon vouchers of the adjutant general."

Section 5292, General Code.

"Officers and enlisted men of the national guard shall receive pay for their services at the following rates: When in *actual service, in case of riot or insurrection,* or when called upon in *aid of the civil authorities,* each commissioned officer shall receive such sum per day for each day's service performed as is allowed commissioned officers of like grades in the army of the United States, together with the *necessary transportation, commissary* and quartermaster stores, and medical supplies. For all horses of enlisted men there shall be paid two dollars per day for each horse necessarily used by them for each day's service performed."

Section 5293, General Code.

"Officers and enlisted men shall receive pay for each day actually spent by them on duty at *annual encampments,* ordered by the commander-in-chief, at the following rate, together with all *necessary transportation,* quartermaster stores and medical supplies. Each commissioned officer shall receive pay as provided in the next preceding section. For each day's service performed, each enlisted man shall receive one dollar and rations at a rate not to exceed forty cents a day."

Section 5295, General Code.

> "Payment under the preceding two sections shall be made on the payrolls prepared according to such forms as directed by and upon the warrant of the adjutant general, and approved by the governor, out of moneys in the treasury, appropriated for that purpose. The necessary *commissary* and quartermaster stores, and medical supplies, and *transportation* for the troops in *actual service,* and while attending the *annual encampment,* and the *transportation and subsistence of organizations of the national guard representing the state officially on accasions of ceremony* within or without the state, shall be contracted for by the proper department officers, by direction of the governor, and paid for in like manner."

Under Sections 5292 and 5293, General Code transportation and subsistence is authorized for *officers and enlisted men* of the militia in the following instances: First, when in actual service; second, in case of riot or insurrection; third, when called upon in aid of the civil authorities, and fourth, when on duty at annual encampments.

Under Section 5295 transportation and commissary supplies are authorized on behalf of the *troops,* first when engaged in actual service, and second, while attending annual encampments. Under the same section transportation and subsistence is provided for *organizations* of the national guard when representing the state officially *on occasions of ceremony* within and without the state.

I am of the opinion that the purpose here presented of sending representatives to the meeting of the Association of Military Surgeons of the United States is not included within any of the foregoing provisions. Transportation or subsistence of such representatives therefore, may not be paid out if state funds.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

738.

COMPENSATION OF OFFICER FOR REPRESENTING ADJUTANT GENERAL'S OFFICE IN ARBITRATION BEFORE ATTORNEY GENERAL FOR DAMAGE CLAIM AGAINST RAILROAD SAME AS ALLOWED AT ANNUAL ENCAMPMENTS.

Under Section 5296 General Code, an officer delegated by the governor to represent the adjutant general's department, in a claim for damages against a railroad company in the matter of which the attorney general is acting as arbiter, may be paid for the time devoted to such duties the amount allowed by law for duty at annual encampments.

HON. CHARLES C. WEYBRECHT, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 18, 1912, in reference to the claim of Col. B. L. Barger, which letter is as folows:

> "Enclosed bill from Colonel B. L. Barger is forwarded for your approval. Colonel Barger was employed by this department to look after the interests of the state in the matter of certain damages paid by the

state of Ohio on account of railroad wreck at Belle Valley, Ohio, 1910, on Pennsylvania lines.

"The total damages to horses and men amounted to $2,400.00. This amount is withheld from the bill of transportation to the Pennsylvania Company. An agreed statement of facts was to be furnished your department by February, 1912, but it is evident that the Pennsylvania Company does not intend to press the claim.

"We would like to have your approval of this as soon as possible."

As stated in your letter, Col. Barger was employed, or detailed, by you, to represent the state on behalf of your department, in a claim amounting to $2,400, against the Pennsylvania Railroad Company, for damages on account of loss in a wreck at Belle Valley, Ohio, on July 31, 1910, in which wreck a number of horses, belongin to the Fourth and Eighth Infantry, were killed and injured. The claim on behalf of the state, and your department, was resisted by the railroad company, and it was necessary that someone be assigned to look after the interests of the state. It was agreed that the matter be submitted to me as arbitrator, and, therefore, it would not have been proper for anyone connected directly with my department to appear before me in behalf of the state; and it was eminently fitting that Col. Barger, on account of his complete knowledge as to the transaction, as well as of the law governing, be assigned to this duty. The duty to which he was assigned most efficiently performed by him, and his services resulted in the claim of the state being paid. The amount he has charged is most reasonable—in fact, he has simply charged what his pay as an officer would have amounted to had he spent the time devoted to this matter in the performance of ordinary military service.

Owing to all the conditions surrounding this claim, the manner of its presentation, and the result achieved, I think that Section 5296, General Code, to-wit:

> "For services and attendance upon general court-martial, courts of inquiry, and boards appointed by the commander-in-chief, as member, judge, advocate, recorder or witness, or upon inspection or other duty, when ordered by the commander-in-chief, officers shall receive as pay the amount allowed by law for duty at annual encampments, together with transportation in kind and actual necessary expenses for each day's service, and the time actually employed in going to and returning from such duty, courts or boards."

applies, and that this bill may properly be paid by your department, and the same is hereby approved.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Ohio State Armory Board)

77.

ABSTRACT—BLANCHESTER ARMORY SITE—TITLE BY DESCENT—AFFIDAVIT BY HEIRS OR CONVERSANT PARTIES.

Abstract of Blanchester Armory site purchase is correct except that it shows a necessity for the affidavit of heirs or persons who have knowledge of facts which justify title in property, which comes by descent as required by 102 *O. L. 99 amending* 2768 *General Code.*

COLUMBUS, OHIO, January 29, 1912.

HON. B. L. BARGER, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I herewith desire to acknowledge the receipt of your communication of the 15th inst., enclosing the abstract of title to the real estate for the Blanchester Armory site, and which said real estate is described as follows:

> "The following described real estate, lying and being situated in the county of Clinton and state of Ohio, and further described as follows: town lot No. one (1) in Jonathan Baldwin's Addition to the town of Blanchester which said town lot will be more fully described by references to the recorded plat of said addition to said town."

While I find that said abstract of title and the deed to said real estate are in and of themselves correct, I find upon further investigation that inasmuch as the real estate in question came to the said heir at law under the laws of descent that it will be necessary to attach to said deed an affidavit conforming to Section 2768, General Code as amended 102 O. L. 99, and which provides in part as follows:

> "* * * before any real estate, the title to which shall have passed under the laws of descent shall be transferred * * * from the name of the ancestor to the heir at law * * * or to any grantee of such heir at law * * *; and before any deed or conveyance of real estate made by such heir at law or next of kin shall be presented or filed for record by the recorder * * * such heir at law shall present to such auditor the affidavit of *such heir or heirs at law or next of kin, or of two persons resident of the state of Ohio, each of whom has personal knowledge of the facts,* which affidavits shall set forth the date of such ancestor's death * * * the fact that he or she died intestate, the names, ages and addresses * * * of each such ancestor's heirs at law or next of kin who by his death inherited such real estate, and the relationship of each to such ancestor and the part or portion of such real estate inherited by each * *. Such affidavit shall be filed with the recorder and shall be by him recorded and indexed * * * in his office. * * *"

It follows from the provisions of the foregoing section of the General Code that such affidavits may be sworn to and subscribed either by all the heirs at law of the decendent who join in the deed, or by two persons residents of the state of Ohio, not themselves heirs at law but who have knowledge of the facts. Said affidavit shall set forth the date of such ancestor's death, the fact that he or she died intestate, the names, ages and addresses of such ancestor's heirs at law or next of kin, who by his death inherited such real estate and the relationship of each to such

ancestor and the part or portion of such real estate inherited by each. As soon as such affidavit is filed, then the said abstract of title and the said deed meet with my approval.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

200

ARMORY BUILDING—EXPENSE OF CONSTRUCTION BORNE BY STATE—LAW PUTTING EXPENSE ON COUNTY, UNCONSTITUTIONAL—RIGHT OF COMMISSIONERS TO DEMAND RENT FROM STATE FOR ARMORY ERECTED UNDER UNCONSTITUTIONAL LAW.

The expense of constructing an armory building must be borne by the state and taxes for the purpose must be levied by a uniform rule upon all the property in the state.

When the county commissioners of Muskingum County have erected an armory as part of a monumental building, in compliance with a law requiring them to bear the expense of said armory, which law has since been adjudged unconstitutional, said commissioners may charge the state a reasonable rental for the use of said building for armory purposes. The trustees of the monumental building may be authorized to collect such rent as agents of the commissioners.

March 12, 1912.

HON. B. L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I herewith desire to acknowledge the receipt of your communition of January 25, 1912, copy of which is as follows:

> "The Zanesville monumental building, built under a special statute was *part armory*. This armory part was built by the county commissioners under a law which directed them to furnish an armory for the National Guard organizations within their county. After the commissioners of Muskingum county performed this statutory duty, by building the *armory part* of the monumental building, the armory law was declared unconstitutional. (It was held to be the duty of the state to provide armories). Before (or unaware of) the rendition of this decision the county commissioners executed said ninety-nine years' lease, exempting the armory part of said building. Later they authorized these lessees-trustees to collect armory rents, and rents were so collected. (See 3*a*).
>
> "Then Attorney General Denman's opinion of August 11, 1910 (see 3-b), was rendered and payment of rentals, for armory part of building, ceased.
>
> "The trustees of the Soldiers' and Sailors' Monumental Association contend that said opinion of the attorney general was based on the fact that he had not been advised of the specific authority vested in the trustees by the commissioners (subsequent to lease) to collect rentals for armory part of building. They have requested that you re-

view the former opinion of Attorney General Denman, in light of the facts herewith submitted, and advise whether or not said trustees are entitled to rentals for the armory part of said building.

"Therefore, the armory board submits this matter; but with a further suggestion:

"After said county commissioners sold bonds and built an armory under the old armory law, without expectation of rentals, can they afterward claim rentals simply because their act in building the armory was performed under an unconstitutional statute?"

The special act under which the Zanesville monumental building and armory was built is found in Vol. 84 O. L., page 71, and provides as follows:

"Be it enacted by the general assembly of the state of Ohio, that the board of county commissioners of any county, in which there is a city of the second class and third grade, be, and said board is hereby authorized and empowered to unite with any board of trustees of any soldiers' memorial association organized under the law, and whose principal office is in such city, in the erection of a building suitable for monumental or memorial building, as well as for an armory; such board of county commissioners are hereby further empowered to purchase, or lease real estate in such city suitable for a site for such building as aforesaid, from the board of trustees aforesaid, and erect on the site so purchased or leased as aforesaid, a building suitable for a soldiers' monumental building as well as an armory. The terms and conditions upon which said association shall hold and occupy the parts of any such building so erected by said board of commissioners, as well as the terms and conditions upon which the said association on the one part, and said board of commissioners, for armory purposes only, on the other part, shall, respectively, hold and occupy the building erected by both boards jointly, shall be fixed by a written lease or other contract, between the said two boards.

"Section 2. To meet such expense, the county commissioners of any such county may levy a tax in excess of the maximum allowed by law, but the total collectable for such purpose in any one year shall not exceed ten thousand dollars, and said commissioners are hereby further authorized and empowered to issue the bonds of the county for the purpose aforesaid."

A special act similar to the above cited act was passed by the general assembly April 27, 1893, 90 Ohio Local Laws, 115, authorizing the commissioners of Cuyahoga county to build and furnish an armory as follows:

"Be it enacted by the general assembly of the state of Ohio, that the commissioners of any county containing a city of the first class, second grade, be and they are hereby authorized and empowered to build and furnish an armory in any city for the use of the Ohio national guard, to procure a site for the same and to borrow money to pay for the same, not to exceed the sum of two hundred and twenty-five thousand dollars ($225,000).

"Section 2. That to secure the payment of the amount so borrowed, with interest, the said commissioners are authorized to issue the notes of bonds of said county, payable, if bonds are issued, in twenty-five years and redeemable after ten years from date; said bonds

shall be denominated 'central armory bonds,' and shall be for the sum of one thousand dollars each, payable to bearer, and bear interest at rate not exceeding five per centum, payable semi-annually; said notes or bonds shall be signed by the president of the board of county commissioners, and counter signed by the auditor of said county, and the sale of said bonds shall be governed by the provisions of an act entitled 'An act providing for the sale of public bonds,' passed March 22, 1883.

"Section 3. To pay the interest on said notes or bonds and to create a sinking fund sufficient to redeem the same at maturity, the commissioners of said county are hereby authorized to levy a tax, in addition to any tax now authorized by law, not to exceed three-tenths of a mill on the dollar valuation, on the general tax duplicate of said county.

"Section 4. That if, on the completion of said armory, there is any unexpended balance of said fund, it shall be placed and kept to the credit of the sinking fund provided for by this act.

"Section 5. This act shall take effect and be in force from and after its passage."

The Supreme Court in construing the last act in the case of Hubbard as treasurer of Cuyahoga county vs. Fitzsimmons, 57 O. S. 436, holds as follows:

"1. The erection of an armory for the use of the national guard is a general purpose of the state, and taxes to be devoted to that purpose constitution, be levied by a uniform rule upon all the taxable property must, in obedience to the requirement of Section 2, of article 12, of the within the state.

"2. The act of April 27, 1893 (Local Laws, Vol. 90, p. 115) entitled 'an act to authorize the commissioners of any county containing a city of the first class, second grade, to borrow money and issue bonds therefor, for the purpose of building and furnishing a central armory in any such city for the use of the Ohio national guard, and procuring a site therefor' is void, being an attempt to make such general purpose the subject of a local imposition.

"(Wasson et al. vs. the Commissioners, 49 Ohio St., 622, followed and approved)."

Section 3085, Bates' Revised Statutes as originally enacted April 28, 1886, 83 O. L., 101, provided as follows:

"The board of county commissioners of the county in which all, or a majority of the officers and enlisted men of any regiment, battalion, company, troop or battery reside, shall provide for each organization a suitable armory for the purpose of drill, and for the safe keeping of the arms, equipments, uniforms and other military property furnished by the state, subject to the inspection and approval of an officer detailed for such purpose by the commander-in-chief, and the expense of armories including the necessary fuel and lights, shall be paid either by the county wherein all the members of any such organization reside, or by counties in proportion as they have resident members of any such organization."

Said section as amended April 18, 1892, 89 O. L., provided in substance that the board of county commissioners shall provide a suitable armory for the purpose of drill and for the safe-keeping of the arms, equipment, uniforms and other military property purchased by the state.

The circuit court in the case of State ex rel vs. Brinkman, 7 C. C. Rep. 165, held said act unconstitutional. Later said section was again amended by the legislature on April 27, 1893, and again on March 24, 1894, 91 O. L., 100.

In construing said act as last amended, that is as amended on March 24, 1894, the circuit court in the case of State ex rel vs. Kreighbaum, et al., 9 C. C. Rep., 619, held said act clearly unconstitutional. In said case the court traces the history of said statute through its various amendments in the following language:

> "In determining the constitutionality of this section of the statute, it is necessary to examine the entire act of which it forms a part, and the previous legislation on this same subject, recently enacted by the legislature.
>
> "April 18, 1892, the legislature passed the act found in 89 Ohio L. 411, pertaining to the militia of the state, providing as to how it should be constituted, organized and apportioned.
>
> "Section 3085 of that act provides that the board of county commissioners shall provide a suitable armory for the purposes of drill and for the safe-keeping of the arms, equipment, uniforms and other military property furnished by the state. The constitutionality of that section was considered and passed upon by the circuit court of the three circuit, sitting in Putnam county, and reported in 7 O. C. C. R., 165. The opinion of the court was announced by Seney, J. We concur in the reasoning and the conclusion of the court arrived at in that case.
>
> "No doubt, in view of the decision in that case, the legislature repealed that section of the statute, and April 27, 1893, enacted by way of amendment, Section 3086 as found in 85 Ohio Laws, 90, 367.
>
> "The original section required the county to bear the expense of the erection of a suitable armory. The section as enacted April 27, 1893, provided that the adjutant general, by contract or otherwise, for a period not exceeding one year from the passage of this act, provides for each organization in the county where a majority of the officers and enlisted men of any regiment, battalion, company, troop or battery reside, a suitable armory for the purpose of drill, and for the safe-keeping of the arms, equipments, uniforms and other military property furnished by the state, expenses to be paid by the state.
>
> "On March 28, 1894, this section was repealed, and the one now under consideration by this court enacted. It reads as follows:
>
> "Section 3085. The board of county commissioners of a county in which all or a majority of the officers and enlisted men of any regiment, battalion, company, troop or battery reside, shall provide for each organization a suitable armory for the purpose of drill, and for the safe-keeping of the arms, equipments, uniforms and other military property furnished by the state; which armory shall be inspected and approved by an officer detailed by the commander-in-chief for such purpose, who shall file with the board of county commissioners a certificate of such inspection and approval.
>
> "Under this last section, instead of the state bearing any of the cost of providing a suitable armory, the county must bear the entire burden.
>
> "Section 3085*a* provides, among other things, that the expense of armories, including the necessary care, fuel and lights, provided under Section 3085, shall be paid by the county wherein all the members of the military organization reside. This would apply to Stark county under the agreed facts of this case."

And on page 626 of the opinion the court further says:

> "We conclude the act for the organization of the militia of the state and to provide suitable armories for the safe-keeping of the arms, equipments, uniforms and other military property furnished by the state, is a general law, and not local in its character; and that the cost and expenses provided for by the act should be borne by the state at large, and not by the particular locality."

The provisions of said Section 3085, Revised Statutes, so held unconstitutional were very similar to the provisions of the special acts of the legislature passed April 27, 1893, 90 Ohio Local Laws, 71, heretofore referred to.

All the cited decisions hold in substance that the erection of an armory for the use of the national guard is a general purpose of the state and void as being an attempt to make such general purpose the subject of local imposition.

Now, coming to answer your question directly, I am of the opinion, based upon the reasoning of the above cited cases, that the county commissioners of Muskingum county are not required to furnish armory quarters to the state militia free of rent, for if the county commissioners were to do this they would be providing an armory for the general purpose of the state supported and maintained by local taxation, which would be contrary to the decisions above cited. I think the said commissioners are clearly entitled to charge and receive rent for said armory, and that the trustees of the Soldiers' and Sailors' Monumental Association of Muskingum county may collect such rent as the properly authorized agents of said county commissioners. Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

234.

ABSTRACT OF TITLE—ARMORY SITE OF MARION—PROPERTY OF WM. B. DENMAN.

COLUMBUS, OHIO, April 5, 1912.

HON. BYRON L. BARGER, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 2, 1912, enclosing abstract of title and deed for a proposed armory site at Marion, the same being described as follows:

> "Known as being part of the west half of the southeast quarter of section 21, township 5, south range 15 feet, bounded and described as follows:
>
> "Commencing at a point where the north line of Church Street intersects the east line of Olney Avenue in said city; thence north along the east line of Olney Avenue one hundred thirteen and one-tenth (113.1) feet to the south line of William Coler's land; thence east on the south line of said Coler's land eighty-two and eight-tenths (82.8) feet to a point ten feet north of the northwest corner of Hattie Murphy's lot; thence south on a line parallel with the east line of Olney Avenue one hundred thirteen and one-tenth (113.1) feet to the north line of Church Street aforesaid; thence west along the north line of Church Street eighty-two and eight-tenths (82.8) feet to the place of beginning."

Examination of said abstract discloses no defects which would prevent the State of Ohio from acquiring a good and sufficient title to said premises in fee simple. No liens are disclosed except taxes and assessments, due and payable June 20, 1912, amounting to $31.40.

There should be attached to the abstract a certificate of the clerk of the United States District Court for the Northern District of Ohio, Western Division, as to pending suits or judgments in said court against William B. Denman.

The deed from William B. Denman and wife to the State of Ohio is in proper legal form and, in my opinion conveys a good and sufficient title in fee simple.

I am returning herewith the abstract and deed.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

416.

ABSTRACT OF TITLE—DEFECTS AND OMISSIONS—PROPERTY SITUATED IN VILLAGE OF HILLSBORO.

HON. B. L. BARGER, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I herewith acknowledge the receipt of abstract of title to the following described real estate:

"DESCRIPTION:

"Situated in the County of Highland, in the state of Ohio and in the town of Hillsboro, and bounded and described as follows: In-lot number forty-four (44) as the same is known and designated on the recorded plat of said town, and being the north-east corner of High and Beech streets. The premises hereby conveyed being formerly known as the 'Woodrow House' property, now the 'Clifton House' property.

"PART OF SAID REAL ESTATE TO BE DEEDED TO THE STATE OF OHIO, FOR SITE FOR ARMORY.

"DESCRIPTION:

"A part of in-lot number forty-four, in the Village of Hillsboro, Highland County, Ohio, bounded and described as follows:

"Beginning at the southwest corner of said in-lot number 44, at the intersection of High and Beech streets; thence with the west line of said in-lot number 44 and the east line of High street, northwardly 99 feet, the full width of said in-lot; thence eastwardly with the north line of said in-lot, 125 feet; thence southwardly, parallel with High street across said in-lot, 99 feet to the south line of said in-lot and the north line of said Beech street; thence westwardly with the south line of said in-lot and the north line of Beech street, 125 feet to the beginning."

The plat does not show or designate the real estate to be conveyed and does not show the measurements. I would suggest that the plat be made to show both.

The first of the above description seems to include all of said in-lot No. 44, and the second describes only a part of in-lot No. 44. This is not a material defect, but I believe it would be well to explain the same in the abstract.

At page 5 of the abstract, transfer No. 4, James Elliott to Benjamin Elliott, said conveyance fails to state whether or not the said James Elliott is married or single and there is no release or dower. However, I do not think that this is a material defect for the reason that an act entitled "To cure and make valid certain deeds and the record thereof" passed by the 79th General Assembly in the 102 Ohio Laws, page 461, provides as follows:

> "When any deed conveying real estate shall have been of record in the office of the recorder of the county within this state, in which such real estate is situated, for more than twenty-one years prior to the taking effect of this act, and the record thereof shows that there is a defect in such deed, for any one or more of the following reasons; because the husband did not join with the wife or the wife with the husband in all the clauses of the deed conveying such real estate, but did join with each other in one of them, in the execution and acknowledgment of such deed; or because any grantor in such deed omitted to affix his seal thereto; or because such deed was not properly witnessed; or because the acknowledgment to such deed does not show that the wife was examined separate and apart from her husband; or because the officer taking the acknowledgment of such deed, having an official seal, did not affix the same to the certificate of acknowledgment; or because the certificate of acknowledgment is not on the same sheet of paper as the deed; or because the executor, administrator, guardian, or assignee or trustee making such deed, signed the same individually instead of in his official capacity; or because the corporate seal of the corporation making such deed was not affixed thereto, such deed and the record thereof shall be cured of such defects, and be effective in all respects as if such deed had been legally made, executed and acknowledged. Provided that nothing herein contained shall be construed to affect rights vesting after the record of such defective deed and prior to the passage of this act, or operate on any suit or action now pending, or which may have been heretofore determined in any court of this state, in which the validity of the making, execution or acknowledgment of any such deed has been or may hereafter be drawn in question. Any person claiming adverse title thereto shall bring proceedings within one year from the taking effect of this act, if not already barred by limitation or otherwise."

At page 6 of the abstract, transfer No. 5, entitled power of attorney of Benjamin Elliott to Phineas Hunt, it appears at page 8 of said abstract that there were no witnesses to said signature of said Benjamin Elliot. However, I think this defect is not material by virtue of the act found in 102 Ohio Laws, page 461, quoted above.

Transfer No. 15 of said abstract is as follows:

"No. 15.

"Joshua Woodrow, Sr., Plaintiff, vs. "Joshua Woodrow, Jr., Margaret T. Woodrow, John Barry, Samuel C. Steel and Eliza Steel, his wife, Christopher Arthur, Joseph V. Patton, Andrew Blount, Matthew Caldwell, Jas. Mitchell, George Roads and John Townley."	"Action in Common Pleas Court, Highland Co., Ohio. Complete Record No. 1, Page 670. Date of filing, February 13, 1858."

"Suit in foreclosure of mortgage.

"Petition sets out that Joshua Woodrow, Jr., and Margaret T. Woodrow, his wife, executed a mortgage of date of July 2, 1855, recorded in book 2, page 194, by which they agreed to maintain and support plaintiff for his natural life. Recites a complete failure to do so by which the conditions become absolute.

"Recites the conveyance to John Barry in Trust, (See No. ____. Abstract,) also a mortgage of $5,000.00 given to Samuel C. Steel and Eliza Ann Steel, his wife; recites that the other defendants, Arthur, Patton, Blount, Caldwell, Mitchell and Roads had brought suits in attachment against said Joshua Woodrow, Jr. That defendant Townley had a lease on said premises, being the property described in the Abstract.

"Complete record shows all parties were served, and an entry shows that all parties consented to judgment in favor of plaintiff on his mortgage for $1,250.00 in his favor; and consented to order of sale of the premises being in-lot No. 44, described in Caption.

"Record shows appraisement and sale to be regular, sale being made to James T. Thompson for $2,600.00 and on confirmation, Thos. H. Baskin as Master Commissioner and Sheriff, was ordered to make deed to purchaser, and an order of distribution was made.

The mortgage from Joshua Woodrow, Jr., and Margaret T. Woodrow, his wife, upon which suit was brought, is recorded in Mortgage record No. 2, page 194. There is no release entered of said mortgage on said record, but the sale was made and distribution ordered, on the petition alleging said mortgage.

"In the above suit, Samuel C. Steel and Eliza Ann Steel, his wife, are made parties defendant, and are alleged to have a mortgage for $500.00 on said property. A finding is made and an order that they be paid the amount due. A release of said mortgage is entered on the records. (Mortgage Record No. 2, page 485-6), as follows:

"'Received payment in full satisfaction of the within note and mortgage and in consideration I hereby release the same and all right and title under the deed of mortgage. July 15, 1858.

"'Samuel Stell for himself and wife.'"

The records disclose suits filed against Joshua Woodrow, Jr. prior to the above action as follows:

"Christopher Arthur	vs.	Joshua Woodrow, Jr.,	Jan. 11, 1858.
"Joseph V. Patten	vs.	same	Jan. 11, 1858.
"Matthew Caldwell	vs.	same	Jan. 11, 1858.
"Jas. W. Mitchell	vs.	same	Jan. 11, 1858.
"Andrew Blount	vs.	same, dismissed	Mar. 26, 1858.
"Geo. Roads	vs.	same	Jan. 11, 1858."

The judgment in above case in favor of Joshua Woodrow, Sr. and the order of distribution provided that the proceeds of sale should be divided and distributed after payment of costs as follows:

"To Joshua Woodrow, Sr., $1,250.00.

"To Samuel C. Steel and wife, $500.00 and interest.

"To John Barry, trustee for Margaret T. Woodrow, the balance of the proceeds."

The suits against Joshua Woodrow by Arthur and others above noted were most of them reduced to judgment, but nothing was left of proceeds to apply to the claims, and as they were all made parties and consented to sale, their interests in the lot, if any, by attachment were transferred to the fund by the sale.

I am of opinion that a copy of the petition in that action should be set forth, together with copies of the records in such case, and also show copies of all records shown as the final determination of the suit, and also a copy of the court entry showing the consent of the defendants to the sale of said property, and then the abstract will conclusively show that all the interests of the respective parties were transferred from the real estate to the funds realized from the sale of the property.

Transfer No. 20 shows no release of the dower estate, but for reasons above stated, this defect is not material.

Encumbrance No. 1, being a mortgage deed from Jacob Uhrig and Mary Uhrig, his wife, to N. Craig McBride and J. D. McBride, should be cleared up by showing a copy of release.

In respect to encumbrance No. 2, I think the abstract should contain a certificate of the Probate Court, showing the estate of Eliza J. Wright to have been fully administered.

I think said abstract should further state whether or not there are any tax assessment or judgment liens against said property, and whether or not there are any foreign executions standing against said premises.

I believe also a certificate should be secured from the United States District Court (setting forth whether or not there are any pending judgments or liens against said property).

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

485

DEED AND ABSTRACT OF TITLE—COMMONS OF MARIETTA, OHIO—OHIO COMPANY'S PURCHASE—ORIGINAL TOWNSHIP DEDICATION—FEE IN COUNTY TO USE OF CITY—LEGAL INTEREST CONVEYED TO STATE FOR ARMORY PURPOSES.

The commons of Marietta was originally a part of the Ohio company's purchase, and under such sale, was devoted to religious purposes.

The plat, however, was laid off and dedicated by the trustee of original township and this dedication was ratified by the legislature. Such dedication, by virtue of Ohio Land Laws, 445, vested the fee simple of the streets, alley, commons and public places, in the county to the use of the municipal authority.

Such use constitutes an "interest" within the meaning of Section 3631, General Code, which may be legally deeded to the state of Ohio for armory purposes.

The deed, under consideration therefore, legally vests such interest in the state and the armory board may employ said property for armory purposes.

March 15, 1912.

COL. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—

IN RE MARIETTA ARMORY SITE.

There was submitted to this department sometime in July last an abstract of

the land offered by the *city of Marietta, Ohio,* to *the state of Ohio* for the purpose of erecting and maintaining an armory at Marietta.

On consideration of said abstract on July 28, 1911, I wrote you as follows:

> "In reference to the property covered by the abstract of title herewith presented and signed by Mr. A. D. Fellett I beg to advice that it is my judgment that the title to the premises therein described is good and sufficient for the erection and maintenance by the state of Ohio of an armory for the use of the Ohio National Guards, or any other public purpose for which the state should desire to use the same."

and at the same time enclosed said abstract of title. I am informed that said abstract and opinion did not reach the board, and that the board now desires to have the same renewed, together with a statement of the title which the board will receive when acquiring the deed offered by the city of Marietta, to it.

I have, therefore, gone fully into the matter and especially in reference to the title which is offered and I find no reason to change or modify my letter of July 26, 1911.

The tract in question, to-wit: Commons of Marietta, was originally a part of Section twenty-nine (29) of the Ohio company's purchase, which under the contract of sale or conveyance to the Ohio company was devoted to religious purposes. This fact for a time gave me considerable concern, but upon careful examination, I find that while a portion of the lots, streets and alleys of Marietta, and all of this commons was laid off and dedicated by the trustees of the original township, as is shown by the original plat of the town of Marietta left for record April 20, 1802, yet since that date the legislature of Ohio recognized the dedication by authorizing the leasing of all lands included in the dedication other than such as was laid off in streets, alleys and commons, Ohio Land Laws 161, act of February 21, 1805.

By the act of December 6, 1800 (Ohio Land Laws 445) requiring the recording of town plats, it is provided that such proceeding shall vest the fee simple to the streets, alleys, commons and public places in the county.

The plat so recorded on April 20, 1802, had the effect, as I view it, to vest the fee to this commons in the county, the same, however, to be under the control of the municipal authority for public uses as found in the plat. Such use, however, is not to be strictly construed, but will include any public use to which the city authorities may desire to devote it.

Langley vs. Gallipolis, 2 O. S., 110.

The result of this is the dedication vested a naked legal title to this commons in the county with the use in the city, and the fact that it was originally a portion of Section twenty-nine(29) cuts no figure whatever. The title acquired by the state will be just the same had the dedication been made by any other land owner.

Section 3631, General Code, was amended 102 Ohio Laws, 153, granting municipal corporations the power

> "to hold real estate or any interest therein and other property for the use of the corporation and to sell or lease it, or to donate the same by deed in fee simple to the state of Ohio as a site for the erection of an armory."

The city of Marietta undoubtedly has an interest in the commons, a part of which is herewith offered by deed of fee simple to the state of Ohio.

I am of the opinion, that, as heretofore stated, the title offered is good and sufficient for the purposes desired, though the deed from the city will not convey a fee which can subsequently be disposed of by the state.

I have suggested, however, as a purely precautionary measure and no more, that a resolution be procured from the county commissioners approving the conveyance for the purposes for which the same is made, which has been done.

I herewith enclose a copy of the abstract which I have heretofore sent you and a deed conveying the title to the state of Ohio, which deed has been submitted to me and which I find to be correct in form.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

638

ABSTRACT OF TITLE—PROPERTY IN SIDNEY, OHIO, LOT NO. 1.

HON. BYRON L. BARGER, *Secretary State Armory Board, Columbus, Ohio.*

DEAR SIR:—Herewith find enclosed abstract of title and deed from the city of Sidney to the state of Ohio for lot No. 101 in said city, which said city is donating to the state of Ohio as a site for an armory.

Careful examination has been made of said abstract and deed, and in my opinion the same are sufficient to convey to the state of Ohio a good title in fee simple.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

639

ABSTRACT OF TITLE—PROPERTY IN COVINGTON, OHIO—VACATION OF STREETS AND ALLEYS.

HON. BYRON L. BARGER, *Secretary of State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 5, enclosing three deeds from the village of Covington to the state of Ohio, and two abstracts of title for the following described premises, which it is proposed to donate to the state of Ohio for an armory, to-wit:

> "Situated in the county of Miami, in the state of Ohio, and in the village of Covington, and bounded and described as follows:
>
> "Situate in the northeast quarter of Section 20, town 8, range 5, east, and more fully described as follows: Including all of in-lot 151 and the east 30 ft. of lot 152 in Daniel Lehman's addition in said village. Beginning at the southeast corner of said in-lot 151; thence southwestwardly along the southeasterly line of said lot, 128 ft; thence northwardly parallel with and 30 ft. westwardly at right angles from the east line of said lot 152, 126.4 ft.; thence northeastwardly 128.2 ft. to a point in the west line of High street 119.8 ft. northwardly measured along the west line from the place of beginning; thence southwardly along said west line to the place of beginning; thence southwardly along said west line from the place of beginning, containing an area .334

of an acre, more or less. (This description embraces the in-lots as described and the land lying on the north boundary thereof, which was formerly the right of way of the P. C. C. & St. L. Railway Co.).

Also,

"Being all that certain tract or parcel of land, situate in the northeast quarter of Section 30, town 8, range 5, east, in the village of Covington, Miami county, Ohio, and being further described as follows:

"Beginning at a point in the east line of Main street at the northwest corner of in-lot No. 153 in Daniel Lehman's addition; thence northwardly along said east line 45.3 feet; thence northeastwardly 149.5 feet to an iron pin at the northwest corner of a parcel of land conveyed to J. J. Hittle by deed dated December 28, 1909, recorded in Vol. 136, page 432; thence southwesterly by lands last mentioned 38.4 feet to the northwestly line of in-lot 152 in said addition; thence southwardly along the northwesterly line of said lot 162 to the place of beginning, containing an area of 0.135 of an acre, more or less. (This description embraces what was formerly the right of way of the P. C. C. & St. L. Railway Company, adjoining on the north the following lots, viz: lot No. 153 and part of lot No. 152, in the D. Lehhan addition to said village of Covington)."

Also,

"Being all of lot number one hundred and fifty-three (153); and all of lot number one hundred and fifty-two (152), except 30 ft. off the east side of lot No. 152 heretofore deeded to the P. C. C. & St. L. Railway Company."

A careful examination has heretofore been made of these abstracts and certain amendments were incorporated therein at my suggestion, and upon a further examination of the abstracts as amended, I am of the opinion that the state of Ohio will acquire a good and sufficient title in fee simple.

It will be observed that the council of the village of Covington has instituted proceedings to vacate the alleys between lots 151 and 152, and lots 152 and 153, respectively. These alleys were never, in fact, open to the public, as is shown by exhibit B, attached to abstract No. 1913, and exhibit E attached to abstract No. 1915.

It is practically certain that the alleys will be duly vacated inasmuch as the adjoining property is now owned by the village of Covington, and by the time the proceedings for vacation will have been completed, the state of Ohio will have become owner of the adjoining lands by virtue of the aforesaid deeds, and said alleys will become the property of the state.

The delay in the proceedings for the vacation is not, in my opinion, sufficient justification for your board to hesitate about taking any contemplated action with regard to the location of an armory at Covington.

Herewith find enclosed abstracts and deeds hereinbefore referred to.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

742.

MECHANICS LIEN LAW NOT AVAILABLE AGAINST STATE—STATE ARMORY BOARD—RIGHTS OF BOARD WHEN CONTRACTOR DIES INSOLVENT.

Upon the principle that the State may not be sued, when a contractor dealing with the Armory Board, dies insolvent, before the completion of the Armory contracted for, with monies owing to material men and sub-contractors for work done on the Armory, the latter have no right to perfect liens under the mechanic's lien law.

When the administration fails to make application to probate court for authority to complete the contract, immediate notice of the fact should be given to the surety and demand made to complete the contract. Upon failure to comply, the Armory Board may complete the contract and charge the cost thereof over and above the amount still due on the contract, to the bonding company.

December 4, 1912.

HON. BYRON L. BARGER, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 28th, as follows:

> "Mr. J. L. H. Barr, contractor for Batavia armory died November 16, 1912.
>
> "At the time of his death he was nearing completion of his contract and the Armory Board had allowed him estimates aggregating $10,228.00. On final completion he would have been entitled to an additional sum of about $7,665.00. An additional sum of $105.00 is in dispute.
>
> "His bondsman is The Citizens Trust and Guaranty Company of Parkersburg, West Virginia. A copy of the bond is herewith transmitted.
>
> "D. L. Barr, son of the decedent, has been appointed administrator. His attorneys are Messrs. Griffith and Nichol, of Batavia.
>
> "On Sunday, November 24, 1912, the Armory Board met the administrator and Judge Griffith at Cincinnati, and the Board was informed that said decedent owed about $9,400.00 to sub-contractors and material men et al for materials and work on this Batavia armory. That decedent's estate was insolvent and that the Probate Court would not direct the administrator to complete this contract. Judge Griffith further suggested that the Board direct the bondsman to complete the contract.
>
> "Meanwhile several of the sub-contractors have endeavored to perfect liens.
>
> "Please advise as soon as you can what action the Board should now take."

The right of sub-contractors, material men or laborers of a contractor making public improvements for the State of Ohio to secure a lien upon the funds set apart by the State for such improvement is adversely decided in the case of State ex rel vs. Morrow, 10 N. P., n. s., 279, the third syllabus of which is as follows:

"The mechanic lien law, although general in its nature, and the language in code broad enough to include public improvements of the state, does not apply to any public improvement made by the State. And any steps taken pursuant to the mechanic lien act to establish a lien or claim against funds in the hands of the state set apart for any public improvements have no effect in law and afford no ground for action either in law or equity against the state."

And on page 285 of the opinion, Kyle, J., says:

"The trustees know no one in the transaction save the principal contractor, and under the law it was the duty of them to have an estimate made to such principal contractor, and having certified such estimate to the auditor it was the duty of the auditor to pay the same to to such principal contractor, there being no provision for the determination of any other person's rights to such fund by them. Hence, it is my opinion that the State of Ohio is not subject or bound by the provisions of the lien law, and no person can acquire any interest in any money by any steps taken under such lien law against any fund in the hands of the board of trustees or the Auditor of State, and that, therefore, the relator is not entitled to a peremptory writ of mandamus, and the writ will be quashed and the petition dismissed at the costs of the plaintiff."

The circuit court on October 21, 1910 affirmed this decision in the following memorandum set forth in the note at the bottom of page 279 of the above case, to-wit:

"We think that the judgment of the lower court should be affirmed for the reasons given by Judge Kyle in his opinion, and in addition this reason:

"'There is a doctrine laid down in 38th Law Bulletin, 212, which is the law that where a contractor absconds that ends his rights, and the owner may proceed with the completion of the work and without paying to the contractor or his sub-contractor anything, even though he should complete the work at a less price than originally contracted for.'"

The additional reason given by the circuit court is not germane to the situation herein presented.

I am, therefore, of the opinion that no part of the fund in the hands of the State Armory Board for the construction of the Batavia armory can be subjected to the payment of the liens above mentioned. Inasmuch as the estate of the contractor is insolvent, and as his administrator refuses to make application to the probate court for authority to complete the contract, I advise that you give immediate notice of this fact to the bonding company and demand that they complete the contract. In event of their failure to take steps to do so within reasonable time, it would be the duty of the State Armory Board to see to the completion of the same and charge the cost thereof over and above the amount of money still due on the original contract to the bonding company.

I herewith return copy of the bond sent to me with your communication.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

758.

ABSTRACT OF TITLES—TEETERS, LAMBORN AND COMPANY'S ADDITION TO THE INCORPORATED VILLAGE OF ALLIANCE, OHIO.

December 20, 1912.

HON. BYRON L. BARGER, *Secretary State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 16th, enclosing for my consideration and approval, deed and so-called Abstract of Title for roads 1322, 1323, and 1324 in Teeters, Lamborn & Company's Addition to the incorporated village of Alliance, Ohio; also all the right, title and interest of the grantors in said deed, to a certain strip of land twenty (20) feet in width and one hundred and twenty (120) feet in length adjoining said lots, upon which land it is proposed to erect an armory.

A careful examination of said so-called abstract discloses that it is nothing more, in the main, than copies of the indexes to certain deeds in the office of the county recorder of Stark County. It is absolutely impossible for anyone to intelligently pass upon the legality of this title with the meager information at hand. I would suggest that an abstract be made in regular form and transmitted to this office. In addition to this, I would suggest that the following doubtful points be covered in the abstract.

1. Summons in the proceeding appearing at No. 14 does not appear to have been served on all of the defendants, nor do those named as not having been served, appear to have waived service. I presume the record will show these facts.

2. It appears that in the proceeding abstracted at No. 27, summons were issued to various counties, but the abstract fails to state from whom they were issued and whether or not service was had upon the parties.

3. A copy of the plat of Teeters, Lamborn & Company's Addition to the town of Alliance, or so much thereof as will be necessary to show the location of the lots in question, together with a complete copy of the minutes appearing upon the record of the plat, should be attached to the abstract.

4. Affidavits should be procured showing that L. H. Miller, grantee in No. 30, and Lyman H. Milner, grantor in No. 31, are one and the same person; and as to the discrepancies in No. 31, between the names of the grantors as given at the head of the instrument and the signatures.

5. Affidavits should be procured showing whether Richard W. Teeters, grantee in No. 31 and R. W. Teeters, grantor in No. 33 are one and the same person.

6. The abstractor states that there is only one witness to the signatures of the two last grantors in No. 28, and as two witnesses are required under the laws of Ohio, it will be necessary to procure a quit claim deed from those persons.

Affidavits should be procured covering the point as to whether the John R. Morgan and Arthur Morgan, whose names appear as grantors in the deed, are the same persons who appear to have signed the same as John W. Morgan and Arthur P. Morgan, respectively.

7. There is no apparent reason why the quit claim deed in No. 40 should have been given. The title had theretofore vested in Margaret M. Ramsey by virtue of a deed given by the heirs of Thomas Morgan including William H. Morgan, and I do not understand why William H. Morgan should be included as a grantee in said instrument. If the interests of William H. Morgan are not fully divested, a quit claim deed should be obtained from him; at least, an explanation should be made as to why the deed was executed.

8. A certificate of the Clerk of the United States District Court at Cleveland, as to the pendency in said court of judgments or bankruptcy proceedings against Margaret M. Ramsey, should be attached to the abstract.

The certificate to the amended abstract should be more comprehensive than the certificate attached to the papers I have considered. It should contain a statement of the abstractor as to the character of title that would be acquired by the State.

I have also examined the deed from Margaret M. Ramsey and husband to the State of Ohio, and while it is not absolutely necessary inasmuch as both parties have joined in the granting clause, yet I would prefer that the contingent right of dower of Willis H. Ramsey be specifically released.

You raise the question in your letter as to what effect the words "for armory purposes,"appearing in the granting clause, would have on the fee simple title which the State would acquire.

Inasmuch as the deed is for a valuable consideration, and as no clause is contained therein providing that the said land should revert to the State of Ohio if sold or used for other than armory purposes, I am of the opinion that the State would acquire a good fee simple, marketable title.

I am herewith returning to you said deed and the alleged abstract, for correction in the particulars mentioned.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Tax Commission of Ohio)

17.

FOREIGN CORPORATIONS—"DOING BUSINESS" IN OHIO—STATUTORY REQUIREMENTS.

A foreign corporation is not "doing business" in Ohio within the meaning of Section 183, G. C., by the mere fact of procuring a lease or commencing a litigation based upon the question of the validity of certain of its patent rights.

A company is not "doing business" within the meaning of statutes like 183, General Code, unless it is engaged in the principal enterprise for which it was organized.

COLUMBUS, OHIO, January 12, 1912.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 8th, certifying to me, as a foreign corporation doing business in the State of Ohio without having complied with the laws thereof, the International Metal Products Company, a corporation organized under the laws of the State of New Jersey, and having its place of business at Middletown, Ohio. You refer to me in connection with this certification a question raised by the company and its counsel in correspondence, copies of which are enclosed in your letter, as to whether, upon the facts therein stated, the company is "doing business" in this state within the meaning of the statute applicable thereto.

The facts thus stated are as follows: The company owns all of its property and keeps all of its books at Middletown, Ohio. Its property consists solely of certain patent rights pertaining to the manufacture of a certain article of commerce. These patent rights are at present in litigation, the company having brought a suit for the purpose of testing their validity and value. In addition to bringing this action the company has leased a manufacturing plant for the purpose of carrying on the business of manufacturing the article by the use of the patented process in question. The company has never manufactured anything and the foregoing are all the corporate activities upon which it has embarked.

Section 183 of the General Code, under which the obligation of the company to file the statement and pay the fee failure to file and pay which renders it liable, if it is liable at all, to the penalty for which you have requested me to bring suit, provides in part as follows:

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

From this language it is at once apparent that the mere ownership of property and the mere use of the capital stock of a foreign corporation in the State of Ohio otherwise than in the *doing of business* does not impose any obligations upon such a foreign corporation under this section.

Analyzing the facts above described, it appears that two acts, and two only, might be construed as the doing of business within the meaning of Section 183, above quoted, namely: the bringing of the action and the making of the lease.

Upon the authorities which I have examined in connection with this question I am of the opinion that neither of these acts constitute "doing business" within the State of Ohio as the phrase is used in the statutes. The authorities are as follows:

"Railway Company vs. Fire Association, 55 Ark., 163.
"Life Insurance Company vs. Sawyer, 44 Wis., 387.
"Christian vs. Land and Mortgage Co., 89 Ala., 198.
"Cook vs. Bridge Company, 98 Ala., 409.
"Lard Stock Company vs. Cattle Co., 16 Utah, 59.
"Utley vs. Mining Company, 4 Colo., 369.
"Mandel vs. Land and Cattle Co., 154 Ill., 177.
"Cattle Company vs. Commissioners, 9 Mont., 145.
"Wood and Cement Company vs. Cement Co., 84 N. Y. Sup., 38.
"Beard vs. Publishing Company, 71 Ala., 60.
"United States vs. Amer. Bell Tel. Co., 29 Fed., 17.
"(A case arising under the Ohio Statutes.)"

All these cases establish the same general principle, viz: that a company is not *doing business* within the meaning of statutes like Section 183, General Code, unless it is engaged in the principal enterprise for which it was organized—in the case of the International Metal Products Company, the business of manufacturing.

I am, therefore, of the opinion that this company is not doing business under Section 183, General Code, upon the facts submitted. I, therefore, await your advice as to the correctness of these facts.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

230.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—TRANSFER OF FUNDS BY COUNTY COMMISSIONERS—"DEFICIENCY BONDS" FUNDING INDEBTEDNESS.

There is no authority for the issuance of deficiency bonds by the County. An indebtedness must be valid, matured and of a non-contractual nature before it can be funded or refunded.

The Commissioners could not reimburse a special fund from which a transfer has been made out of the proceeds of a general levy for the fund to which the transfer has been made. The theory of the Smith law as expressed in Section 5649-3 *impliedly repeals Section* 2443, *General Code, providing for transfers of unexpended funds.*

The Commissioners may not therefore, after March 1, 1912, *make a temporary transfer from a special fund to the judicial fund and have the special fund reimbursed out of the next semi-annual collection for the judicial fund.*

March 26, 1912.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt, through you, of a letter addressed to you by Hon. Frank L. Johnson, Prosecuting Attorney of Greene County, and of another letter from Hon. Walter L. Dean, Auditor of Greene County, sub-

mitting several queries arising by virtue of the effect of Section 5649-3*d* of the Smith law upon pre-existing statutes. The questions, as I gather them from the two letters, are as follows:

> "1. May the proceeds of a special fund, a part of which will not be needed until after the next collection of taxes, be transferred to the judicial fund under Section 2443, General Code, and the special fund reimbursed out of the collection for the judicial fund at the next semi-annual collection?
>
> "2. Can the county commissioners and county auditor allow and pay bills after March 1st from a fund that has been provided for by levy but exhausted?
>
> "3. Can the county auditor issue warrants on the county treasurer when a fund is exhausted?
>
> "4. How are the commissioners to provide money when needed where there is no money in the funds?
>
> "5. Can we issue deficiency bonds: if so when and how?"

I enclose herewith copies of opinions rendered by me to Hon. Edward C. Turner, Prosecuting Attorney of Franklin County, and to the Bureau of Inspection and Supervision of Public Offices, which furnish answers to some of these questions. Thus, the auditor's third question is fully answered in the letter to the Bureau of Inspection and Supervision of Public Offices. The reasoning of that opinion is also applicable to the second question, above submitted, and furnishes a negative answer thereto. The fifth question is also sufficiently answered by the opinion to Mr. Turner, as I have suggested therein, the circumstances under which bonds may be issued by a county. I may state further, however, that there is no authority whatever for the issuance of "deficiency bonds" in the broadest sense of that term; except in the case of specific improvements bonds may not be issued by the county commissioners, save for the funding or refunding of a valid existing indebtedness. The commissioners have no power, under any statute, to borrow money to supply a deficiency in a fund and then to proceed to contract indebtedness and pay the same out of the proceeds of such a bond issue. The indebtedness must first have been lawfully contracted for, or must be a claim existing, by virtue of law, against the county, regardless of contract; and, in addition thereto, must be due before it can be funded or refunded. Therefore, if a fund becomes exhausted and some of the claims against this fund, which are likely to accrue in the future, are non-contractual in their nature, such as salaries of county officers and the like, such claims, after they become due, must be met by the issuance of bonds under Section 5656, General Code. The accrual of such claims can not be anticipated under said section, nor can such claims be met by the issuance of warrants and their being stamped "Not paid for want of funds," as was the case under prior laws. The reasons for these conclusions will, I think, be sufficiently disclosed by the opinions above referred to.

The fourth question asked by the auditor has, I think, already been answered. County commissioners are utterly without power, under the Smith law, to provide money for claims of a contractual nature when there is no money in the funds, but may, under Section 5656, General Code, provide money when needed to meet matured claims of a non-contractual nature.

The foregoing conclusions leave unanswered only the first question. This question renders necessary a consideration of Section 2443, General Code, and the effect thereon, if any of Section 5649-3*d*. Said Section 2443 provides as follows:

> "The county commissioners may transfer an unexpended balance of

any fund, raised for the purpose of erecting public buildings, remaining in the treasury, to any other fund, or to any other purpose for which money is needed by the county. If there is a fund in such treasury that has been levied and collected for a special purpose, and such fund, or a part thereof, will not be needed for such purpose until after the period fixed by law for the next payment of taxes, and any of the other funds of the county are exhausted, the commissioners may transfer such special fund, or such part thereof as is needed to such exhausted fund, and reimburse such special fund from the taxes levied for such other fund, as soon as they are collected."

By referring to my opinion to Mr. Turner, as well as to some pages in my opinion to the Bureau of Inspection and Supervision of Public Offices, it will be noted that a part, at least, of this section cannot be carried into effect under the Smith law. None of the avails of taxation can be expended under that law unless first appropriated, and the proceeds of each levy are devoted, by force of its provisions, to meeting the expenditures between March 1st of one year and the same date of the following year. Therefore, the power of the commissioners to "reimburse such special fund from the taxes for such other fund, as soon as they are collected" is inconsistent with the plain purpose of Section 5649-3*d*, and the latter being later in point of enactment must control. Hence, it follows that the commissioners may not reimburse a special fund, from which a transfer has been made, out of the proceeds of a general levy for the fund to which the transfer has been made. However, if a special levy be made for that purpose, i. e., the reimbursement of the fund from which the transfer was made, the proceeds of such a levy might, after appropriation, be lawfully expended for such purpose. This, however, is not what is meant by Section 2443; that fund contemplates a reimbursement, not from a special levy but from a general levy, for the purpose of the fund to which the transfer was made.

In short, the theory of the Smith law, as exemplified in Section 5649-3*d*, is absolutely inconsistent with former Section 2443, and I can reach no other conclusion than that said Section 2443 has been repealed by implication. It is, therefore, my opinion that the commissioners are without authority to make a temporary transfer from the special fund in question for the relief of the judicial fund, under Section 2443, General Code, after March 1, 1912. The reason for selecting this date will appear in the two opinions, copies of which I enclose herewith.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

290.

TAXES AND TAXATION—CORPORATIONS—WILLIS TAX LAW—CERTIFICATE OF DISSOLUTION—CANCELLATION OF ARTICLES OF INCORPORATION.

The authorities have settled that the mere filing of Articles of Incorporation confer sufficient corporate powers to justify the assessment of a tax upon the privilege of being a corporation. Therefore, when Articles of Incorporation have been procured from the Secretary of State, a corporation has been "organized under the laws of this State" within the contemplation of Section 5495, General Code. Such a corporation is not entitled to the certificate of dissolution provided for in Section 5521, General Code, until it has filed the report and paid the annual fee as provided for in said sections. In case of default of said payment and report, the Tax Commission may certify said corporation to the Secretary of State who must then cancel its Articles of Incorporation as provided in Section 5509, General Code.

April 5, 1912.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 21st, requesting my opinion upon the following questions:

> "Where articles of incorporation have been procured from the Secretary of State, but no certificate of stock subscription filed or any other steps taken—
>
> "1. *Query*: Is such "a corporation organized under the laws of this state," and as such required to file reports and pay fees as provided in Section 5495 et seq. of the General Code?
>
> "2. *Query*: Is it entitled to the certificate provided for in Section 5521 of the General Code when it has filed no reports and paid no fees as required under Sections 5495 et seq.?
>
> "3. *Query*: Is it such a corporation as should be certified to the Secretary of State by the Tax Commission for cancellation of its articles of incorporation, where it has failed to file reports and pay fees as provided in Section 5509, General Code?"

I quote the sections referred to by you in your letter.

> "Section 5495 (Section 106 of the Act of June 2, 1911, 102 O. L. 249). Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each corporation, *organized under the laws of this state*, for profit shall make a report, in writing, to the commission, in such form as the commission may prescribe."

> "Section 5521 (Section 132 of said act, 102 O. L. 254). In case of dissolution or revocation of its charter, on the part of a *domestic corporation*, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state, shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports, required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid."

"Section 1309 (Section 120 of said act, page 251, 102 O. L.) If a corporation, wherever organized, required by the provisions of this act, to file any report or returns or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this state for profit or as a foreign corporation for profit doing business in this state and owning or using a part or all of its capital or plant in this state, or as a sleeping car, freight line or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the commission shall certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state, by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation to do business in this state by proper entry. Thereupon all the powers, privileges and franchises conferred upon such corporations, by such articles of incorporation or by such certificate of authority, shall cease and determine. The secretary of state shall immediately notify such domestic or foreign corporation of the action taken by him."

. . . .

The essential provisions of the first of these sections are found in the Willis Law of 1902, so-called; the phrase concerning which you inquire has always been in the law, since its original enactment.

The other two sections above quoted are new in the act of 1911 and, of course, have not been judicially construed. I think it is apparent, however, that Section 120, at least, applies to precisely the same corporations or organizations as Section 5495; it is only as to corporations "required by the provisions of this act to file a report" that the commission may take the action therein referred to.

For similar considerations I am of the opinion that Section 5521 is limited in its operations and effect to the class of organizations defined in Section 5495. I refer you to a previous opinion, in which I held that Section 5521 did not apply to domestic corporations not for profit, organized after the law of 1911 went into effect, and the reasoning therein in support of this conclusion.

It follows, therefore, that the sole question of law for determination here is as to the meaning of the phrase "organized under the laws of the state, for profit," as used in Section 5495.

The manner of the organization of a corporation under the laws of Ohio, for profit, is prescribed by Section 8623 et seq. General Code, some of which I quote.

"Section 8623. Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves."

"Section 8625. Any number of persons, not less than five, a majority of whom are citizens of this state, *desiring to become incorporated*, shall subscribe and acknowledge articles of incorporation * * *."

"Section 8625. * * * Articles of incorporation shall be filed in the office of the secretary of state, who shall record them, and shall also record certificates relating to that corporation, thereafter filed in his office."

"Section 8627. Upon filing articles of incorporation, the persons who subscribed them, their associates, successors, and assigns, by the name and style provided therein, shall be a body corporate, with succession, power to sue and be sued, contract and be contracted with: also, unless specially limited, to acquire and hold all property, real or personal, necessary to effect the object for which it is created, and at pleasure convey it in conformity with its regulations, and the laws of this state. Such corporation also may make, use, and at will alter a common seal, and do all other acts needful to accomplish the purposes of its organization."

Section 8629. A copy of articles of incorporation so filed, and duly certified by the secretary of state, shall be prima facie evidence of the existence of the corporation therein named.

"Section 8630. The persons named in the articles of incorporation of a corporation for profit, or a majority of them, shall order books to be opened for subscriptions to the capital stock of the corporation at such time or times and place or places as they deem expedient."

"Section 8633. When ten per cent. of the capital stock is subscribed, the subscribers to the articles of incorporation, or a majority of them at once shall so certify in writing to the secretary of state."

"Section 8634. The incorporators shall be liable to any person affected thereby, in the amount of any deficiency in the actual payment of ten per cent. on the stock subscribed for at the time of so certifying to the secretary of state."

"Section 8635. As soon as such certificate is made, the signers thereto, shall give notice to the stockholders, as provided in section eighty-six hundred and thirty-one, to meet at such time and place as the notice designates, for the purpose of choosing not less than five nor more than thirty directors, to continue in office until the time fixed for the annual election, and until their successors are elected and qualified. * * *"

"Section 8636. At the time and place appointed, directors shall be chosen by ballot, by the stockholders who attend, either in person or by lawful proxies. * * *"

"Section 8660. The corporate powers, business and property of corporations formed under this title shall be exercised, conducted, and controlled by the board of directors: * * *"

It is manifest, under all these sections, that the "organization" of a corporation, formed under the laws of Ohio for profit, is not *complete* until its directors have been elected; until that time there is no agency whereby the corporate powers may be fully exercised. So it was held in the case of State, ex rel. vs. Insurance Company, 49 O. S., 440:

"The making and filing, for the purpose of profit, of articles of incorporation in the office of the secretary of state, do not make an incorporated company; such articles are simply authority to do so. No com-

pany exists within the meaning of the statute, until the requisite stock has been subscribed and paid in, and the directors chosen."—(Syllabus, 5th Branch.)

This was the holding of the Supreme Court in an action in quo warranto brought for the purpose of ousting a foreign insurance company from the privilege of exercising corporate franchises in Ohio without authority of law. The action was founded specifically upon what was then Section 282, Revised Statutes, which provided as follows:

"When, by the laws of any other state or nation, any taxes, fines, penalties, license fees, deposits of money, or of securities or other obligations or prohibitions are imposed on insurance companies of this state, doing business in such state or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state or nation doing business within this state, and upon their agents here."

It was shown that the respondent company was organized under laws of the state of New York, which said state imposed upon insurance companies of the state of Ohio certain obligations and prohibitions which had not been imposed by the State of Ohio upon the respondent. The court held, however, that in order to lay the foundation for the application of this statute to the respondent it would have to be shown that there was in existence in Ohio an insurance company of Ohio doing business in this state. One of the defenses being that there was no such company in existence at the time the attorney general, the rolator, in the case, sought leave to file a reply to this defense, setting up the filing of articles of incorporation by persons proposing to form an Ohio insurance company. The court held, as evidenced by the syllabus already quoted, that for the purpose of this statute no Ohio company was shown to be in existence by the proposed reply. The language of the opinion on this point, per Minshell, J., is found on page 446, as follows:

"3. The next question is, should leave be given to file the proposed reply to the third defense? We think not, for the reason that it does not show that an Ohio company has been formed to do the four lines of insurance in which the defendant is engaged. It will be observed that it does not aver that any officers or directors have been chosen, or that any of the stock has been subscribed, or that any organization whatever has been effected. It is simply that 'articles of incorporation' have been made, and filed and recorded in the office of the Secretary of State. Articles of incorporation do not make an incorporated company; they are simply authority to do so."

It will thus be seen that while the court laid down some broad principles in this case it had before it a very restricted question.

Again, in Cincinnati vs. Telephone Company, 15 O. Dec. 43, the action was by a telephone company, under the statute which authorized a hearing by the probate court of a proceeding to condemn a right-of-way for its wires in a municipal corporation upon the refusal of council to grant the same. It was made to appear that directors of the plaintiff company had been elected by the votes of stockholders who had not paid the first installment of ten per cent. on their sub-

scriptions as required by statute. The court in its opinion, per Littleford, J., pointed out that under the decisions relating to condemnation proceedings, to which this was likened, a plaintiff corporation is obliged to show a complete right to exercise corporate powers, citing Railway Company vs. Sullivant, 5 O. S., 276; Atkinson vs. Railway, 15 O. S., 21; Powers vs. Railway, 33 O. S., 429. State vs. Insurance Company, supra, is also cited; and the acknowledgment is made that "it is true that the syllabus of the case (State vs. Insurance Company) must be interpreted in the light of the text and restricted accordingly." In all these authorities it was held that the city could question the regularity of the organization of the company and that the failure of the company to show a regularly completed organization precluded recourse by it to the probate court for the purpose of compelling the granting of a right-of-way for its wires.

From what has been said I think it is apparent that decisions of this sort are not conclusive of our question. The real point is as to whether or not a corporation is to be regarded as organized for the purpose of taxation; *not* whether it is completely organized so as to be an insurance company doing business in Ohio, or so as to be able to exercise the right of eminent domain.

Now, whatever be the effect of the issuance of a certificate of incorporation, to the individuals who desire to incorporate a corporation not for profit, it is clear that such certificate does confer corporate powers upon them; they have the right to be a corporation, although certain steps may yet remain to be taken before their corporation may act in all respects as such. I feel that I need go no further than the provisions of Section 8627 in support of such a statement; however, a very profitable discussion of the effect of the filing of articles is to be found in Ashtabula & New Lisbon R. R. Company vs. Smith, 15 O. S., page 328, and particularly in the opinion therein, per White, J. It is said therein on page 334, that:

> "Under the restrictions imposed, these general powers fall into two classes; such as may be exercised before, and, such as can not be until after, the election of directors. Among the former is the right to receive subscriptions to the capital stock, and, when ten per centum of the amount shall be subscribed, to elect directors; and, among the latter, the location and construction of the proposed road."

It is thus clearly pointed out that the right to elect directors is itself a corporate power, and the object of a special privilege granted by the state.

Now, the class of privileges to which Judge White refers as those which may be exercised before the election of directors constitute corporate powers and special privileges which may be made the subject of excise taxation; of this there can be no doubt. As much was definitely decided in the case of Ashley vs. Ryan, 49 O. S., 504; the syllabus in this case is as follows:

> "Section 148*a*, Revised Statutes, as amended February 12, 1889, (86 O. L. 33), requiring the payment of a fee to the secretary of state for the filing of articles of agreement of incorporation, and, also, of consolidation, proportioned to the authorized capital stock of the company, is a valid law; and applies to articles of agreement of consolidation between an Ohio company and a company or companies of another state, as well as to articles of consolidation between Ohio companies only."

Section 148*a*, Revised Statutes, is described in the foregoing syllabus only insofar as it related to the filing of articles of agreement of consolidation. It

ought to be pointed out, however, that the same section was that which provided the fee which the secretary of state should exact for filing articles of incorporation of domestic companies for profit. With this point in mind the reasoning of the opinion, per Minshall, J., becomes of especial interest; I quote liberally from that opinion:

> "The plaintiffs base their right to relief upon the invalidity of the law under which the money paid by them, was exacted by the secretary of state * * *
>
> "The first objection to the statute is, that it imposes a tax, not authorized by the constitution of the state; * * *
>
> "1. In support of the first objection the second and fifth sections of the twelfth article of the constitution are cited. We think it well settled that the second section simply relates to the taxation of property; and unless it can be shown that the sum exacted of the plaintiffs is such a tax, it has no application to the case. * * *
>
> * * * Whether the sum required by this statute for filing articles of incorporation be termed a fee, a tax or an assessment, is, we think, immaterial, for it is clear that it is not a tax on property. The filing and record of such articles is simply an authority or license to the persons filing them to form a corporation, and the sum paid therefor is the consideration demanded and paid the state for the grant of the right to be a corporation. We fail to perceive anything in the principles of government or sound policy, that should forbid the state from making an exaction, even for the purposes of general revenue. The franchise is valuable to the corporators, or, it is fair to assume, it would not be sought; and that the burdens of government are greatly increased by the formation of corporations, is daily seen in the business of the courts and the police establishment of the state. It is further claimed that the exaction made by the statute violates that principle of equality that should underlie all taxation. That this principle should not be disregarded is clear; but perfect equality is not attainable in any system of taxation. This, however, is equal in the sense that it applies to the formation of all incorporated companies, and is imposed according to the amount of the capital of each; and in this respect it is neither unequal nor unusual. Cooley Const. Lim. 608. The fact that it does not apply to companies already formed, does not make it unequal. If that were so then a change in any fee will, or rate of charges, would be open to the same objection. The law operates upon the future, and its equality must be determined by the future and not the past."

Here, then, the filing fee, which the secretary of state is authorized to charge for the issuance of a certificate of incorporation to the incorporators of the company, is called a tax on the privilege of being a corporation.

When the so-called Willis law was enacted in the year 1902, the rate of the annual fee, prescribed by its provisions, was the same as that of the initial fee under Section 148*a*, although the two fees were not based upon the same amount, the one being based upon the subscribed, issued or outstanding capital stock, and the other upon the authorized capital stock. Whether for this reason, or from other considerations, the Supreme Court, in passing upon the constitutionality of the Willis law in the case of Southern Gum Company vs. Laylin, 66 O. S., 578, seemed to regard the Willis law as simply an extension of the principles of taxation embodied in Section 148*a*, as pointed out by the court in its previous decision, in Ashley vs.

Ryan. Thus, the following language appears in the third, fourth and fifth branches of the syllabus:

> "3. * * * a tax on privileges and franchises can not exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value hereafter. The determination of such values rests largely in the general assembly, but finally in the courts.
>
> "4. An excise tax may also be imposed upon corporations to compensate the state for the additional burden caused by the aggregation of capital in an artificial body, and the exemption, in part at least, of the individuals composing such body from liability for its debts.
>
> "5. A franchise tax may be imposed by the general assembly upon corporations, both domestic and foreign, doing business in this state."

These propositions of the syllabus find support in the opinion of Burket, J., on page 594 et seq., as follows:

> "* * * upon the power to tax privileges and franchises there is no express limitation in the constitution, but certain limitations upon that power must be implied from other provisions of the constitution, so as to make the whole instrument harmonious and consistent throughout. The constitution was established to 'promote our common welfare.' Preamble to the constitution. Government is instituted for the equal protection and benefit of the people. Section two of the bill of rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section nineteen of the bill of rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. Ashley vs. Ryan, 49 O. S., 504; State ex rel. vs. Ferris, 53 O. S., 314, and Hagerty vs. State, 55 O. S., 613, are examples of taxing the privilege or franchise conferred; while Telegraph Co. vs. Mayer, 28 O. S., 521, and Express Co., vs. State, 55 O. S., 59, are examples of taxing the continued value of the existing privilege or franchise from year to year.
>
> * * * * * * * * *
>
> "A domestic corporation is given life and continued existence by the state, and this life and existence with their accompanying powers constitute the franchise, and this franchise being valuable and given by the state, the state may impose a franchise tax thereon to the amount of the value thus conferred and continued, the same as in taxation by assessment, the public first bestows a special benefit upon the property, and then takes back by way of assessment a part or all it has thus conferred. Walsh vs. Barron, 61 O. S. 15. A foreign corporation can do business in this state only upon such terms and conditions as the state may impose, and therefore a franchise tax may be imposed upon a foreign corporation for the privilege of doing business in this state. It therefore follows that a franchise tax may be imposed on both domestic and foreign corporations alike.
>
> "An excise tax may also be imposed on corporations to compensate the state for the additional burden sustained by the state and the people, by reason of property being held by artificial bodies, the persons comprising such bodies being exempt from liability to a great

extent for the debts thereof. This ground of excise taxation was recognized in Adler vs. Whitbeck, 44 O. S., 539, and was there applied to the liquor traffic, because that business was there shown to impose additional burdens upon the state. So the aggregation of capital by corporations imposes additional burdens, and requires regulations not applicable to individuals."

Whether by accident or otherwise, it is to be seen that the Supreme Court, both in the syllabus and in the opinion of Burket, J., in Southern Gum Co. vs. Laylin, has referred to the annual fee under the Willis law as the "reasonable annual value" of the "privilege originally conferred." In speaking of the "privilege originally conferred," and of its value, the court clearly had in mind, not the privilege of doing business as a corporation, but the privilege of being a corporation—the privilege taxed under Section 148*a*, Revised Statutes, as construed in Ashley vs. Ryan, supra.

It occurs to me, however, that there is considerable warrant for the position taken by the Supreme Court in Southern Gum Company vs. Laylin, whether that position was thoroughly considered or not. The fee under the Willis law has always been measured, and still is, under the act of 1911, measured by the "subscribed or issued and outstanding capital stock." It does not seem likely that the general assembly would have used this peculiar language had it not contemplated the contingency that a corporation might have subscriptions to its capital stock without being in a position to issue any capital stock.

Upon the consideration which I have given to the subject, then, I am of the opinion that the word "organize," as used in the original Willis law and carried into the tax commission law of 1911, is descriptive and not definitive; that no intention can be imputed to the general assembly to apply the provisions of the Willis law to such corporations only as are completely and legally "organized"; that such internal evidence of intention as is afforded by the remaining provisions of the statute points to the conclusion that it applies to all corporations for which certificates of incorporation have been issued; and that, as construed in Southern Gum Company vs. Laylin, the annual fee or tax is based upon the reasonable annual value of the privilege originally conferred by the issuance of the certificate of incorporation and not upon the doing of a corporate business.

I might add, here, to state more clearly the reasons upon which my opinion is based, that the tax is laid upon stock, irrespective of the amount of business done; this serves but to emphasize the proposition that it is based upon the privilege of being a corporation and not upon the manner in which that privilege is used or upon its use at all. I might also state that a conclusion opposite to that which I have reached would place upon the state the burden of ascertaining whether a corporation had been legally organized or not, and would afford to a corporation the possible defense (although I question whether estoppel would not prevent its successful interposition) that it would not be liable for franchise tax because it had not been properly organized.

Some certificate filed in the office of the secretary of state must be regarded as conclusive of the "organization" of a corporation within the meaning of the Willis law. As your letter suggests, it must be either the certificate of incorporation or the certificate of subscription to the capital stock. It must be the former, because that confers the privilege, which is considered a proper subject for taxation under the statute passed upon in Ashley vs. Ryan; because the privilege conferred by the articles of incorporation is itself the essential privilege, that conferred by the certificate of subscriptions being the incidental power; and because, finally, in Section 124 of the act of 1911, which is merely a revision of the provision which has been in the law since its original enactment, it is provided that failure

to pay the annual fee shall subject a corporation to an action in quo warranto for the annulment of its franchise—the ouster of its corporate existence and not merely its right to carry on the business—and by Section 120, already quoted, it is provided that the secretary of state, under the direction of the tax commission, may, for failure to pay the tax, cancel, not the certificate of subscription, but the articles of incorporation.

The questions which you submit are perhaps somewhat doubtful. I have, however, in accordance with the foregoing reasoning, come to the following conclusions:

When articles or incorporation have been procured from the secretary of state there is in existence a corporation "organized under the laws of this state" within the meaning of Section 5495 et seq., General Code; such corporation is not entitled to the certificate provided for in Section 5521, General Code, when it has filed no report and paid no annual fee as required by said sections; in case of default in making report or paying fee, on the part of such a corporation, the tax commission may certify the corporation to the secretary of state, who must then cancel its articles of incorporation as provided in Section 5509, General Code.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

297.

TAXES AND TAXATION—CORPORATIONS—WILLIS TAX LAWS—COLLECTION OF PENALTIES FOR DELINQUENCY OF REPORTS AND FEES—DUTIES OF STATE AUDITOR, TREASURER, TAX COMMISSION AND ATTORNEY GENERAL.

The intention of the Act of 1910 *seems to be that penalties against corporations shall not be collected by the Treasurer, but that the same shall be collected by the Tax Commission or the Attorney General.*

The Auditor of State in certifying fees to the Treasurer of State for collection is not to add penalties for failure to file reports to the amount of a fee due from a foreign or domestic corporation under the act of 1910, *when such fee has for the first time been certified to him by the Tax Commission.*

With respect to foreign and domestic corporations, delinquent for reports and payment fees under the Willis Tax Law for years preceding the year 1910, *it is the duty of the Tax Commission in the exercise of the powers formerly conferred upon the Secretary of State, to which it succeeds, to collect such penalties or to certify the delinquency of the companies to the Attorney General for action thereon under provision of Section* 5535, *General Code. It is not the duty of the Auditor to add any penalty to sums certified to him in this relation, for certification for collection to the Treasurer of State. This method may be followed, however, if all officers are willing.*

Prior to the year 1911, *it was not the duty of any officer of state except the Attorney General, to collect any penalties for failure of a public utility to file a statement due under the "Cole" law. The above principles also apply to the duty of the Auditor in this connection.*

Action of the Commission, under Section 72, General Code, however, may effect a modification of the above rules.

COLUMBUS, OHIO, November 28, 1911.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of October 9th, receipt whereof is acknowledged, you request my opinion upon the following questions:

"(1) Section 94 of the Act of May 10, 1910, (101 O. L., 399) provides that 'if a corporation, other than public utility, required to file a report and pay the fee prescribed in the act, fails or neglects to make such report as required, it shall be subject to a penalty of fifteen per cent of the amount of the fee required to be paid by it.' Section 95 provides that such penalty may be recovered by an action in the name of the state.

"The commission has certified to the auditor of state a number of companies which failed to file reports within the time prescribed in said Act. The commission in its order found that each of said corporations was delinquent for report and liable for the penalties provided by law for failure to file the same, and ordered that the auditor of state be so advised.

"*Query.* Is it the duty of the auditor of state to add a penalty of fifteen per cent. to the amount of the fee required to be paid by each such delinquent corporations, before certifying the same to the treasurer of state for collection?

"(2) A number of foreign and domestic corporations, delinquent for reports and payment of fees under Sections 5522-5542 of the General Code, commonly known as the 'Willis Law,' for years preceding the year 1910, were at the same time certified to the auditor of state with like advice.

"Section 5534 provided that if a corporation required to file report fails or neglects to make such report within the period prescribed, it shall be subject to a penalty of fifty per cent. of the amount of the fee required to be paid by it, with an additional penalty of ten dollars per day for each day's omission after the time limited for filing such report.

"Section 5535 provided for collection of such fees by an action instituted by the attorney general.

"*Query.* Is it the duty of the auditor of state to add a penalty of fifty per cent. or any other amount, before certifying the same to the treasurer of state for collection?

"(3) The commission at the same time certified to the auditor of state a number of public utility companies delinquent for the year 1910, and one company delinquent for the years 1908 and 1909, each of which companies was found to be delinquent for report and subject to the penalties provided by law for failure to file the same, and the auditor of state advised accordingly.

"Section 110 of the Act of May 10, 1910, provides certain penalties for failure to make report within the time prescribed in the Act, it being made a misdemeanor for any officer, agent or employe of any public utility company to fail or refuse to fill out and return blanks as required by the Act or to answer questions, etc., and making the company, if such agent or employe acted in obedience to the direction, instruction or request of such utility, or any general officer thereof, subject to a penalty of not less than five hundred dollars nor more than one thousand dollars.

"Section 5508 of the General Code (repealed by the Act of May 10, 1910) provided for a penalty of five hundred dollars on each public utility failing to make report.

"*Query.* What is the duty of the auditor of state with reference

to adding any penalty to the amount of the tax before certifying the same to the treasurer of state for collection?"

Answering your first question I beg to state that I have carefully examined the Act of May 10, 1910, referred to by you and fail to find therein any provision whatever as to the manner of collecting the penalties provided for by Section 94 thereof, save and excepting the provision of Section 95 to the effect that the penalty may be recovered by an action in the name of the state, which in turn, by the provisions of Section 96, is to be instituted by the Attorney General on the request of the Commission. The sole duty of the Auditor of State, with respect to the collection of annual fees from corporations, is defined by Sections 84, 87, 90, 91 and 92 of the Act of May 10, 1910, 101 O. L., 422-4 as follows:

Section 84..

"Upon the filing of the report provided in sections 82 and 83 of this act, the commission * * * shall report to the auditor of state, who shall charge and certify for collection * * * a fee of three-twentieths of one per cent. upon its subscribed or issued and out-standing capital stock * * *."

Section 87.

"Upon the filing of the report provided for in the last two preceding sections the commission * * * shall determine the proportion of the authorized capital stock of the company represented by its property and business in this state, a * * * * and shall report the same to the auditor of state who shall charge and certify to the treasurer of state * * * * for collection * * * * one-tenth of one per cent. for the year 1910 and three-twentieth of one per cent. for each year thereafter upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in this state."

Section 90.

"Upon the filing of such report as provided for in the last two preceding sections, the commission shall report to the auditor of state * * * who shall charge and certify to the treasurer of state * * * for collection * * * a fee of ten dollars from each corporation organized as a mutual insurance corporation, etc."

Section 91.

"Upon the filing of the report provided for in sections eighty-eight and eighty-nine of this act the commission shall report to the auditor of state * * * who shall charge and certify to the treasurer of state * * * for collection * * * one dollar from each corporation * * * not organized for profit."

Section 92.

"Upon the filing of the report and the payment of the fee provided for in sections eighty-two to one hundred inclusive of this act to

> the treasurer of state, the auditor of state shall make out and deliver to the corporations so paying, a certificate of the compliance by such corporation with said sections of this act, and the payment of the annual fee therein provided for. The auditor of state shall make a report monthly to the commission of the annual fees collected."

Full machinery is thus provided for the certification to the treasurer of state for collection of the principles of the fees payable under those provisions of the Act of 1910, which is familiarly known as the "Willis Law." No provision whatever is made for the preparation of duplicates or certificates for the treasurer's guidance in collecting the penalties in case of delinquency. On the contrary the intention of the act of 1910 seems to be that the treasurer shall not collect penalties, but that the same shall be collected by the Tax Commission of the Attorney General.

Section 102 of the act of June 2, 1911, 102 O. L. 248 contains quite a different provision in this respect. It is as follows:

> "* * * if any corporation fails or refuses to pay *on or before the dates fixed in this act,* the fee charged against it, the treasurer of state shall certify the list of such * * * corporations so delinquent to the auditor of state who shall add to the tax or fee due a penalty of fifteen per cent. thereon. The auditor of state shall thereupon forthwith prepare proper duplicates and reports of such taxes and fees and penalties thereon and certify them to the treasurer for collection. Thirty days after he receives such duplicates or delinquent taxes and fees and penalties thereon from the auditor of state, the treasurer of state shall certify to the commission a list of such public utilities and corporations as have failed to pay such taxes and penalties thereon."

Section 103 then provides that the fees and penalties may be recovered by action in the name of the state, etc., in language quite similar to that of Sections 95 and 96 of the act of 1910 above quoted and referred to.

However, these provisions of the act of 1911, in my opinion, do not apply to delinquencies under the act of 1910, but only to corporations delinquent under the act of 1911 unless perhaps the action of the commission was under Section 72 of the act of 1911. This section is quite lengthy, but authorizes in general the correction by the commission of the returns and reports made in former years, and the certification by the commission for collection "as required in *this* act" of the fees or taxes upon the facts ascertained by it.

In no event, however, in my opinion, is the auditor of state authorized or required to add to the amount of the fee due from a foreign or domestic corporation under the provisions of the act of 1910 for the first time certified to him by the commission for collection any sum whatever by way of penalties for failure to file reports, before certifying the principal fees themselves to the treasurer of state for collection.

The reasons above given support a similar answer to your second question, although the statutes are not precisely the same. Indeed, there are differences in the related statutes which are fundamental. Thus Sections 5524, 5527, 5530 and 5531, General Code, authorized and required by the Secretary of State to collect what were popularly known as "Willis Law" fees from corporations, while another section required him to pay the amounts so collected into the state treasury. These sections were simply repealed by the act of May 10, 1910, not, however, with any intention of waiving the rights of the state as to reports and fees due but not furnished

thereunder as is apparent from Section 123 of the act of 1910, which expressly provides, "this act shall not in any manner affect existing causes of action or pending action, proceedings or prosecutions."

However, Section 115 of the act made it clear that the Legislature did not intend that the Secretary of State should continue to exercise his powers as to the unpaid fees and the reports not yet furnished at the time of the passage of that act. It provides that,

> "* * * any power or duty which has heretofore been conferred upon any state *.* * officer * * * which power and duty is hereby conferred upon the commission, is hereby imposed and conferred upon the commission created by this act."

Evidently then the Tax Commission was, under the act of 1910, to exercise all the powers and duties of the Secretary of State with respect to the collection of franchise taxes from domestic and foreign corporations.

The above quoted language of Section 115 is repeated in the act of 1911. See Section 35 thereof, 102 O. L. 229.

Under these sections then it is my opinion that the Auditor of State is not required to make up any duplicates whatever for the collection of fees under the original Willis Law, but that if the Commission so desires it may, upon the filing of a report by a corporation which failed to file a report for the years preceding the year 1910 collect the fee and pay it into the state treasury upon the warrant of the auditor. Here again, however, the same exception must be made as to the action of the commission under Section 72 of the act of 1911.

It is, therefore, my opinion as to your second question that in general it is not, the duty of the Auditor of State to add any penalty to the principal sums certified to him as due from corporations which failed to make reports under the Willis Law for the years prior to 1910, nor is it his duty to certify the fees due from such corporations to the Treasurer of State for collection at all. Convenience, however, would seem to dictate that the collection be made by the Treasurer of State, and if the officers concerned are willing I suggest that this method be followed.

In connection with your second question I beg to advise that it is my opinion it is the duty of the commission to collect the penalty or certify the deliquency of the companies to the Attorney General for his action thereon as provided in Section 5535, General Code.

Nevertheless, as above suggested, if other officers of the state are willing to collect these penalties I am sure I would be glad to be relieved of the burden of collecting them, although the law seems to require that I do so.

For the reasons above stated I am clearly of the opinion with respect to your third question that prior to the year 1911 it was not the duty of any officer of the state save the Attorney General to collect any penalties for failure of a public utility to file a statement due from it under what was popularly known as the "Cole Law." With the same qualification respecting the action of the commission under Section 72, I beg to advise that in my opinion the Auditor of State is not authorized to add any penalty to the amount computed by him as being the excise tax of such public utility for any year or years preceding the year 1911 because of a failure of the utility to file statements in such year or years.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

422

TAXES AND TAXATION—REAL ESTATE CONVERTED INTO NON-TAXABLE BONDS NEED NOT BE LISTED—MONEYS, CREDITS OR OTHER "EFFECTS" INCLUDE ONLY PERSONAL PROPERTY.

The words "other effects" in item 16 of Section 5376, General Code, providing for the listing of the average monthly value of moneys, credits, or other effects, which have been converted into non-taxable securities, comprehends personal property only. Real estate converted directly into said bonds need not, therefore, be listed.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 7, requesting my opinion as to the following question:

> "Item 16 of Section 5376, G. C., requires the statement of a person required to list property to truly and distinctly set forth 'the monthly average amount or value, for the time he held or controlled them, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April."
>
> "*Query:* Does this provision cover real estate converted into such bonds?"

I find no decision construing Section 5376 with reference to the question which your raise. The matter is one for the application of the ordinary rules of statutory construction. The ultimate inquiry is, of course, as to the meaning of the word "effects" as here used. The following definitions are given to this term

> "Goods; movables; personal estate. In law:
> (a) property; whatever can be turned into money.
> (b) personal property." (Century Dictionary).
>
> "Goods; movables; personal estate * * * sometimes used to embrace real as well as personal property." (Webster's International Dictionary).

If these lexicons are correct, then the term under discussion is capable of two meanings—one limited in its significance to movable things, the other broad enough to include all things capable of ownership. These definitions both relate primarily to the meaning of the word as used without qualification and in the absence of a context which in any way modifies it. There seems to be some conflict of authority as to the true meaning of the word "effects" when so used in the cases cited in "Words and Phrases Judicially Defined," volume 3, pages 2330 et seq. On the whole, however, the weight of authority seems to be the effect that the primary meaning of the words is their restricted one, the border meaning being given to them only under stress of some circumstances showing an intent to use the word in such a sense; thus the cases in which the term is held to include real property, are those in which a testator has defined "all his effects," such a device

being held sufficient to pass real property. Most of the cases arising under the statutes hold the primary meaning of the word to be the restricted one.

I do not enter into a discussion of all the cases, however, because, conceding that the word has two meanings, it is not used in Section 5376 by itself, nor without the assistance of a context,, which, upon the application of well understood principles of statutory construction, discloses the sense in which the word was intended to be used. The whole phrase under consideration is "all moneys, credits or other effects." Here we have a word capable of a restricted meaning and a general one following an enumeration of particular things of the restricted class. A more perfect instance of the application of the rule of *ejusdem generis* could scarcely be afforded. The rule applied to the phrase would result in a provision of it as a whole,—"all moneys, credits, or other effects *of the same kind.*" The broadest meaning which it would be possible to give to the word "effects" under this rule would be that which would include all personal estate as distinguished from real estate I am disposed to give the statutes a liberal construction, and for that reason would extend the meaning of the word to all personal property, although a thorough-going application of the rule of construction would result in the meaning of the term being still further limited so as to exclude specific tangible personal property.

For the reasons above suggested I am of the opinion that the provisions of Section 5376 of the General Code, as to the statement to be made in item 16 of the tax list do not cover real estate converted into non-taxable bonds, and that the taxpayer need not return the monthly average value of the funds coverted into such non-taxable bonds for the time that the same were invested in real estate.

Authorities which might be cited are:

Ennis vs. Smith, 55 U. S., 400.
McKleroy vs. Cantey, 95 Ala., 295.
Bank vs. Electric Light Compony, 97 Ala., 465.
Rawlins vs. Jennings, 13 Bes., 38.
De Cordova vs. Kanowles, 37 Tex., 19.

I am aware of no equitable reason that, carefully considered, would impel a conclusion different from that which I have stated; nor does the constitutional limitation to the effect that laws taxing real and personal property shall be by uniform rule affect the opinion which I have expressed.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

442.

TAXES AND TAXATION—CORPORATIONS—MAY BE REQUIRED BY AUDITOR TO FILL OUT INQUISITORIAL BLANKS UPON AMOUNT OF MONEYS, CREDITS AND VALUES.

The county auditor may require a corporation to fill out blanks containing questions relating to real estate, credits, moneys and values owned.

The power follows from the auditor's power in the correction of returns, to compel attendance and to require answers to all questions under penalty of the contempt procedure of the probate court.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested my opinion upon an inquiry submitted by Hon. Daniel J. Ryan, General Counsel for the Ohio Manufacturers' Association, which is as follows:

> "What authority of law is there for the inclusion in the blanks for the returns of incorporated companies of questions 7, 8, 14, 19, 20, 21 and 22?"

Mr. Ryan states in his letter that there is objection on the part of many manufacturers doing business under corporate organization to some or all of these questions as unnecessarily inquisitorial.

The questions are as follows:

> "7. The market value of its shares of capital stock is—
>
> "8. The actual value (if there is no market value) of its shares of capital stock is—
>
> "14. The amount of fire insurance carried on buildings in Franklin county is—
>
> "15. The amount of fire insurance carried on other property in Franklin county is—
>
> "19. The amount of accounts payable and bills payable in Franklin county on the day preceding the second Monday of April, 1912, was—
>
> "20. The amount of the last inventory of real and personal property in Franklin county was:
>
> "21. The amount of the last inventory of real and personal property in Ohio and outside of Franklin county was—
>
> "22. The amount of the last inventory of real and personal property outside of Ohio was—"

Section 5406 of the General Code requires the county auditor to furnish blanks for the making of returns by incorporated companies.

The form of such blanks is not prescribed by statute, and I am of the opinion that the outline set forth in Section 5376 of the General Code of items which shall be set forth in the personal property return of a natural person is not applicable to the return of a corporation.

It is, therefore, incumbent upon the county auditor to furnish to each corporation a blank which shall enable the corporation to list its personal property subject to taxation. That is, as defined by Section 5404 of the General Code, "all the personal property thereof, and all real estate necessary to the daily operations of the company, monies and credits of such company or corporation within the state, at the true value in money."

The section last above cited, together with Section 5405, as amended at 102

O. L. 61, discloses that the purpose of this legislation is to secure from each corporation a full and complete return of everything it owns in Ohio, as well intangible things of value as tangible property.

Theoretically, the aggregate value of the shares of capital stock of the corporation equals the value of all of its property and interests. This principle is universally recognized. At the very least, such aggregate value of shares of stock is a fact of importance, in connection with other facts, in determining what the property and interests of a corporation are worth in money.

Thus, questions 7 and 8, above quoted, are seen to have a direct and substantial value and use in aiding the taxing authorities in the discharge of their duties.

It scarcely seems necessary to comment on questions 14 and 15. Surely the amount of insurance carried upon buildings and personal property affords something of an index as to the value of such buildings and property.

Question 19 is of importance because corporations are required to return for taxation all their credits in Ohio. The term "credits" is defined in Section 5327, General Code, to be "the excess of the sum of all legal claims and demands * * * due to the person liable to pay taxes thereon * * * when added together * * * over and above the sum of legal bona fide debts owing by such person." Question 19 simply informs the taxing authorities as to what deductions may lawfully be made from the sum of the amounts shown in answer to questions 17 and 18, which are not quoted.

There is surely no question as to the aptness of this question.

Questions 20 to 22, inclusive, relate to the amount of inventories of real and personal property in the county, outside of the county in the state, and outside of the state respectively. The answers to these questions are of value to the taxing authorities because they show the distribution of the property and, in connection with the answers to questions 7 and 8, indicate the proportion of the intangible interests of the corporation represented by tangible property in the county, and the apportionment therein in accordance with the rule set forth in Section 5405. Furthermore, the taxing authorities are entitled to know the book value of the assets of the corporation which they are assessing.

What I have thus far said relates to the use which the taxing authorities may make of the answers to the mooted questions. Such answers are doubtless useful in other ways than those which I have stated.

It is sufficient, however, to observe in conclusion as to these points that the questions are material and relevant to the issue to be determined by the county auditor.

As to the power of the county auditor to include in his blank any questions which are thus material, I think it is sufficient to point out that under Sections 5398 to 5403, inclusive, of the General Code, a county auditor has the power in the correction of returns filed with him, to call before him any persons having knowledge of the value of the property in question, and inquire of them, under oath, as to the value thereof.

The auditor is given compulsory process to enforce attendance of witnesses under the sanction of contempt proceedings, as set forth in Section 5403; so that, if an officer of a corporation be called before a county auditor and a question were put to him by the auditor "touching the matter under examination," as Section 5403 has it, and should refuse to answer the same, he might be visited with the penalties of contempt of the probate court.

Now, all of the questions under consideration are clearly questions "touching the matter under examination," or which is to be under examination by the county auditor, i. e., the value of all of the real and personal property, monies and credits of the corporation in the county.

I know of no reason why the auditor may not include in his blanks any

questions which he could ask an officer of the company on the witness stand; to hold otherwise would make it necessary, in order that the tax laws should be properly enforced, and a just and equal valuation of incorporated property secured, for the county auditor, or the board of review, or equalization to summon and to examine under oath the officers of all the corporations under their jurisdiction, and themselves to examine into the books of all such corporations.

By answering the questions, concerning which Mr. Ryan inquires, the corporations will avoid the unpleasant and inconvenient consequences of such a cumbersome procedure.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

453.

TAXES AND TAXATION—CORPORATIONS—CREDITS OF NON-RESIDENT CORPORATION—DOMICILE AND RESIDENCE—CONSTITUTIONAL LAW AS TO CORPORATIONS TAXED AS PRIVATE PERSONS—"CONSTITUENT ACTS"—LOCALIZATION OF CREDITS—TAXATION OF AGENTS—NO DEDUCTION OF OUTSTANDING CHECKS FROM RETURN OF BANK DEPOSITS.

Section 5404 of the General Code, in providing for the tax of credits existing in Ohio, belonging to non-resident corporations, does not violate Artivle XIII, Section 4 of the Constitution of Ohio, providing that the property of corporations shall be taxed the same as individuals, for the reason that the credits of non-resident private persons may also be taxed through resident agents.

Credits of a non-resident corporation may be taxed in Ohio, only when they are "localized" by being committed to the charge and management of an agent or other representative who is more than a mere custodian or collector and who has power to deal in a managerial capacity with the fund represented by the credit.

A corporation cannot have a legal residence apart from its domicile and it conducts business in states other than the state of its incorporation, only through agencies.

The "constituent acts," that is, those acts which are necessary to the organization and existence of the corporation itself or its final dissolution, must be performed within the limits of the sovereignty which creates the corporation. Its other business may be conducted in other jurisdictions through its officers acting as agents. The state in which such other business is done, therefore, may tax such credits as are "localized" therein, that is, such as are fully and completely controlled and managed therein, and if all of the business except the "constituent" acts are so managed and controlled therein, the property used in and the credits growing out of such business, may be taxed therein.

A state may also tax all debts due a non-resident corporation from resident debtors regardless of the place where the debt was contracted.

Outsanding checks which are not certified, may not be deducted from a return to the auditor of the amount of deposits held in bank on the second Monday of April. Such checks are debts, however, and may be deducted from credits listed by the taxpayers.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Some time ago you referred to this department a file of correspondence between the Commission and the Board of Review for the City of

Columbus, disclosing the existence of a question as to the taxation of the credits of The W. M. Ritter Lumber Company. The correspondence in question comprises the following:

A letter addressed to the Tax Commission by the Board of Review; a letter addressed to the Board of Review by Mr. Talfourd P. Linn, counsel for the company; and certain confidential data belonging to the Board of Review.

In addition to the foregoing I have examined and considered a brief, submitted on behalf of the company by Messrs. J. J. Divine and Talfourd P. Linn.

The facts stated in Mr. Linn's letter, and elaborated upon in the brief, and which do not seem to be disputed by the Board of Review, are as follows:

> "The W. M. Ritter Lumber Company is a corporation organized under the laws of West Virginia, with its principal place of business at Welch, in that state. In conformity to the provisions of its charter, all of its stockholders' meetings, and some of its directors' meetings, are held at Welch, W. Va. The business of the company, as may be inferred from its name, is that of manufacturing the lumber of commerce from the raw material, known as timber. Its manufacturing operations are variously located; some of them are in the state of West Virginia, one of them being at or near the said corporation of Welch; others are in Kentucky, Virginia and North Carolina; none are in Ohio. At each of these plants there are administrative offices, maintained by clerical forces. The company also owns large tracts of timber land in several states. As a natural corollary to its manufacturing business, the company engages in the sale of its manufactured product, through agents and to customers in various parts of the United States.
>
> "The company's principal business office is located at Columbus, Ohio. Here are located the offices of its executive officers and agents, and here books of account, showing all of its debits and credits are kept. The exact manner of administering the affairs of the corporation, through this Columbus office, is as follows:
>
> "'Orders for the company's products are placed with its selling agents in different parts of the country. Whether or not all of these orders are transmitted to the Columbus office and by it to one or the other of the plants owned by the company is not stated, nor, in the view I take of the case, is this fact material. At any rate, when an order is filled, the Columbus office is notified and entries are made on the books kept there, showing the existence of credit arising from such sale. The company frequently takes notes from its customers to secure the payment of accounts owned by them to it, and these are transmitted to the Columbus office and there held until due.
>
> "'When on account or note held by the company becomes due it is transmitted for collection from the Columbus office to an agent of the company residing near the debtor's place of residence or to some bank with which the company has an account, which said bank collects the same and deposits it to the credit of the company. The Columbus office and the bank used by the company in the city of Columbus constitute the Columbus agency for Ohio accounts, but not for those arising from business transacted outside of Ohio. The moneys deposited in the several banks used by the company, as above referred to, are expended in maintaining the company's various plants and, of course, in part, in maintaining the Columbus office and in the salaries of the executive officers

of the company, who are paid through said office. Surplus profits, reaped by the company, are distributed or reinvested as determined by the directors of the corporation.

"'The company has returned for taxation its credits, arising from sales in Ohio only.

"'On the day preceding the second Monday of April the books of the bank in which all of the cash, excepting a small amount held by the company in Ohio, was deposited, showed a balance in the company's favor of some nineteen thousand dollars; on the same day the check stubs and ledgers of the company showed the balance in this account to be approximately five thousand dollars, the difference being accounted for by outstanding checks which had not been paid by the bank.'"

Two questions are submitted by the Board of Review upon the foregoing facts:

1. Has the company made full return of its credits taxable in Ohio; or are all the credits of the company, arising from sales, wherever consummated, taxable here?

2. What amount of money in bank should be returned for taxation by the company?

There is a suggestion in the letter of the Board of Review as to the personal returns of two of the executive officers of the company, but no facts are submitted showing the nature of the question which is in the minds of the members of the board.

I have given very careful consideration to the first of the two questions above stated, because I have apprehended that the facts, as I have outlined them, might be typical of a very large number of cases. I have heretofore considered questions quite similar to but not identical with this question, and have embodied my conclusions thereon in other opinions, addressed to you; thus, in an opinion under date of September 13, 1911, I had before me the following question, submitted by you:

"A New York company claiming to maintain its principal office in that state, but in fact keeping its books at the office *of its factory* in this state, where it has its headquarters, and where one of the principal owners resides, and where it is admitted by the officers of the company that everything is kept, showing its debts and credits—

"QUESTION: Should such credits be returned by the company and assessed and taxed in this state, where its headquarters are located and such books and records are kept?"

To this question I returned the following answer:

"In my opinion a foreign corporation which maintains its nominal principal office in another state, must return as part of its credits, subject, of course, to proper deduction, and at the true value in money, such claims and demands due the company and for which the evidences of indebtedness, consisting of books, accounts and other papers are kept in Ohio; and if, in point of fact, such a foreign corporation maintains its only factory in this state and there maintains headquarters and keeps its books and papers, excepting its mere corporate records, a very strong presumption, to be rebutted only by the most convincing testimony, will

exist that all of the credits of such corporation should be listed and assessed at the office of the company in Ohio. Hubbard vs. Brush, 61 O. S. 252."

I call attention to this opinion solely for the purpose of distinguishing the case there considered from the one now under consideration. In that case all of the capital of the corporation was invested in Ohio; its only plant was here established and operated, and its affairs were completely managed in this state, excepting the mere formal proceedings incident to the selection of its officers, etc. Here, the capital of the corporation is invested in several states and the function of management seems to be similarly divided among different jurisdictions. In a sense, the Columbus office of The W. M. Ritter Lumber Company is its managing office; in another sense, however, this conclusion would not follow.

I think it is obvious, however, to any one who has made even a cursory study of the subject, that the case of Hubbard vs. Brush, supra, must be examined in connection with the question now presented. The syllabus of that case is in part as follows:

"Choses in action, whether book accounts, promissory notes, or the like, of foreign corporations that are kept in this state *and arise out of the corporate business transacted here,* are subject to taxation under the provisions of Section 2744, Revised Statutes."

The exact question involved in this case, as a full report of the same shows, was as to whether or not, under a statute which provided that "no person shall be required to list for taxation any shares * * * of the capital stock of any company the capital stock of which is taxed in the name of such company," a resident owner of the shares of stock of a certain foreign corporation, having property situated in Ohio, should return the same for taxation. In approaching the ultimate question the court, following Leo 2 vs. Sturges, 46 O. S. 153, and Sturges vs. Carter, 114 U. S. 511, construed the statute in question as affording an exemption to the owners of capital stock of such foreign corporations only, all of whose property was subject to taxation in Ohio. Thereupon, the court proceeded to inquire as to whether or not all of the property of the corporation in question was taxable in Ohio. These facts explain the significance of the first branch of the syllabus in the case, which is as follows:

"Where *all* the business of a foreign corporation is transacted in this state, and *all* of its property stipulated and taxed here, shares of its capital stock held in this state are exempt from taxation by force of Section 2746, Revised Statutes."

Having in mind, then, the question before the court it is readily seen that it does not necessarily follow from the decision that in order that the credits of a foreign corporation should be taxable in Ohio all of its property should be situated and taxed in that state; at least that was not the point decided by the court.

It does seem to follow, however, from the second branch of the syllabus, above quoted, that only those credits arising from the business transacted in Ohio are subject to taxation in this state.

The facts upon which this decision was predicated, as found by the circuit court, and as reported on page 260 of the supreme court report, are in substance as follows:

"The Sandusky Portland Cement Company is * * * a corporation organized under the laws of the state of West Virginia, having its princi-

pal office and principal place of doing business in Erie County, Ohio * * * and engaged solely in the business of extracting from its lands in said Erie County, the materials for Portland cement, and manufacturing such cement from such materials upon said lands in said county and there selling the same. All of its * * * property, except * * * accounts receivable, was listed for taxation in the name of said company, and taxed in the name of said company in 1895, in said county. The company had no office and did no business in West Virginia, during the time referred to."

The legal proposition embraced in the second branch of the syllabus, above quoted, are discussed by Bradbury, C. J. on pages 262 to 264, inclusive, of the report, as follows:

"The finding of the circuit court, in as far as it reflects on this question, shows that the corporation whose stock defendant in error held, was a foreign corporation, but that all of its property was situated within this state and its business wholly conducted herein. Whatever situs, in fact, it choses in action possessed, was also herein, for it appears that it maintained no office, and did no business whatever in West Virginia, the state by which it was created, but that its office was in this state where its property was situated and its business transacted. And whether these choses in action consisted of promissory notes, book accounts or other evidence of indebtedness, they must be presumed to have been kept in its office in this state. However, notwithstanding all this, doubtless the legal situs of this intangible property for most purposes, was that of the residence of the corporation, which, in law, is within the state by whose authority it was created. Bank of Augusta vs. Earle, 13 Pet. 519; B. & O. R. R. Co. vs. Cary, 28 Ohio St. 208; Bridge Co. vs Mayer, 31 Ohio St., 317; 25 Am. and Eng. Ency. of Law (1st Ed.), 146.

"Does that situs for all purposes adhere to the corporate residence, or may choses in action, having the relation, connection and situation in which these were found, be held to possess such a situs in this state as will clothe the state with jurisdiction over them for taxation? The state attempts by Section 2744, Revised Statutes, to assert and exercise such power or jurisdiction. The section, so far as it relates to this subject, reads as follows: Section 2744. 'The president, secretary * * * of every joint stock company, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation * * * all the personal property, which shall be held to include * * * credits of such company or corporation within this state.'

"We perceive no reason for denying to the state the power asserted by this section. If men choose to resort to another state or country for authority to organize a corporation for the purpose of engaging in business in this state. or if that was not their original purpose, chose afterwards to plant themselves herein, and in either case transact the corporate property wholly within our borders, and enjoy the protection of our laws, it is only just and reasonable that its property should be subject to taxation herein as fully as if its organization had been effected under our own laws, and the right of taxation should not be defeated nor limited upon the ground that for some other purpose the situs of a part

of its property should be regarded as being in the state or country where the corporation was organized.

"Where foreign corporations voluntarily bring their property and business into this state to avail themselves of advantages found here which they believe will enhance the probabilities that the business they intend to pursue will be profitable, they should not be heard to complain of laws which tax them as domestic corporations are taxed by the state. We hold, therefore, that the provisions of Section 2744, which make it the duty of foreign corporations to list for taxation in this state, their choses in action where they are held within this state and grow out of the business they conduct herein, is a valid exercise of the taxing powers vested in the state. This holding finds support in many adjudications, among which may be cited The People ex rel. vs. The Village of Ogdensburgh, 48 N. Y., 390; Redmond vs. Commissioner, 87 N. Car., 122; State ex rel. Taylor, Adm'r, vs. St. Louis County Court, 47 Mo., 594."

Section 2744, Revised Statutes, analyzed by the court in this case, has become Section 5404, General Code, which, at the time the question under consideration arose, read, substantially, as abstracted in the above quotation. The section has since been amended in other particulars and not so as to affect the present question. It is perfectly obvious, I think, although the court does not explicitly so hold, that as to corporations, the legislation of Ohio is intended to tax all credits existing in Ohio regardless of the technical domicile of the owner.

Some question might be raised, in the absence of the decision in Hubbard vs. Brush, as to the scope and effect of this legislation under Article XIII, Section 4, of the Constitution, which provides that, "The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals." This section of the constitution, referred to and seemingly so applied in Cleveland Trust Company vs Lander, 62 O. S. 266, appears to prohibit the imposition upon corporations of burdens of property taxation not imposed in equal measure upon individuals. That being the case the provisions of Section 5328, General Code, as compared with those of Section 5404, above referred to, take on a peculiar aspect. Said Section 5328 provides as follows:

"All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. * * *."

It is to be seen from this section that natural persons, not resident of the state, are not to be taxed herein upon their intangible property, whereas under Section 5404, as interpreted in Hubbard vs. Brush, supra, a corporation not technically a resident of the state is taxed on all moneys and credits having a situs here. This apparent inconsistency is cleared up by the provisions of the general tax laws requiring agents and trustees having the power to control and invest funds of non-residents in Ohio, to list the same for taxation, and also upon the theory that the corporation concerned in Hubbard vs. Brush, supra, was regarded by the courts as a resident of Ohio, though not technically domiciled therein. At any rate, further discussion of these statutes is rendered unnecessary by the positive decision of Hubbard vs. Brush.

From that decision it necessarily follows that it is possible for a foreign corporation so to conduct its affairs in Ohio as to create a situs to which all of its credits shall be referable.

It is also apparent that where all the property of a corporation is owned in Ohio, and all of its business is there transacted, this possibility is realized. It seems also to be established, by the second branch of the syllabus in Hubbard vs. Brush, although not necessary to the decision of the case, that any credits of a foreign corporation arising from business transacted in Ohio are taxable here under Section 5404.

These propositions, however, are far from conclusive of the question under consideration, as under the facts above stated the Wm. M. Ritter Lumber Company does not own and use all of its property in Ohio, and whether or not it transacts all of its business in Ohio by virtue of the fact that its principal business office is there located is a very serious question. Again, whether or not the keeping of books of account and the ordinary administration of its affairs at and through its Columbus office constitute the transaction of all of the business of the corporation so as to make all of its credits referable to that office is very uncertain. It is manifest, therefore, that authorities other than Hubbard vs. Brush, if any exist, must be examined in order to furnish an answer to the question now under consideration.

Now, it is manifest, as I have already stated, that Ohio intends to tax all credits of corporations within its territorial jurisdiction. It is also obvious, as conceded by the court in its opinion, that the general rule is that the situs for taxation purposes of credits, and especially book accounts, the most "intangible" of all property rights, is the domicile or taxing residence of the owner. In other words, the right of the state to tax the credits of foreign corporations arises by reason of an exception to the general rule. As the state has manifestly exerted this right to the utmost of its ability it is necessary only to ascertain what the exception to the rule is.

The three cases cited in the above excerpt from the opinion in Hubbard vs. Bruch, namely; People ex rel. vs. Ogdensburg, 48 N. Y. 390; Redmond vs. Commissioner, 87 N. Car. 122; State ex rel. vs. County Court, 47 Mo. 594, are all representatives of a line of decisions, of which Catlin vs. Hull, 21 Vt. 152, decided in 1849, is the leading case. In this case the court had before it a single question, namely: as to whether or not a statutory provision similar to Section 5370, General Code of Ohio, to the effect that every person, resident of the state, should return for taxation all property and credits owned and controlled by him, as agent,trustee or on account of any other person, applied to agents having the custody, control and management of intangible interests of non-residents of the state. The holding, of course, was that the legislature of Vermont had the power to enact a law subjecting property controlled and managed by an agent, resident therein, for a non-resident of the state to taxation. A very great number of cases have been decided to this general effect; in each one of them the doctrine is stated that credits of a non-resident, in the hands of an agent residing in the state, and subject to his control, with respect to management, investment and reinvestment, are to be regarded as situated in the state for purposes of taxation; thus, in Walker vs. Jack, 88 Fed. 576, a decision of Taft, J., the doctrine is stated as follows:

> "It is within the power of the state to tax money and credits of a non-resident when the money is invested, the deed contracted, and the investment controlled by a resident agent of the owner, having the evidences of debt in his possession."

This decision was rendered directly under what is now Section 5370, General Code, which was then Section 2734, Revised Statutes.

So also, in re Jefferson, 35 Minn. 215, the court, in speaking of the exception

to the general rule that the situs of the credit is the domicle of the owner, uses the following language:

> "The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal with a view to retaining the money and keeping it invested *as a permanent business.*"

In Buck vs. Miller, 147 Ind. 586, a very instructive, although by no means lengthy, discussion of this principle, is found. It appears that the Indiana statute provided that "personal property of non-residents of the state shall be assessed to the owner or to the person having the control thereof, in the township, town or city where the same may be," which provision possesses a meaning substantially identical with that under discussion here. The court, per, Powers, J., on page 589 et seq. of the opinion, makes use of the following language:

> "If personal property is *used in business in this state* it will be assessed here, even though the owner may reside elsewhere; and this must be true of credits and moneys as well as of other forms of personal property. *A business may be done in buying and selling property and making loans and investments, collecting and reloaning the money so used from year to year, and if the money, notes and mortgages, so used, are retained in this state they will be subject to taxation here, as well as any other kind of personal property.* * * *
>
> "The same departure (from the legal fiction that movable things follow the person of the owner) has been taken in regard to notes and evidences of debt in the hands of an agent of the owner who resides in another state or county, which notes are taken for money loaned and held for renewal or collection with the view of reloaning the money by the agent in the same state, *the business being permanent in the hands of the agent.* * * *"

Many other cases exemplify the rule of Larkin vs. Buck. Indeed, our supreme court might as well have cited two Ohio cases on the point, as those actually referred to by it; thus, in Grant vs. Jones, 39 O. S. 506, the rule is recognized and applied; so also in Myers vs. Seaberger, 45 O. S. 232. Curiously enough, practically all the cases decided on this point are those in which the moneys and credits in question were in the hands of an agent in the state for purposes of investment and reinvestment; that is to say, the agent was virtually conducting a separate business for his principal, with full power to manage the same; the nature of the agency was general and not limited. Thus, it might appear that the principle, as stated in the decisions above quoted, may have been through caution, limited to the facts before the court. However, a few cases, and among them, decisions of the supreme court of the United States and of the state of Ohio, serve to illustrate the limitations of the principle and to show that all of the qualifications stated, for example, in the above quotation from Walker vs Jack, and in that from In re Jefferson, are indispensible.

In estate of Fair, 128 Calif, 607, that case involved the right to the taxing authorities of California to collect a tax on bonds held by an agent of a decedent in the state of New York, simply for safe-keeping and without the power to control the investment and reinvestment of the moneys represented by the bonds. The court first held that the bonds in question were not taxable properly as investments, but under the law of California amounted to credits, the subject of taxation being

the debt itself and not the negotiable or non-negotiable paper representing it. Considering, then, the question as to whether or not the bonds were taxable in California, the court seemed to place its decision upon the question as to their taxability in New York, holding that they were not taxable there and should be taxed at the domicile of the owner in California. Catlin vs. Hull, and other decisions of the same nature were expressly distinguished, on the ground that the control and management of the credits or their production in business carried on independently of the principal was an essential element of the rule which permitted a state to tax the credits of a non-resident in the hands of an agent.

In Buck vs. Miller, supra, the following paragraph is found in the decision, immediately succeeding the language already quoted therefrom:

> "If notes and other choses in action were in this state temporarily, however, or in the hands of an attorney for collection merely, it would of course, be different * * * still more where the credit is owned and held in another state by a non-resident of this state * * *."

In Grant vs. Jones, supra, the second branch of the syllabus is as follows:

> "Credits owned by a non-resident of this state are not taxable here, unless they are held within this state by a guardian, trustee, or agent of the owner by whom they must be returned for taxation. The fact that such credits are secured by mortgage on real estate, within this state, does not change the rule that credits are to be taxed at the resident of the creditor, and not of the debtor."

While this decision was under the express terms of what was then Section 2734, Revised Statutes, the court discusses the principle involved independently of the exact statutory language. The following from the opinion, per Johnson, C. H., makes this plain:

> "Our statute clearly adopts that rule. Whenever the person holding such choses in action resides in Ohio, he must list for taxation such credits, whether he holds them as owner, guardian, trustee or agent. If they are held within the state in either capacity, they are within the jurisdiction of the state for purposes of taxation. If they are not so held, but are owned and held by a non-resident, they are not subject to taxation."

In Myers vs. Seaberger, supra, the syllabus is as follows:

> "A loan of money, secured by mortgage on real estate, is a credit within the meaning of the statutes of this state providing for the taxation of property; and where the creditor resides in another state, is not subject to taxation in this, *although the securities are in the hands of an agent residing here, intrusted by the terms of his agency with the collection of the interest and principal when due, and its transmission to the creditor when collected.*"

In Buck vs. Beach, 206 U. S. 392, the Supreme Court of the United States still further narrows the doctrine of Buck vs. Miller, supra. making use, per Mr. Justice Peckham, of the following language: (page 400 et seq.)

> "The sole question * * * for this court is whether the mere presence

of the notes in Indiana constituted the debts, of which the notes were the written evidence, property within the jurisdiction of that state, so that such debts could be therein taxed. * * *

"The Supreme Court of Indiana refused to accept the testimony of the agents that the Ohio notes were sent to Lafayette merely for safe-keeping and for clerical convenience and said that * * * the evidence clearly warranted the conclusion that Buck was vested with the control of said notes and securities for the purpose of enabling decedent to escape taxation in Ohio. We must, therefore, conclude * * * that the court below found that in conducting the business of the Ohio agency the decendent separated from said business the possession of said notes and mortgages and vested the right to such possession in said Buck. * * *

"Taking this to be a finding of fact by the supreme court of the state, it is plain that the action of the decedent in sending the Ohio notes into the state of Indiana * * * was improper and unjustifiable."

so held.

It is very difficult to frame a rule by which the power of the state in this respect can be determined. In Judson on Taxation, Section 397, an effort is made to state the rule as follows:

"The principle established in the construction of state statutes taxing all property within the scope of their operation is that the state can tax whatever personal property it can *localize* within its jurisdiction. * * * It seems that in order for the debt to be subject to the taxing power of the state it must be reduced to a concrete form and evidenced in some tangible shape, as in a note or other written obligation, and must be actually in the state, in the hands of the agent, or otherwise *localized* within its confines for permanent, as distinguished from temporary use."

The last statement contained in this quotation is not strictly accurate, as will be seen from a study of Buck vs. Beach, supra, wherein it is decided that tangible evidence of indebtedness in the hands of an agent for permanent custody only are not taxable by the state in which the agent resides if the principal is a non-resident.

Accepting the rule as above stated, with the qualification which must be made in the light of Buck vs. Beach, the problem becomes the ascertainment of what acts or methods of dealing with credits, on the part of a non-resident and his agents within a state, are sufficient to "localize" the same therein. Courts and text writers have used this term, seemingly fearing to use a more exact and definite one. I think, however, that from all the foregoing cases the following principles may be evolved:

Credits owned by a non-resident are so localized within a state if they are committed to the charge and management of an agent or other representative who is more than a mere custodian or collector and who has power to deal in a managerial capacity with the fund represented by the credit.

If it is difficult, however, to frame a principle from the decisions discussed, it is even more so to apply the same to the facts upon which this opinion is based. Two preliminary questions must be first disposed of, namely:

1. Did the W. M. Ritter Lumber Company, by establishing an office in Columbus, Ohio, where its president and managing officers have their headquarters, and where business details respecting the selling operations of the company are administered and the book accounts and other evidences of indebtedness

owing to the company are kept, acquire there a residence of the corporation as such, district from its domicile, so as to render it a resident of the state of Ohio, in the face of the fact that some of its directors' meetings are supposed to be held in Welch, West Virginia?

2. Are the officers and employes of the company, having headquarters in Columbus, to be regarded as the agents of the corporation, which has a distinct entity at its domicile in West Virginia, for purposes of taxation?

It will be readily seen, of course, that if the answer to the first question suggested be in the affirmative, the case is at once disposed of and the corporation, has an entity, is to be regarded as a resident of Ohio. If, on the other hand, the first question be answered in the negative, and the second in the affirmative, then, the ultimate question to which the above stated principle must be applied is raised, namely: As to the nature and extent of the management of the business of the corporation intrusted to those agents whose offices are in Columbus.

In Pelton vs. Transportation Company, 37 O. S. 450, the question involved was as to the taxing district in which the movable property of a corporation organized under the laws of Ohio should be listed. The certificate of incorporation of the company gave the name of a certain village in Cuyahoga county as the place where the principal office of the company was situated. It appeared that the sole business transacted at this office consisted of the holding of the annual stockholders' meeting and the listing of property for taxation. Detailed business affairs were managed in various cities and the principal accounting office (seemingly corresponding, at least rougly, to the Columbus office of The W. M. Ritter Lumber Company) was located in the State of Vermont, where the president of the company resided and the office of its directors was located. In the opinion of the court, per McIlvaine, J., the following language appears: (Page 455 et seq)

> "For many purposes, a corporation is regarded as having a residence —a certain fixed domicile in this state, where corporations are required to designate in their certificates of incorporation the place of the principal office, such office is the domicile or residence of the corporation. The principal office of a corporation, which constitutes its residence or domicile is not to be determined by the amount of business transacted here or there, but by the place designated in the certificate. True, several offices may be established at the place specified in the certificate, as it is sufficient, under this statute, to specify the 'county *or* place.' But where a single office is established in the county, or township, or city, or other place designated, no further inquiry as to the identity of the principal office is admissible. And, as the statute does not require the office building to be specified, it is competent for the corporation to transfer its principal office from one building to another, within the specified county or place, whenever its own convenience or advantage may be subserved. No doubt, the exact location of the office should be open and notorious, so that a secret or fraudulent removal would not avail any purpose, yet the particular motive in making the change is not material, as, for instance, whether it was done to avoid taxation. If a natural person may change his residence for such purpose (and of this there can be no doubt), we see no reason why a corporation may not do the same. Such removal is not a fraud against tax laws, unless so declared by express legislation."

The entire case is interesting, but I forbear to quote more extensively from the opinion, suffice it to say that it is clearly established therein that as to a

domestic corporation of Ohio *its residence* for purposes of taxation is the place designated in its articles of incorporation as its principal office. The court was construing the provision which is now found in Section 5371, General Code, to the effect that "all other personal property, moneys, credits and investments * * * shall be listed in the township * * * in which the person to be charged with taxes therein *resides* at the time of the listing thereof."

The statute in question has not been amended since this decision. The case then settles the rule as to domestic corporations. It would naturally seem that by parity of reasoning the mere establishment of a principal accounting office where the president resides and the directors sometimes meet, in Ohio, on the part of a corporation domiciled in another state would not constitute such foreign corporation a *resident* of the state for taxation purposes. Indeed, this seems to be the well established rule. The state of the law on this point is exhaustively discussed in Thompson on Corporations, Sections 492 to 504, inclusive, and in other similar works.

I think that the authorities cited by me in this connection completely establish the conclusion that a corporation can have no residence, as such, apart from its legal domicile. This is but another way of stating that when the directors and executive officers of a corporation, taking with them all the business books and records thereof, migrate from the state of origin to another state and there establish a business office, they have not taken with them the thing konwn as the corporation; that remains at the "principal place of business" designated in the charter and the directors, officers and employes of the corporation are simply agents of the corporation, transacting whatever business on its behalf may be committed to their hands by the stockholders, within the confines of the state to which they have removed.

The first preliminary question above suggested, then, must be answered in the negative; the corporation, as such, does not reside in Ohio, no matter to what extent its management is intrusted to officers and agents having headquarters therein.

We are brought, therefore, to the consideration of the second of the two questions last above suggested. For the purpose of ascertaining the extent of the state's power to tax the intangible property of a foreign corporation are the officers and employes of such corporation, resident in Ohio, and their exercising the powers and duties committed to them by the corporation, as such, to be regarded as the managing agencies of the corporation?

This question is not free from doubt. Corporations are generally treated as entities, although they must necessarily act through their officers and agents. So, Section 5404 of the General Code, under which the right of the state to the taxes claimed by the Board of Review in this case is asserted, requires the return to be made for the corporation by the principal accounting officer thereof. No different rule is thereby formulated for the making of the return of a foreign corporation from that laid down as to domestic corporations. On the other hand, however, this section does not in terms require a report or return from the corporation, as such, but from the principal accounting officer thereof. Other sections of the Ohio statutes seem to shed a little clearer light upon this question. Thus, Sections 178 to 182, inclusive, General Code, formerly Section 148-*d*, Revised Statutes, require all foreign corporations, excepting banking, insurance, building and loan and bond investment companies, before doing business in Ohio, to designate its principal place of business within this state, and the kind of business to be transacted here, and to secure a certificate from the secretary of state entitling it to carry on such business; so also, Sections 183 to 191, inclusive, General Code, formerly Section 148-*c*, Revised Statutes, requires all corporations other than

insurance, banking, savings and loan, building and loan or bond investment companies, interstate carriers, and "foreign corporations *entirely* non-resident, soliciting business or making sales in this state, by correspondence or by traveling salesmen" to procure another kind of certificate and to pay a compliance fee based upon the proportion of its entire authorized capital stock "represented by property owned and business transacted in this state."

It could surely not be asserted that the state of Ohio, in this legislation, is attempting to run counter to the established principle that the domicile of the corporation cannot be changed. While it may use terms which signify the admission of the corporation into the state to do business, and while text writers and courts have often spoken of the matter in this light, it seems that what is actually done is to admit to the state the agents and officers of the corporation and to authorize them to carry on all or any part of the business of a corporation there. This is made very clear, it seems to me, by the provisions of Section 182, General Code, formerly a part of Section 148-D, Revised Statutes, which imposes criminal penalties upon persons soliciting or transacting business in Ohio for a foreign corporation which has not complied with the provisions of the preceding section.

The general principle here involved is, it seems to me, well stated in some of the above cited sections of Thompson on Corporations. Thus, in Section 495 the following language is used by the author:

> "* * * It has always been conceded that a corporation can have a permissive existence by *delegation and representation* in a state or county other than that of its creation."

That is to say, the corporation does not change its residence but it may *delegate representatives* to transact any part of its business and to manage any part of its external corporate affairs in a jurisdiction other than that of its origin.

Further in the same section the author says:

> "Where a corporation migrates to another sovereignty and takes with it all its property, together with its business, it has been held that it does not thereby carry its corporate attributes with it. * * * But the court of appeals (of New York) treated (such) corporation as a foreign corporation transacting business in the state of New York; since it still held its annual meetings in the state of Connecticut, which was all that it was required to do under its charter * * * the court expressly said * * * 'its domicile was not controlled by the place where its office was kept, where its books and papers were deposited, or where its business was done * * *.'"

That is to say, it is possible for a corporation to maintain its principal place of business within the meaning of its charter in one state and there to hold the meetings and maintain the organization which pertains to its internal affairs as a corporate entity, and yet to have all its business transacted and managed in another state.

In Section 498 the same author says:

> "The distinction between what is known as migration and its effect * * * *and the removal of the office and offivers of a corporation,* must be borne in mind. * * * Of this principle a Missouri case says, 'Directors are the agents of the corporation and it is now quite well settled that they may hold meetings and transact business in a foreign

> state if they desire to do so unless the contrary is expressly provided by the charter of the general laws of the state under which the corporation was organized.' (citing Missouri Lead Mining Co. vs. Reinhard, 114 Mo. 218) The Illinois Court of Appeals said that 'corporations lawfully may, as they often actually do, remove their officers, agents, offices and effects into another sovereignty and there exercise their functions and franchises.' (Citing Pennsylvania Co. vs. Sloan, 1 Ill. Appeals 364.)"

Here is a suggestion of the vital principle, as it seems to me. A corporation of West Virginia cannot change its domicile as a corporation, but by the laws of West Virginia its corporate powers are to be exercised by certain directors and officers. Those directors and officers are the agents of the corporation—the universal agents, so to speak, with full power to manage and control the exercise of the corporate powers committed to them. Should they leave the state of West Virginia and go into the state of Ohio and there maintain the offices, hold the meetings and transact the business which constitutes the exercise of the corporate powers, they do not, thereby, offend against the law of the corporation's domicile or cause the corporation, as such, to migrate to another sovereignty; but as such agents and officers they are deemed to be transacting the business of the corporation in the state to which they have removed as individuals.

Further, in the same section, the author from whom I am now quoting says:

> "The Supreme Court of Georgia makes a clear distinction between what the law terms its principal office of business and its purely administrative offices; the former is said to be that which pertains to the management and control of the corporate affairs proper, while the latter are those which may from time to time be created by the corporation for the purpose of more conveniently transacting the business for which it was created."

The author states the rule in its entirety in Section 500 of his work, as follows:

> "It is very generally conceded and the authorities are agreed that the performance of *constituent acts,* that is, those acts which are necessary to the organization and existence of the corporation itself, or its final dissolution, must be done within the limits of the sovereignty which created the corporation."

That is to say, The W. M. Ritter Lumber Company must hold its stockholders' meeting at Welch, West Virginia, but it is not without power to transact all of its business from an office located in Columbus, Ohio. The managing officers there residing are its agents, to which it has committed the powers it enjoyed under the West Virginia charter.

The whole matter is summed up by the author in Section 501, as follows:

> "As has been already seen, the residence or citizenship of a corporation is not inconsistent with the location of its office, *the transaction of its business and even a residence of its officers,* in a jurisdiction or sovereignty other than that which has given its corporate life. * * * The general rule now recognized by the authorities is, that a corporation may be organized in one state and transact all of its business in another state in the absence of charter or statutory prohibition."

Indeed, recognition of this principle is found in many of the provisions of Section 178 to 192, inclusive, General Code of Ohio, above cited.

> "So, under these principles," says Mr. Thompson, "it has accordingly been frequently held that boards of directors of corporations may act as such outside the limits of the state unless meetings are prohibited by charter or statute. * * *"

The author states that some states prohibit certain meetings from being held outside of the state of origin and that it is very clear, of course, that at common law, regardless of statutory prohibitions or authorizations, constituent acts—those meetings and official acts relating to the internal management of corporations, as such, must be held and the records thereof kept at the domicile of the corporation.

Ohio cases cited by Mr. Thompson under Section 501, from which quotation has been made, are: Bank vs. Hall, 35 O. S. 158, and Petroleum Company vs. Weare, 27 O. S. 343. I do not quote from these decisions because they do not bear directly upon any question involved in your inquiry.

I am unable to escape the logical conclusion that if the removal of the officers of a corporation from the place of its domicile to a place in another state, and the transaction therein by them of its business, and the management of its affairs, do not operate to change the domicile of the corporation as such, yet, such acts do have the effect of establishing in the second state an agency of the corporation; and if to such agency is committed the management of all the affairs of the corporation, excepting its constituent acts, and excepting also the ultimate disposal of the surplus profits, that agency is taxable in the state where it is located, upon the property used in, and the credits growing out of, the business which it there conducts.

It will be seen that I have answered the second of the above suggested preliminary questions and have come to the conclusion that the removal of the officers of a corporation from the state of its origin to another state, and the transaction by them in that state of some of the corporate business duly committed to them, constitutes them the managing agents of a non-resident, within the rule so accurately defined as to private individuals.

I come now to the ultimate question in the case as made by the facts submitted to me, which said question I would state as follows:

The rule being that a state may tax the credits of a non-resident, which it finds localized within its borders and there used in or growing out of the transaction of business managed and conducted within its jurisdiction, by an agent of the ultimate owner thereof and corporate officers, maintaining definite headquarters within a state other than the state of the corporation's origin, being agents of the corporation within the meaning of that rule, to what extent, if at all, are the credits of The W. M. Ritter Lumber Company, arising from sales in states other than Ohio, localized in Ohio by reason of the establishment of the business office of the concern at Columbus?

Before coming to the discussion of the particular facts of this case it would be well to point out the somewhat unsatisfactory state of the law as disclosed by the adjudicated cases. As I have already pointed out, practically all of the cases which I have already cited, and others to the same effect, relate to the subject of investments. That is to say, the typical case is one in which a non-resident principal has intrusted to his agent, in the state exercising the taxing power, a fund for investment in mortgages, notes and other securities, leaving to the agent a large measure of control and management of the funds so to be invested. I

have been unable to find any case, excepting the two Ohio cases of Hubbard vs. Bush and Pelton vs. Transportation Company, supra, in which the test as to the degree of control of a manufacturing or mercantile business, sufficient to give the credits arising therefrom the situs of the agent's residence, rather than that of the principal, has been involved.

While, therefore, these cases are of service in establishing the principle they do not furnish the ultimate and deciding test.

It is asserted that the limitations on the power of the state to tax credits of non-residents' business are accurately defined in the case of Liverpool & London & Globe Insurance Company of New York vs. Board of Assessors for the Parish of Orleans, 221 U. S. 346. This contention is made in the brief filed with me by counsel for The W. M. Ritter Lumber Company, and it is claimed that in that case the Supreme Court of the United States decided as an abstract proposition that the situs of credits for the purpose of taxation is the domicile of the debtor and that each state is permitted to tax to the creditor or his representative, if found within his territorial jurisdiction, the credits owed—not owned within its boundaries, *and no others;* so that a state has no power to tax a resident principal or agent upon credits arising from business managed by him within its boundaries if the debtors reside in another state.

I do not so interpret the decision, and in order to make my views of it clear, I take the liberty of quoting at some length from the report thereof, and particularly from the opinion of Mr. Justice Hughes, at page 349:

> "The assessment itself is not shown by the record, but, from the testimony, the Supreme Court of the state concluded 'that the property intended to be assessed was the amount due plaintiff *by its policy holders in this state* for premiums on which credit of thirty and sixty days had been extended. * * *.'
>
> "The assessment was laid under act 170 of 1898. Section 1 of this act, in defining property subject to taxation, includes 'all rights, credits, bonds, and securities of all kinds; promissory notes, open accounts and other obligations * * * and all movable and immovable, corporeal and incorporeal, articles or things of value, owned and held and controlled within the state of Louisiana by any person, in any capacity whatsoever.' Section 7 * * * provides as follows:
>
> "'* * * the intent and purpose being that no nonresident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits *arising from the business done in this state,* are hereby declared assessable within this state, and at the business domicile of said non-resident, his agent or representative.'"

The italics are mine. It will be seen that the act does not attempt to cover credits arising from business transacted in Louisiana but due from non-residents of Louisiana to the agents of the company located in that state. In all likelihood the Louisiana agents of the insurance company were given no management and control of the business of the company within Louisiana at all. It was not the case of a foreign corporation whose entire affairs are managed at an office within a given state other than that of its origin; it was the case of a corporation maintaining its actual business office at its techincal domicile, being taxed in another state on credits due, not to one of its agents but directly to it at its home office, and owned by citizens of that state. So viewed, the case is not in point at all; but

it is interesting to note that it really does what is claimed for it by counsel for The W. M. Ritter Lumber Company, namely: It revolutionizes the law of the taxation of credits, but in a way opposite to that supposed by these counsel. The effect of this decision, in connection with that in Hubbard vs. Brush, supra, would be to authorize the state of Ohio to tax the credits of The W. M. Ritter Lumber Company, arising from sales made in Ohio and owned by persons and corporations resident in Ohio, whether The *W. M. Ritter Company had an office in Ohio or not.*

It is with this point in mind that the following language, found on pages 354 and 355 of Mr. Justice Hughes' opinion, must be read:

> "The legal fiction expressed in the maxim *mobilia sequuntur personam* yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor, and is of value to the creditor, because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforcement. Blackstone vs. Miller, 188 U. S. pp. 205, 206, 47 L. Ed. 444, 445, 23 Sup. Ct. Rep. 277. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditor were to be endorsed. If locality, in the sense of subjection to sovereign power could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there."

In other words, the point that was *not* decided in the case last discussed was that if the insurance company had maintained a universal agent in the state of Louisiana, having the entire management and control of its business in that state and, say the states of Texas and Arkansas, Louisiana could not have taxed the credits due that agency from residents of Texas and Arkansas.

In Hutchison vs. Board of Equalization of the City of Oskaloosa, 66 Ia. 35, the plantiff appealed from an assessment made by the board of equalization upon moneys and credits in his hands as the agent of non-residents. The facts are sufficiently stated in the opinion of the court, beginning at page 38, as follows:

> "II. The plaintiff came to Iowa from England in 1875, and became a resident of Mahaska county. Afterwards, and for a year or more prior to the assessment in question, the plaintiff changed his mode of doing business, and made the loans of said money in his own name, and he collected the interest and principal when they became due, and reloaned the same. The notes and mortgages were in his possession, and he had the exclusive management and control thereof, but he was accountable for his doings to the parties in England. *A portion of the money, at the time of the assessment, was loaned in Kansas in the plaintiff's name.* (Italics mine). Such loans were made by his direction, and the loans and the evidences thereof were controlled by him. It does not appear that there was any understanding between the plaintiff and

the parties in England as to how long the arrangement above stated was to continue. For aught that appears, it could well continue for an indefinite time. The assessment was made for the year 1882, and is in these words, as appears from the assessor's books: 'Hutchinson, Charles, Agent for the other parties, names not given, moneys and credits, $34,699: total $34,699.'

"III. The plaintiff has the money in question under his *control* and *management*, and loaned the same for pecuniary profit, and is therefore clearly within the letter and spirit of the statute; and counsel does not claim otherwise. Their contention is that the statute should not be so construed, for the reason, as we understand, that, whatever may be the rule as to tangible personal property, the *situs* of moneys and credits is where the owner resides; and, as the owners reside in England, such property cannot be taxed here, for the reason that it must be deemed to be in England. It is undoubtedly true that for some purposes, to prevent injustice, legal fiction has been adopted in relation to the *situs* of personal property. But this fiction cannot be permitted to prevail in view of the facts in this case. Nor are we aware of any difference between different species of personal property. The fiction, when allowed to prevail at all, applies alike to all personal property."

While the court does not elaborately discuss the proposition as to the taxability of the credits represented by the Kansas investment, yet, it will be observed that this point was necessarily involved in the decision of the case and that the same is, therefore, to that extent, authority for the conclusion that a state may tax the credits arising from a business managed and conducted within its territorial borders by an agent of a non-resident, having full power in the premises, regardless of the domicile of the debtor. This conclusion is consistent with the decision of the Supreme Court of the United States in Buck vs. Beach, supra, wherein the sole question was as to the extent of the control and management possessed by the agent residing in Indiana.

The broad principle, then, which should be stated before embarking upon its application to the facts submitted by the board of review, is as follows:

A state may tax credits due to a non-resident arising from business transacted by such non-resident within its territorial jurisdiction and due from those residing therein, regardless of the place from or through which the affairs of the non-resident, respecting the business so transacted, are managed; a state may also tax credits ultimately belonging to a non-resident, if arising from a business managed and conducted within its territorial limits by an agent of such non-resident, regardless of the situs of the debtors.

It will be readily seen, from what has preceded, that it will be necessary for the board of review to ascertain definitely the extent of the management of the business affairs of the W. M. Ritter Lumber Company which is intrusted to the officers of the company at Columbus, Ohio, or which is transacted and managed through and from the Columbus office.

As a guide to the board in the pursuit of this inquiry I beg to point out some of the *immaterial* facts which have been given to me, and all of which are incorporated in the statement made at the opening of this opinion:

In the first place the mere fact that the books of account and the notes and other evidences of indebtedness are held at Columbus is not of itself of determining force. Regard must be had to the purpose for which such accounts and notes are there held and to the nature of the control over the collection thereof, and the disposition of the proceeds of such collections when made, by the Columbus

office. That is to say, if, as seems to be claimed by counsel representing The W. M. Ritter Lumber Company, the Columbus office is nothing more or less than a sort of clearing house for its various collection agencies, the company is not taxable here upon the credits so held for temporary purposes at Columbus.

In the second place the mere fact that some of the executive officers of the company have their offices in Columbus is not of itself controlling, although of strong persnasive force. Under the regulations and by-laws of the corporation the power and duties intrusted to such officers may relate solely to the rountine and detail of its business. Broad questions of policy and the like may be required to be determined at stock-holders' meetings or directors' meetings, held at Welch, W. Va. This seems, however, I am free to say, to be most unlikely, and I apprehend that upon investigation it will be found that a very large and active part in the management of the corporate concerns, in the broadest sense, is vested in the officers who have their headquarters at Columbus.

In the third place the mere fact that the company owns no plants in Ohio and that practically all of its tangible property is located in other states is not of itself conclusive. While it is true that in Hubbard vs.Brush, supra, the court mentions the fact that all of the property of the corporation therein concerned was located in Ohio, and it is its only plant there situated, these facts were dwelt upon, as I have already pointed out, because the question before the court was as to whether or not the company paid taxes on its entire capital in the state of Ohio. It is true that the principal business of The W. M. Ritter Lumber Company is that of manufacturing, and that ordinarily such business is deemed to be carried on at the manufactory. This test is not accurate, however, and it seems to me that the specific case under consideration affords an excellent example of the impossibility of its application. If the business of The W. M. Ritter Lumber Company is to be regarded as carried on where its manufacturing activities are immediately conducted, then, it has no one business place, but several, located in different states, for its saw mill operations are thus scattered. On the contrary, I am satisfied that though the saw mills themselves may be in a dozen states, if, as a matter of fact, they are all managed in the executive sense by officers of the corporation and directors, sitting in a single place, the business situs to which the credits arising from the manufacture of lumber, through such plants, are referable is that office and that only.

In the fourth place, the mere fact that The W. M. Ritter Lumber Company is incorporated under the laws of West Virginia and that its stockholders' meetings and *some* of its directors' meetings (as the statement of counsel has it) are held there, is not of itself conclusive. So far as the stockholders' meetings are concerned, unless the regulations of this company differ from those of most business corporations, they pertain exclusively to the doing of what Mr. Thompson calls the "constituent acts" of the corporation, and have nothing whatever to do with the management or conduct of the business carried on by the corporations. So also as to the directors' meetings held in West Virginia; if, under the regulations, by-laws and customs of the corporation, the only business transacted by the directors in West Virginia is the election of officers to be elected by them, the declaration of dividends, etc.—in short, that pertaining to the management of the corporation, as such, as distinguished from the business in which it is engaged, then, it would still be possible for the corporation, through its directors and other officers, to act completely in another jurisdiction in the management and control of its purely business activities.

In the fifth place, the mere fact that the increment to the capital of the company is not reinvested in Ohio is not of itself of determining force. This point is closely related to that with respect to the location of plants of the company. I

mention it, however, because of the fact to which I have already repeatedly alluded, that nearly all the cases pertaining to the power of the state to tax the credits of non-residents are those in which the business of loaning money was conducted through an agent in the state asserting the taxing power. As I interpret those decisions, however, as well as the few cases in which the facts are not in this typical form, the ultimate test is that of control and management of the investment and not the place where it is made;—the place where the business is conducted and not that where the property is located or the debtor resides.

In the sixth place the mere fact that the Columbus office in its capacity as a collecting agency, if that be only one of its functions, uses banks and other agents in different states in which the debtors of the company reside is of no force whatsoever. If the Columbus office has control of these collections and of the evidences of indebtedness upon which they are based, and surrenders such evidences of indebtedness to such bank or other agents upon its own intiative—in other words, at all times retains the full charge of the collection business of the company without dictation from any other or higher authority in the company than itself, then, that office is certainly more than a mere clearing house for the collections of the company and the board is entitled to take such facts into consideration, together with others pertaining to the degree of control possessed by the Columbus office over the affairs of the corporation generally in determining whether or not the Columbus office is the one executive office of the company.

All the aforementioned considerations, then, are subordinate to the one test which, in the last analysis, must determine whether or not the credits of the W. M. Ritter Lumber Company, arising from sales outside of Ohio or otherwise due it from persons and corporations not resident of Ohio, must be returned by the accounting officer of that company at Columbus, Ohio, for taxation there. That test is as follows:

If, at the offices of the company in Columbus, Ohio, the ultimate control of all of its business affairs is exercised by its directors and managing officers, leaving for transaction at the technical domicile at Welch, W. Va., only such business as relates to the organization of the corporation as such, and its relation to its stockholders, all of the credits of the company arising from business done everywhere are taxable here, because all of the business is managed here and the control of the credits is referable to this office. If, on the other hand, those in charge of the Columbus offices are agents to whom limited authority is delegated, with respect to the corporation's business policies and dealings, subordinate to the control of some external power within the corporation, then, only those credits arising from sales in Ohio or otherwise attributable to Ohio debtors must be returned by the company in Ohio or otherwise attributable to Ohio debtors must be returned by the company at Columbus. The statement is made by counsel representing the company that *some* of its directors' meetings are held at Welch, W. Va. No statement is made as to where the other directors' meetings are held, or as to what the policy of the company is as to the nature of the business customarily transacted in the directors' meetings held in Welch, W. Va. Ordinarily, the ultimate control of the business policies of a corporation is vested in its board of directors and by them exercised; they in turn delegate the execution, in detail, of the policies determined upon them by them to the managing officers of the company. The exact functions of the several officers and of the directors respectively are subject to definition by the regulations and by-laws of the corporation. It is, therefore, apparent that I cannot answer categorically the question which has been submitted to me. I can only advise that the board of review ascertain certain facts and act in accordance therewith, under principles which I have laid down and shall hereafter lay down. I have gone thus carefully into the question, however, because I have apprehended that

many similar questions might arise from time to time throughout the state and that the tax commission might be requested for rulings thereon.

I am of the opinion, therefore, as to the first question submitted, that the board of review must first call upon The W. M. Ritter Lumber Company for a statement as to the degree of control vested by the regulations and by-laws of the company in its board of directors. If it is ascertained that the directors exercise over the affairs of the corporation the degree of conrtol usually exercised by directors of corporations generally, and particularly with respect to the determination of what terms shall be given purchasers in general, what plants shall be operated, by what force of men, what forests of timber shall be purchased for the uses of the company, what localities shall be canvassed by the representatives of the company in an effort to secure business, what proportion of the income of the corporation shall be set aside for betterments and the like (I have suggested a few only of the many possible activities of the board of directors); then the board should ascertain where those meetings are ordinarily held at which the directors transact business of this nature. If the board finds the meetings held at Welch, W. Va., are for the purpose of doing acts which relate to the constituency of the corporation itself, such as the annual election of officers, the periodical declaration of dividends, etc., while all other meetings at which general business policies are discussed and determined are held at Columbus, at the general offices of the company there, then, in my opinion, the board may safely determine that the credits of the company are all subject to taxation in Ohio.

If upon such investigation the board finds that under the regulations and by-laws of the company the board of directors is not vested with active control and management of the business policies of the company, and that the same is committed to the president or to some other officer or officers of the corporation, subject to no superior control and to no check whatsoever, save that which would be rendered effectually by removal from office or employment, then, the board should ignore the custom of the directors with respect to the holding of their meetings and should ascertain whether or not the business offices of the president and the other managerial officers of the corporation are at Columbus. If that is ascertained to be the case, and if the business headquarters of the executive officers of the corporations are in Columbus, and those officers have, as aforesaid, the complete and actual charge of the business affairs of the corporation, being responsible only for results to the board of directors, then, and in that event, all the credits of the corporation, arising from sales, wherever made, or due from debtors wherever residing, should be returned for taxation here.

I may summarize my conclusions of law as follows:

If the business affairs of the W. M. Ritter Lumber Company are transacted from the Columbus office, without control as to such matters on the part of any other agency or power within the corporation, then, the whole business of the corporation is transacted at Columbus, and all of its credits are localized here within the meeting of the rule as so frequently and so loosely stated by courts and text writers. In any event, the credits arising from Ohio sales and due from residents of Ohio must be returned by the Columbus office for taxation here. The representatives of the company seem to concede this point,with possibly one qualification, which I shall immediately discuss.

The qualification which I have in mind is that which takes the form of a contention on the part of counsel representing the company to the effect that inasmuch as all of the plants of the company are in another state and the company maintains no lumber yard or other office from which sales are directly made in the state of Ohio, but ships its product directly form one of its plants to its customers wherever located, it is, therefore, as to Ohio sales, engaged in interstate commerce,

and that the credits arising from such business cannot be taxed. In support of this contention the case of Western Union Telegraph Company vs Kansas, 216 U. S. 1 is cited. This case is easily distinguished upon the principle which is stated in Judson on Taxation, Section 183, as follows:

> "In one sense all commercial business between citizens of different states is interstate commerce. The manufacturer who ships his goods to a purchaser in another state, is engaged in interstate commerce. But in this connection the term 'carrying on interstate commerce' has a peculiar and technical meaning, which limits it to corporations actually engaged in carrying on interstate commerce, that is, common carriers and others, who afford the facilities whereby commerce is carried on between the states. Thus all public carriers, railroads, steamboats, telegraph or telephone companies, bridge and ferry companies, are carrying on interstate commerce in this sense. The state can neither exclude corporations of this class, actually engaged in interstate commerce, nor can it impose any conditions upon the transaction of their business in the state. A railroad or telegraph company opening an office in the state for its business and manufacturing corporation, which establishes there a sales office or a sales agency, are both, broadly speaking, engaged in interstate business, but in a different sense. The latter can be taxed by the state for the privelege or excluded, the former cannot."

In writing this paragraph, the author was discussing the right of a state to exact license fees from foreign corporations for the privelege of doing business within its jurisdiction. That was the nature of the case in Western Union Telegraph Company vs. Kansas.

This point is not elaborately discussed in the brief, and I shall not take the time to go deeply into it. Suffice it to say that the rule seems to be that a state may tax whatever property rights and things of value it finds located within its borders, although the same may be themselves the instrumentalities of interstate commerce or arises out of the carrying on of that commerce. In order to constitute a burden upon interstate commerce the taxation of the state must directly fasten itself upon that commerce as such. I am aware of no case which holds that a state may not tax the fruits of interstate commerce when it finds them localized within its borders, by the same rule and under the same laws as it taxes other property there localized. The tax which the board of review claims in this case is neither a license tax nor a privelege tax. It is not imposed upon the receipts from commerce as such or the credits growing out of commerce as such; it is the general property tax due the state as a just return on the value of the property right held within its domain. This contention of counsel, if it be seriously put forth, is not tenable.

Your second question is more easily answered. While it seems a hardship to hold that a taxpayer must, at his peril, ascertain the amount of money with which he is credited at the bank on the day preceding the second Monday of April, although he may have issued a large number of checks against his account, and in good faith believes the same to be practically exhausted, yet, in Insurance Company vs. Hynicka, 5 N. P. n. s., 255, our statute pertaining to the taxation of moneys was construed in this particular as follows:

> "Money as defined in Section 2730, when on deposit and subject to legal demand, is taxable, whether held by one in his own right or in a representative capacity, and outstanding checks which have not been cer-

tified can not be deducted from the balance in the bank in determining the amount to be returned." (Revised Statutes, now Section 5326, General Code.)

My view of the law is in accordance with this decision and I am therefore of the opinion that the amount of money actually in the bank subject to withdrawal on the day preceding the second Monday in April must be returned by the taxpayer for taxation, subject to no deduction for outstanding checks excepting such as may have been certified by the bank.

Of course, checks not certified and outstanding on the day preceding the second Monday in April represent debts of the taxpayer; as such they may be deducted from his credits, but not from his moneys in bank.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

460.

TAXES AND TAXATION—CORPORATIONS—WILLIS FRANCHISE TAX—INTERSTATE COMMERCE—DETROIT & CLEVELAND NAVIGATION COMPANY.

Since the Detroit & Cleveland Navigation Company is engaged in interstate commerce, it is not subject to Section 148c, Revised Statutes, and since a corporation is not liable for the Willis Franchise Tax unless it is subject to Section 148c. Revised Statutes, the Detroit & Cleveland Navigation Company is not liable for the same tax.

Tax Commission of Ohio, Columbus, Ohio.

In re F—11822—The Detroit & Cleveland Navigation Company.

GENTLEMEN:—In the above entitled matter I find, as a matter of law, that the state has no claim for franchise fees. I recommend that the Commission authorize the Attorney General to dispose of the claim without collecting any part of it. My reasons for this conclusion are such, I believe, as to justify the preparation of an opinion for the guidance of the Commission in other similar cases, of which I apprehend there may be several instances.

The facts presented to me by counsel for The Detroit & Cleveland Navigation Company, and verified by the Secretary of State, in person, are as follows:

"The Detroit & Cleveland Navigation Company is a foreign corporation engaged in interstate commerce, as a water transportation company. This company, under its former name of The Detroit & Cleveland Steam Navigation Company, qualified under the laws of this state in 1893, the law being what has since been known as section 148-*d*, and is now section 178 of the code. When the section, generally spoken of as 148-*c*, was passed in 1894, the then Secretary of State called upon this company to qualify under that section, and it was pointed out to him that this company came within the exception of that act in that it was a transportation company engaged in interstate commerce. Subsequently, on March 16, 1904, the company, having changed its name by dropping out the word 'steam', again qualified under Section 148-*d*, but it has not

qualified under Section 148-*c*, which is now Section 183, etc., of the code. For some years two or three boats, obsolete for the general line work, a part interest in which was owned by The Cleveland & Buffalo Transit Company and the remaining interest owned by The Detroit & Cleveland Navigation Company, have been by a joint arrangement put into a Cleveland and Toledo service, taking some local passengers and some on through tickets coming from other states, but the general, and with this small exception, the entire business of The Detroit & Cleveland Navigation Company has been at all times its interstate commerce business in connection with its service between Cleveland and Detroit, and so on, up Lake Huron.

"The Detroit & Cleveland Navigation Company has made reports and paid through the State Auditor's office the annual excise tax from the years 1904 to 1909, both inclusive, but in 1910 this service between Cleveland and Toledo was treated separately by the tax commission of Ohio and it goes by the name of The Cleveland and Toledo line, although there is no such corporation, and its only existence is, as above stated, a joint operation as to two or three boats, and this only for about two months of the year."

In an opinion addressed to the Secretary of State, a copy of which I have sent you under separate cover, I have stated the following conclusions of law, the reasoning in support of which it will not be necessary to repeat in this opinion:

1. A corporation might be, and possibly many corporations are, required to comply with Section 148*d*, Revised Statutes, now Section 178, General Code, without being required to comply with Section 148*c*, Revised Statutes, now Section 183, General Code.

2. All foreign corporations subject to compliance with any laws of the State of Ohio are subject to compliance with Section 178 of the General Code, formerly Section 148d, Revised Statutes; so that all corporations subject to compliance with Section 183, General Code, are also subject to compliance with Section 178, General Code.

3. The Willis law, popularly so-called, and particularly that portion thereof now incorporated in Section 110 et seq. of the Act of June 2, 1911, 102 O. L., 249. does not, nor in any of its form did it ever apply to corporations not required to comply with the provisions of Section 148*c*, Revised Statutes, now Section 183, General Code.

It appears from the above statement of facts that The Detroit & Cleveland Navigation Company has never complied with Section 183 of the General Code, nor with its predecessor, Section 148*c*, Revised Statutes, but did comply with Section 148*d*, Revised Statutes. Whether or not it was liable to comply with Section 148*d* is not mooted by counsel representing the company. The question as to whether or not any kind of a privilege or franchise tax or license may be exacted by a state from a foreign corporation engaged in interstate commerce is an interesting one; as is the further question as to the exact nature of the exaction made by the state of Ohio under former Section 148*d* of the Revised Statutes. It is sufficient to note that the company has voluntarily complied with this section and that in accordance with the reasoning of the opinion to the Secretary of State, to which I have already referred, such voluntary compliance with Section 148*d* does not estop a corporation from denying that it is liable to comply with Section 148*c*.

In but two respects is the case of The Detroit & Cleveland Navigation Company different from that of Eastman Kodak Company, passed upon in the opinion

to the Secretary of State. In the first place, The Detroit & Cleveland Navigation Company is a public utility and has paid excise taxes to the Auditor of State for a number of years. This, however, was upon the assumption by it that it was in part engaged in intra-state commerce, the excise tax law, at all times, requiring the payment of taxes upon receipts of transportation companies from such commerce at least, whether the company was engaged also in interstate commerce or not. There is nothing in such conduct incompatible with the present assertion that the company is engaged largely, if not exclusively, in interstate commerce.

This brings me, then, to the second and principal points of difference between the present case and the one discussed in the opinion to the Secretary of State. While Eastman Kodak Company neither owned nor used any part of its capital or plant in Ohio, and did not, within the technical definition of the term, "do business" in Ohio, this is not the case of The Detroit & Cleveland Navigation Company; that company does not own valuable property in Ohio (although this is not disclosed by the statement of facts above set forth) and does use a part of its capital in this state. Unless some other reason appears, therefore, for claiming exemption from the Willis law, the company is liable for that tax, inasmuch as it has been determined (and the correctness of the determination is not disputed) that the corporation, *as such,* is not engaged in the business of intra-state water transportation, but that this operation is separate and distinct from its ordinary corporate activities. Such another reason is found, however, in the language of present Section 188, General Code, formerly part of Section 148*c*, Revised Statutes, which provides as follows:

> "The preceding five sections (including Section 183) shall not apply to foreign * * * express, telegraph, telephone, railroad, sleeping car, transportation, or other corporation engaged in Ohio in interstate commerce; * * *"

The Detroit & Cleveland Navigation Company is a foreign transportation company, engaged in Ohio in interstate commerce—almost exclusively so engaged, in fact, under Section 188, I am of the opinion that the extent to which a corporation may be engaged in interstate commerce is immaterial. It is very clear, it seems to me, that The Detroit & Cleveland Navigation Company was not subject to compliance with Section 148*c*, Revised Statutes, and is not now subject to compliance with Section 183, General Code, or liable for the penalties prescribed by Section 186, General Code, for failure to comply therewith.

The question is thus raised as to whether or not a foreign corporation which owns and uses a part or all of its capital or plant in Ohio, but which is one of the companies engaged in interstate commerce and enumerated in Section 188, General Code, is liable for reports and fees under the Willis law, or rather under Section 110 et seq. of the Act of 1911.

Recurring now to the analysis of Section 2 of the Willis law, and its successors, Section 5525, General Code, and the corresponding sections of the tax commission acts of 1910 and 1911, as set forth in my opinion to the Secretary of State, I beg leave to point out again that in order that a foreign corporation may be made liable to the Willis law under any of these sections, it must appear not only that it does business in Ohio, not only that it owns or uses a part of all of its capital in Ohio; *but also that it is subject to compliance with Section* 148*c*, *Revised Statutes, or Section* 183, *General Code.*

The Detroit & Cleveland Navigation Company is not subject to compliance with Section 148c, Revised Statutes, or Section 183, General Code, and is there-

fore not subject to the Willis tax; that is, it is not liable for reports and fees under Section 110 et seq., 102 O. L. 249.

In my opinion it would be useless to take any position other than that which I have above outlined, in court. The meaning of the statutes involved is so plain that litigation of this point is not worth while.

I therefore respectfully repeat my request that I be authorized to compromise claim F-11822, without the payment of any fees or penalties, or the making of any reports whatsoever.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

489.

TAXES AND TAXATION—BOARDS OF REVIEW—POWER TO CHANGE VALUATIONS ON FUTURE DUPLICATE WHEN ACTING AS ANNUAL BOARD OF EQUALIZATION, AND ON PRESENT DUPLICATE WHEN ACTING AS QUADRENNIAL BOARD OF REVIEW.

Changes in real estate value made by the board of review when acting as an annual board of equalization, affect only the duplicate in process of being made up. When acting as a quadrennial board of revision, however, such board has power to make changes on a duplicate in the hands of a treasurer for collection.

COLUMBUS, OHIO, July 5, 1912.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your favor of June 12, enclosing me a copy of a letter addressed to the commission by the county auditor of Franklin county, in which the writer state that a complaint against a real estate valuation has been recently filed with the board of review of the city of Columbus, with the specific request that the valuation complained of be changed upon the duplicate now in the hands of the treasurer for the collection of taxes thereon. The auditor desires to be advised as to the power of the board of review at the present time to order changes made upon the tax duplicate.

The following sections of the General Code furnish I think, by necessary inference the answer to the question thus submitted:

"Section 5624.

> "Boards of review, within and for their respective municipalities, shall have all the powers and perform all the duties provided by law for all other municipal boards of equalization and revision. * * * * * * When the appointment of a board of review in a municipality all other boards of equalization and revision therein shall be abolished. At the conclusion of the quadrennial appraisement of real property in such municipal corporation, the board of review therein shall sit as a board for the equalization of the value of such real property."

Section 5624-1.

> "Boards of review for municipal corporations sitting as boards of equalization and revision shall have and exercise, in so far as the same may be applicable, all the powers and perform all the duties, and be

governed by the same rules and limitations, conferred or imposed by law upon annual county boards of equalization of real estate and personal property, moneys and credits and quadrennial county boards of equalization of real property outside of cities, and such boards sitting as boards of revision; * * *"

Section 5595.

"The quadrennial county board of equalization shall complete its work of equalization, on or before the first Monday in October then next following the beginning of the equalization. On the completion of such work the board shall adjourn as a board of equalization."

Section 5601.

"The quadrennial county board of equalization, sitting as a board of equalization or as a board of revision, may call persons before it and examine them, under oath, as to their own or other's property. The president or the presiding officer pro tem. of the board may administer oaths. If a person notified to appear before the board refuses or neglects to appear at the time required, or appearing, refusing to be sworn, or answer any question put to him by the board, or by its order, the presiding officer of the board shall make complaint thereof, in writing, to the probate judge of the county, who shall proceed against such person in like manner as is provided for in the last sub-division of chapter three of this title."

Section 5599.

"The quadrennial county board of equalization shall sit as a board of revision, when notified by the auditor of the county to meet for that purpose. It shall begin its session as a board of revision, on the first Monday of May following the completion of the quadrennial equalization, and shall close its session on or before the fourth Monday of September next following."

Section 2588.

"From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicates, either in the name of the person charged with taxes or assessments, the description of lands or other property, or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other."

Section 5580.

"The * * * board for the annual equalization of the real and personal property, moneys and credits in each county * * * shall meet * * * on the Wednesday after the third Monday in May * * *."

Section 5590.

"The county auditor shall lay before the board *and also before all city boards of equalization* * * * the returns of the assessors for the current year * * and also the valuation of the real estate *as entered on the duplicate of the preceding year* * *."

Section 5620.

"The board of review shall meet annually at the office of the county auditor on the first Monday in June, and continue in session from day to day, except Sundays and legal holidays, until the Saturday preceding the first Monday in June of the following year. The state board of appraisers and assessors for laying excise taxes may fix the time within which the work shall be completed."

I think it is reasonably clear upon even a casual inspection of the foregoing sections, that the answer to the auditor's question depends upon the further question as to whether or not the Board of Review of the City of Columbus was at the time the complaint was made sitting as a quadrennial board of revision or an annual board of equalization. It is obvious that inasmuch as changes made by a board of revision are under section 5601 to be made in the manner provided by law for making corrections on the duplicate, such board has power to change valuations on a duplicate in the hands of the treasurer for collection. It is equally obvious, I think, that changes made by an annual board of equalization affect only the duplicate then in process of being made up. This follows from section 5590 supra, and further from the fact that the work of the annual county board of equalization and the board of review sitting as an annual board of equalization is one of the steps in making up the future duplicate,—not correcting a past duplicate.

In my opinion the Board of Review of the city of Columbus was at the time the complaint spoken of by the auditor was filed (June 11, 1912) sitting as an annual board of equalization. I do not think that the state board of appraisers has the power under section 5620 supra, to regulate or change the times at which city boards of review shall exercise the various functions imposed in them by law. These matters are regulated by Sections 5580, 5594 and 5599, all of which, as to boards of review, are adopted by appropriate reference in sections 5624 and 5624-1 supra. Between the first Monday of May, 1911, and the fourth Monday of September, 1911, or such later date, within the limits fixed by the state board of appraisers, as might have been necessary to afford the board sufficient time to complete the work of hearing complaints theretofore made to it as a *board of revision,* the board of review was sitting as such board. Changes made by it upon such complaints after the duplicate of 1911 was in the treasurer's hands were in and to that duplicate. Complaints thereafter filed, however, are to be heard by the board as an annual board of equalization at its session beginning on the third Monday in May, 1912. Acting as such board it cannot change the 1911 duplicate.

As to the exact date beyond which complaints made to the board of review as a board of revision may not be received by it, I express no opinion. (See Britton vs. Baker, 12 O.D., 107.)

It is sufficient for the present purpose to state that the complaint in question clearly invoked the jurisdiction of the *annual* board, not the board sitting as a quadrennial board of revision.

Very truly yours,

ATTORNEY GENERAL.

539.

TAXES AND TAXATION—SAVINGS BANKS—RETURN OF DEPOSITS BY DEPOSITORS—BY BANK—"MONEYS"—"CREDITS"—PERSONAL PROPERTY—SOCIETY FOR SAVINGS—SPRINGFIELD SAVINGS SOCIETY—BANKS WITH AND WITHOUT CAPITAL STOCK.

Both the society for savings of Cleveland and the Springfield Savings Society of Springfield were organized under laws since repealed and these institutions are therefore different from all other banking companies in Ohio.

Upon the authority of Collet vs. Springfield Savings Company which considered the case of the defendant company which was similar to the society for savings, in that neither society had a capital stock, the entire working capital of either being made up of the deposits received by them, both societies are to be held the agents or trustees of the depositors. The funds of such depositors could not therefore be classed as credits.

In spite of the fact that Section 5370 of the General Code requires agents or trustees to return for taxation funds invested by them in behalf of others, still by reason of the requirement of the same statute that the moneys subject to order or check should be returned by the depositor, these deposits must be returned not by the society but by the depositor. Further reasons in support of this rule, are that the bank could not intend such deposits to be returned by both bank and depositor and also the fact that since moneys are subject to the depositor's order, without regard to the nature of the investment, he has no direct interest in the investment itself, as cestui que trust.

Whether such deposits must be returned by said depositor as money or as personal property is immaterial.

In savings banks properly so-named, the officers or trustees are agents of the depositors. When the capital is owned by shareholders however, they are wrongly named savings banks, and the relation between bank and depositor is that of debtor and creditor for the reason that the security for deposits therein depends partly upon investments made of their capital stock and not altogether upon the investments of the deposits themselves.

Since therefore, all so-called savings banks in Ohio, except the two above mentioned, possess a capital stock, depositors in such banks are really preferred creditors of the banks and ont principals or cestui que trusts.

Such deposits should therefore be listed as credits, except when they become money by express provision of Section 5325 of the General Code, that is when they are payable upon demand and without right to interpose a suspension of payment by notice.

From these rules therefore deposits in the society for savings and The Springfield Savings Society and in all other proper savings banks outside of Ohio, mus be returned by the depositor himself.

Deposits in all other Ohio savings banks and in all banks having a capi stock must be returned as moneys, if payable on demand, if payable otherwise credits.

COLUMBUS, OHIO, July 22, 1912

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 13th in full is as follows:

"The commission submits to you the following questions relatin deposits in savings banks, and encloses herewith the rules of a numb

such institutions—three from Cleveland and two from Columbus—will not that the rules governing withdrawals and the requirements to give notice before withdrawing deposits are substantially similar in all of these, and presumably are the same in all savings banks throughout the state.

The questions submitted are:

"1. Are such deposits 'moneys' within the definition of that term in Section 5326?

"2. If such deposits are not moneys, are they 'credits' within the definition of that term in Section 5327?

"3. Does a trust relation exist between the bank and those depositing money with it under the conditions provided by such rules and regulations, and, if so, is it the duty of the bank to return the same as trustee under the provisions of Section 5370, General Code?"

One of the pamphlets enclosed by you in your letter contains the rules and regulations of the society for savings in the city of Cleveland, the other rules are those of several banks organized as savings and trust companies. I mention this fact because, for convenience, I shall deal separately with the case of the society for savings. The rules of the society for savings, insofar as they bear upon the question submitted by you, are as follows:

"Deposits will be received from one dollar upward; the sum deposited to the credit of any one account may not exceed in the aggregate five thousand dollars, without special arrangement. * * *

"Dividends are declared and credited upon depositors' accounts semi-annually, on January 1st and July 1st, and these are entitled to dividends the same as the original deposits. The rate is fixed by the society's earnings, which in the past have warranted a dividend of not less than four per centum per annum. * * *

"The society does not accept on deposit the funds of banks, bankers, firms, or business corporations. * * *

"Money deposited, and the dividends thereon, may be withdrawn by the depositor either in person, by order in writing, or by letters of attorney, and in case of death by legal representatives; but no preson shall be entitled to receive any part of his principal or dividend *unless he produce the pass-book* * * * or shall prove that such book has been lost or destroyed, in which case a written discharge and indemnity my be required. * * *

"The privilege which is uniformly reserved by savings banks, of requiring notice before any sum may be withdrawn will not ordinarily be enforced, and as a general rule depositors will be permitted to withdraw their deposits at pleasure."

The other rules enclosed in your letter, while differing in language, are substantially similar to each other. I quote one of these pamphlets, which is ypical of all of them.

"Savings deposits of_____Dollars, or more, will be received, upon which interest will be allowed, in accordance with these rules, at the rate of_____per cent. per annum.

"Accrued interest will be placed to the credit of depositors, * * * and if not withdrawn will be added to the principal and will draw interest from the date of credit * * *

"Deposits may be withdrawn by the depositor in person or by written order, but either case the pass-book shall be presented that such withdrawal may be entered therein,* * * In the event this book is lost and a duplicate issued, and payment made upon presentation of either the duplicate or the original will be a valid discharge to the bank for the amount so paid. The bank reserves the right to require a bond of indemnity before a duplicate pass-book will be issued.

"Depositors may be required to give sixty days' notice before withdrawing their deposits, but as a general rule they will be permitted to withdraw them at their pleasure. * * *

"No assignment or transfer of this pass-book, or of the deposits herein entered, will be recognized by or binding on this bank, unless the consent of the bank shall first be obtained, and a memorandum thereof entered herein."

The statutes cited by you, and under which the questions arise are as follows:

Section 5326.

"The term 'money' or 'moneys' as so used (in this title) includes any *surplus or undivided profits held* by societies for savings or banks having no capital stock, * * * and every *deposit* which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand."

Section 5327.

"The term 'credits', as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable things, dues or to become due to the person liable to pay taxes thereon including deposits in banks *or with persons in or out of the state, other than such as are held to be money*, as hereinbefore defined, * * * over and above the sum of legal bonafide debts owing by such person. * * *"

Section 5370.

"Each person of full age and sound mind shall list the personal property of which he is the owner and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him as agent or attorney, or on account of any other person or persons, company or corporation, and all moneys deposited subject to his order, check, or draft; * * * The property * * * of a person for whose benefit property is held in trust (shall be listed) by the trustees: * * * and surplus or undivided profits held by a society for saving or bank having no capital stock, by the president or principal accounting officer."

I think that my reason for treating separately of deposits in the society for savings must have been made apparent by some of the foregoing statutory provisions. This institution (for, as I understand it, there is no other institution precisely like it in the state of Ohio) has been given the distinction of separate treatment in some of the taxation statutes of the state and it remains to be seen

to what extent such express mention thereof affects the question which you have submitted, insofar as that institution is concerned.

In an opinion to the commission under date of May 24, 1911, I considered and passed upon *inter alia* the following question:

> "Is the society for savings of Cleveland such a bank or banking association under the laws of this state as should make report to the county auditor and be assessed by him under the provisions of Sections 5407-5414 of the General Code?"

In that opinion it was pointed out that the society for savings of Cleveland was incorporated by special act of the legislature of this state prior to the adoption of the Constitution of 1851; that said special act created certain individuals a body corporate and provided that they, and such others as should be duly elected members of the said company, should be and remain a body politic and corporate for a period of thirty years, which said period was subsequently extended indefinitely by the Act of February 15, 1877; that membership in the society as a corporation is not extended to all of its depositors, but only to such persons as may be elected by ballot by other members, thus constituing the society a "close corporation"; and that, finally, Section 3 of said Act provided as to deposits as follows:

> "All deposits of money received by said society, shall be used and improved to the best advantage and in a manner not inconsistent with the laws of this state. And the income or profits thereof shall be applied and divided among the persons making the deposits, their executors or administrators, in just proportion, with such reasonable deduction as may be chargeable thereon, and the principal of such deposits may be withdrawn at such time and in such manner as the said society shall direct and appoint."

It was also pointed out that the Act of February 15, 1877, extending the charter of this society, together with that of other savings societies, which were incorporated under an entirely different law, provided that such societies, before paying dividends or interest on deposits, should have a surplus fund equal to five per cent. of the whole amount of deposits, which should be gradually increased until the same equaled ten per cent. thereof. It was also pointed out that the society for savings has no "capital stock" in the sense in which this phrase is most often used.

The question being, as aforesaid, upon the duty of the principal accounting officer of the society for savings, to return to the county auditor the aggregate value of the means invested in the enterprise, as in the case of an incorporated bank, I advised the commission that in my opinion the society for savings is not a bank within the meaning of the present bank taxation law, being neither an incorporated bank having capital stock divided into shares, nor an unincorporated bank, but being, on the contrary, an incorporated bank the capital stock of which is not divided into shares, and indeed an incorporated bank without capital stock, in the strict sense of the term.

In reaching this conclusion I pointed out that the statutes contain explicit provision for the taxation of all things of value held by the society for savings, in that, under Section 5325 and 5370 of the General Code, above quoted, the surplus and undivided profits belonging to the society were required to be listed as "moneys" by "the president or principal accounting officer thereof", the real and personal property belonging to the society, as such, being assessable to it, as a "person,"

by virtue of the provisions of Section 5320, in connection with the fact that the society could not be held to be an incorporated company whose taxation is not "specifically provided for" within the meaning of Section 5404 as amended; that the members of the society, as members, are required to return for taxation the value of their interest therein, as such members, as "personal property" under Section 5325, being "shares or interests in means not forming part of the capital stock of an incorporated company"; and that, finally, the depositors in such society should return as money the amount of their several deposits in the institution.

It will be observed, therefore, that insofar as the taxation of deposits in the society for savings is concerned, I have already, in a way, passed upon that question. Inasmuch, however, as the question which you now ask was not directly before me when I prepared the other opinion, and as my statement respecting the taxation of deposits, therein set forth, was in a sense gratuitous, though made in the course of the expression of my reasons for the ultimate conclusion reached by me, I deem it proper to go into the matter again; and to restate in this opinion the substance of the reasoning upon which the statement in question was made by me.

The case upon which the conclusion of the former opinion, and each of them, were based is that of Collett vs. Springfield Savings Society, 13 C. C. R. 131, affirmed without report, 56 O. S. 776. A full discussion of this case will be found in the previous opinion; suffice it to say at this time that it is held therein that in the absence of any law specifically taxing the assets controlled by the defendent savings society, as such, it was the duty of the depositors to return and pay taxes upon their deposits. That this was directly held in the case appears from the following language quoted from the decision of Summers, Jr.:

> "The defendent, for each of the years in controversy, returned and paid taxes upon its furniture, real estate, and surplus, less that part of the surplus invested in United States bonds, and the (common pleas) court, in one of its conclusions of fact finds that in each of said years 1887 to 1892, both inclusive, said savings society paid taxes on a larger amount than it would be required to pay taxes upon, by the letter of Section 2759 of the Revised Statutes.
>
> "The findings of fact, sustained by the evidence, will warrant no other conclusion of law than that the return for each of the years in controversy, prior to the year 1892, was not false; so that only the return for 1892 is involved, and the principal question is, does Section 2759*b* of the Revised Statutes * * * conflict with any provision of the constitution?
>
> "Or, to state it in a different form, do the deposits held and controlled by the defendent. The Springfield Savings Society, belong to it, or do they belong to the depositors, and are they held and controlled by the society as the incorporated agent or trustee of the depositors, and for their sole use and benefit? * * *
>
> "That the relation of savings societies, such as defendent, and depositor is that of agent and principal, is settled by an unbroken current of authority. (Here follow citations to numerous authorities, including Ridenour vs. Mayo, 40 O. S. 9) * * *
>
> "* * * The society can have no capital or anything with which to carry on business other than the deposits; and, in order that it may induce people to entrust their money to its care and so accomplish the objects of its creation, it is necessary that the depositor may, from time to time, put in whatever he can spare, with the assurance that he can, at any time, upon short notice, draw out the whole or any part * * *

without awaiting the winding up of the institution, or relying upon the uncertainties of finding a purchaser for his interest. And so the law provides that he may withdraw his deposits upon thirty days' notice, and that an account shall be given him in a book, or otherwise, of the sum deposited, which shall be the evidence of his property in such society. * * *

"* * * it is evident that the depositors' property in such society and the deposits, or that in which they are invested, are for the purpose of taxation just as clearly reciprocals as are stockholders' shares of stock and the capital stock or that in which it is invested; and if the depositors are taxed upon the reciprocal of the deposits or that in which they are invested, and the society is taxed upon the real estate, furniture, surplus and undivided profits, the whole property is taxed, and not only is no provision of the constitution violated, but, perhaps, all is exacted that the constitution will permit. * * *

"It only remains, then, to determine whether the depositors are required to return for taxation their "property" in these societies."

After quoting from Section 2730 of the Revised Statutes the definitions of "money" and "personal property," above quoted from Sections 5325 and 5326, respectively, General Code, above quoted and referred to, the court uses the following language:

"That is to say personal property shall be held to mean and include every interest in the capital stock, undivided profits, and all other means not forming part of the capital stock, by whatsoever name the same may be designated, of every company, whether incorporated or unincorporated. * * *

"* * * whether or not the interests or 'property' of depositors, in savings societies organized under the law of 1867, might be held to be a deposit, which the owner is entitled to withdraw in money on demand, and therefore comprised in the term 'money', or a deposit which the owner is not entitled to withdraw in money on demand, and therefore embraced in the term 'credit', there can be no doubt that that part of the definition of personal property in Section 2730 * * * is sufficiently comprehensive to include the interests of such depositors, and that they must be returned under the fifteenth item of Section 2737. If not, then certainly under the seventh item of that section."

The two items referred to by the court are now found in Section 5376 of the General Code, and are as follows:

"* * * seventh, the total values of all articles of personal property not included in the preceeding or succeeding classess; * * * fifteenth, the amount of all moneys invested in bonds, stock, joint stock companies, annuities, or otherwise; * * *"

A careful reading of the above quoted excerpts from the opinion of the Circuit Court, and indeed of the entire opinion, establishes three facts:

1st. That the court did not decide unequivocally as to whether or not the interests of the several depositors were to be regarded as moneys, investments or personal property, though seeming to incline to the view that they are to be re-

garded as personal property. It is quite apparent, however, that the court meant to hold that such interests did not constitute "credits", although this is not expressly stated.

2nd. It was not necessary for the court to decide precisely the method of listing such depositors' interests, because the court was striving to establish the conclusion merely that the taxation of the deposits as property belonging to the depositors, together with the taxation of the tangible property and the surplus and undivided profits, in the name of the society, reached everything of value existing by virtue of such society.

3rd. The court undoubtedly meant to hold—although, again, it was not unequivocally so stated in the opinion—that the deposits should be returned by *the depositors.* This follows from the decision that prior to the enactment of the special statute (since repealed), by virtue of which savings societies were to be taxed as banks, the defendant had returned only its surplus and undivided profits, and real and tangible personal property, for taxation, and had not returned anything as agent or trustee for its depositors. By approving the conclusions of fact and law on this point, reached by the common pleas court, the circuit court, and of course the supreme court, affirming it, lent their sanction to the method of return adopted by the savings society.

The decision itself leaves something to be desired in the matter of clearness. To be sure, it makes very little practical difference as to whether deposits in a society like the Springfield Savings Society are to be taxed as "moneys," "investments" or personal property", the "personal property" having no usual selling price. In any event, under Section 5388, General Code, the ultimate rule of valuation would be the same. So long as it is established, and I think it is, by the decision, that the depositor's interest is not "credits" the taxing authorities need give little concern to the further purely argumentative question.

But the decision also leaves a cloud upon the question as to the court's reason for holding seemingly that the savings society should not make the return for its depositors as their agent or trustee. It is expressly held in the opinion that the society does bear precisely this relation toward its depositors, and it is difficult at first blush to understand why it should not be obliged to make the return as such. Careful inspection of Section 5370, above quoted, however, seems to furnish the answer suggested by this question. That section provides that each person shall list the personal property of which he is the owner, and all moneys invested, loaned or otherwise controlled by him as agent or attorney, and all moneys deposited subject to his order, check or draft. That is to say, with respect to moneys three rules are furnished, as follows:

1. One who holds possession of money must return it.
2. One who controls moneys invested or loaned, as agent or attorney for another, must return such moneys so invested or loaned.
3. All moneys deposited, subject to the order of an individual, must be returned by the one having the right to issue such an order.

It will thus be seen that a special rule is made to cover deposits, and in my judgement this special rule takes the case covered by it out of the more general rules otherwise applicable. Thus, in a sense, the actual cash on hand in a savings society on taxing day would be covered by the rule that moneys in possession should be returned by the possessor, and as a result the society would have to return such moneys; so also the amount represented by the deposits, but which is actually invested in productive securities for the benefit of the depositors, on taxing day, should be returned as an investment made by an agent for the benefit of his principal, that being the relation of the savings society to its depositors. But because all persons having the right to demand money deposited with another must return such deposit as

money of their own, it necessarily follows that when the cash on hand, plus the amount invested, represents an aggregate sum that is subject to withdrawal by check, order or draft, it is not to be returned as cash in the possession of the society or as an investment made by the society for the benefit of another, but as deposits in the name of and upon the return of the depositor.

To hold otherwise would result in two general property taxes being levied upon the same thing, an end surely not contemplated by the statute. Furthermore, as to so much of the assets of any institution which is in law the trustee of its depositors as are invested for the benefit of the depositors, it is clear that the moneys cannot be regarded as completely invested, loaned and controlled by such trustee, so long as the right to withdraw on demand exists in the depositor. For both of these reasons, then, I am of the opinion that an institution which holds moneys of depositors and invests them for the interest of such depositors, is not to be regarded as a person having invested, loaned or controlled moneys on account of any other person or persons, within the meaning of Section 5370; but that the persons subject to whose order the moneys so deposited and invested are held must severally return their interests in such fund under the same section.

Now, the foregoing comments relate exclusively to an institution precisely like the savings society whose case was considered by the circuit court in Collett vs. Springfield Savings Society, supra. The application of these principals to the case of other institutions is to be determined by considering the points of similarity and difference, respectively, between the nature, power and methods of doing business of such other institutions than the Springfield Savings Society.

Returning, then to the case of the society for savings in the city of Cleveland, I beg to state that by reference to the former opinion, wherein the powers of this institution are fully discussed, it will be found that it differs from the Springfield Savings Society principally in that the members of the latter were all depositors of moneys in excess of a certain amount, while the membership of the former was confined to the original incorporators and their successors, as elected by them. Neither society had a capital stock, the entire working capital of both being made up of the deposits received by them.

I am of the opinion, however, that the single noteworthy point of difference above pointed out is not essential, and that the conclusions above referred to apply fully to the case of the society for savings as well as to that of the Springfield Savings Society. The essential point upon which Judge Summers bases his conclusions in the Springfield case is the fact that the savings society was not the debtor of its depositors, but was a trustee or agent for them. This fact, at the very outset, precluded the possibility of deposits being considered as credits, regardless of the fact that they were not payable, strictly speaking, on demand. The same thing is true of the society for savings. While it is not clear that the members of the society for savings are not entitled to reap profits for themselves out of the conduct of the business, yet, it is true that under the act they are trustees and their obligations to the depositors may be enforced on that basis. Strength is lent to this conclusion by the fact that instead of paying "interest" this institution assumes to pay dividends to its depositors.

I am, therefore, of the opinion that the deposits in the society for savings of Cleveland are not to be regarded as credits. I am further of the opinion that such deposits are to be returned for taxation by the individual depositors; as to whether or not such deposits are to be called "moneys" or "personal property" is a question which I regard as academic, though I incline to the belief that they are to be regarded as moneys notwithstanding the peculiar nature of the institution, and notwithstanding also the implied reservation of the right to require notice before any sum may be withdrawn.

Having thus disposed of the case of the society for savings, I come now to consider the case of other savings banks, whose printed matter you have enclosed. Herein, again, it will be necessary to examine into the nature of the institutions, as such, which, under the laws of Ohio, have the right to hold themselves out as "savings banks". For it must be understood that the term "savings bank" has a certain technical significance. thus, in Morse on Banks and Banking, Fourth Edition, the nature of a savings bank in the proper sense is defined as follows: (Sec. 617)

> "The depositors are the bank, the trustees and officers are their agents for receiving and loaning their money; and the profits belong to the depositors."

while in the next section (Section 618) the following qualification is set forth:

> "Although a bank may be called a savings bank, if it is really a stockholders' bank, while the capital is owned by the share-holders, the name will amount to nothing * * * and in such a bank a deposit creates the relation of debtor and creditor * * *. A by-law authorizing a savings deposit to be withdrawn after giving due notice, without regard to the condition of the investment at the time, indicates that the depositor has not trust in the investment; otherwise he would have to await the maturity of the note on which his money was loaned."

It is clear from the foregoing authority that, as already suggested, the statutes of the state must be examined to ascertain the nature of the different kinds of savings banks, if such there are. We have already discussed the questions which you present insofar as they relate to two classes of savings institutions now obsolete, save insofar as they are represented by existing institutions; i. e., it is no longer possible to organize such an institution as either the Springfield Savings Society or the Society for Savings of Cleveland. The Act which repealed the law under which the Savings Society of Springfield was organized provided for the organization of what were known to the statutes as "savings and loan associations" (70 O. L. 40). Many of the provisions of this act, save only that authorizing the formation of this act, save only that authorizing of such associations, are now found in the General Code, being Sections 9798 to 9809, inclusive, thereof. This Act was in full force from the time of its enactment until the passage of the so-called Thomas Banking Act in 1908, 99 O. L. 269. A "savings and loan association," as an institution, might be roughly described as follows: the association was a corporation having a capital stock divided into shares; so far, at least, it was, as Mr. Morse would say, a "stockholders' bank." It was governed by a board of directors, but their acts were subject at all times to the provisions of what is now incorporated in the above cited sections of the General Code. Of all these provisions the essential one is that now found in Section 9803, as follows:

> "Such corporation may receive on deposit for safe-keeping or investment all money offered for that purpose by tradesmen, clerks, mechanics, laborers, minors, or other persons, or by a religious or charitable society, or municipal corporation, or that may be ordered to be deposited by a court in this state having custody of money, and make investment thereof in the manner provided in this chapter. It may credit and pay such rates of interest thereon as are agreed upon, not exceeding the rate allowed by law; also purchase and sell promissory notes, drafts, and bills of exchange, at such rates as are agreed upon, and transact such

other business as properly pertains to the business of such associations not forbidden by the constitution and laws of this state."

What is now Section 9805 prescribes in detail the manner of investing the funds of such association. Section 9806, formerly Section 3806, Revised Statutes, regulates the manner of discounting notes and bills of exchange by such association. Section 9808, formerly Section 3808, Revised Statutes, authorizes the declaration of dividends to the stockholders. Section 9809, formerly Section 3809, Revised Statutes, explicitly provides that:

> "When such an association ceases to do business * * * the assets thereof shall be distributed and disbursed by the directors, or other designated persons, as follows:
> "First. In Payment of depositors.
> "Second. In payment of the debts of the corporation.
> "Third. The remainder, proportionately among the shareholders."

The effect of all these sections, insofar as the powers thereby created bear upon the questions submitted you, are described in Meissee et al.vs. Loren 4 N. P. 100 et al. It is therein held that the property and assets of a savings and loan association constitute a trust fund for the benefit of the stockholders and depositors, and that the directors were to be regarded as trustees with respect to their obligation toward the depositors. The decision is somewhat complicated by a discussion of the so-called trust fund doctrine as applicable to corporations generally. No distinction is made in the opinion as between depositor and general creditors with respect to the application of the trust fund doctrine. It is to be pointed out that the power of the corporation is "to receive on deposit for safekeeping and investment" moneys offered to it; to invest such moneys only in certain specified ways and in general to conduct the business of the institution in the manner prescribed in the statute. It is also expressly provided that the depositors shall be paid first from the assets of the corporation upon its dissolution. It is clear, thereof, that under these statutes the depositors of a savings and loan association, organized under the Ohio Law, are not the general creditors of the institution; they are at least preferred creditors.

Unfortunately, all of the authorities cited, for example, in 5 Cyc., 607, as to the relation of a savings bank to its depositors are cases of savings institutions having no capital stock, and in each one of the decisions there set forth the absence of capital stock as given as one of the reasons for holding that the institution is the trustee of its depositors. So also in State vs. National Banks, 75 N. H. 27, the supreme court of New Hampshire, citing Section 618 of Morse on Banks, supra, holds that a national bank is the debtor and not the trustee of the depositors in its savings department. The following sentence from the opinion of the court is of particular interest:

> "The depositors' security, as a matter of law, does not depend upon the character of the investment made by the bank, but upon the general solvency of the institution."

This decision, well reasoned as it is, would seem to be decisive of the question as to *national banks,* although you do not directly submit any such question. It sheds light upon the status of a so-called "savings and loan association," organized under the laws of Ohio. It is true that very great weight ought to be given to the use of the word "savings"; it would seem that the state would not in its

statutes use this term in an inaccurate sense. Nevertheless, it is equally true that the security of the depositor in such an institution depends not upon the investment made by the bank for his benefit alone, but also upon the capital stock which the state requires to be subscribed and issued and invested in certain specified securities. If this be the test then, "savings and loan associations" are improperly so-called, and in reality their depositors are preferred creditors rather than *cestuis que trustent.*

Unfortunately, there is no authority in this state, other than the unsatisfactory case of Moisse vs. Loren, supra, upon this question. Nor do the statutes of other states seem to be similar to those of Ohio. In Polley vs. Hicks, 58 O. S. 218, the court seems to treat the delivery of a savings bank book as the delivery of the deposits represented by the book. Inferentially, at least, this case is authority for the conclusion that the depositor is the owner of his deposits. However, the exact point is not necessary to the decision of the case, and it will be observed that the delivery of the book is treated, as well as "a delivery of an instrument evidencing a debt" (page 223) as a delivery of the deposit itself.

Upon careful consideration of the question, however, I am of the opinion that the relation of a savings and loan association to its savings depositors is that of debtor and creditor and not trustee or agent and principal.

The relation, then, being that of debtor and creditor, the further question arises as to the application of Section 5326 to the question. It is conceded that the relation of a commercial bank to its ordinary depositors is that of debtor and creditor, and that the effect of Section 5326, above quoted, is arbitrarily to take such deposits out of the class of "'credits' where they naturally belong. This is pointed out in the opinion in Collett vs. Springfield Savings Society, supra. The definition being an arbitrary and unnatural one, it appears to me, although I am unable to cite authority on the proposition, that the section will be strictly construed as in derogation of the common law. So that, when it is provided that "every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand," every word will be given its strict and full meaning.

Now, it is obvious that the depositor in a savings and loan association is not entitled to withdraw his deposit *on demand.* To be sure, the rule which the bank has made is not ordinarily enforced, and in all probability is not at a given tax listing day regarded by either of the parties as in force. Nevertheless, it cannot be said by the depositor whose duty it is to list such deposits, whatever be their nature, that he is not at any time subject to that rule; the officers of the savings bank may meet him at the paying window, with the statement that the rule will be enforced as to him; there is no obligation on the part of the bank to notify all depositors when the rule goes into effect. This being the case , I am of the opinion that deposits in savings and loan associations are not "moneys" within the meaning of Section 5326.

Naturally enough, not being moneys, such deposits must be treated as "credits" within the meaning of Section 5327, being "deposits in banks" other than such as are held to be moneys. "It is the duty of the individual depositor to include the amount of such deposits in the sum of all legal claims and demands due to him, which, less his bona fide debts, constitutes the "credits" which he must return for taxation.

The foregoing remarks apply as well to so-called "savings and trust associations" of which there are a large number in the state. These institutions exist by virtue of consolidation of "savings and loan associations," as above described, with "safe deposit and trust companies," provided for by other sections of the statute. The powers and obligations of such institutions with respect to

savings accounts are exactly the same as those of savings and loan associations.

The so-called Thomas Banking Act, referred to above, and now incorporated in Section 9702 to 9795, inclusive, General Code, provides in Section 9762 et seq. for the organization of savings banks. It is also provided in Section 9704, *inter alia*, that "the capital stock * * * of a savings bank * * * (shall be) not less than twenty-five thousand dollars." The detailed provisions of Section 9762 et seq., already referred to, are substantially similar to those of Section 9798 et seq., respecting savings and loan associations, and the same conclusions apply.

For all the foregoing reasons, then, I am of the opinion that with certain definite exceptions, deposits in *Ohio* savings banks, by which the rule of notice of withdrawal is adopted, are to be listed as "credits;" deposits in savings institutions outside of Ohio are to be listed as "credits" if such institutions have a capital stock; but if they are "savings institutions" in the proper sense of the term, they should be listed as "money." Deposits in the savings department of national banks are to be listed as "credits;" deposits in private or unincorporated intsitutions are to be listed either as "credits" or as "moneys," according to the nature of the agreement between the parties; but if such private institution holds itself out as a "savings bank," then, the presumption would be that its savings deposits are "moneys." The only exception to the general rule that deposits in savings banks, incorporated under Ohio laws, are to be listed as "credits," are those of institutions incorporated under the laws providing for the organization of "savings societies' and "societies for savings."

Of course, if any incorporated institution, above referred to and discussed, does away with the rule respecting the giving of notice of withdrawal, so that such savings deposits may be withdrawn on demand, then, in spite of the requirement that the passbook be brought, I am of the opinion that such deposits would, by virtue of Section 5325 be regarded and listed as "moneys."

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

543.

TAXES AND TAXATION—WILLIS TAX—WHEN BECOMES A LIEN SO AS TO JUSTIFY PAYMENT OF TAX OUT OF PROCEEDS OF JUDICIAL SALES—PERSONAL LIABILITY OF CORPORATION ATTACHES, WHEN.

Where no time is expressly named a lien for tax becomes a charge upon the property when such tax is entered upon the roll for collection. Since therefore it is the duty of the auditor under Section 5498 *General Code to charge the Willis tax for collection on the* 15*th of August, the lien for said tax attaches on that date against the property of the corporations.*

The personal liability of the corporation, however, attaches for the ensuing year when the corporation has been in existence during the entire month of May of that year. When, therefore property of such corporation is sold at a judicial sale prior to August 15, *the lien of the state is not to be paid out of the proceeds of said sale though the state has a claim against the corporation as such for said tax.*

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I take the liberty of addressing an opinion to you upon a question which has been squarely raised in the matter of The Euclid Heights Realty Company, a claim certified to this office for collection. The question has arisen be-

tween counsel representing this department in the city of Cleveland and counsel for the company, and is as follows:

> "The property of the corporation is involved in foreclosure proceedings, founded upon a trust deed and mortgage of some years' standing; it is the intention of the parties to sell the property at judicial sale prior to to August 15th. Should the decree of the court order that the franchise fees upon the report of the company, filed, or which should have been filed, in May, 1912, shall be paid out of the proceeds of the sale; and if so, should such fees be set aside prior to other taxes or to the satisfaction of the lien of the mortgage?"

I quote the following sections of the General Code of Ohio, under which this question arises:

Section 5692.

> "When * * * real estate is sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order the taxes and penalties and the interest thereon against such lands, to be discharged out of the proceeds of such sale or election."

Section 5671.

> "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually * * * "
>
> "Section 5495. Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each corporation, organized under the laws of this state, for profit, shall make a report, in writing, to the commission, in such form as the commission may prescribe. (Section 106, 102 Ohio Laws, p. 224)
>
> "Section 5498. Upon the filing of the report, provided for in the last three preceding sections, the commission, after finding such report to be correct, shall, on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following October. (Section 109, 107 O. L. p. 224)
>
> "Section 5506. The fees, taxes and penalties, required to be paid by this act, shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof. (Section 117, 102 O. L. p. 224)"

The first question which naturally arises is as to the application of Section 5671, supra, to the case at hand. I think it will be apparent, however, upon reflection, that this section has no application because it manifestly applies only to taxes levied upon *real property as such.*

By virtue of Section 5506 the Willis law tax, so-called, is constituted the first and best lien on all property of the corporation liable therefor; but the date at which this lien shall attach is not specified. If this statute is to be relied upon for *an* answer to the question at hand, then, the date at which it becomes operative in each year must be ascertained by the rules or rule applicable to such case.

The rule is stated, I think, in Cooley on Taxation, Volume 2, page 872, as follows:

> "Where no time is thus expressly named the lien should attach at the time when by an extension of the tax upon the roll a particular sum has become a charge upon a particular parcel of land."

This rule was applied to Section 5692, supra, in Hoglen vs. Cohan, 30 O. S. 436, wherein it was held that the taxes should not be discharged out of the proceeds of a judicial sale, held between the day preceding the second Monday of April and the first day of October, on the ground that no tax is charged against any lands in any year until the duplicate is placed in the hands of the treasurer. In the course of the opinion in that case, per Ashburn, J., is found the following language:

> "The payment provided for by Section 77 (now Section 5692) is in no way affected by Section 53 (now Section 5671), which provides, 'the lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes, on the day preceding the second Monday of April, annually, etc.' The practical operation of this rule as a lien, is to fix the lien of the state on a day in advance of any and all levied for general purposes. It was scarcely necessary to declare such a lien for the sole purpose of protecting the interests of the state, since under our general system of taxation, the payment of taxes legally assessed against real property could not be successfully resisted. It would follow the land like a covenant of title into the hands of all successive owners. The payment of state taxes, without this express lien, could only be jeopardized when the taxes levied on the land exceeds its value, and the owner is found to be bankrupt."

The practical effect of this decision, then, as to real estate taxes, is that while the lien of the state attaches on the first of April, it is not a charge against the land in the hands of the owner of the property on that date, but its effective force will not be exerted until the tax itself becomes a charge on the land.

Applying the principle as stated by Judge Cooley, and as unanimously supported by the authorities, as, for example, those cited in 37 Cyc., page 1142, it appears, it seems to me, clearly, that the lien of the state for the Willis law tax, so-called, attaches on August 15th. On that date, under Section 5498, supra, the auditor of state is required to charge for collection the fees due from each corporation. By Section 5488, General Code, which I do not quote, the auditor is, immediately, to prepare duplicates and reports and certify them to the treasurer of state for collection. The collection may be made at any time between the 15th of August and the first of October, The analogy between the sections upon which I have just commented and the section construed in Hoglen vs. Cohan, supra, is almost perfect. While holding, as already pointed out, that the tax on land was not to be paid out of the proceeds of the sale, held after the day preceding the second Monday in April and before the first of October, the court refused to hold, in that case, that the date of the making of the final levy, or the last date at

which payment of taxes could be made, were either of them material. The court also did not consider the possible variance in the actual date at which the auditor would transmit his duplicate to the treasurer for collection; it was sufficient for the purpose of the court to determine that it was the duty of the auditor to perform this official act on the first day of October.

It seems clear to me, therefore, that the Willis tax is a lien upon the property of the corporation liable for it on the 15th day of August following the month of May in which the report is to be made.

I am also of the opinion, for reasons sufficiently apparent, I think, from what has preceded, that the court ordering the distribution of proceeds of the judicial sale of property of a corporation, held prior to August 15th, in any year and after May 31st of such year, may not lawfully set aside any portion of such proceeds for the payment of the Willis tax for the current year.

I am further of the opinion that the purchaser at such judicial sale takes the property of the corporation free from the lien of the state for the Willis tax. In this particular the case differs from the case of the real estate tax considered in Hoglen vs. Cohan, supra, by virtue of the specific provision of Section 5671, already considered, respecting the real estate tax, and by virtue also of the essential difference between the specific tax on real estate and the franchise tax on a corporation. Without citing any other sections, it may be I think, safely stated, as a general principle, that the specific real estate tax assessed *in rem*. It is not and never becomes a charge upon the owner of the land in person, although, in this respect, the law of the state have been changed within recent years. The corporation fee, on the other hand, is a strictly personal obligation, and becomes a charge upon the property, as such, only by virtue of Section 5506, supra. And when it is provided as it is in this section, that the fees and penalties shall be the first and best lien on all property of the corporation, the effect of such a provision, in my opinion, is to make the lien attach to all property which the corporation has when the tax becomes chargeable, and not to all property which the corporation may have had at the time the liability for the tax accrued. In speaking of the time when liability of the tax accrued I mean to refer to the provisions of Section 5495, above quoted, as construed in Emmerman vs. Specialty Company, 14 O. F. D. 289, and Bank vs. Aultman, 14 O. F. D. 298. It is held in these cases that the Willis tax is levied upon the privilege of being a corporation for the year following the month in which the corporation is required to report; and that the exercise of the privilege during any part of that year renders the corporation liable for the tax. Without entering into the philosophy of the Willis law, suffice it to state that I am of the opinion that insofar as these decisions hold that a corporation which is in existence during the entire month of May in any year is liable for the Willis fee, upon the report that should be made in that month, they are correct. This liability, however, as I have already stated, is purely personal to the corporation and does not become charged upon its property, as such, until the date when, under the rules already referred to, the lien created by virtue of Section 5506, supra, becomes effective.

From what I have already stated it follows, of course, that the state must seek payment of the Willis tax for the year 1912, from the Euclid Heights Realty Company, as such, on and after October 1, 1912, and may not lay claim to any portion of the proceeds of a judicial sale of the property of this corporation, if held prior to August 15th, nor follow any of the property disposed of at such sale, or otherwise, by The Euclid Heights Realty Company, prior to August 15th, when in the hands of the purchaser, and sequester the same for the satisfaction of the fee.

I have taken the liberty of addressing this opinion to the commission because I apprehend that the question is one which will arise frequently under the amended

law, which provides for the certification of the fees, taxes and penalties, due to the state under the so-called Willis and Cole laws at a date subsequent to the month in which the report is required to be made.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

557.

TAXES AND TAXATION—INSURANCE POLICIES—LIFE AND ENDOWMENT POLICIES—"INVESTMENTS"—"CREDITS"—ANNUITIES—CONSTITUTIONAL LAW.

Insurance policies are valuable property rights, and it was intended by the constitution, Art. XII, Sec. 2, that provision should be made for the taxation of the same.

Said constitutional provision is not self executing however, and it is therefore necessary to look for specific legislative provision to determine whether or not insurance policies are taxable.

The right of the policy holder under a paid up life insurance policy, or under certain types of policies when not paid up, if they have a cash surrended value is not "money" as defined in Section 5326 of the General Code. It is not "credits" as defined in Section 5327 of the General Code because it is not a legal claim or demand to which the policy holder is entitled without parting with a thing of value to himself. It is not an "investment in bonds" as defined in Section 5323 of the General Code, nor an "investment in stocks" as defined in Section 5324; nor "personal property" as defined in Section 5325.

If they are to be taxed at all therefore, they are to be taxed as "investments otherwise" as the term is employed in the constitution and the statutes to-wit, Art. XII Sec. 2, and Sections 5376 and 5388 of the General Code. In each instance the intention seems to be to tax the moneys invested and not the investment itself or the act of investing.

The holder of a life insurance policy invests for the benefit of the beneficiary and the cash surrender value which alone may be deemed his proper interest may not be considered an investment. A policy holder's interest in an ordinary life insurance policy, or in a limited term policy, which said interest consists merely of a right to a cash payment upon the surrender thereof, is therefore not taxable at all whether the policy is paid up or not.

In the case of an endowment policy, however, wherein after all premiums are paid up the holder is entitled to a fixed sum of money, or the annual payment of a fixed sum, prior to the time when the assured is himself entitled to such payment the policies are not taxable.

If, however the time for payment has arrived and the same is due but not received by the assured his interest should be taxed as a "credit." The same is true of any insurance payment which is due but not yet received.

Whether or not the assured's interest after election has been made to receive his returns in annual payments, may be taxed as an annuity is a doubtful question.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 2d, requesting my opinion upon the following question:

"Are life insurance policies taxable in this state?

"There are different kinds of life policies issued, some of which may be described as follows:

"The ordinary life policy, which provides for the payment of an annual premium during life, the insurance being payable at death. Such policies may have some cash surrender value.

"Another form provides for the payment of fixed premiums during a limited period of years, the insurance being payable at death. After the policy is paid up it has a cash surrender value, the amount of which is sometimes fixed in the policy.

"Another form provides for the payment of fixed premiums during a definite term of years and payment of the insurance at death or at a certain fixed time prior thereto. These policies also have a cash surrender value."

I have searched in vain for authority upon this question, which would seem to be one which would be likely to arise frequently. It is unquestionably true that life insurance policies represent to the policy holder valuable interests—property rights convertible into money and protected by the law of the state, which, in good conscience, ought to be assessed upon the tax lists, and made to contribute to the public revenues. Furthermore, it was surely the intention of the framers and adopters of the constitution of 1854 that such valuable interests, in common with other property, should contribute equally to the revenues of the state. Article XII, Section, 2, of the constitution provides that:

"Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money * * *"

It is seemingly obvious that this provision is not self-executing. That is to say, unless laws are passed taxing investments and bonds, for example, such investments cannot be taxed although laws may have been passed the other classes of things enumerated in the constitution. It is thus seen that it is possible for the General Assembly, in carrying out the mandate of the constitution makers, inadvertently to omit some class of property or property rights which the constitution requires to be taxed uniformly with other property. This possibility has been recognized in many adjudicated cases, which it is not necessary to cite and which hold that such inadvertence neither invalidates the legislation which has been enacted nor affords ground for taxing the things thus omitted.

It is also apparent from Article XII, Section 2, of the constitution, that the things subject to the property tax, and hence, to the uniform rule, are enumerated and classified therein; that is to say, in order that a subject of ownership may be taxed by the property tax, it must be one of the things referred to in the section—moneys, credits, investments in bonds, investments in stocks, investments in joint stock companies, investments otherwise than in bonds, stocks, or joint stock companies, or personal or real property. But it does not follow that these words of Section 2 of Article XII have any extra legislative meaning, any more than it does that the whole section is self-executing. It devolves upon the legislature to formulate definitions of these terms, just as it does to pass laws whereby the taxing power of the state shall be made effective.

In the discharge of this necessary duty the legislature has enacted the following statutes:

"Section 5323. The term 'investment in bonds' * * * includes all

moneys invested in bonds, certificates of indebtedness, or other evidences of indebtedness of whatever kind * * *

"Section 5324. The term 'investment in stocks' * * * includes all moneys invested in the capital or stock of a bank * * * or an association, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferable without the consent of the other * * * stockholders * * *

"Section 5325. The term 'personal property' * * * includes first, every tangible thing being the subject of ownership, whether animate or inanimate other than money, and not forming part of a parcel of real property as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stocks, profits, or means, by whatsoever name designated * * * third, money loaned on pledge or mortgage of real estate * * *

"Section 5326. The term "credits" as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing * * * due or to become due to the person liable to pay taxes thereon * * * over and above the sum of legal bona fide debts owing by such person. * * *

"Section 5328. All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such porperty as may be expressly exempted thereform. * * *"

This section, however, is not of itself affectual to tax every subject of ownership. Its provision shows that it is declaratory merely of the intention of the legislature that certain property shall be taxable, as distuinguished from such property as is intended to be properly exempted from taxation.

"Section 5375. A person required to list property, upon receiving a blank for that purpose from the assessor, or, within five days thereafter, shall make out and deliver, annually, to the assessor, a statement, verified by his oath, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, *annuities, or otherwise,* in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required to list for taxation, either as owner or holders thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise.

"Section 5346. Such statement shall truly and distinctly set forth: first, the number of horses, and the value thereof; second, the number of meat cattle, and the value thereof; third, number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages, of every kind, and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of pianos and organs, and the value thereof; tenth, the average value of the goods and merchandise which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or

stock-jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or by deposit, subject to order, fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise; sixteenth, the monthly average amount or value for the time he held or controlled them, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this state, not taxed to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April.

"Section 5388. In listing personal property, it shall be valued at the usual selling price thereof, at the time of listing, and at the place where it may then be. If there is no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as is believed could be obtained therefor, in money, at such time and place. Investments in bonds, stocks, joint stock companies, or otherwise, shall be valued at the true value thereof, in money. Money, whether in possession or on deposit, shall be entered in the statement at the full value thereof, except that depreciated circulating notes shall be entered at their current value. A credit for a sum certain, payable in money, property of any kind, labor or service, shall be valued at its true value in money, except that if it is for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor of services of any kind, it shall be valued at the current price of such property, or of such labor or service, at the place where payable. Annuities or moneys receivable at stated periods, shall be valued at the sum which the person listing them believes them to be worth in money at the time of listing."

Manifestly, the right of a policy holder, under a paid-up life insurance policy or under certain types of policy when not paid up, if such policy has a cash surrender value, is not "money" as defined in Section 5326, above quoted; it is not "credits" as defined in Section 5327, supra, because it is not a legal claim and demand to which the policy holder is entitled without parting with nothing of value to himself; it is rather a right to elect between two inconsistent benefits of a policy; nor it is a claim which is "due or to become due" as provided in said section; it is not an "investment in bonds" as defined in Section 5323; nor an "investment in stocks" as defined in Section 5324; nor "personal property" as defined in Section 5325. All of the last three statements are manifestly true.

If, then, the policy holder's interest in a life insurance policy is comprehended within any one of the classes of taxable things enumerated in Article XII, Section 2 of the Constitution, it must be an "investment otherwise," within the meaning of said section. The word "investment," in the sense in which it is used here, is defined as follows, in the Century Dictionary:

"* * * Expenditure for profit or future benefit; the placing or conversion of capital in a way intended to secure income or profit from its employment * * *. (2) That which is invested; money or capital laid out for the purpose of producing profit or benefit. (3) That in which money is laid out or invested."

Cases in which the word "investment" has been used afford no definition

other than the three, quoted from the lexicon. It is apparent that in the financial sense there are three shades of meaning in which the word may be used; first, it may describe an act; second, it may refer to the money used; and third, it may refer to the thing purchased or held, with a view to profit. In which sense, then, is the word used in the constitution; or rather, in what sense has the legislature defined the word as used in the constitution?

This question is easily answered as to investments in bonds and stocks. *There the thing to be taxed is not the property or evidence of indebtedness* or security purchased for investment purposes, but the *money* so laid out and expended; at least this is clearly inferable from Sections 5323 and 5324, supra. There is, however, no definition of the phrase "investments otherwise" as used both in the constitution and in the statutes. Does it refer to moneys, invested otherwise than in stocks or bonds, or to the thing in which the investment has been made? Certainly, it cannot refer to the act of investing, as an act is not a proper subject of taxation.

It seems to me that the answer to this question is furnished by Section 5376, supra. Item 15 therein is as follows: "The amount of all *moneys* invested in bonds, stocks, joint stock companies, annuities or otherwise." This provision is interesting for two reasons: In the first place it shows that investments "otherwise" are the same kind of investments as investments in stocks; that is, the thing taxed is the money invested and not the thing in which it is invested. The meaning of "or otherwise," as the phrase is used in the constitution, is pointed out in this legislation. I refer to "annuities," which the Legislature evidently intended to provide specifically for, and not to leave covered by the general term "otherwise."

When we come to Section 5388, certain difficulties are encountered; although the thing taxed is the amount of money invested, yet "investments" are to be valued at the true value thereof in money, while "annuities" or moneys receivable at stated periods "shall be valued at the sum which the person listing them believes them to be worth in money at the time of listing." These rules for valuation are more appropriate to the idea of the investment considered from the standpoint of the thing in which the investment is made. The paradox, however, afforded by comparison of Section 5376 and Section 5388 is not concerned in the question under consideration; suffice it to say, as to Section 5388, that a method of valuing "investments otherwise" than in "stocks, bonds, joint stock companies and annuities" is therein provided for. Seemingly, it was the intention of the General Assembly that all investments should be taxed.

Is, then, the life insurance policy an "investment?" The germ of the idea of investment is that of profit. If one makes an investment he does so with the expectation of preserving the principal sum so expended, and reaping thereby, in addition thereto, a reasonable profit.

Now, the holder of a policy of a life insurance company makes an investment, to the benefit of which he himself is never entitled unless it be in the case of an endowment policy. The real investment is for the benefit of his beneficiary. His right to demand the cash surrender value of his policy is dependent upon his waiver of the benefits to accrue to his beneficiary. He cannot preserve the one and secure the other. If he surrenders the policy and secures the surrender value thereof, he will not receive anything like the amount of money which he has expended in premiums, to say nothing of the interest thereon. True, the cash value of policy is a thing upon which money can be secured as a loan; this fact, however, tends rather to establish the conclusion that the policy holder's right to the cash surrender value is rather a "credit" or "property" than an "investment," and certainly does not go to show that it is to be regarded as the latter.

Certainly, then, so far as the cash surrender value of a policy is concerned, it cannot be said to be an "investment." No person ever buys a life insurance policy with the purpose, at the time, of surrendering it for its cash value at some future date; if he did he would be making a mistake and not an investment, knowing, as he does, that he will expend a much larger amount than he will receive by virtue of the transaction.

I am, therefore, of the opinion that the fact that a life insurance policy has a cash surrender value does not render the same, to the extent of the policy holder's interest therein, an "investment." In this connection the following remarks, which are *obiter dicta* found in the opinion of Burket, C. J., in Chisholm vs. Shields, 67 O. S. 374-377, 378:

> "It is claimed by counsel for defendant in error, that this legacy (which gave to testator's widow an annuity chargeable against the body of his estate) is an investment in an annuity, and being of the same general class as credits, investments in bonds and stocks, that it is included within the word *'otherwise'* that all property must be taxed, and that as this legacy is property, it must also be taxed. But this section is only the declaratory section, and subsequent sections, especially 2736, 2737 and 2739 carry this declaratory section into execution, and perscribe the manner in which taxation is to be imposed upon property therein specified; and property not so specified in any section, is not taxed; as for instance, investments in life insurance policies are not taxed, for the reason that no statute authorizes their taxation, although thousands, if not millions of dollars are invested in them, many being fully paid up, and others having a surrender value. Such policies are clearly property, and very valuable property at that, but not taxed, because no statute specifically requires their taxation. The same is true of many other valuable investments. So that the word "otherwise" in Section 2731 includes only such property or investments as are specificially mentioned and required to be taxed in the subsequent sections, and property or investments not so mentioned cannot be taxed. And in so specifically mentioning and requiring to be taxed, the property must be such as is ordinarily included in the description given, and not such as can be brought within the description by a process of reasoning only, or by a strained construction. The general assembly must be presumed to be able to fairly describe such property as it desires to tax, without resorting to a strained construction, or a course of fine reasoning."

If the Supreme Court had had before it, for decision in this case, the points concerning which these remarks are made, they would, of course, be conclusive of the question which you ask. Even as it is they are entitled to great weight. In the face of the reasons above stated, and the conclusion at which I have independently arrived, together with this decision, I am compelled to take the view that the policy holder's interest in an ordinary life insurance policy, or in a limited term policy, which said interest consists merely of a right to a cash payment upon the surrended thereof, is not taxable at all, whether the policy is paid up or not.

The above remarks, however, do not necessarily apply to an endowment policy. I am not familiar with the forms of contracts in use, by life insurance companies, but if I have a correct understanding of the matter, the form of policy known as the endowment policy affords to the policy holder himself, after the expiration of a certain number of years from the date of the policy a fixed lump sum of money, or the annual payment of such a fixed sum of money. In order, however,

to be entitled to these benefits, the policy holder must have, previously to the time fixed in the policy for payments thereunder, paid all the premiums due from him; that is to say, such policies must be paid up before the policy holder himself is entitled to receive any fixed sum of money, without waiving some alternative right. I am of the opinion that during the time in which premiums are being paid on a policy of this type it does not, for the reasons already stated, constitute an "investment;" that is to say, it is not taxable, at least, until it is paid up.

After such an endowment policy becomes paid up, however, the situation is entirely different. Under the terms of the policy, the policy holder is entitled to receive either a certain lump sum or a specified sum, annually, for a limited number of years. This right of the policy holder is his without surrendering any alternative right. If it is stipulated in the policy that some time shall elapse between the payment of the last premium and the payment of the lump sum or annuity, during which time the benefits due under the policy will, in the event of the death of the assured, be paid to his beneficiaries, then, during such time, the right of the assured to the payments provided for in the policy is not yet fully vested; that is to say, as against the contingent rights of the beneficiary he cannot dispose of the payments by assignment or will; nor, in the event of his death interstate, would his personal representatives be entitled thereto. I am, therefore, of the opinion that prior at least to the time when the right to the payments under an endowment policy becomes absolutely vested in the assured, his interest in the policy is not taxable, though the same be fully paid up.

If, however, the time has arrived when, under the policy, the assured is entitled to have either a lump sum to him or a fixed sum paid annually to him, and he has made the necessary election, but has not received payment thereunder, his interest, if the sum due be a lump sum, is clearly a "credit," as the same is defined by our statute. Cooper vs. Board of Review, 207 Ill. 472.

If the policy holder has elected to receive his benefits in yearly payments, and one of these payments is due and unpaid, such installment would of course be listed as a "credit." Whether or not his interest in the policy, reduced by such amount, would then be taxable either as an "annuity," within the meaning of our statutes, or as a "credit," is, in view of the language used by Burket, J., in Chisholm vs. Shields, supra, a very doubtful question. I should be inclined to hold that such interest is not taxable. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

612.

TRUSTEES RESIDENT IN OHIO—CONTROL OF DEPOSITS OUTSIDE OF OHIO—LISTING FOR TAXATION OF MONEY, CREDITS AND INVESTMENTS—JOINT TRUSTEES—PERSONAL PROPERTY.

Under 5326, 5328, 5370 *and* 5371, *General Code, all deposits which the person who resides in Ohio is entitled to withdraw in money, upon demand should be listed for taxation at the place where such person resides, regardless of the place where such deposits are held. The same is true of credits and investments which are controlled by a person in Ohio though held outside of Ohio.*

Where such deposits, credits or investments are subject to joint ownership or management by a party who resides in Ohio and by another who resides outside of Ohio, one-half thereof should be listed in Ohio at the place of residence of the party residing therein.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 19th, requesting my opinion upon the following questions:

"An estate consisting of real property was transferred to two trustees, one residing in the city of Lorain in this state and the other in Washington, D. C. The trustees converted the property into money and the money is held by the trustees residing in Washington, D. C. Part of the beneficiaries of the trust reside in the city of Lorain and part of them outside of the state of Ohio."

The statutes of this state, insofar as they relate to the question which you ask, are as follows:

"Section 5326. The term "money" or "moneys" * * * includes * * * every deposit which the person * * * holding in trust, or having a beneficial interest therein, is entitled to withdraw in money on demand."

"Section 5328. All * * * moneys * * * of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom * * *."

"Section 5370. Each person of full age and sound mind shall list * * * all moneys in his possession, all moneys invested, loaned or otherwise controlled by him * * * on account of any other person or persons * * * and all moneys deposited subject to his check or draft; * * *. The property of * * * a person for whose benefit property is held in trust (shall be listed) by the trustees * * *.

"Section 5371. A person required to list property, on behalf of others shall list it in the township, city or village in which he would be required to list it if such property were his own. He shall list it separately from his own, specifying in each case the name of the person * * * to whom it belongs. * * * All * * *moneys * * * except as otherwise specially provided shall be listed in the township, city, or village in which the person to be charged with taxes thereon resides at the time of the listing thereof, if such person resides within the county where the property is listed, and if not, then in the township, city, or village where the property is when listed."

The following points have occurred to me in connection with the foregoing statutes:

1. "Moneys" need not be actually located in Ohio in the physical sense in order to be taxable in Ohio. The state of Ohio asserts, its right, well established in law, to affix to all intangible property the taxable situs of the owner's residence. In contemplation, of law, therefore, all "moneys" are taxable in Ohio which belong to "persons residing in this state." (Section 5328 G. C.)

2. The ordinary, or rather the theoretical, status of deposits in banks being that of "credits," and the above quoted provision, constituting them "moneys," being arbitrary and artificial it follows that those only are "moneys of persons residing in this state "is entitled to withdraw in money on demand," if consisting of bank deposits.

3. It is the evident intention of the statutes that persons holding moneys in trust for the benefit of others shall list such moneys at their own places of residence, respectively. Insurance Company vs. Hynicka, 5 N. P. n. s. 255-259; Section 5370, supra; Section 5371, supra; Brown vs. Noble, 42 O. S. 405; State ex rel vs. Matthews, 100 O. S. 431.

In Brown vs. Noble, supra, the syllabus is as follows:

"Where administration of an estate is committed to two or more persons residing in different counties, 'the moneys, credits and invest-

ments' belonging to the estate must be listed for taxation under Section 2735 of the Revised Statutes, in the county where the administrator, having actual possession and control of the property to be listed, resides at the time of listing."

Section 2735, Revised Statutes, referred to in this syllabus, is at present Section 5371, General Code, supra.

It was held further, however, in this case, that as between two administrators, both residents of the state, but residents of different counties therein, the in tangible assets of an estate should be listed at the residence of the managing administrator. The court, in the opinion, clearly recognizes the fact that in contemplation of law, the legal title of all property and interests of the estate resided jointly in both administrators, but insisted that what is now Section 5371 fixed upon the domicile of the managing administrator as the situs of the entire assets of the estate. There is nothing in this case from which a rule can be derived, by virtue of which the jurisdiction of the state over property within its power of taxation is in any way abridged or limited.

I have already discussed, and shall hereafter discuss, your question literally; that is to say, I shall assume that the "money" of which you speak in your letter is actually money on deposit in banks, withdrawable on demand. I shall also hereafter discuss the question upon the theory that the "money" of which you speak may prove to be "credits" or "investments."

Upon this first assumption, then, I am of the opinion that although the money may be held on deposit, at the residence of the trustee who resides outside of the state, yet, if it is subject to the joint control of both trustees, so that neither one, alone, is entitled to withdraw the deposits on demand, but the concurrent action of both is required, then, one-half of the money is taxable in Ohio upon a return by the resident trustee. The money in question represents the conversion of real property that was formerly taxable in Ohio. Presumably, at the instant of conversion the taxable situs of the fund was in the state of Ohio. Some weight, although not great weight, perhaps, is to be attached to this fact in determining the present situs of the property; that is to say, the property, once having been subject to the jurisdiction of the Ohio taxing authorities, the legal effect of the acts which might be relied upon to change the situs of the property, in whole or in part, must be made to appear. Mackay vs. San Francisco, 128 Calif. 678.

Our statutes are silent as to the taxation of trust estates, the legal title to which is in trustees, some of whom are not residents of the state. In the face of the considerations which I have mentioned, I do not think that this silence should be given effect so as to restrict the power of the state in such matters, but rather to give it its full scope. If the money in question is on deposit outside of Ohio, and yet the Ohio trustee is the joint manager of the fund, and his authority is necessary to the withdrawal of any considerable portion of the deposit, then, in my opinion, he should list his half of the estate at his residence; even if the money were held outside of the state as actual cash, but could not be expended in any considerable amount except by authority of both the trustees, the same result would follow; while, if, on the other hand, the possession of the non-resident trustee is so full and complete, in fact, as to make his control of the money absolute, so that the resident trustee has no real part in the control and management of the fund, none of the money is taxable in Ohio.

If the fund is so deposited or invested as not to be payable on demand to the trustees or either of them, a different question would, of course, arise. If the fund had been converted into "credits" the test would be practically the same as above defined with respect to "moneys;" that is to say, if the control and manage-

ment of the fund is joint it is the legal interest of the resident trustee that is taxable here, regardless of the place where the evidences of indebtedness may be physically held.

In case the fund has been converted into "personal property," within the meaning of the section defining that term, no part of the estate is taxable in Ohio. (Section 5328, supra)

If the fund is so invested as to be returnable as "investments" the question is perhaps doubtful; but I am of the opinion that the test above laid down, with respect to moneys and credits, would apply.

Upon all the propositions above laid down I beg leave to cite the following authorities:

Somers vs. Boyd, 43 O. S. 648, in which it is held that the mere custody of a trust estate does not determine its situs, the test being the actual power of control and manage the same.

Mackay vs. San Francisco, supra, in which the facts are very much like those which you state in your question, and in which half of the estate was held to be taxable in California, although the securities in which it was invested were deposited outside of the state, in the joint names of the two trustees. It is interesting to note here that the beneficiaries, under the trust in this case, resided outside of the state; that the estate originated in California; and that one of the trustees resided there.

People ex rel vs. Feitner, 168 N. Y. 360, in which it was held that property consisting of moneys and credits, in the hands of three trustees, one of whom was a non-resident of the state, was taxable in New York as to the two-thirds interest of the resident trustees. This case is of imporance because it was decided under a statute providing that,

> "Every person shall be taxed in the taxing district where he resides * * * for all personal property * * * under his control as * * * trustee. Where taxable personal property is in the possession or under the control of two or more * * * trustees * * * each shall be taxed for an equal portion of such property so held by them * * * if a person holds taxable property as * * * trustee * * * he shall be assessed therefor as such, with the addition to his name of his representative character * * *.

These provisions are very much like those of Sections 5370 and 5371 of our own General Code, passed on in Brown vs. Noble, supra, and in State ex rel vs. Matthews, 10 O. S. 431. In this latter case the Supreme Court held, under the statutes above cited, that where three executors resided in different taxing districts, and the control of the executors over the estate was joint in every sense, the assessment should be divided among the taxing districts. The New York case, just cited, was decided under a statute which laid down this rule expressly. It might just as well have been decided under the Ohio law.

In People ex rel vs. Coleman, 119 N. Y., 137, the court applied a rather narrow construction to the then existing statute of that state, holding virtually that because the statute did not expressly provide for the case of persons holding possession of property for the benefit of others, jointly, with other persons non-resident of the state, there was, therefore, no method of taxing the interest of such persons. For reasons already stated, I do not feel that this decision should be followed, but that the better reasoning of the other cases, which I have cited, should prevail.

For the foregoing reasons, and upon the above cited authorities, I am of the opinion, as already stated, that if the estate of which you speak has been

converted into that which is either "moneys," "credits" or "investments," within the meaning of our tax statutes, half of the estate is taxable in Lorain county, Ohio, unless the control of the non-resident trustee over the fund is absolute and complete, so that the resident trustee is virtually a figurehead. If, however, the conversion is into "personal property," none of such property, if held outside of Ohio, is taxable here under any circumstances.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

623.

TAXES AND TAXATION—INTERSTATE COMMERCE—CONNECTING GAS COMPANY—TRANSPORTATION OF GAS BY PIPE LINE—REPORTS TO PUBLIC UTILITIES COMMISSION—EXCISE AND FRANCHISE TAX—"GROSS RECEIPTS."

Inasmuch as the Connecting Gas Company, corporation formed for the purpose of transporting and selling natural gas, and maintaining a pipe line for the purpose of receiving gas at the state line from a trunk line, which is itself fed from the producing fields in West Virginia, is engaged in the business of conducting such gas along the line of its transportation, from its delivery in one state to the point of its destination in another state, the receipts derived form such business must be regarder as "Interstate Commerce Receipts" within the meaning of the excise law of Ohio.

Such company, under 5410 *General Code, is "engaged in the business of transporting natural gas through pipes or tubing" and therefore subject to assessment and valuation of its property for simple taxation under* 5423 *General Code.*

Said company is subject to Section 5470 *and* 5471, *requiring the filing, with the commission before September first of each year, a statement setting forth the information prescribed by* 5471 *General Code, also Section* 5475 *General Code. This latter section requires a statement of the total gross receipts of said company from all sources, whether from intra or interstate business, or from services done as other than a public utility, as set out in Section* 5417 *General Code; and also a statement of the entire gross receipts of said company, except receipts derived from interstate commerce or business done for the federal government.*

Under 5475 *and* 5481 *General Code, the commission shall certify all intrastate receipts and all receipts for all services except interstate commerce business, to the auditor of state for taxation at the rate of one and two-tenths per cent. as specified in Section* 5483 *General Code, the amount to be not less than* $10.00 *in any case.*

Notwithstanding the fact that the amount of such tax in the case of the Connecting Gas Company would evidently be trivial, being engaged almost entirely in interstate commerce, yet by virtue of the fact that it is required to pay this excise tax, it is exempted from paying franchise fees as a domestic or foreign corporation by virtue of 5518 *General Code.*

The filing of a report of interstate receipts under such circumstances is subject to suspicion and the commission is advised to exercise caution in such cases.

September 5, 1912.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 21st, enclosing a copy of the purpose clause of the articles of incorporation of The Con-

necting Gas Company, an Ohio Corporation, together with a statement of the nature and character of the business in which the company is engaged.

The corporation, it appears, is formed for the purpose of producing, transporting and selling natural gas, with authority to maintain a pipe line and appurtenances from a point on the Ohio River in Washington county, this state to a point at or near Sugar Grove, in Fairfield county.

The statement of the nature and character of business in which the company is engaged is to the effect that it produces no gas in Ohio and sells none there, but that it is engaged solely, or substantially so, in the transportation, through its pipe line, of gas received by it from a certain West Virginia corporation for delivery to certain Ohio distributing companies of Sugar Grove.

The corporation reports, in its statement under the excise tax law, some intrastate receipts, consisting of interest, the source of which is not definitely explained.

Upon these facts so disclosed you request my opinion as to the following questions:

> "1. Are the receipts of this company from transporting gas in the manner stated 'interstate receipts?'
>
> "2. If such receipts are 'interstate,' should the company be required to report and pay an excise tax upon its intrastate receipts, or as a domestic corporation for profit and pay an annual fee upon the amount of its subscribed or issued and outstanding capital stock?"

It will be necessary for me to assume certain facts which are, however, I think obvious, in order to answer your first question. It appearing that the pipe line of the Connecting Gas Company begins, so to speak, exactly upon the state line, it necessarily follows, from the nature of the commodity to be transported, that it must there connect with another similar pipe line extending into the state of West Virginia. I think it perfectly safe to assume that this pipe line, in turn, receives gas from the producing field through radiating or gathering lines. That is to say, the line which connects at the state line with the pipe line of the Connecting Gas Company is itself a "trunk line;" the gas from the producing wells does not pass directly into the pipe line of the Connecting Gas Company and only arrives there by means of the agencies above described.

Under this statement of facts, partially assumed, it seems clearly to follow that when natural gas is pumped into the pipe line which connects at the state boundary with the pipe line of The Connecting Gas Company and had no place of escapement excepting into the said pipe line, its journey from the producing field to its ultimate point of destination has commenced.

In Coe vs Errol, 116 U. S., 517 the supreme court of the United States in describing the movement of a commodity which consists of interstate commerce uses the following language, per Bradley, J.:

> "this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. This is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put

in course of transportation out of the state. Carrying it from the farm or the forrest to the depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in flori, and not at all a fixed and certain thing."

Applying this reasoning to the case at hand and having regard to the nature of the commodity, the transportation of which is involved here, it appears that in the very nature of things the continuous movement of the gas could not begin at the Ohio River terminus of The Connecting Gas Company pipe line, but at some point in the state of West Virginia. From this it follows that The Connecting Gas Company's service with respect to the transportation of the gas in question is one of two or more like services necessary in order to complete a continuous movement. The service itself takes place entirely within the state of Ohio, but the movement originates in West Virginia and terminates in Ohio.

In Steamer Daniel Vall vs. United States, 557, the following self-explanatory language appears, per Mr. Justice Field:

"But it is contended that the steamer, Daniel Ball, was only engaged in the internal commerce of the state of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented.

"There is, undoubtedly, an internal commerce which is subject to the control of the states. The power delegated to Congress is limited to commerce 'among the several states,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated and, of course, that commerce which is carried on entirely within the limits of a state, and does not extend to or affect other states. Gibbons vs. Ogden, 9 Wheat., 194. In this case it is admitted that the steamer was engaged in shipping and transporting, down Grand river, goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought within the state from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has began to move as an article of trade from one state to another, commerce in that commodity between states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

The doctrine of this case has been followed without deviation by the Supreme Court of the United States. (Sec. N. & W. R. R. vs. Pennsylvania, 136 U. S., 114; W. ST. L. & P. R. R. vs. Illinois, 116 U S., 557).

The facts in the case under consideration made a clearer case for the characterization of the transportation in question as interstate commerce than those in Steamer Daniel Ball, supra, for here, in the very nature of things, the gas pipe line must connect directly with a like transportation line extending from the interior of West Virginia to the Ohio state boundary.

I am, therefore, of the opinion that the transportation of gas from the state boundary line to a point in Ohio, being a part of a single movement of the commodity for a point in West Virginia to a point in Ohio, constitutes interstate commerce and that the receipts from such business are "receipts from interstate business," within the meaning of the excise law of Ohio.

The foregoing conclusion answers your first question. Your second question is more difficult in view of the peculiar language of the excise tax law. The corporation in question is clearly "engaged in the business of transporting natural gas * * * through pipes or tubing, within the meaning of Section 40 of that act, designated as Section 5416, General Code. It is, therefore, notwithstanding the interstate character of its business, subject to assessment and valuation of its property for simple taxation under Section 47 of that act, designated as Section 5423, General Code, which seems to be a point not conceded by the company but concerning which you do not request my opinion.

Being, therefore, by virtue of these facts, "a natural gas company" and a "public utility," within the meaning of the Tax Commission act, it is clearly subject to the requirements of Section 81 and 85 thereof, designated as Sections 5470 and 5474, General Code, respectively. These sections stipulate that each public utility, as defined in the act, shall make a statement of gross receipts to the Tax Commission annually. That is to say, it must make *some* report, at least setting forth the facts mentioned in Section 82 of the act, designated as Section 5471, General Code. Indeed, it seems clear that some report must also be made under Section 85 of the act, which requires the statement to contain "the total gross receipts * * from business done within this state," whether interstate or intrastate in character, though the same section also requires a separate statement of receipts from intrastate business alone. The exact form of this stipulation is as follows:

> "Such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever sources derived, for business done by it within this state for the year next preceding the first of May * * * but this shall not apply to receipts from interstate business * * *."

This language is enlarged in its scope by the provisions of Section 41 of the above cited act, designated as Section 5417, General Code, as follows:

> "The term 'gross receipts' shall be held to mean and include the entire receipts for business done by any person or persons, firm or firms, co-partnerships or voluntary association joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incident thereto or in connection therewith. The gross receipts for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire receipts for business done by such company under the

> exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

Reading these two sections together it appears that although the public utility business of a corporation in Ohio may be entirely interstate, yet if the corporation has receipts other than those derived from the public utility business as such and which are derived from business within this state under its corporate charter, such receipts must be reported to the Tax Commission. It follows, then, that under Section 86 of the act, Section 5475 of the General Code, the Tax Commission must determine the gross receipts of a company so engaged in business as being those receipts in Ohio other than those from the operation of the public utility as such. However trivial in amount such recipts may be, the amount so ascertained must, under Section 92 of the act, Section 5481, General Code, be certified to the Auditor of State, who must, under Section 94 of the act, Section 5483, General Code, compute an excise tax of one and two-tenths per cent. thereof, not less than $10.00 in any case, thereon and charge the same for collection.

In view of the foregoing considerations it seems clear that the corporation in question comes under the saving clause incorporated in Section 129 of the act, Section 5518, General Code, which exempts public utility corporations paying excise taxes from the payment of franchise fees as domestic or foreign corporations. The language is as follows:

> "An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act * * * shall not be subject to the provisions of Sections one hundred and six to one hundred and fifteen, inclusive, of this act."

The corporation in question being one which is operating a public utility in this state, and is, as such required by law to pay an excise tax upon its gross receipts, need make no report and pay no fees as a domestic corporation for profit.

It seems that the construction which I have been forced to apply to the law involved in your inquiry results in the receipt of a ridiculously small amount of taxes from the company in question. Substantial justice would seem to require that this company pay franchise taxes. The legislature, however, has so enlarged the meaning of the words "gross receipts," as used by it throughout the act, as to make it impossible for me to escape the conclusion that so long as a corporation engaged exclusively in an interstate public utility business has any miscellaneous or trivial recepits which are not interstate, it may escape privilege taxation on everything save those receipts.

I am, therefore, of the opinion that The Connecting Gas Company, under the facts submitted, is required to report and pay an excise tax upon its intrastate receipts, if any, and is not required to report annually as a domestic corporation for profit or to pay franchise fees as such. It will be observed that I do not hold that if a corporation doing business in the manner in which The Connecting Gas Company does business in Ohio, actually has no intrastate receipts it will escape taxation altogether. On the contrary, under Section 5518, General Code, supra, exemption from Willis law taxation is extended only to such corporations as are required to pay *some* excise taxes. It will be observed, also, that I do not hold that the corporation in question is not a "public utility." As already stated its property must be assessed by the commission for simple taxation upon the unit basis as a going concern, despite the fact that it is engaged in interstate commerce.

In conclusion I may be permitted to suggest that cases of this sort seem to me to afford some grounds for suspicion that the so-called "intrastate receipts" are not actual and bona fide. The commission is not, of course, bound by the report of the company, and if upon the investigation which it is authorized to make it is found that a company reporting a small amount of "intra state receipts" in fact has no such receipts, and has so reported solely for the purpose of avoiding Willis Law taxation, the commission may lawfully and with propriety insist that such a company must file report and pay fees under the Willis Law sections of the act.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

630.

TAXES AND TAXATION—DEPOSITS IN SAVINGS BANKS WITHDRAWABLE ON DEMAND AT TIME OF LISTING "MONEYS"—"CREDITS."

When a savings bank has a rule as follows:"Depositors may be required to give sixty days notice before withdrawing their deposits, but as a general rule they will be permitted to withdraw at pleasure;" held: that evidence of long usage and custom established that such rule is intended as a reservation of a right to pass a rule suspending payment for sixty days, rather than as a rule itself, and that as a matter of fact such deposits are and always have been "withdrawable on demand," will justify the listing of such deposits by a person owning the same, or holding them in trust, or having a beneficial interest in them as moneys under Section 5320 *General Code.*

August 14, 1912.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 9th, enclosing a communication addressed to the commission by the board of review of the city of Cleveland. The letter of the board of review sets forth a statement of facts upon which a reconsideration of my opinion of July 22, upon the taxation of savings deposits, is requested in so far as the said opinion relates to deposits in savings banks in corporated under the general statutes of this state. In the former opinion it was assumed that the statements denominated the "Rules and Regulations" as set forth in the printed matter of several of these institutions, transmitted to me by you are all of the same dignity and effect, and are all what they purport to be, namely, rules adopted by the directors of several banks governing their officers on the one hand, and the depositors, on the other, as to the manner and conditions of receiving and making savings deposits.

I am free to state that I was fully cognizant at the time of writing the former opinion that in practice savings bank depositors, generally, are permitted to withdraw their deposits at pleasure without giving any notice. I had been unable, however, to satisfy myself, from my own general knowledge of the subject, upon the question as to whether or not a savings bank depositor was entitled *as of right* to withdraw his deposits without giving notice, being unable to assume from the face of the so-called "Rules" on the subject that the officers of the bank might not at anytime as to a given depositor choose to stand on the bank's legal rights, whatever they might be. In other words, I could not feel certain that the requirement of the sixty-days' notice, was not to be regarded as fully in effect and as qualifying in some way the right of the depositor to withdraw his deposits.

In the face of these facts, and in the face, too, of the strict construction to

which I felt the section of the General Code which defines the term "money" is subject, I deemed it wise to give to the so-called "Rules" full force and effect as such.

The statement of facts now submitted by the board of review of Cleveland is to the effect that in Cuyahoga county, at least, a rule stating that:

> "Depositors may be required to give sixty days' notice before withdrawing their deposits; but as a general rule they will be permitted to withdraw them at their pleasure."

is not treated in practice by and savings bank itself as a self-executing regulation of the corporation, but that it is regarded—and the practice is universal among all the like institutions in the county—rather as the reservation of the right to make a rule than as a rule itself. That is to say, the actual understanding of the parties—the bank on the one hand, and the depositors on the other—sanctioned by long usage under printed statements like the above, is that the bank has no rule requiring notice, but that it reserves the right at any time to make such a rule and to enforce it as to any deposits which may be outstanding at that time.

The letter of the board of review also states that none of the savings banks in the city of Cleveland, or in the county outside of the city, so far as the writer is advised, has ever taken action through its board of directors in any way modifying this usage or understanding.

Of course, the foregoing statement of facts is not the one considered in my former opinion. I took the so-called "Rule" at its face value; the custom of the business seems to be such as to modify what had appeared to me to be the primary meaning of the printed statement. I acknowledge that the printed statement is fairly susceptible of either of the two meanings involved. That being the case, it is sufficiently ambiguous to permit of proof as to its real meaning by evidence of any custom, usage or understanding which may show, or tend to show, the real intention of the parties concerned.

Assuming the facts to be as the board of review states them, that is to say, assuming that the mere inclusion of a so-called "Rule," like the one above quoted, in the printed "Rules and Regulations" of a savings bank does not establish the conclusion that the directors of the bank have actually adopted a rule understood by them as requiring sixty days' notice, and authorizing the officers of the bank to relax the rule simply as a matter of convenience to the depositors, the rule itself still being in existence as a matter of legal rights, but that on the other hand the understanding and custom is to treat such printed statement as notice of the reservation of a right to act in the future, the conclusion which I would reach would be opposite to that stated in my former opinion. That is to say, if there is actually no rule authorizing the requirement of thirty or sixty days' notice as a condition of withdrawal of savings deposits therein until the board of directors of the bank has exercised the right reserved to it, and has passed such a rule, savings deposits therein would be "deposits which the person owning * * * is entitled to withdrawal in money on demand" within the meaning of Section 5326 of the General Code.

In other words, the question as it ultimately presents itself is as to the real mutual understanding between the depositor, on the one hand, and the savings bank, on the other, as to their respective rights in the premises on the day preceding the second Monday in April. When such an understanding is shown to exist and it is to the effect that the deposits are on that day actually withdrawable in money on demand and will be so payable until such future time as the board of directors of the bank may see fit to put into force a general rule applicable to all depositors

requiring notices of withdrawal, then such deposits should be listed as "money" of the depositor, not in spite of the printed "Rule," but because the ambiguity of the rule permits such understanding to be shown in the interpretation thereof. Evidence of such long continued usage and evidence of the fact, as stated by the writer of the letter from the board of review, that no savings bank has ever attempted to treat its "Rule" as operative further action of the board of directors would be such evidence as might lawfully be received by the taxing officers, such as the county auditor or the board of review in support of an assessment of a savings deposit as "money" instead of as a "credit."

I am, therefore, of the opinion that under facts like those above stated, showing as they do a practical construction of the "Rule" of a savings bank by its own managers, somewhat different from what might be considered to be the primary meaning of its language, but nevertheless not so inconsistent therewith as to be inadmissible as evidence to contradict the written language, deposits made thereunder in a savings bank must be listed as "moneys" and not as "credits."

While the facts stated by the board of review are represented as being those which existed in Cuyahoga county, only, the above conclusion would, of course, apply in any other locality in which the custom of savings banks, and the interpretation placed by the banks themeslves, as well as the depositors, upon rules of this sort, are shown to be similar to that described in the letter of the board of review. I suppose the custom prevails throughout the state.

In matters of taxation the law looks to substance and not to form, to real facts and not to any shells that may surround them. Where one has, in fact, at the time of listing a deposit in the hands of a society for savings or banks having no capital stock, or a deposit which the person owning, holding in trust of having the beneficial interest therein, is entitled by practice to withdraw in money on demand, such deposits it taxable as moneys; and to be exempt from paying tax as money under the head of not being payable on demand, it must be true that the time of listing such depositor could not, in fact, receive his money upon demand.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

635.

TAXES AND TAXATION—NON-RESIDENT CORPORATION HAVING AGENCY IN OHIO—DEDUCTION OF DEBTS CREATED WITH RELATION TO BUSINESS DONE AND NOT MERELY GOODS HELD IN OHIO.

On the authority, Hubbard vs. Brush 610 *O. S.* 252, *a foreign corporation having an agency in this state and a stock of goods and machinery located at such agency, is not entitled under the tax laws to deduct from the sum of all its legal claims arising from the sale of such goods and machinery in this state, the legal bona fide debts owing by such corporation regardless of whether such debts are related to the goods sold and the business done in this state of Ohio.*

Such corporation may deduct from its credits, under the control and management of the Ohio agency, arising from the sale of goods and machinery in this state, its legal bona fide debts which are related to the business conducted in Ohio, but not those debts which are related merely to the goods owned by the corporation in Ohio.

Debts therefore, created by the corporation at its domicile in the general purchase of goods, part of which are consigned to the Ohio agency for sale, are not deductible.

Debts so created, however, solely for and on account of the goods to be sold in Ohio may be deducted.

COLUMBUS, OHIO, August 22, 1912

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 18th requesting my opinion upon the following questions which you advise have been submitted to the commission by Hon. Daniel J. Ryan, general counsel for The Ohio Manufacturers' Association:

> "1. Is a foreign corporation having an agency in this state and a stock of goods and machinery located at such agency, entitled under the tax laws to deduct from the sum of all its legal claims and demands arising from the sale of such goods and machinery in this state, the legal bona fide debts by such corporation regardless of whether such debts are related to the goods sold and the business done in the state of Ohio?
>
> "2. May such corporation deduct from its credits arising from the sale of goods and machinery in this state, its legal bona fide debts owing on account of the purchase by such corporation of the goods and machinery from the sale of which in this state the credits arise?"

You enclose a copy of Mr. Ryan's letter to the commission in which he expresses the view that under Hubbard vs. Brush, 61 O. S. 252, seems to him that a foreign corporation, under the circumstances detailed in your question, would be entitled to deduct all indebtedness which it owed regardless of whether such indebtedness related to the goods sold and business done in the state of Ohio or not; and that certainly upon a more limited construction the corporation would at least be entitled to deduct that indebtedness which was directly connected with the goods and business out of which taxable credits arose.

The taxation of credits of foreign corporations in Ohio and the meaning and effort of the decision of Hubbard vs. Brush, *supra*, were somewhat elaborately

discussed by me in my opinion of recent date to you in the matter of the Ritter Lumber Company. It will, therefore, not be necessary for me to repeat much that was said in that opinion as to the manner in which credits of a foreign corproation acquire a taxable situs in Ohio nor as to the general interpretation of the decision in the case cited. It will be sufficient to state, as a conclusion arising from the authorities discussed in the former opinion that the *credits* of a foreign corporation that is, not the technical credits defined in Section 5327 General Code, but the legal claims and demand owing to the corporations, become assessable in Ohio when they grow out of a business conducted and managed by representatives of the corporation in Ohio and are there held and controlled by such representatives.

The matter of what debts may lawfully be deducted by such a corporation from the claims thus arising in order to ascertain the amount of the tax on *"credits"* as defined by Section 5327 was not considered in that opinion.

In the case of Hubbard vs. Brush, *supra,* the third branch of the syllabus is as follows:

> "Such corporation, in listing for taxation is 'credits' liable to taxation in this state, may, under the provisions of Section 2730, Revised Statutes, deduct from its claims and demands that arise out of the business it transacts in this state, such of its bona fide debts *as arises from the same sources."*

This proposition of law is, of course, to be given precedence over any portion of the opinion on the case which may seem inconsistent with it. Mr. Ryan in his letter quotes from pages 264 and 265 of the opinion from which the inference may be drawn that the court was of the opinion that the corporation whose case it had before it was entitled to deduct all of its debts from the credits which it would be required to list for taxation. It is not necessary, however, to resort to the rule which obtains in this state, that is to the effect that the syllabus governs the opinion, in dealing with the seeming inconsistencies between this portion of the opinion and limited language of the syllabus above quoted. The court had already found that as to the Sandusky Portland Cement Company, the foreign corporation involved, in the case of Hubbard vs. Brush, all of its business was conducted in Ohio and all of its credits—that is all of its accounts receivable and notes were situated in this state, so that the effect of the opinion in that case is merely to hold that a foreign corporation, all of whose credits are taxable in Ohio, may deduct all of its debts in making up the sum thereof.

In framing the third branch of the syllabus thereof, quoted above, the court was very careful to state the proposition of law upon which the decision was founded with entire accuracy. It seems to me that it is perfectly clear from this syllabus that the law of this state is that a foreign corporation, subject to taxation upon any of its credits in Ohio, may deduct from its claims and demands so subject to taxation such of its bona fide debts, and such only, as arise from "the business it transacts in this state."

We are thus furnished with a rule which is complete in itself, but the application thereof to the facts submitted by you is not perfectly clear. That is to say, it is clear that the answer to your first question must be in the negative.

Your second question must be answered by applying the above stated principle, but the principle itself does not furnish an immediate answer thereto. The exact question of law now presented may be stated as follows:

Does indebtedness created by a foreign mercantile corporation in the purchasing of goods and machinery which it sells at a profit through an agency located in Ohio become attributable to the business done by the agency in Ohio so as to

be subject to deduction from the claims and demands due to, managed and controlled by such agency in Ohio? I have described the foreign corporation as a mercantile corporation because it appears from Mr. Ryan's letter to be such in the particular instance of which he inquires.

In the first place it is to be observed that the debt in question is not created by the agency as are the claims and demands from which it is proposed to deduct it. In the second place the debt is created in the course of business usually managed and conducted, I take it, by the home or principal office of the company. That is to say, I assume that the Ohio agency is without authority to create indebtedness in the purchase of merchandise but that it merely draws upon the home office or warehouse for such stock as may be needed. The fact that the goods sent to the home office are not yet paid for is a fact over which the Ohio agency has no control, if this assumption be correct. In the light of these facts, partly apparent on the face of Mr. Ryan's letter and partly assumed as probable in connection with the facts which he states, the question becomes somewhat difficult to answer.

Under tax laws like those of New York, for example, your second question would have to be answered in the affirmative. That state imposes a tax upon non-residents, not upon their tangible property, but upon the sums invested in the state. Under this statute it has been held that such non-residents are entitled to deductions for debts, not only as against New York credits, but also as against the value of any tangible property they may possess in the state. It is further held that indebtedness incurred by a non-resident in the purchase of assets located in New York, is, under this rule, deductible from the value of the assets. People ex rel vs. Barker, 147 N. Y. 31. See also, People ex rel vs. Barker, 145, N. Y. 239; People ex rel vs Barker 35 App. Div. 486; People ex rel vs. C. Dannell, 46 Misc. 521.

The rule in all these cases is perhaps well illustrated by the following excerpt from the opinion in the first cases above cited:

> "Is the fact that the company has in its possession as ostensible owner $200,000 in value of wheat conclusive evidence that the company has invested that sum in its business in this state, when in truth it has paid a sum amounting to but half its value and has promised to pay the balance at some future time? It seems to us there can be but one answer to this question. The sum invested is the sum paid and not the sum which is promised to be paid on a future occasion."

If the Ohio law permitted, as does that of New York, the deduction of debts from tangible personal property owned by a non-resident and located in Ohio then, of course, it could be said that the debts mentioned in your letter did bear a direct relation to the goods and machinery mentioned therein and should be deducted from the value thereof. Under the Ohio rule, however, the debts must bear relation, not to the property owned in Ohio, but to business conducted in Ohio, and it is clear that under Hubbard vs. Brush, *supra,* the debts must have been created in the ordinary course of the business conducted in this state in order to be subject to deduction from the claims and demands likewise created. If the debt is created by the central management of the corporation in the course of its regular business, then the same fact that the debts is on account of goods, some of which are sent into Ohio, does not, in my judgment, constitute the debt when created in the course of the business transacted in Ohio. That is to say, if the central or general management of the corporation in the coarse of its business buys with the intention of re-selling a large amount of goods, then the situs of the debt for the purpose of taxation would clearly be that of the corporation itself. If, before the indebtedness

created in this manner is discharged, some of the goods not yet paid for are sent to the agency in Ohio for re-sale, I do not believe that upon any reasoning it could be held that a portion of the debt becomes separated from the principal debt and travels with the goods to Ohio, becoming there referable to the business conducted by the agency. The debt still remains that of the corporation itself as distinguished from that of its agency; or to put it more clearly, it is one incurred in the transaction of the general business of the corporation and not one incurred in the course of its business in Ohio. It would be otherwise, of course, in the indebtedness, whether created by the agency or by the home itself, were directly referable to the business of the agency. That is to say, if goods are purchased by the corporation especially for sale in Ohio, the whole transaction being directly referable to the business conducted in Ohio, than, in my judgement, such debt by whomever created may be deducted from claims and demands growing out of Ohio business. This would be clearly true if the Ohio agency had authority to purchase goods or to use the credits of the company for this purpose; but in my judgement it would also be true if the general management of the company, in order to supply the needs of the Ohio agency, purchased goods solely on account of those needs and pledged its own credit for a part of the purchase price thereof.

The whole question is one upon which there is a surprising lack of authority aside from the New York cases which I have cited, which, in reality, are not in point at all. The rules which I have tried to lay down, however, are, in my judgement, correlative to those suggested by me in my opinion in the matter of the Ritter Lumber Company for determining the situs for taxation purposes of claims and demands owing to a foreign corporation by virtue of business conducted in Ohio. That is to say, the test as to the situs of such claims and demands for taxation purposes be the place where the business in which they are created, is managed and conducted, it seems at least consistent and reasonable to hold that such debts and those only are deductible from such claims and demands as are incurred by or directly on account of those representatives of the company in Ohio whose management and control would constitute the claims and demands of the company taxable here.

For all the foregoing reasons I am of the opinion that the mere fact that a foreign corporation having an agency in this state and a stock of goods and machinery located at such agency, owes money on account of such goods and machinery, does not entitle such corporation to deduct from its claims and demands arising from the business conducted at its Ohio agency all of such indebtedness. The indebtedness which may be deducted from such credits must be related, not to the *goods* owned by the corporation in Ohio, but to the *business* which it conducts therein. If the purchase of the goods for the corporation is directly referable to the Ohio business alone, then, in my opinion, a deduction on account of indebtedness so created may be made from Ohio credits, otherwise the only indebtedness which may be deducted from the claims and demands created by the Ohio agency are the debts created by that agency itself.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

637.

TAXES AND TAXATION—CORPORATION—RETURN UNDER 5404 AND 5385, GENERAL CODE—MERCHANTS AND MANUFACTURERS STOCK—MANUFACTURED STOCK REMOVED TO STORFHOUSE IN OTHER COUNTY TO BE THEREIN SEPARATELY LISTED AS MANUFACTURERS STOCK.

Section 5404 *and* 5405, *General Code, providing for the return to the county auditor, by corporations, of all personal and real property, are not exclusive provisions in the sense that they exclude such portions of chapter three of the title in the General Code, relating to taxation, as may be applicable to corporations.*

A corporation, obliged to return all its personal property under 5404, *General Code, which is engaged in the manufacturing business, must return, upon an average basis, so much of its property as is engaged in process of manufacture, in the manner specified in* 5385 *and* 5386, *General Code.*

As to the articles manufactured by a corporation in this state and sent to a warehouse in another county to be stored, decisions in other states support the proposition that manufactured products so separated from the manufactory, should be separately listed for taxation in the county whence removed.

The one decision in Ohio, however, Bridge Company vs. Yost, presents seeming contrary authority to the effect that all manufacturing stock should be returned at the principle place of business. Inasmuch as this decision, however, overlooked the requirement of Section 5371, *General Code, requiring manufactured stock to be listed in the township, city or village where situated, it seems advisable to distinguish the case by limiting it to the peculiar circumstances of the Bridge Company which required its articles to be manufactured at various places. The rule is adhered to therefore, that the stock stored in the warehouse should be separately listed at the place where stored.*

Under Section 5381, *General Code, inasmuch as such stock has "not been purchased" and has not "been consigned from a place outside of the state," the same cannot be listed as "merchants" stock.*

Under 5385, *General Code, therefore, the manufactured products so stored in the warehouse in another county, should be listed in such county on the average basis as a separate stock of manufactured products, and the same should not be returned with the list of products on hand at the place of their manufacture, from the time they have left such place for storage in the separate county.*

August 25, 1912.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 16th, submitting for my opinion the following questions:

"1. Does chapter 4, beginning with Section 5404,, G. C., include all the provisions for the taxation of corporations designated in Section 5405, or are corporations entitled to all of the privileges and subject to all of the requirements enumerated in chapter 3?

"2. In view of the provisions of Section 5404, G. C., are corporations subject also to Section 5385, G. C., contained in chapter 3?

"3. In answer to question 75 in QUESTIONS RELATING TO TAXATION, answered by the Tax Commission March 19 and 20, 1912, it is indicated that goods of a manufacturer shipped on consignment

to another state "cease to be on hand" within the meaning of Section 5385. Inasmuch as goods shipped to another county are taxed in such county under the provisions of 5405, should goods so shipped and taxed in another county be considered as not on hand at the date of return in the county of the residence of a corporation?

"4. If a corporation is engaged in county 'A,' which is its place of residence, makes return in such county in accordance with Section 5385 and is thus taxed upon the average of all articles purchased, etc., for the purpose of being used in manufacturing and of all the articles which were at any time by it manufactured, and such corporation has in county 'B' a warehouse in which is stored a portion of its manufactured product of the year preceding the return day, if such contents of warehause is taxed under 5404 in county 'B,' is there such double taxation as would be improper?

"5. In view of the provisions of Sections 5405 and 5404, whereby all of the property of a corporation is taxed in which ever county of the state it is found, should Section 5385 be operative upon corporations?"

Question 75 referred to by you in your third question is answered by a quotation from an opinion which I gave to the Tax Commission on September 13, 1911. In that opinion I considered and answered your questions No. 1, 2 and 5, holding that a corporation which is engaged in the business of manufacturing must return that portion of its property which consists of materials and manufactured products in the capacity of a "manufacturer," and upon the monthly average basis as provided by Sections 5385 and 5386, General Code.

By reference to that opinion, then, you will observe that your first question may be answered by stating that Sections 5404, etc., General Code, are not exclusive provisions for the taxation of corporations in the sense that they exclude such portions of Chapter 3 of the title relating to taxation as may appropriately be applied to corporations. It will also be observed that your second and fifth questions should be answered in the affirmative.

In the former opinion I considered and passed upon the question as to whether or not the manufactured products of an Ohio corporation, sent into another state for the purpose of sale, cease to be "on hand" within the meaning of Section 5358 and, hence, should not be considered as a part of a manufacturer's stock of finished products from the date upon which they are sent into another state.

In discussing this question I considered and commented upon the cases of Bridge Co. vs. Yost, 22 O. C. C., 376; American Steel & Wire Co., vs. Speed, 110 Tenn., 524, affirmed 192 U. S., 500; and Selz vs. Cagwin, 104 Ill., 647. The first of these cases I distinguished as not in point on the question then under consideration; the other two cases I cited upon the point that manufactured products, separated from the stock on hand at the manufactory and transmitted to a separate warehouse for the purpose of sale, were there to be treated as merchandise stock. In the Tennessee case it was held that a sales agency of a foreign manufacturing corporation located in Tennessee was there taxable upon its stock of goods as a "merchant;" in the Illinois case the facts are identically the same as those stated by you in your third question; that is to say, the manufacturing operation was carried on in one county of the state and the warehouse was located in another county. Both stocks were held to be assessable where located, the one as a manufacturer's stock and the other as that of a merchant.

The principal point upon which these two cases were cited, however, was that establishing the separation from the manufacturer's stock of finished products at the manufactory of the goods treated in the manner under consideration in

the former opinion. To that extent these cases are also applicable to the question which you submit. That is to say, although the statutes under which they are decided are not quite similar to those of Ohio they are authority for the conclusion that when a stock of goods is maintained by a manufacturing corporation at a place other than the manufactory and in a manner separate and apart from the stock of manufactured products kept on hand at the manufactory, such stock becomes separately taxable.

In seeming opposition to these cases in so far as they apply to the question which you now ask, although not with respect to the question passed upon in the former opinion, is the case of Bridge Co. vs. Yost, supra. In that case it was held, in short, that a manufacturing company must return, as if located at its principal place of business and as if a part of the stock there maintained, all of the material located in the state and used by it there in the process of manufacturing, although such material might never go into the manufactory at all. The facts in that case are as follows: The bridge company manufactured at its factory some only of the materials used by it in constructing its finished product, the completed bridge; other materials used by it were purchased from other manufacturers and transported to the places where the bridges were in process of erection and there worked into the finished bridge. The court held that all of the material in Ohio, whereever situated, must be deemed a part of the manufacturer's stock of materials, having its taxable situs in Locus county, and must be there valued on the average basis. As pointed out in the former opinion the decision in this case simply ignores the provisions of Section 5376, General Code, which are in part as follows:

> "Merchants' and manufacturers' stock and personal property upon farms shall be listed in the township, city or village in which it is situated."

In the former opinion I was forced to speculate upon the degree of weight and effect which should be given to this decision in view of this apparent oversight, but the matter was not important for the reason that the case could be distinguished from the facts then under consideration. In connection with your present question, however, I am brought face to face with this problem. There being an entire lack of authority upon the proposition in Ohio and in the face of cases like those above cited from other jurisdictions, I feel compelled to take the view that while Bridge Co. vs. Yost may be regarded as establishing an artificial situs for all of the material of a manufacturing company doing business in the peculiar manner in which the Toledo Bridge Company conducted its manufacturing operations, that case can not be regarded as controlling facts like those which you now submit. There are essential differences which must be taken into account. In the first place, the bridge company did not have any one place where all of its manufacturing operations were carried on to completion; under the facts which you submit the manufacturing operations of the corporation are completed in a single taxing district, or at least in one place. In the second place, the Toledo Bridge Company did not maintain any selling warehouse but its manufactured articles were put in place by it in the course of manufacture as permanent additions to the real estate; in the case which you submit the corporation has a warehouse in a county other than that in which its manufactory is located and in other counties a stock of goods which is regularly kept up. In the third place, the controversy in the bridge company case related to the materials used in manufacturing; the question submitted by you relates to the taxable situs of the manufactured product. The difference between the two kinds of goods is possibly of some importance; the location of materials is dependent upon the practical necessities of the manu-

facturing operation; manufactured products, on the other hand, if susceptible of being kept in stock may, by the voluntary act of the manufacturer, be separated from his general stock and taken elsewhere for the purpose of sale.

Having regard to all these substantial differences between the case of Bridge Company vs. Yost and that presented by you, and having regard also to the principles enunciated in the former opinion and embodied in the two other cases above cited, I am of the opinion that the act of a corporation in separating from its stock at the manufactory, articles of its finished product and sending them to a warehouse maintained by it in another county, causes the goods so separated to cease to be "on hand" with the meaning of Section 5385, General Code, as part of the stock which a corporation must list in the county where the manufactory is located.

I come now to the consideration of the question as to the manner of listing the stock at the warehouse in the other county. Three views might be taken of this question:

> "1. That it must be listed as any other tangible personal property, by setting forth the value of the goods on hand on the day preceding the second Monday of April;
>
> "2. That it must be listed as merchant's stock;
>
> "3. That it must be listed as a separate manufacturer's stock."

Having regard to the purpose of the statutes relating to the listing of merchants and manufacturers stock, and the manifest intention of the Legislature in enacting them, as discussed by me in the former opinion, I reach the conclusion that a stock of goods maintained in a warehouse in the manner suggested in your question should not be listed as ordinary tangible property, but should be listed upon the average basis either as merchants or manufacturers stock of finished product. In spite of the decision in the Illinois case above cited I am of the opinion that the warehouse stock should not be listed as merchants stock. Section 5381 defines the term "merchant" as follows:

> "A person who owns or has in his possession or subject to his control personal property within this state, with authority to sell it, which *has been purchased* either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant."

Analyzing this provision, it appears that the agent of a manufacturing company located outside of the state who has in his control or possession a stock of its manufactured product in Ohio, shall list such stock as a merchant but that when both the manufactory and the selling agency are located in Ohio this rule does not prevail because the agent does not have possession of property "which has been purchased * * * with a view to being sold at an advanced price or profit." In this respect the statute of this state differs from those of some other states upon the same subject.

Section 5385, General Code, in so far as it applies to the listing of manufacturers finished products and to the definition of the term "manufacturer," is as follows:

> "A person who purchases, received or holds personal property * * * for the purpose of adding to the value thereof by manufacturing * * * or by the combination of different materials with a view of making a gain or profit by so doing, as (is) a manufacturer, and, when he is required

to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, he shall include therein the average value estimated, as hereafter provided * * * of all articles which were at any time by him manufactured or changed in any way, either by combination or adding thereto which, from time to time, he has had on hand during the year next previous to the first day of April annually * * *."

Taken in connection with the provision of Section 5381 which I have already quoted, this statute furnishes, it seems to me, the proper guide for the listing and valuation of the warehouse stock described in your letter. To be sure, there is a slight inconsistency arising out of the failure of the statute specifically to provide for separating a stock of finished products into more than one part. That it was the intention of the Legislature that this should be done, however, seems to me to be reasonably clear from Section 5371, supra, and I can not reach the conclusion that the General Assembly intended to give such an artificial situs to a manufacturer's stock of finished products as to preclude him from keeping two separate stocks of said products in two different places. For the reasons already suggested the case of Bridge Co. vs. Yost, supra, can not be relied upon in support of any such construction of the law. The construction suggested is consistent with reason and justice and, in my opinion, ought to prevail.

This construction is also consistent with the provisions of Sections 5404 and 5405, General Code, pertaining to corporate returns, and permits corporations to return their property consisting of manufactured products in the counties wherein it is actually situated in accordance therewith.

I am, therefore, of the opinion that when a manufacturing company whose factory is located in one county maintains in a warehouse, or otherwise, situate in another county, a stock of its manufactured products, such stock should be listed in such other county as a separate stock of manufactured products and valued on the average basis. No "double taxation" results from adherence to this principle. The moment an article leaves the factory it must be charged off from the stock of finished products there maintained and credited to the stock of manufactured articles maintained at the warehouse in the other county. No single article need be included in the monthly averages of both stocks for any one month.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

666.

TAXES AND TAXATION—CORPORATION NOT FOR PROFIT—WESTERN METHODISTS BOOK CONCERN NOT LIABLE FOR FRANCHISE TAX—NOT AN INSTITUTION OF PURELY PUBLIC CHARITY BECAUSE BENEFITS RESTRICTED TO ONE DENOMINATION —PROPERTY NOT EXEMPT FROM TAXATION.

The Western Methodist Book Concern, being a company engaged in the publishing business, under the management of a board of trustees known as a "Book Committee," to be appointed from time to time by the general conference of the Methodist Episcopal church in the United States, whose profits are to be applied according to its articles of incorporation to the relief of ministers of that denomination, their wives, widows and children, which has no capital stock, and the ministers of which and the beneficiaries are not members, is a corporation on "not for profits" and, therefore, not liable for annual reports to the Tax Commission or for franchise taxes.

Since the benefits of said corporation are limited strictly to ministers of the Methodist Episcopal church and their dependents, in view of the rule of strictly construction to be applied to exemption statutes, it may not be deemed "an institution of purely public charity" and therefore none of its property, either real or personal, or if its moneys or credits, is exempted from general property taxation.

COLUMBUS, OHIO, October 10, 1912.

To the Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 26th, enclosing a copy of the amended Articles of Incorporation of the "Western Methodist Book Concern," a corporation under the law of Ohio, and certain correspondence relating thereto. It appears that this company is engaged in the publishing business under the management of a board of trustees known as the "Book Committee" to be appointed from time to time by the general conference of the Methodist Episcopal church in the United States of America. The profits of the business so conducted are, by the Articles of Incorporation, to be applied, as provided by the constitution of the said church, to the relief of ministers of that denomination, their wives, widows and children. The company has no capital stock, and the ministers and other beneficiaries, as such, are not members of the corporation.

From this statement of facts you request my opinion upon the following questions:

"1. Is the Methodist Book Concern a domestic corporation for profit, and as such required to file annual reports and pay fees as provided in Section 5495 to 5498 G. C., inclusive?

"2. Is the property of said company, or any part of it, exempt from taxation under laws of Ohio?"

I enclose herewith copies of opinions rendered Honorable Charles H. Graves, Seceretary of State, in which I have attempted to define what constitutes a corporation "for profit," or, conversely, one "not for profit," within the meaning of our statutes.

Applying the reasoning of these opinions to the facts above stated, I am of the opinion that the Western Methodist Book Concern is a corporation *not for profit* within the meaning of the general incorporation laws of this state.

I am further of the opinion that the term "corporations organized under the laws of this state, for profits," as referred to in Section 106 of the Tax Commission Act of 1911, (102 O. L., 224) designated as Section 5495 of the General Code, is identical with the corresponding phrase as used in the general incorporation act.

OPINION:—No franchise tax being assessed against domestic corporations *"not for profit,"* I am of the opinion that the Western Methodist Book Concern is *not liable* for annual reports to the Tax Commission for franchise taxes thereon.

* * * * * *

Coming now to your second question, I beg to preface my discussion of it by the general statement that all tangible real and personal property, moneys, credits and investments within the taxing jurisdiction of the state are presumed to be subject to taxation unless the contrary clearly appears from the exemption statutes passed under favor of Article XII, Section 2, of the Constitution of 1851. Said constitutional provision is, in part, as follows:

> "Burying grounds, public school houses, houses used exclusively for public worship, *institutions of purely public charity,* public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, may, by general laws, be exempted from taxation."

It is obvious that if the Western Methodist Book Concern is to be regarded as within the purview of any of these exemptions, it must be classed as "an institution of purely public charity." The following section of the General Code is the only one which has been passed in pursuance of this constitution authority as affecting "institutions of purely public charity," Section 5353, which provides:

> "* * * property belonging to institutions of purely public charity only, shall be exempted from taxation."

Formerly this section was a part of the sixth paragraph of Section 2732. Revised Statutes, which provides as follows:

> "All buildings belonging to institutions of purely public charity, and all buildings belonging to and used exclusively for armory purposes by lawfully authorized military organizations * * *, and all moneys and credits appropriated solely to sustain and belonging exclusively to such institutions, and military organizations" (shall be exempted from taxation.)

The verbal change which has been made was made only in the process of codification, and some question arises as to whether there has been a corresponding change in meaning. Under the former section it was held, in Little vs. Seminary, 72 O. S., 472, that a college which makes a charge for tuition, but the principle object of which was for the diffusion of knowledge, and which was not conducted for pecuniary profit, was an "institution of purely public charity," and that moneys and credits appropriated solely to sustain such institutions by way of endowment funds were exempted from taxation under favor thereof. Whether a court would reach the same conclusion under the present language of the statute is, in a way, a question.

In an opinion to the prosecuting attorney of Lorain county rendered sometime ago I held that in view of the legislative history involved, the word "property," as used in the present Section 5353, must be given a broad meaning so as to include

intangible possessions like moneys and credits if appropriated solely to sustain the institutions, as well as tangible real and personal property. I am informed that the Nisi Prius court in Cuyahoga county has held to the contrary and reached the conclusion that a change of meaning has resulted from the verbal change made in the statute. Not having seen the opinion of the court, I am in doubt as to what point was actually involved in the decision, and in view of my former opinion I am disposed to adhere thereto, at least until the question is fully adjudicated.

Assuming, however, that moneys and credits appropriated solely to sustain an institution of purely public charity are still exempt from taxation, two questions still arise from the facts submitted by you, the answer to either of which is conclusive of the matter, viz:

1. Is the Western Methodist Book Concern "an institution of purely public charity?"

2. Are the moneys and credits of this institution, consisting of its moneys in bank and its book accounts, "appropriated solely to sustain" the institution within the meaning of this phrase?

Perhaps still another question arises here which ought to be considered in this connection. That is to say, the phrase now being, "property belonging to institutions of public charity only" and a reason existing for which the word "property" should be given a meaning broader than the technical one which refers only to the tangible real and personal property, should the statutes, and particularly Section 5353 of the General Code, be now construed so as to render exempt all real and personal property, moneys, credits and investments of institutions of purely public charity?

I think it is clear that this question, like the one last above suggested, does not even arise unless an affirmative answer is returned to the first question just stated. I think that it is obvious that the Western Methodist Book Concern is, on the facts submitted, a charitable institution. No member of the incorporation receives a pecuniary profit from its business activities, and whatever profits are derived from the management of the concern are distributed in a charitable way. But is this charity "purely public," or, using the language of the statute instead of that of the constitution, (there being in the very nature of the case no difference in meaning between the two,) is that "charity" of the Western Methodist Book Concern " public only?"

Questions of this sort have been before the Supreme Court of this state in the following cases:

Gerke vs. Purcell_____25 O. S., 229,
Little vs. Seminary, supra,
Library Association vs. Pelton 36 O. S., 253,
Humphreys vs. Little Sisters of the Poor, 29 O. S., 201,
Morning Star Lodge vs. Hayslip, 23 O. S., 144, and
Davis vs. Camp Meeting Association, 57 O. S., 257.

The doctrine of these cases may be summarized as follows:

In Gerke vs. Purcell it was held:

"A college consisting of a private corporation and having a private foundation fund is devoted to a public use, yet the use is none the less public because tuition is charged * * *" (page 241) and that

"Schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit are 'institu-

> tions of purely public charity' within the meaning of the provisions of the constitution, which authorizes such institutions should be exempted from taxation." (5th syllabus.)

In Little vs, Seminary, supra, this case was followed and approved, and it was held that a college privately managed and owned, and open to all on the same conditions is an institution of purely public charity. The question of charging tuition does not seem to enter into this case.

In Library Association vs. Pelton, supra, a public library " open to all without distinction" was, apparently, held to be an institution of purely public charity, although the exact ground in the decision is very difficult to comprehend.

In Humphreys vs. Little Sisters of the Poor, supra, it was held that:

> "A corporation organized for the sole and only object of offering an asylum for destitute men and women and the incurable sick and blind, irrespective of nationality or creed, is an institution of purely public charity." (first syllabus.)

In Morning Star Lodge vs. Hayslip, it was held that:

> "A charitable or benevolent association which extends relief to its own sick and needy members and to the widows and orphans of its deceased members is not 'an institution of purely public charity.'"

In Davis vs. Camp Meeting Association, it was held that:

> "An association organized and conducted for the purpose of a purely public charity, as a camp meeting, under the supervision and control of some church."

is exempted from taxation on its real estate, although it charges for the privileges contributing to the comfort and convenience of those who may attend the meetings. In reaching this conclusion the court took refuge behind a finding of the lower court to the effect that the association in question was an institution of purely public charity. It appears, however, from the pleadings set forth in the report of the case that all of the income of the association was used to keep up the camp meeting.

None of these cases directly touch the question here. It is significant in all of them, excepting Morning Star Lodge vs. Hayslip, that the institutions concerned afford benefits to *all persons upon equal terms* regardless of religious affiliations or other points of difference. This point might be relied upon as a basis of an opinion to the effect that because the Western Methodist Book Concern devotes the proceeds of its business to the relief of ministers of a certain denomination and their dependents only, it is not an institution of *purely public charity.* The case of Morning Star Lodge vs. Hayslip is not direct authority for any such conclusion. There the benefits of the Lodge were to be accorded to the members thereof and their dependents only; here the charitable activities of the Western Methodist Book Concern are to be undertaken for the benefit of those who are not members of the corporation itself.

It may be parenthetically remarked here that in the case of the Cleveland Library Association vs. Pelton it was held that the word "purely" modifies the adjective "public" and not the noun "charity." No such direct statement is found in the opinion, but it is held that an institution which leases some of its property for profit and for purposes disassociated from the charity, which constitutes the

principal pursuit of the institution, does not thereby lose its exemption in toto, but merely pro rata. Therefore, the mere fact that the Western Methodist Book Concern is in a sense a business institution will not destroy its character as a charitable one.

It is proper here to remark also that in the correspondence attached to your letter there is a statement that the corporation in question has heretofore been paying taxes upon its real and personal property and not on its moneys and credits. This would be perhaps a proper practice under the language of the sixth paragraph of Section 6732 of the Revised Statutes, as above quoted, where the qualifying clause "not leased or otherwise used with a view to profit" is found in connection with the exemption of tangible property of the institution of purely public charity. In order, however, to justify such practice completely it would still be necessary to demonstrate that the Book Concern is "an institution of purely public charity."

The lack of authorities directly in point in this jurisdiction, then, leads to the examination of the cases decided under similar constitutions and statutory provisions of other states. Such provisions, insofar as they relate to the exemption of property used for charitable purposes, fall into two classes, viz:

1. Constitutional provisions and the statutes exempting "property used for charitable purposes" or " belonging to charitable institutions."

2. Constitutional provisions and statutes exempting "institutions of purely public charity." In this class the Ohio Constitution and statutes enacted thereunder, belong.

Under provisions like those of the first class, it has been directly held in the case of Book Agents of the Methodist Episcopal church, South, vs. Hinton, 92 Tenn., 188 that a "book concern" managed exactly like the Western Methodist Book Concern is exempt from taxation upon its property. If the Ohio Constitution and its statutes were like those of the state of Tennessee, this case would be directly in point and would support, possibly, under the present statutory provisions the complete exemption from taxation of *all* of the property of the Western Methodist Book Concern.

Indeed, under such constitutional provisions and statutes it is held that an institution which administers charity among its own members exclusively is entitled to exemption from taxation.

(Fitterer vs. Crawford, 157 Mo., 51)
(Philadelphia vs. Masonic Home, 160 Pa., 572)
(Hibernian Benevolent Society vs. Kelly, 28 Oreg., 173)
(Petersburg vs. Petersburg Benev. Mechanic Assoc., 78 Va., 431)

It is evident, however, that there is a wide distinction between the phraseology employed in the first class of constitutional provisions and statutes, and the language employed in the second class thereof as above exemplified, and, undoubtedly, "charitable" institutions may nevertheless not be entitled to exemption under the language of the second class of provisions because of not being "public."

(Philadelphia vs. Masonic Home, supra.)
(Morning Star Lodge vs. Hayslip, supra.)
(Bangor vs. Rising Virtue Lodge, 73 Me., 428.)
(Nupert vs. Masonic Temple Assoc., 108 Ky., 333.)

And the deliberate use of the qualifying adverb "purely" makes it all the more apparent that exemption is not to be extended to charitable institutions the activities of which cannot be said in the proper sense to be "public."

Now, it is apparent that some latitude must be allowed to charitable insti-

tutions and that it is not required that the county afforded by them be offered to all objects of charity upon the same basis, and without any discrimination whatever. Discriminations which may be made without affecting the public nature of the charity will readily occur to the legal mind; such are territorial restrictions, as the relief of the poor of a certain town; racial restrictions, as the relief of destitute and needy negroes; discriminations with respect to the nature of the relief to be awarded, as the relief of poverty, of ignorance, of sickness and injury, etc., restrictions with respect to the afflicted and needy as objects of charity, as the relief of the destitute blind, the deaf, etc., and discriminations as to occupations, sex, etc., as the relief of the working girls, sailors, mechanics, etc. Statutes so restricting the scope of their charitable activities are, nevertheless, "purely public" within the meaning of the provisions now under consideration.

It is obvious however, that there must be a line of distinction between the two classes of exemption provisions; and it is clear that institutions dispensing charity to their own members and their families exclusively are beyond the line. A more difficult case is presented by institutions like the one under consideration which limit their charitable activities, not to their own members, but to members of a particular religious or fraternal society. Perhaps the leading case here is that of Philadelphia vs. Masonic Home, supra, in which the following test is laid down which I think is reasonable and accurate:

> "A charity may restrict its admissions to a class of humanity, and still be public; it may be for the blind, the mute, those suffering from special diseases; for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which *involuntarily* affects or may affect any of the whole people, although only a small number may be directly benefitted, it is public. But when the right to admission depends on the fact of *voluntary* association with some particular society then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, because they are men, women and children, not because they are Masons. A home without charges exclusively for Presbyterians, Episcopalians, Catholics or Methodists, woud not be a public charity. But then to exclude every other idea of public, as distinguished from private, the word 'purely' is prefixed by the constitution; this is to intensify the word 'public,' not 'charity.' It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. That the appellee is wholly without profit or gain only shows that it is purely a charity, and not that it is a purely public charity.
>
> "Nor does the argument that, to the extent it benefits Masons, it necessarily relieves the public burden, affect the question; there is no public burden for the relief of aged and indigent Masons; there is the public burden of caring for and relieving aged and indigent men whether they be Masons or anti-Masons; but age and indigence concern the public no further than the fact of them; it makes no inquiry into the social relations of the subjects of them."

This distinction is observed in Commonwealth vs. Thomas, 119 Ky., 208, and in Burd Orphan Asylum vs. School District, 19 Pa., 21, as construed in Philadelphia vs. Masonic Home, supra.

On the other hand, it must be admitted that authority directly opposed to the

Pennsylvania case above cited may be found in Widows' and Orphans' Home of Odd Fellows of Kentucky vs. Commonwealth, 16 L. R. A., N. S., 829 (Ky. 1907) it was held:

> "The benefits of a home for the support of widows and orphans or confined to those of members of a particular society, does not deprive it of the character of a purely public charity within the meaning of a constitutional tax exemption."

The opinion of the majority of the court, per Baker, J., is based on the theory that relief of widows and orphans is a public burden, and that whosoever without profit to himself engages in this activity, though he limit it to widows and orphans having peculiar social relations is dispensing charity which is "purely public."

> (Burd Orphan Asylum vs. School District, supra)
> (Kentucky Female Orphans School vs. Louisville, 100 Ky., 470)
> (Norton vs. Louisville, 118 Ky., 836)

were cited in support of the proposition of law announced by the court, but the citation here is obviously erroneous, because each of these cases when examined are found to offer instances of charitable institutions open to the public, but in which preference is to be given to those having peculiar social relations, as church and lodge affiliations. These cases cannot properly be cited in support of the proposition that an institution which simply closes its doors to all excepting those of a certain class, socially defined, is an institution of purely public charity.

The court, in the Kentucky case, further bases its conclusion upon debates in the Constitutional Convention at which the provision was framed. Believing, however, as I do that such debates are merely a final recourse in cases of doubt. I do not deem it necessary to investigate the debates of the other convention of 1851 as to this point. It is significant, however, that the court found it necessary to overrule the prior case of Widows' and Orphans' Home vs. Bosworth, 112 Ky., and that two judges dissented emphatically, calling attention to the prior decision of the Kentucky Court of Appeals.

In this connection it may be remarked that the case of Gerke vs. Purcell is cited in Burd Orphan Asylum vs. School District, and Widows' and Orphans' Home vs. Commonwealth, supra, as establishing the principle—

> "When the charity is public the exclusion of all idea of private gain or profit is equivalent in effect to the force of 'purely,' as applied to public charity in the constitution."

This language is found in the Gerke vs. Purcell case and may be accepted as defining the law of Ohio without changing the views herein expressed; for it must be noted that within this rule it must first be established that the charity is "public." The facts in Gerke vs. Purcell, as I have already mentioned them, show that the charity in question there was administered without reference to artificial classification of people.

The question, indeed, is a close one and convincing reasons may be marshalled on both sides of it. On the one hand the doctrine of the Pennsylvania Supreme Court, as laid down in the quotation made from its opinion herein, is logical and convincing. On the other hand, the argument of the Kentucky Court of Appeals to the effect that the constitution must be interpreted in the light of the reason for the exemption which is, that whoever relieves the public of the necessity of supporting the poor, for example, is engaged in a public work, is equally satisfying.

The temptation is, of course, to adopt the broader and seemingly more humane rule of the Kentucky court. I am constrained not to do so, however, for two reasons in addition to the logic of the Pennsylvania decision. These reasons are as follows:

1. To follow the Kentucky case would leave no distinction in logic between institutions relieving the wants of those of a particular denomination or society other than its own members and institutions relieving its own members exclusively. Inasmuch as the Supreme Court of this state has, in Morning Star Lodge, vs. Hayslip, supra, expressly held that an institution of the latter class is not one of "purely public charity," I cannot lend my assent to a holding which cannot in principle be distinguished from one that is opposed to that decision.

2. At the very most the question may be said to be extremely doubtful. That being the case, recourse must be had, I think, to the well-defined and settled principle that exemptions from general taxation are strictly construed, so that every presumption is against the exemption and in favor of the taxing power.

> "The exemption must be shown indubitably to exist: at the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported."
>
> (Railway Company vs. Supervisors, 93 U. S., 595)

quoted with approval by Spear J., in delivering opinion in Lee, Treasurer vs. Sturges, 46 O. S., 153-159.

For the foregoing reasons, then, I am of opinion that The Western Methodist Book Concern is not "an institution of purely public charity," because its benefits are limited strictly to ministers of the Methodist Episcopal church and their dependents, and that, therefore, none of its property, either real or personal, or of its moneys or credits, is exempted from general property taxation.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

669.

PUBLIC UTILITIES—GAS COMPANIES AS OPPOSED TO PIPE LINE COMPANIES—BUSINESS OF "TRANSPORTING" AND BUSINESS OF "PRODUCING" GAS—INTERSTATE COMMERCE RECEIPTS—RIGHT OF STATE TO IMPOSE EXCISE TAX FROM POINT OF DISTRIBUTION.

When a gas company which produces gas in another state and transports the same through pipes directly to an independent distributing company in Ohio and also transports said gas to individual consumers in this state; held:

That although transportation of said gas is an incident to its business, nevertheless, it is not any more incidental than it is to any other business involving production and sale and, therefore such company is engaged in the business of supplying natural gas to consumers within this state, within the meaning of Section 5416, *General Code, defining gas companies and not in the business of transporting natural gas through pipes or tubing within the meaning of the same section defining pipe line companies. Its receipts, therefore, from the sale of gas transported through its pipes to points in Ohio cannot be designated "interstate commerce receipts" in the same sense that they may be so considered for the purposes of taxation in the case of transportation companies.*

The case of the American Steel and Wire Company vs Speed, 192 *U. S.* 500, *held that when a foreign corporation sends goods into this state, though they are consigned to a definite point in this state for distribution in their original packages, interstate commerce ends when the goods reach their point of destination, (i. e. the point of distribution) and the right of the state of distribution to impose a privilege tax upon the sale thereof begins.*

Upon the authority of this decision, when the gas company, in this case, transports its gas through main line pipe to a point of distribution in this state, i. e. to a point where the main line enters into a system of branch pipes for the purpose of diverting the product to individual consumers, "interstate commerce" as intended by Section 5474, *General Code, ceases and the right of the state to impose an excise tax, without discrimination, upon the business of selling the gas, as upon all gas, produced and sold in Ohio, begins.*

The sale of the gas directly to the independent company in Ohio, however, is interstate commerce, which may not be subject to tax in this state. The same is true of the sale to any consumer directly from the producing company in another state, or directly from the main line of said company without entering the point of common distribution.

September 27, 1912.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 21st, enclosing copies of the purposes clauses of the following named companies:

Ohio Valley Gas Co. (Ohio Corporation).
Tri-State Gas Company (W. Va. Corporation)
Wetzel Gas Company (W. Va. Corporation)
Wheeling Natural Gas Co. (W. Va. Corporation)

together with certain correspondence and information respecting the business transacted by these companies; also, of a letter under date of September 6th, setting forth a statement of facts with respect to the business done by The United Fuel Gas Company, a corporation organized under the laws of West Virginia. The questions of law raised in these two letters are substantially the same, and for convenience I shall discuss them together.

With respect to the companies mentioned in your letter of August 21st, it appears that all of them are operated through stock control as a part of the general system of The Manufacturers Light & Heat Company, a Pennsylvania corporation, and that all of them *apparently* are engaged in the business exclusively of supplying natural gas to *consumers* within Ohio. That is to say, it does not affirmatively appear that these companies sell any of the gas to other distributing companies, but all of them appear to be dealing with consumers of that commodity directly. Three of these companies produce some gas in Ohio which said gas is mixed in the mains of the companies with other gas produced elsewhere than in Ohio, in proportions practically impossible of definite ascertainment. All of the companies produce a large portion of the gas sold by them in Ohio, in other states, while one of the companies produces all of the gas which it sells in Ohio in another state.

Counsel for these companies contend that they are entitled as best they can to separate receipts from the sale of gas produced and sold in Ohio from receipts from the sale of gas produced elsewhere than in Ohio and sold in this state; and that the latter constitutes "receipts from interstate commerce" within the meaning of the excise tax law of this state.

As to one of these companies, to-wit, The Wheeling Natural Gas Company, at least, it appears its distribution lines in Ohio constitute an extension of a similar system in Wheeling, West Virginia, although the exact facts with respect to the manner of conducting this business are not available from the memoranda furnished me.

The questions submitted by the commission as to these four companies are as follows:

> "(1) Are receipts from sale of gas produced outside of the State of Ohio, either by the company itself or some one of the allied companies operated by The Manufacturers Light & Heat Company, 'receipts from intra-state business' within the meaning of the provisions of the Act of May 31, 1911?
>
> "(2) Where, by reason of the mingling of the gas produced within and without Ohio, the company is unable to state, with any reasonable degree of accuracy, the amount produced in Ohio, what, if any, part of the receipts from the sale of gas so produced should be considered by the Commission as receipts from intra-state business?"

In the case of the United Fuel Gas Company, the facts are very clearly stated in your letter as folows:

The company produces natural gas in West Virginia, and transports it through pipe lines in West Virginia and Kentucky to a point on the Ohio river opposite Portsmouth, where its lines cross into Ohio. It sells gas at Portsmouth to the Portsmouth Gas Company, which distributes it to consumers in Portsmouth; this company also sells gas directly to consumers in the city of Ironton. This company contends that all of its receipts for gas sold both to the Portsmouth Gas Company and to consumers in Ironton are "receipts from interstate business" within the meaning of the law, but reports certain intra-state receipts,—being those from the sale of merchandise. The questions submitted in connection with this statement of fact by the Commission are as follows:

> "(1) Are the receipts of this company from sales of gas 'intra-state' or 'interstate' receipts?
>
> "(2) If such receipts are 'interstate' should the company be required to report and pay an excise tax upon its 'intra-state' receipts alone,

or as a foreign corporation for profit and pay an annual fee upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state?"

I think it is apparent, as already stated, that a single fundamental question of law is raised by all of these facts. That question may be stated as follows:

"Does the business of supplying natural gas to consumers in Ohio constitute interstate commerce when the gas is produced in another state by the companies which supply to consumers, but is committed to their transportation pipe lines for carriage into Ohio, and there distributed by them to the consumers?"

Though the question is single, my investigation has led me to the conclusion that the principles of law which govern its solution are such that various qualifications must be made so that eventually the single question becomes subdivided into several subsidiary questions.

In the matter of the Connecting Gas Company—a pipe line company—I held recently that a corporation engaged in the business of *transporting* natural gas through pipes, which said transportation constituted a part of a movement of the commodity from a point outside of Ohio to a point within Ohio was engaged in that respect in *interstate* commerce, so that its receipts from that source would be "receipts from interstate business" within the meaning of the excise tax law. That conclusion was inevitable because the company in question there was itself an instrumentality of commerce between the states, and the business or occupation upon which the tax in question in that opinion was laid was a business which itself constituted an instrumentality of commerce. In a word, the Connecting Gas Company was taxed as a carrier of a commodity, and it is very clear, under the principles that have been laid down by the Supreme Court of the United States in numerous decisions, beginning with that of Gibbons vs. Ogden, 9 Wheaton 1, that the journey of a commodity of commerce from a point in one state to a point in another state is a movement of interstate commerce so that every act or service of transportation committed in connection with such a journey and all instrumentalities employed therein are subject to the exclusive jurisdiction of Congress, except for local police purposes. So that no state may regulate or by taxation or otherwise impose any burden upon such commerce or its instrumentality. Detailed discussion of the rules of law applicable to this subject insofar as they relate to transportation business as such is unnecessary here.

But the business upon which the companies, concerning which you now inquire, are subject to excise taxation, if at all, is not a *transportation* business. No question is raised as to the right of the state to tax them or any of them as "pipe line companies" for the state asserts no such right. The business in respect of which the state requires a tax is defined by Section 5416 of the General Code as follows:

"The business of supplying natural gas for lighting, heating or power purposes, to consumers within this state."

And this business is separate in the contemplation of the statutes from that next defined in the same section, which is,

"The business of transporting natural gas * * * through pipes or tubing, either wholly or partially within this state."

I think, therefore, that I may safely postulate the proposition that the business upon which the tax of one and two-tenths per cent. of such receipts thereof is laid, and which constitutes the company in question a "natural gas company," as distinguished from a "pipe line company" is to be deemed and considered a mercantile business rather than a transportation business.

Perhaps I am not justified in making this assumption. Arguments may possibly occur to one to the effect that the business of supplying natural gas to consumers is a transportation business. Certainly transportation is a necessary incident to the business, as, indeed, it is to every barter and sale of commodities. A farmer cannot sell the produce of his garden unless one of two things happens:—Either he must by some means transport same to the market, or the purchaser thereof must come and get it. His potatoes, and turnips, and onions, and radishes possess no value or utility to anyone as they grow in his garden or as they are sheltered in his barns. If because of some mysterious force of nature it should be discovered that these vegetables could not be moved from the place where they are found in the producer's possession they would be worthless, and would no longer constitute something for barter and sale. The value, therefore, of a commodity arises in a large part from its susceptibility to transportation. So it is very apparent, I think, that transportation is a necessary incident to every commercial activity. It will not do, then, to say that because transportation is essential in the business of supplying natural gas to consumers it necessarily follows that such a business is a transportation business.

Now, when a consumer of natural gas pays his bill at the office of a gas company, he is paying for a valuable thing which he has received, and the value of which has been contributed to from different sources or by different causes. It is by no means an inconsiderable element in the value of what he has received that it is delivered at his meter by means of transportation facilities of the gas company; but this is not all that adds value. The gas in the first instance having been liberated from its natural reservoirs by the art of the *producer* has become tangible property in the possession of the producer. As such property it is capable of control, transportation, delivery, and consumption in a way which satisfies an economic want of the public. Therefore it is like any other commodity that may be so delivered and used; while transportation-cost enters into its selling price, it has an intrinsic value which arises from its susceptibility to ownership and consumption.

I have therefore felt justified in making the assumption that, as between a "natural gas company" as defined and referred to in Section 5416 of the General Code, and the "consumers" with which it deals, "the business" transacted is in no essential respects unlike any transaction of barter and sale whereby a commodity having a value arising from use and consumption changes hands. And if I had any doubt upon this proposition, I think all such doubts were readily dissipated by consideration of the fact that the same statute recognizes a business of transporting natural gas and separates it from the business of supplying the same commodity to consumers, imposing upon the two separate businesses different rates of excise taxation.

Now, in considering the principal question involved here I have imagined a simpler case which, in the light of the assumptions which I have been discussing, may be tentatively regarded as analagous. Let it be supposed that a farmer in the state of Kentucky produces a bushel of potatoes which he himself loads into his wagon and carries across the ferry, or by other means, to an Ohio city for the purpose of sale there. Undoubtedly the transportation of this bushel of potatoes from Kentucky into Ohio for the purpose aforesaid constitutes interstate commerce. Let it be supposed, however, that upon reaching the Ohio city he takes his commodity into the market place and there exposes his bushel of potatoes for sale. Does that sale by him of the potatoes under these circumstances constitue interstate business?

More explicitly—would he be subject to an occupation tax for carrying on the business of selling in the market, if such tax were imposed on all who sold therein at the same rate without discrimination against those selling the products of another state?

In answering this hypothetical question the temptation is to trace the history of the rule by the application of which it may be answered from its origin, in Brown vs. Maryland, 12 Wheaton, 436. through various other leading cases like

Leisy vs. Hardin, 135 U. S., 100;
Lyng vs. Michigan, 135 U. S., 161;
Woodruff vs. Parham, 8 Wal., 123; and
Brown vs. Houston, 114, U. S., 622.

For the purpose of this opinion, however, it will suffice to state the rule as it is found reiterated and embodied in American Steel and Wire Company vs. Speed, 192 U. S., 500. The facts in that case will be found very fully stated in the opinion by Mr. Justice White, beginning at page 508, Abstracted, they are as follows:

The state of Tennessee levied a "merchants tax" upon persons and corporations engaged in the trades and in the manner defined therein, being denominated by Mr. Justice White as "a privilege tax," which, I take it, is substantially the same kind of tax as that involved in your question. The American Steel and Wire Company, having been compelled to pay this tax under protest, brought suit for the recovery thereof, asserting that it was a New Jersey corporation maintaining in the various states plants for the manufacture of wire and nails; that the city of Memphis, Tennessee, had been selected by it as a distributing point. With that end in view, the American Steel and Wire Company entered into a contract with a transfer company under which products shipped to Memphis consigned to the American Steel and Wire Company were to be received and stored, subject to its order, by the transfer company. The goods so received were held by the transfer company in the "original packages," and all of them came from outside of the state of Tennessee. Therefore, it was contended that inasmuch as the goods were in the original packages as shipped from the other state and were unsold in Tennessee, they were moving in the channels of interstate commerce from the place where the goods were manufactured for delivery to persons to whom "in effect" they had been sold.

The trial court found all of the facts alleged in the bill to be true, and in addition found that the transfer company, under its contract with the American Steel and Wire Company, was required to assort the goods received by it so as to make them available for convenient re-distribution. The products were sold to jobbers through the solicitation of traveling agents, generally in advance of manufacture, but subject to specifications as to the exact quantity and kind of goods to be furnished, which specifications were required to be filed with the storage company at Memphis.

The lower court held accordingly that the goods were not in transit but had reached the destination of their interstate journey when they arrived at Memphis, and that despite the fact that the goods arrived in their original packages and had been, in a sense, sold before their arrival, the privilege tax upon the plaintiffs as merchants was lawfully assessed because of the maintenance of the stock of goods at Memphis, in the manner described.

This holding was affirmed by the Supreme Court of the United States.

Mr. Justice White, in the course of the opinion, first points out that some of the points of the decision in Brown vs. Maryland, supra, could not be applied to an instance of commerce among the several states because the constitutional prohibition upon the levying by states of duties on imports related only to commerce with foreign nations. Therefore, it woud not do to hold that the test laid down in

Brown vs. Maryland is applicable upon questions of taxation by a state of goods brought into that state from another state while yet in the original package. An import is an import until it is sold; but "interstate commerce" may have ceased as to goods brought into a state from another state while yet the goods remain in the original packages of their transportation, and before their actual sale.

Proceeding further in his opinion, Mr. Justice White points out that Leisy vs. Hardin and Lyng vs. Michigan, supra, cannot be cited with accuracy as defining the powers of a state to tax such things which have been subjects of interstate commerce, because both of those cases involved the right of a state to prohibit the sale of a commodity which had been brought into the state from without. The true rule, then, was said to have been laid down in Woodruff vs. Parham, and in Brown vs. Houston, supra. Speaking of these cases, Mr. Justice White summarizes as follows:

> "Woodruff vs. Parham, and Brown vs. Houston * * dealt with no positive and absolute inhibition against the exercise of the taxing powers, but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in Brown vs. Maryland—that is, sale in the original packages at the point of destination—was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the constitution, although its levy might remotely and indiretcly affect interstate commerce."

Two other cases are cited, namely: Emart vs. Missouri, 156 U. S., 296; and Kelley vs. Rhoads, 188 U. S., 1.

The exact conclusion reached by the court, as phrased by Mr. Justice White, was:

> "The goods * * were subject to state taxation after they had reached their destination and whilst held in the state for sale."

I do not think, in the light of the cases commented upon in the decision just discussed, and upon its express authority, that there can be any doubt as to the liability of the Kentucky farmer, in the suppositious case which I have imagined, for occupation tax levied upon him as a seller in the market under the circumstances referred to.

How different, then, is the case of these gas companies? One manifest seeming difference lies in the fact that the commodity which is the subject of its transportation and sale never is "at rest." This is true for obvious reasons arising out of the nature of the commodity itself and the means taken to transport it. It might be logically conceivable that natural gas should be sold in tanks and transported by railroads to distributing points, there to be sold to consumers. Such a hypothesis is practically impossible. The gas must be forced into the pipe lines of the company at high pressure which propels it to its destination, and which pressure is sufficient in most instances to carry to the meter of each consumer, and beyond it to the point of consumption, the cubic feet of gas which he uses. So, it might be argued that

the journey of the gas from the wells in West Virginia or another state to the residence of a domestic consumer of the commodity in Ohio is a continuous one.

In spite of these difficulties arising from the inherent nature of natural gas as a subject of transportation and sale, however, I am of the opinion that the interstate journey of the commodity is complete and ended before it reaches the consumer's meter, at least in a typical case. In speaking of a "typical case" I refer to the well-known fact that gas, water, and steam—the ordinary subjects of distribution and sale as public utilities, must be *distributed* through radiating lines of pipe of smaller dimensions than the main pipe line. That is to say, the natural gas business, for example, is divided quite accurately into the two distinct processes (among others) of *transportation* and *distribution*. Frequently, if not always, the pressure at which the gas is propelled in the transportation mains or lines is reduced, by an apparatus designed for that purpose, when the gas enters the distribution system; but this fact while of some collateral weight is not of itself essential. The controlling point is that the main current, so to speak, of gas which flows through the transportation pipe line is broken up and diverted into numerous and increasingly numerous subsidiary currents when it reaches the distribution system.

In such a typical case, then, where domestic and commercial consumers are supplied by means of a well-defined distribution system, I am of the opinion that when the natural gas enters that distribution system its technical interstate journey is complete, and it has become the subject of domestic delivery and sale, so that it is co-mingled with the general mass of commodities in the state within the meaning of the rule exemplified in the authorities cited. At least I am sure that the excise tax levied on those who are "engaged in the business of supplying natural gas to consumers" appertains to them as *distributors* of the natural gas, and not as *transporters* thereof; and that the distribution of the product is in a typical case a wholly domestic or intrastate activity; so that the tax not being levied only on those engaged in the business of supplying natural gas produced in other states as such nor by different rates as to such persons, and there being no discrimination in this particular, the tax in question if exacted from those doing business in this manner would not constitute such a direct burden on interstate commerce as is prohibited by the constitution of the United States.

In reaching this conclusion I have relied not only upon the authorities cited, but upon others which illustrate and express the reason for the rule which prohibits a state from regulating by taxation or otherwise commerce among the states. That reason may be expressed as follows: The taxation of the state may not directly affect or burden commerce among the states; but such taxation, as, without discriminating against the products of other states or those engaged in dealing in them as such, and without tending directly or indirectly to discourage, curb, or regulate commerce among the states, is laid upon goods which have been brought into the state and commingled with the general mass of property in the state from other states, or upon those who deal therein with respect to their occupation as dealers in goods generally, is not without the power of the state.

The tax in question, as I have construed it, does not impose burdens upon interstate commerce at all. It does not tax the bringing of natural gas into Ohio from another state, but only the distribution of the gas and its sale to consumers in this state, regardless of the state of its production.

At this point it seems necessary to remark that, in my opinion, the words "receipts from interstate business" as found in Section 5474 of the General Code are to be construed in the light of the rules of law which I have already discussed. That is to say that is "interstate commerce" within the meaning of this phrase which it is beyond the power of the state to burden by taxation within the meaning of the rule as laid down.

Applying these principles, then, to the specific cases mentioned by you, and speaking first of the case of the United Fuel Gas Company, I am of the opinion that the transportation of gas by this company into Ohio for the purpose of delivery to the Portsmouth Gas Company, a distributing company, is "interstate commerce" so that no receipts of The United Fuel Gas Company from the sales of gas to the Portsmouth Gas Company made by it are to be included in the report of the former to the Tax Commission of Ohio. I assure that it is an essential element of the contract between the Portsmouth Gas Company and the United Fuel Gas Company that the service furnished to the former by the latter be performed in the precise way in which it is being performed; and inasmuch as the activity of the United Fuel Gas Company in this behalf consists solely in transporting gas from West Virginia and Kentucky to Ohio for the purpose of sale there, so to speak, in bulk, or, adopting an awkward analogy "in the original package," I am of the opinion, as already expressed, that this portion of the receipts of the United Fuel Gas Company consitutes "receipts from interstate business" within the meaning of Section 5474. Indeed, the Portsmouth Gas Company is not "a consumer" within the meaning of Section 5416, supra, and perhaps but for the comprehensive definition incorporated in the last sentence of Section 5417 of the General Code, these receipts would not have to be reported for that reason alone. That fact, however, is immaterial in this connection.

The sales of the United Fuel Gas Company to consumers in Ironton, however, are upon a different footing. I cannot state unequivocally that this business is "intrastate" because the facts are not complete enough for me to do so. If there is a distribution system in the city of Ironton owned by the United Fuel Gas Company so that the gas is carried across the river in a single pipe and distributed to different Ironton consumers wholly within Ohio, then I am of the opinion that receipts from this business shoud be included in the statement of the company. If, however, the consumers at Ironton, being few in number, if that be the case, are supplied directly from Kentucky without the medium of a distribution system however extensive, a contrary result would follow. That is to say, if the distribution of gas necessary to conduct the same to the meters of consumers in Ironton is effected in the state of West Virginia so that each consumer receives, so to speak, his own "original package" of gas, the Ironton business as well as that done in Portsmouth is "interstate;" but if the distribution takes place in Ohio, then the business in question is "intrastate."

With respect to this company's merchandise sales in Ohio, the same constitute "receipts from intrastate business" upon the principles laid down in my opinion with regard to The Connecting Gas Company, so that this compensation is subject to excise taxes and not to franchise taxes. Indeed, no franchise tax could be exacted from this company, which is a foreign corporation, in any event, it being engaged in interstate commerce. (See opinion in re Detroit and Cleveland Navigation Company, a copy of which you have.)

I need not go into details in applying the principles and conclusions to be drawn therefrom to the case of the four other corporations mentioned by you in your letter of August 21st. The specific questions regarding these corporations may be answered as follows:

In reply to your first question, I am of the opinion that the fact that some of the gas sold in Ohio to consumers by the four corporations mentioned is produced outside of the State of Ohio, is immaterial as affecting the question as to whether or not receipts from the sales are "receipts from interstate business" within the meaning of the section above cited. The test in each case is determined by the location of the point at which final distribution to the consumers begins, for at that point "interstate commerce" ends.

In this connection I beg to state that the mere branching out of an elaborate

system of gas pipe lines does not constitute "distribution" within the meaning of the principle as I have tried to define it. That is to say, one of these corporations might have a pipe line running parallel to the Ohio River on the West Virginia shore, and whenever a point opposite to a town in Ohio was reached a branch line might be constructed to carry the gas across the river. In my opinion the gas is still in the process of transportation as distinguished from distribution when it is in such branch line.

The principles which I have tried to define cannot be applied to the second question asked by you in your letter of August 21, and the conclusion reached by me makes it unnecessary to consider that question.

I trust that I have furnished a test which the Tax Commission will find practicable to apply. In conclusion I will state that I have observed that counsel for the four companies inquired about in your letter of August 21st make the suggestion that they will be glad to make a statement of their position on the law of the matter. I wish to state that while confident of the ground that I assume, I will be glad at anytime to reconsider the matter on the furnishing of briefs by any counsel for any interested parties.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

689.

CORPORATIONS—INSURANCE COMPANIES NOT YET AUTHORIZED TO DO BUSINESS AND NOT REQUIRED TO FILE REPORTS WITH SUPERINTENDENT OF INSURANCE, ARE NOT EXCEPTED FROM WILLIS LAW PROVISIONS.

Section 5518 General Code excepts from the Willis Law franchise tax provisions such insurance companies as are required by law to file "annual reports with the superintendent of insurance."

Such exceptions cannot be construed therefore to include an insurance company organized for profit, which has not yet disposed of all its shares of capital stock, as required by law and has not yet been licensed to do business by the superintendent of insurance, and therefore, is not required to file reports with that official.

The franchise tax is a tax upon the privilege of being a corporation rather than a tax upon doing business.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of October 5th, in which you state that the Bankers Guaranty & Casualty Company, a domestic insurance company, was incorporated June 13, 1911, but, not having disposed of all its shares of capital stock, as required by law, has not yet been licensed to do business by the superintendent of insurance. You request my opinion as to whether a corporation like the one mentioned, organized for the purpose of transacting the insurance business, must make so-called "Willis Law" reports, and pay fees thereon between the time of the filing of its articles of incorporation and the time it is licensed by the superintendent of insurance to do business.

A definite question is presented here as to the interpretation of the following statutes:

"Section 5495. Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each

corporation, organized under the laws of this state, for profit, shall make a report, in writing, to the commission, in such form as the commission may prescribe.

"Section 5518. An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, and insurance, fraternal beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of Sections one hundred and six to one hundred and fifteen.

"Section 9349. When the (legal reserve life insurance) company is fully organized and has deposited the requisite amount of securities, it shall file with the superintendent of insurance a duly certified copy of its articles of incorporation and approval of the attorney general, and a copy of its by-laws or constitution. If the superintendent finds that the company is duly organized and that its capital stock has been subscribed, paid in and invested as required by law, unless he finds the name assumed by the company so nearly similar to the name of another company doing business in this state as to lead to confusion or uncertainty on the part of the public, he shall furnish the company with his certificate of such deposit, and with a license duly reciting that the company has complied with the law and is entitled to transact the business defined in Section ninety-three hundred and eighty-five, which license shall be its authority to commence business and issue policies.

"Section 9522. * * * If the superintendent finds that the company (other than life) is duly organized and has complied with the law entitling it to transact business and issue policies, unless he also finds the name assumed by it so nearly similar to that of another company doing business in this state as to lead to confusion or uncertainty on the part of the public, he shall furnish the company with his license reciting that it has complied with the law and is entitled to transact the business authorized, describing it, which license shall be the authority to commence business and issue policies.

"Section 9590. The president or vice-president and secretary of each insurance company organized under the laws of this or any other state, and doing business in this state, annually, on the first day of January, or within thirty days thereafter, shall prepare, under oath, and deposit in the office of the superintendent of insurance a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items, and in the following form: * * *"

It is obvious, I think that the legislature, in excluding "insurance * * * and other corporations required by law to file annual reports with the superintendent of insurance" from the operation of the franchise tax, must have had in mind that without this express exclusion such companies would have been within the meaning of the term "domestic corporation for profit," if, in point of fact, they were corporations for profit. (Some forms of insurance companies, organized under the laws of Ohio, are clearly corporations not for profit, but I do not understand that this is the case with regard to the corporation concerning which you specifically inquire. That is to say, Section 5518, which contains subject matter that has always been in the Willis law since its original enactment in 1902, could not have been inserted through an abundance of caution, but must be referred to an intention to

make an exception that otherwise could not exist. Therefore, I am of the opinion that a stock insurance company is a "corporation for profit" within the meaning of Section 5495, above quoted.

The other sections which I have quoted make it apparent that an insurance corporation cannot "do business" until it receives its license from the superinendent of Insurance, and that such a corporation does not become liable to make annual reports to the superintendent of insurance until it is engaged in business; that is, until it has reached the point where it requires a license.

Applying to these facts the express language of Section 5518, supra, which is not at all ambiguous, it seems clear to me that an insurance company which has not yet become "required by law to file annual reports with the superintendent of insurance" is not exempted from the "Willis law" provisions of the Tax Commission Act. That is to say, it is not the mere fact that a corporation is organized for the purpose of doing an insurance business which makes it exempt; the company must be actually engaged in such business.

If any further discussion is needed, it might be well to consider the fact that the franchise tax, as construed in Southern Gum Company vs. Laylin, 66 O. S. 578, is a tax upon the privilege of being a corporation—the privilege originally conferred by the issuance of articles of incorporation. It is not upon the privilege of *doing* the business for which the corporation is organized, but upon the privilege which exists at the instance of the issuance of the articles of incorporation, and by virtue of which the incorporators proceed to dispose of the capital stock of the corporation before engaging in any business whatever.

I am, therefore, of the opinion that the Bankers Guaranty & Casualty Company, upon the facts mentioned by you, is liable for annual reports and fees for the year 1912, it having been organized more than six months prior to the month of May of that year.

I herewith return the correspondence enclosed in your letter, as requested by you.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

704.

TAXES AND TAXATION—SALE OF REAL ESTATE WITH PRIVILEGE OF LEASE AND RE-PURCHASE NOT TAXABLE AS "CREDIT" NOR AS INVESTMENT—IF A SECURED LOAN IT IS TAXABLE AS PERSONAL PROPERTY.

Where a transaction is consumated, whereby the owner of real estate sells the same with a condition, providing for its immediate lease by the seller from the buyer, and with an option of re-purchase by the seller at the expiration of the lease at the original selling price; held:

Whether such a transaction is in reality an out and out sale, with an option of re-purchase, or a mere loan to be secured by the real estate, depends upon the intention of the parties as shown by all accompanying incidents and the facts and circumstances of the deal based upon tests herein prescribed.

The lessor in such case could not be taxed for the same as an "investment" in any event, for the reason that the land itself is already taxed to its full value.

If the transaction in actual fact proves to be a land secured loan, the contract cannot be taxed as a credit but must be taxed under Section 5325 *General Code as "personal property."*

COLUMBUS, OHIO, October 24, 1912.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of Ocotober 7th, requesting my opinion upon the following questions:

> "A. being the owner of certain real estate, and having the legal title to the same, leases it to B. for a definite term of years. The lease contains a provision under the terms of which B. has the privilege of purchasing the property for a fixed sum, provided he chooses to exercise the option within a certain number of years.
>
> "Question: Does this contract constitute a credit or investment subject to taxation in the hands of A. or his assigns?
>
> "It will be noted that in this particular instance B. sold the property to A. in consideration of the sum of $9,000. On the same day A. executed the lease to B., with the privilege of purchase for the sum of $9,000. The effect of this was very much the same as if A. had loaned B. $9,000 and taken a mortgage upon the property, with conditions for payment similar to those contained in the option of the purchase clause of the lease."

The precise question which you submit can be easily answered. That is to say, it is very clear that the contract in question creates in the hands of A. or his assigns nothing which can be assessed to him or to them either as "a credit" or as "an investment." Sums due as rent or periodical payments under the lease in question must, of course, be included in the list of A. as "credits." Not so, however, as to the price at which the property may be repurchased whether the transaction be held to constitute a sale or not. The reason for this statement I shall presently point out. Meanwhile, permit me to call your attention to the dictum of Burket, C. J., in Chisholm vs. Shields, Treasurer, 67 O. S., 374-379, wherein it is pointed out that a legacy consisting of a stipulated sum annually to be produced by investing a certain security cannot be taxed as "an annuity" for the reason that

> "payment must be made out of the estate, the legacy and the estate being

combined and both together constituting but one; and as the estate is and must be taxed upon its full value, to tax her on her legacy as an annuity, would clearly be double taxation."

So, in the case presented by you there can be said to be no "investment" for the reason that the thing invested in is the land itself and that is already taxed to A, at its full value.

The reason for holding that regardless of the legal effect of the transaction described by you, A cannot be said to have any "credit" arising therefrom, excepting for the periodical payments due and unpaid, appears from a consideration of certain language found in Section 5325 of the General Code, which provides in part as follows:

> "The term 'personal property' as * * * used (in this title) includes, third, money loaned on pledge or mortgage of real estate; although a deed or other instrument may have been given for it, if between the parties thereto it is considered as security merely."

If the contract in question creates in A a property right other than the legal title to the land itself, it is clear that under Section 5325 such right as a subject of taxation must be classed as "personal property" as distinguished from either "a credit" or "an investment."

Upon the assumption that you have in mind the taxibility of the contract to A or his assigns as "personal property" as well as "a credit or investment," I have investigated this question also, without, however, any very satisfactory results. The difficulty here arises from the fact, seemingly well established by all the authorities, that an arrangement identical in written terms with that described by you is capable of producing either of two legal effects, according to the real intention of the parties participating therein. These two effects are as follows:

1. A giving of a deed and the return of a lease with option to re-purchase for a fixed sum within a certain time may witness a simple sale with limited option of re-purchase. That is to say, natural persons clearly have the right to enter into an arrangement of this sort, and they would naturally choose conveyances of the kind described by you to effect it. As stated by Chief Justice Marshall in Conway vs. Alexander, 7 Cranch, 218,

> "To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the courts of chancery, in a considerable degree, the guardianship of adults as well as infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale; * * *."

2. On the other hand, courts of chancery do not hesitate upon proper showing to give to such transactions the effect of a mortgage, particularly when in the language of our statutes the case is one of "money loaned on pledge * * * of real estate * * * as between the parties thereto it is considered as security merely."

As already pointed out, however, the form of words used by the parties in reducing the agreement to writing and embodying it into a legal conveyance is absolutely inconclusive as a test by which to determine which of the two legal effects

above described will be given to such a transaction. In the language of Chief Justice Marshall found in the same case,

> "The form of the deed is not in itself conclusive either way. The want of a convenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy *really* exists, its not being reserved *in terms* will not affect the case. But it must *exist* in order to justify a construction which overrules the express words of the instrument. * * *"

As already stated, I have examined a number of authorities both from Ohio and other jurisdictions without completely satisfying myself as to the existence of any universal test by which all cases presenting on the surface facts like those described by you can be classified.

In Patrick vs. Littell 36 O. S. 79, it was held that the retention of an agent to secure a loan on the deed and lease plan, broadly similar to that described by you, was not void as against public policy, the purpose being to evade the revenue laws of the state, because among other things the revenue laws of the state would not have been successfully evaded thereby. The language of the syllabus on this point is as follows:

> "Where a loan of money is to be secured by a conveyance of real estate in fee to the lender with a lease back for a specified number of years, with a privilege of redemption to the lessees to pay ground rent equal to eight per cent. per annum on the money loaned, such security is in equity a mortgage and subject to taxation under the statutes."

There was an evidence in this case, however, an agreement of agency wherein the transaction was described literally as "a loan." Judge Boynton, in delivering the opinion of the court, remarked in the course thereof,

> "They were constituted agents *to procure a loan,* upon terms prescribed by the plaintiff and her husband * * *."

So, it was clear and undisputed in this case that if the transaction had been carried out, it would have been in pursuance of a real intention to negotiate a loan. In other words, the intention of the parties was not obscure, but was fully disclosed by evidence in the case without recourse to that which was merely circumstantial.

In Slutz and Larue vs. Desenberg, et al., 28 O. S., 371, on the other hand, it was held in the language of the syllabus that:

> "1. A deed absolute in form, if intended to secure the payment of money, and the relation of debtor and creditor exists between the grantor and the grantee at the time of its execution, will be treated as a mortgage. But where no such relation exists, and the grantor and grantee, at the time of the execution of the deed agree in writing that the grantor shall have the option of repurchase in a given time, at a certain price, the transaction is a conditional sale.
>
> "2. To determine whether a deed, absolute in form, is in equity a

mortgage, requires that the real intention of the parties to the transaction be ascertained. A fair criterion seems to be this: If, under all the facts and circumstances, the relation of lender and borrower, or creditor and debtor, do not subsist, and the grantor is under no personal obligation that can be enforced by the grantee as creditor or mortgagee, the transaction will be treated as a sale and not as a mortgage."

In this case the facts disclose the existence of no lease. The only conveyance was an ordinary warranty deed, and it was further disclosed that the guarantee was, under the contract which accompanied the deed, to retain possession of the premises. There are other distinctions which may be made between this case and that presented by you, but I do not feel that an extended discussion of these distinctions is necessary in this connection.

In Wilson vs. Giddings, 28 O. S., 554, the following language appears in the syllabus.

"2. Where, between the vendor and vendee, the relation of debtor and creditor exists at the time a conveyance, absolute in form as a deed, is made for real estate, and the parties, as part of the transaction, enter into a written agreement, by which, among other things, it is agreed that the vendee will reconvey the real estate to the vendor, on the repayment of a stipulated sum of money in a stated time, and the circumstances attending the transaction and general course of dealing between them furnish strong presumptive evidence that the deed was intended as a mortgage security, a court of equity will hold such a deed to be a mortgage.

"3. Gross inadequacy of price, the grantor's continued possession, regular payment of taxes and assessments on the property by him, receiving the rents and profits as his own, controlling, using and improving the property as his own, by the grantor, in connection with the grantee's avowed purpose to make ten per cent. on his investments, and continued expectation that the vendor would take back the property, afforded strong presumptions that the vendor still holds the equity of redemption in the real estate.

"4. When a deed absolute in form is accompanied, as part of the transaction, by a matter of condition of defeasance, expressed in the conveyance, or contained in a separate instrument, or exists in parol, whether the condition be a pre-existing debt or present advance of money, if the relation of borrower and lender, debtor and creditor, exists between the parties, the conveyance will be regarded as a security, and treated in equity as a mortgage, and not as a sale, either absolute or conditional."

The above quotation is valuable as suggesting one of the circumstances which induces courts to hold deeds absolute in form to be mortgages in effect.

There are other cases decided by the Supreme Court of Ohio illustrating the rules and their practical operation.

In Kraay vs. Gibson, 2 N. P. n. s., 537, the taxability of a lessor's interest something like the one described by you as "personal property" under what is now Section 5325 of the General Code was directly involved; that being the only question in the case. The decision is that of the Superior Court of Cincinnati, per Hosea, J. In that case there was a deed absolute on its face and *perpetual* lease back to the grantor containing a privilege to repurchase at the lessor's option at the consideration stated therein. The county auditor undertook to place the lessor's interest on the duplicate as personal property, and with this end in view took certain

testimony which is abstracted in the report of the case. It appears that both parties to the transaction denied that either of them had any intention of creating a relation of debtor and creditor. The grantee testified that those whom he represented were interested solely in an income-producing investment and did not care ever to have the principle invested by them returned to them. The grantor and lessee testified that he desired to raise money on his property and put it in the shape of ground rent, reserving to himself the privilege to repurchase, but being under no obligation to do so.

Upon these facts and this testimony the court held the lessor's interest not to be taxable. There are many cases cited in the reported case, but I shall not quote them. Suffice it to say that the conclusion reached by the court seems to be justified because there does not appear to be any evidence whatever of any intention to create the relation of debtor and creditor as between the parties.

Let it be pointed out, however, that Judge Hosea makes a pertinent observation respecting the meaning of Section 5325. He says, in effect, at pages 539 and 540 that whether or not a deed absolute on its face with a lease back to the grantor would, in a given instance, be held to create a mortgage by reason of the surrounding facts and circumstances is not determinative of the taxability of the lessor's interest under this statute, because the subject of the tax is not the lease as an income-producing contract, not even as a contract for a valuable consideration to be paid in the future, but the "money loaned." Therefore it must also be inquired under Section 5325 whether or not the grantee and lessor has loaned money to the grantor and lessee and what the amount thereof is.

Thus it will be seen that ultimately in a question of this sort, the form of the deed, lease, contract, or instrument or instruments involved, disappears from the case and the object of the inquiry is to ascertain the amount of the loan.

Nevertheless it is often necessary to examine into the instruments employed themselves, as well as the surrounding facts and circumstances, with a view to ascertaining the real understanding of the parties. As already stated no single or ultimate test which may be applied in such cases is available. Instead there are numerous rules by the application of which to the various phases of each case the conclusion may be reached. Practically all of these rules are suggested in the above cited authorities and in the decisions of the courts of other states which may decide it. A very full discussion of the subject is found, however, in Jones on Mortgages, Vol. 1, Chapters 7 and 8. From this work, as well as from cases examined by me, I have gathered the following rules, by the joint application of which to a given case it may be determined whether a deed and agreement to reconvey under lease or otherwise will be held to be a mortgage:

1. In order to convert what appears to be a conditional sale with agreement to reconvey, the evidence should be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage. (Jones on Mortgages, Section 260).

2. A debt either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. (Id. 265)

3. When there has been an application for a loan on the part of the grantor to the grantee, and it is not shown that the grantor ever abandoned his intention to borrow money on his real estate, the choice of a deed with agreement to reconvey, whether a lease is interposed or not, is immaterial, the transaction being adjudged to be a mortgage. (Id. 266).

Nevertheless it is always possible to show that though the original intention may have been to negotiate a loan the parties did not agree upon this basis.

4. On the other hand the mere exisence of a debt on the part of the grantor to the grantee coupled with a stipulation to reconvey, etc., does not conclusively establish the existence of a mortgage, if it is shown that the parties regarded the debt as discharged by the conveyance. (Id. 267-269).

5. The non-existence of any collateral written undertaking by the grantor for the payment of money or the performance of an obligation is not of itself conclusive. The parties may not have reduced their real understanding to writing, nor even to express spoken words; nevertheless other circumstances may show that the parties must have intended a loan of money secured by real estate. (Id. 272.)

6. If it can be reasonably inferred that the amount payable periodically by the grantor remaining in possession to the grantee under the form of rent, is intended merely as interest upon the money advanced by the person who takes the title, it may be safely held that the transaction is a mortgage. (Id. 273.)

7. The mere fact that the grantor remains in possession even under a form of lease is a circumstance tending to show that the agreement for repurchase in connection with the deed constitutes a mortgage rather than a sale. This test, in common with all the others, is not conclusive in itself. (Id. 274)

8. Inadequacy of the price at which the legal title to the property changes hands is a circumstance of considerable weight as tending to show that the transacion is a mortgage. Nevertheless, even this circumstance is not conclusive, and it must always be borne in mind that courts must deal with great caution with questions involving opinion as to the value of real estate. (Id. 275.)

9. Although the evidence which will be sufficient to overthrow the apparent legal effect of the form of conveyance used by the parties must be clear and convincing, yet in applying this test, having ascertained the facts, courts are inclined to hold such transactions to be mortgages rather than conditional sales. (Id. Sections 278-279).

10. This is peculiarly true where the parties deal with each other under fiduciary relations. (Id. 335.)

11. The intention of the parties at the time the transaction was consumated governs—once a mortgage always a mortgage. (Id. 340.)

12. It follows from this that in order that the transaction may be held a mortgage, it is necessary that the deed of conveyance and the instrument containing the defeasance or agreement to reconvey be contemporaneous. If they are so, some evidence is afforded thereby of the existence of a mortgage. If not, the transaction must be held to be a sale. (Id. 345.)

13. The payment of the taxes and assessments on the property by the grantor remaining in possession and the complete control and use thereof by him, together with the making of improvements, are facts tending to show the existence of a mortgage—not of themselves, but taken in connection with other facts. (Wilson vs. Giddings, supra.) But it seems that inasmuch as such a course of conduct is usual on the part of the one holding under a lease, these circumstances do not afford evidence as strong when the grantor continues in possession under a lease as when there is no lease from the grantee back to the grantor.

14. The case is stronger in favor of holding the transaction to be a mortgage and not a sale, if the right to repurchase is limited to a specified period than it is when the right is perpetual. (Kraay vs. Gibson, supra, page 549.)

(It may here be remembered that the case just cited is to be distinguished from the one stated by you on these grounds.)

Applying to the facts as stated by you, and as disclosed by the correspondence attached to your letter, the tests among those mentioned above, which are applicable thereto, the following facts appear:

1. On its face the transaction is completely reduced to writing in the form of conveyances, and the legal effect of these conveyances must be overthrown by satisfactory evidence. That is to say, presumptively, the transaction is a sale and lease with the privilege of repurchase, and nothing more, and as such creates no "personal property" in A. which may be taxed as such.

2. The fact that B. remains in possession of the property, pays the taxes,

and completely and fully uses the same as his own, while directly attributable to the lease which he holds, nevertheless tends to show the existence of a mortgage. If it can be coupled with other facts tending to the same conclusion, the apparent legal effect of the transaction may be disregarded. That is to say, a court, or the county auditor, might infer from these facts, in connection with other facts, that B. owed A. a sum of money equal to the purchase price. From careful consideration I have reached the conclusion that the continued possession of B. is entitled to weight in this connection. I am aware that it might be argued that the continued possession is only attributable to the lease. Here, however, another element asserts itself, which is,

2a. The fact that the deed and lease are contemporaneous and evidently part of a single transaction. This fact not only of itself tends slightly to show the existence of a mortgage because the lease contains the agreement for repurchase as one of its covenants, but it greatly lessens the force of the possible contention that A's continued possession is only referable to the lease. In fact, it might almost be conclusively inferred from these circumstances that B. would not have deeded the property to A. without knowing that he was to secure a lease back for it and was to continue to enjoy the use of the property and to pay the taxes thereon. That being the case, it must have been for some ulterior purpose that B. parted with legal title to his property. Such a purpose could have been none other than the borrowing of money, and the transaction might, therefore, be held to constitute a loan and mortgage.

3. If (and this is not apparent from the face of the papers submitted to me) B. during his possession had made valuable improvements, thus treating the property in all respects as if it had been his own, additional evidence is thereby afforded of a real intention on the part of the parties to negotiate a loan, and to cover the same by a mortgage.

4. The fact that the privilege to repurchase is limited to the life of the lease and does not arise until a certain time after the execution of the deed and lease is one consistent with the theory that the parties had intended a loan of money secured by a mortgage. (It might be stated here that it is disclosed by the correspondence submitted that the privelege of repurchase does not arise until after the expiration of five years and continues only during the life of the lease). As pointed out in Kraay vs. Gibson, supra, these facts more strongly support the conclusion that a mortgage was intended than a perpetual lease and unlimited right of repurchase would have supported such a conclusion.

5. If it be ascertained that the consideration mentioned in the deed, being the same as that for which the grantee agreed to reconvey, does not represent the true value of the property, but is *grossly* inadequate as a price therefor, this fact in connection with other facts to which I have called attention may be relied upon in support of a conclusion that the transaction is a loan and mortgage.

6. On the other hand, if the conduct of the parties, aside from the express language used in the two conveyances, shows that the debt of the grantor to the grantee arising when the money was advanced to the latter was extinguished by the conveyance of land, the transaction must be held to be that which it purports to be. If, however, the amount of rent payable by the grantee to the grantor under the lease of the former represents the current rate of commercial interest at the time the transaction was consummated on the amount of money advanced by the grantee to the grantor, this fact would be almost sufficient in itself to negative the idea that the parties did not consider that the grantor continued to owe the grantee. If the amount of the rent exceed such commercial rate of interest, then it would be much clearer that it in deed and in fact constituted a rent charge.

7. In connection with the last point above mentioned I have noticed from the correspondence that the privilege of repurchase under the lease is such that

the purchase price may be paid by the lessee to the lessor in annual installments. and that upon each such payment the amount of rent, so-called, shall be reduced by a sum equal to five per cent. of such payment. This fact impresses me as very significant, and as being of considerable weight in support of the conclusion that the specific transaction involved is in reality a loan and mortgage. That is to say, it tends to disclose the real intention of the parties.

All of these tests, then, applied to the specific case submitted by you, and to the typical case described by you, would of themselves lead me to the conclusion that the two transactions would be held to be mortgages in equity; so that the real nature of the transaction is that of "a loan of money on the pledge of real estate" wthin the meaning of Section 5325, supra. I would not, however, unequivocally hold this to be the case. In any such case it is possible that other facts may exist which, under the tests above laid down, may tend to neutralize the force of those upon which I have commented, and may accomplish this result to such a degree as to leave a court without sufficient evidence upon which to disregard the strictly legal effect of the two conveyances.

In conclusion I beg to state that it is my opinion that the county auditor, or any other taxing officer having power to bring property upon the personal tax duplicate, may by the application of the tests above suggested ascertain for his own satisfaction whether or not a transaction like the one described by you is in reality a loan of money upon the pledge of real estate, and hence constitutes "personal property" which may be taxed to the owner of the legal title of the real property. His judgment in this matter, however, is not conclusive, but may be reviewed by the courts in an appropriate action. (Kraay vs. Gibson, supra.)

I trust that the tests which I have furnished may prove explicit enough to enable the taxing officers to apply them conveniently to individual cases. Let it be borne always in mind that as a general rule, a least no one of these tests ought to be regarded as conclusive, but that the cumulative effect of all of them which can be applies to the particular cases must be considered.

Finally, none of these tests is necessary where the taxing officers have direct evidence to the effect that the parties themselves have regarded the transaction as a loan. The object of the application of the tests themselves is to ascertain the intention of the parties, and if this can be discovered by any other means it must be given effect.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Public Service Commission)

85.

RAILROADS—UNIFORM RATES FOR INTRA-STATE HAULS—SHORT AND LONG HAULS.

Where a definite rate is established by a railroad between certain points, the charge of a higher rate for shorter hauls from either point to an intermediate point would be discriminatory and in violation of Section 8988, *General Code, providing for uniformity in rates, for intra-state hauls.*

COLUMBUS, OHIO, January 25. 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of October 5th, in which you ask for an opinion with reference to Section 8988 of the General Code, and cite the following examples, namely:

> "Suppose, for instance, that the existing rate on coal from Fultonham, on the Z. & W. Ry., via Crooksville and the C. & M. V. to Circleville is seventy cents per ton. Would Section 8988 require the railroads, parties to the Circlevillle rate, to apply such rate as the maximum to Stoutsville, a local point on the C. & M. V. intermediate between Crooksville and Circleville?
>
> "There is in existence a rate of 35 cents per ton on sand and gravel, in carloads, from Akron to Kent via the Erie R. R. Would the application of Section 8988 of the General Code require the Erie R. R. to apply the 35 cents rate to Tallmadge, a point directly intermediate on the same line?"

In reply to your inquiry, I desire to say that the section of the General Code, referred to, provides as follows:

> "No company, or person owning, controlling, or operating a railroad in whole or part within this state, shall charge or receive for transportation of freight *for any distance within this state a larger sum than is charged by the same company or person for the transportation in the same direction, of freight of same class or kind, for an equal or greater distance over the same road and connecting lines of road.*"

A railroad is a common carrier and subject to state control as to rates charged on freight shipped thereon which is intrastate.

Said Section 8988 was enacted with the intent and for the purpose of preventing undue discrimination and preference to one shipper or to shippers over another or others.

It is plain that the provisions of the section in question do not in terms embrace the case of the interstate traffic, but it is restricted in its regulation to long and short distances upon railroad lines and connecting lines within this state.

It may be contended that, so long as the rate charged for the short haul is open to all who desire to make a shipment, it is not discrimination, but I am of the opinion that any rate charged by any railroad for a short haul which would be greater than any rate for a long haul on the same and connecting lines would be a discriminatory rate and would be in contravention to said Section 8988.

The whole spirit of the statute in question would be abrogated if the railroad could charge more for a short haul on its road and connecting roads than for a longer haul thereon in the same direction. The sum charged by the railroad is based upon a rate, and any rate or rates which would give to a shipper a privilege to ship a certain commodity for a longer distance for a cheaper rate or smaller sum would, in my opinion, be discrimination.

I am, therefore, of the opinion that under said Section 8988 of the General Code a railroad cannot charge a higher rate to an intermediate point than to a farther point on the same and connecting lines in the same direction. Hence, in answer to your first example, I think the railroad, party to the Circleville rate, would have to apply such rate as the maximum to Stoutsville, a local point on the C. & M. V. Railroad intermediate between Crooksville and Circleville.

In answer to your second example, I am of the opinion that the Erie Railway Company would be required under said section of the General Code to apply the thirty-five cent rate to Tallmadge, a point directly intermediate on the same line, and the maximum rate from Akron to Kent the longer distance on the same and connecting lines.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

185.

PUBLIC UTILITIES ACT—TELEPHONE COMPANIES—MUTUAL CORPORATION NOT FOR PROFIT DEALING WITH OTHER THAN MEMBERS—"COMMON CARRIERS."

A mutual telephone company which is incorporated as a corporation not for profit, but which furnishes services to persons outside of its membership, is a "corporation operated for profit" and then a "common carrier" and answerable as such under Section 66 of the Public Utility Act.

COLUMBUS, OHIO, March 8, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication dated January 10, 1912, in which you ask for my opinion as to the application of Section 66 of the Public Utility Act, Section 614-63 of the General Code. (102 Ohio Laws 569) to the following example.

> "Where 'Mutual Telephone Companies' incorporated *not for profit;* but are actually operating for profit, that is to say, they furnish service to persons not members of the company and charge for such service. Suppose then that two Mutual Companies each incorporated 'not for profit;' but each actually operating for profit by serving others than members of their company; would not such companies be utilities under the law and entitled to the application of said Section 66 of said act?"

was duly received and in reply will say that Section three (3) of said act (102 Ohio Laws 550) reads:

> "Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated;" "When engaged in the business of trans-

mitting to, from, through, or in this state, telephonic messages, *is a telephone company,* and as such is declared to be a *common carrier.*"

Section four (4) of said act (102 O. L. 551) in defining the term "public utility" carries an exception as follows:

"*Except such public utilities as operate their utilities not for profit.*"

From a careful reading of the said section above quoted, it, in my opinion was the plain intention of the Legislature to provide by said act for the efficient regulation of public utilities which are affected with a public interest.

It is apparent that these portions of sections three (3) and four (4) of said act above quoted, must be considered together to properly answer your inquiry, and in so considering them, it is clear to me that any mutual telephone company, incorporated not for profit, but nevertheless *furnishes service* to persons not members of the company and charges therefor, becomes a common carrier under the definition of said term, set forth in said section three (3) and, again, whenever such mutual company or companies do furnish service to persons not members of the companies and charge therefor, they do not come within the exception set forth in said section four (4), but "*operate* their *utilities for profit;*" and all such mutual companies would be stopped from claiming they *were operated* not for profit.

There must be a distinction made between a corporation incorporated not for profit, and one "operated for profit," as applied to the Public Utility Act, for the reason that as soon as any such company, as referred to in your inquiry, accepted business from others than its members and charged therefor, it is operating for profit, even though the members may not under its charter be entitled to participate in the proceeds or fund derived from such charges.

Therefore, whenever such mutual telephone companies become utilities as above described, I am of the opinion that they become answerable to said Section 66 of said act.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

210.

CORPORATIONS—PUBLIC UTILITIES—JURISDICTION OF PUBLIC SERVICE COMMISSION OVER OFFICE BUILDING CORPORATION SUPPLYING ELECTRICITY TO OTHER THAN TENANTS.

A corporation whose articles express the purpose of acquiring and holding real estate and furnish to tenants "and others," space, power, light, and other facilities, and which corporation is actually engaged, in addition to its operation of an office and power building, in the sale of surplus electric current and heat to customers other than tenants of the building, is operating a business for supplying electricity to "customers with this state" and therefore, is a "public utility" and subject to the jurisdicion of the utilities commission.

March 16, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 9th, in which you enclosed certain correspondence between the officers of The Caxton Building Company of Cleveland, Ohio and your commission, and request my

opinion as to whether said company, upon the facts set forth, is to be considered a public utility and subject to the jurisdiction of the commission. The facts in said matter are as follows:

> "The Caxton Building Company of Cleveland, Ohio is a duly incorporated company under the laws of Ohio and engaged, as shown by the affidavit of the secretary of said company, in the business of operating an office and power building in the City of Cleveland, Ohio. Said building contains a heating and lighting plant for its own purposes, which plant has been installed with sufficient capacity to take care of expected demand by the tenants of the building; and at present is furnishing heat and electric current, generated by its heating and lighting plant, to certain continguous buildings or customers."

The question, therefore, is:

> "Under the above statement of facts is the said corporation a public utility and subject to the jurisdiction of the public service commission of Ohio, under and by virtue of House Bill 325, 102 O. L. 549?"

I have examined the records in the office of the secretary of state and find The Caxton Building Company was incorporated for the purpose of acquiring and holding real estate and furnishing to tenants and others space, power, light and other facilities."

Under the articles of incorporation of said company it has the right to furnish to tenants and *others* space, power, light and other facilities, which, in its terms, is broad and not ambiguous.

Section 614-2 of the General Code, 102 O. L. 550, defining the terms as used in said act, provides as follows:

> "Any person or persons, firm or firms, co-partnership or voluntary association, joint stock company or corporation, wherever organized or incorporated:
>
> "When engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state, is an electric light company."

Section 4 of said act, defining the term "public utility" as used in the act says that,

> "The term 'public utility' as used in this act shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit * * * *."

It is apparent from the reading of the two sections above quoted that the act was to include any corporation engaged in the business of supplying electricity for light, heat or power purposes to *consumers within this state;* and I have no difficulty in reaching that opinion in this specific case, on account of the broad terms of the articles of incorporation of said company. According to the affidavit of the secretary of said corporation the company is now engaged in the sale of surplus electric current and heat, generated by the plant in the building of the company, to customers other than tenants of their building, to the extent of several thousand dollars annually; and being authorized by its articles of incorpora-

tion so to do there can be no question in my mind but that said company is a public utility within the meaning of the act and is subject to the jurisdiction of your commission. Said corporation is a creature of the state, and the intent of the passage of said public utility act was the exercising by the state of the general police power in order that no person or corporation or public utility should use its property or do anything to the injury of the public in furnishing any product, such as the inquiry cited.

I might say in conclusion that every individual case will, of necessity, have to depend upon the facts relating thereto; and in view of the terms of the articles of incorporation of the said company I can not arrive at any other legal conclusion than that since said corporation is furnishing to customers power, heat and light as authorized, it has acquired the status of a public utility and become subject to said act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

221.

PUBLIC SERVICE COMMISSION—DUTY TO FURNISH "DATA AND INFORMATION" WITHOUT CHARGE AND TO FURNISH "COPIES OF PAPERS, FILES, ETC.," UPON PAYMENT OF FEE.

The Public Service Commission is required by Section 614-77, *General Code, to furnish without any charge therefor, any officer, board or commission, upon request all "data or information" with regard to any matter pending before the Commission.*

Under Section 614-76, *General Code, the Commission is obliged to furnish any person, upon the payment of the prescribed fee, with copy or copies of any "paper, record, testimony or writing made," taken or filed under the provisions of the Public Utilities Act.*

March 21, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication dated January 26, 1912, in which you enclose a copy of letter received from Hon. Newton D. Baker, Mayor of the City of Cleveland, to your commission, under date of January 12, which letter is as follows:

> "CLEVELAND, OHIO, January 12, 1912.
> "The Public Service Commission, Columbus, Ohio.
> "GENTLEMEN:—I am told that the Cleveland Electric Illuminating Co., of this city, has filed with your Commission an application to be permitted to enlarge its capitalization for the purpose of making various extensions and betterments to its plant and equipment in Cleveland.
> "Acting under Section No. 81 of the Public Utilities Act, I respectfully request that a copy of such application and any accompanying papers be transmitted to me for my official information.
> "(Signed) Newton D. Baker, Mayor."

You request my opinion as to whether or not there is any authority in law for charging the mayor of Cleveland for copies of documents which he requests,

and in reply I desire to say that Section 614-77 of the General Code, being Section 81 of the Public Utilities Act, provides as follows:

> "The commission shall, whenever called upon by any officer, board or commission now existing or hereafter created in the state or any political subdivision thereof, furnish any data or information to such officer, board or commission and shall aid or assist any such officer, board or commission in performing the duties of his or its office, and all officers, boards or commissions now existing or hereafter, created in in the state or any political subdivision thereof, shall furnish to the commission, upon request, any data or information which will assist such commission in the discharge of the duties imposed upon it by this act."

Under said section just quoted, I am of the legal opinion that any data or information requested by any officer, board or commission as therein defined must be furnished by your commission, and that no charge shall be made therefor, but in construing said section, I am also of the opinion that under said section no such officer or commission shall be furnished any copy or copies of any paper, record, testimony or writing made, taken or filed under the provisions of the Public Utilities Act, but simply such data or information as might inform such officer of commission of facts pertaining to any matter pending before your commission.

Under Section 614-76, Section 80 of the Public Utilities Act, it is mandatory that your commission, upon application of any person and the payment of the proper fee therefor, furnish certified copies under the seal of the Commission of any order made by it, and also any copy of any paper, record, testimony or writing made, taken or filed under the provisions of this act, and further provides that the same fees for such services shall be charged by your Commission as are now charged by the Secretary of State, which fees are provided by Section 176 of the General Code, under sub-division 18 thereof. Therefore, in conclusion, while the mayor of the city of Cleveland has the right, under Section 81 of the Public Utilities Act, above quoted, to demand without payment of any fee any data or information relative to the matter referred to in his letter, your Commission must charge him for a copy of the application and any accompanying papers relative to the same on file with your Commission.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

288.

RAILROAD COMPANIES—SWITCHING FACILITIES TO OTHER ROADS —PUBLIC UTILITIES—REMEDY OF PARTY AGGRIEVED.

When the tracks of one railroad company lie contiguous to certain industrial establishments, such railroad is obligated by Section 8998 General Code, at the request of shippers or other R. R. Companies, to switch the cars of other railroads to said establishments. When a railroad refuses to do this, the remedy to the party aggrieved is afforded by Section 9002 General Code, namely: a recovery of a sum double the amount of the overcharge caused by said refusal Further remedy may be had through an order of the Public Utilities Commission after formal complaint by the parties aggrieved.

March 20, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of November 15th, 1911, wherein you state:

> "I am in receipt of a letter from Mr. B. A. Worthington, Receiver, W. & L. E. R. R. Co., complaining, informally, that at Massillon, Martins Ferry and Bridgeport Ohio, the Pennsylvania and B. & O. refuse to accord to the W. & L. E. R. R. the same switching facilities that they accord to each other; that is to say, if a carload of freight arrives at either of these places via the W. & L. E. for a consignee having a private siding on the Pennsylvania, the Pennsylvania will not switch it. While if a car were to arrive via the B. & O. consigned to the same party, they would switch it."

And you ask my opinion as to whether or not there is any action under the statutes that can be taken by the Commission in the absence of formal complaint to require a railroad company to treat all its connections on the same basis with reference to interchange switching arrangements. In reply thereto I desire to say that Section 8998 of the General Code provides that when the tracks of one company

> "* * * lie contiguous to coal mines, stone, quarries, manufacturing establishments, elevators, warehouses, navigable waters or side tracks, suitable for loading or unloading, it shall switch the cars of other companies, at the request of such companies, or the shippers, over and upon the tracks so lying by such mines, quarries, manufacturing establishments, elevators, warehouses, navigable waters or side tracks, for the purpose of unloading or loading grain or other freight into or from such elevators, warehouses, boats upon such navigable waters, or side tracks without demurrage, for forty-eight hours."

And Section 8999 provides when companies must transport cars of other companies, and Section 9000 provides the rate for switching the cars of other companies. Section 9002 provides in part as follows:

> "A company which violates or permits to be violated any provision of Sections 8997 to 9001, inclusive * * * or which demands or receives a greater sum of money for transportation * * * or for the service provided for in such Sections 8997 to 9001, inclusive, than the sum allowed by law, *shall pay to the party aggrieved for*

*every such overcharge a sum equal to double the amount of the overcharge; and any officer, employe, or agent of any such company who violates or permits to be violated, any of such provisions, or demands or receives such sum of money, shall be subject to the like penalty to the party aggrieved. * * *"*

After a careful consideration of the question submitted in your inquiry, I am compelled to arrive at the legal conclusion that said sections, above referred to, provide no penalty to be assessed by the state, but the remedy is given to the party aggrieved under Section 9002 for such overcharges, etc.

The matter submitted in your inquiry being one of the cases which is covered by the statutes, not only as to the rights of the party aggrieved, but also providing a statutory remedy, I am also of the legal opinion that your Commission is without authority to remedy the wrong without a formal complaint being filed with it by the party aggrieved, which, under my construction of Section 9002 of the General Code, would be the party who has been overcharged, i. e., the shipper who must pay such overcharge for freight shipments.

I am of the opinion that a company has no right to refuse absolutely to switch the cars of another company when the tracks lie contiguous to the company's mines, stone quarries, manufacturing establishments, elevators, warehouses, navigable waters or side tracks suitable for loading or unloading, if requested by such company or shippers, and if they absolutely refuse they would have the right to file a formal complaint with your Commission and upon hearing your Commission could issue an order requiring the same to render such services as are required by law.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

458.

PUBLIC SERVICE COMMISSION—GRANT OF PERMISSION TO RAILROAD COMPANY TO SELL STOCKS AND BONDS—EFFECT OF APPLICATION OF PROCEEDS TO IMPROVEMENTS OUTSIDE OF OHIO.

When the Public Service Commission has granted an application of a Railroad to sell stocks and securities, the fact that part of the proceeds of said sale is to be used for improvements outside of Ohio does not in any way invalidate the procedure.

July 12, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication dated May 14th, received, in which you request my opinion upon the following question:

> "What authority has the Public Service Commission of Ohio to authorize the issuance and sale of stocks and securities by railroad companies, part of the proceeds of which are to be used outside the State of Ohio?"

The section which regulates the authority of your Commission to grant authority or power to any utility or railroad to issue bonds, stocks, etc., for the purposes mentioned in your letter is Section 56 of the Public Utilities Act, or Section 614-53 of the General Code of Ohio, which reads as follows:

"A public utility or a railroad, as defined in this act, *may*, when authorized by order of the Commission, and not otherwise, issue stocks, bonds, notes and other evidences of indebtedness, payable at periods of more than 12 months after date thereof, *when necessary* for the acquisition of property, the construction, completion, extension or improvements of its facilities or for the improvement or maintenance of its service, or for the re-organization or re-adjustment of its indebtedness and capitalization, or for the discharge or lawful refunding of its obligations, or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility or railroad not secured or obtained from the issue of stocks, bonds, notes or other evidences of indebtedness of such public utility or railroad within five years next prior to the filing of an application therefor as herein provided, or for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditures in such manner as to enable the Commission to ascertain the amount of money so expended and the purposes for which said expenditure was made."

Section 614-55 of the General Code is Section 58 of the Public Utilities Act, and reads in part as follows:

"* * * No interstate railroad or public utility shall be required, however, to apply to the Commission for authority to issue stock, bonds, notes or other evidences of indebtedness for the acquisition of property, the construction, completion, extension or improvement of its facilities or the improvement or maintenance of its service outside of the state, or for the discharge or refunding of obligations issued or incurred for such purposes or for reimbursement of moneys actually expended for such purposes outside of the State."

In addition to your request, I have the information from your Commission that an application has been made by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, under said Section 56, above quoted, for authority to issue bonds, the proceeds from the sale of which are to be used for legal purposes, but partially to be expended outside of the State of Ohio, and the question, therefore, is as to the authority of your Commission under the above quoted sections, and under the Public Utilities Act generally, to authorize the said issuing of such bonds when it is conceded that the proceeds, in part at least, are to be expended outside of this State.

There can be no question in my mind as to the legality of such a bond issue if the proceeds derived from the sale of any or all of such bonds were to be used exclusively within the State of Ohio, and for any of the purposes enumerated in Section 56 above quoted; but the serious question for consideration is whether or not your Commission has any authority to grant the issuing of bonds or other securities under said sections where the proceeds derived from the sale of such bonds and securities are to be expended, in part at least, for the purposes enumerated in said section, but *outside* of this State.

The fact that the Legislature in enacting that part of said Section 58 above quoted wherein "no interstate railroad or public utility shall be required to apply to the Commission for authority to issue such bonds or securities for the purposes mentioned where the expenditure is to be made outside of the State,

or for the refunding or the reimbursement of moneys actually expended for such purposes outside of the State" clearly convinces me that legally the granting of an order by your Commission to any railroad company or public utility, as defined in the Public Utilities Act, to do the thing inquired of in your letter, would not invalidate any bonds or part of the issue of said bonds or securities, the proceeds from which were to be expended without the State. And, on the other hand, the order, as far as the issuing of bonds or securities the proceeds of which were to be used within the State, would be legal and proper under said Section 56 above quoted.

I am, therefore, of the legal opinion that so long as your Commission is convinced that the granting of permission to any railroad company or utility, and particularly a railroad, to issue bonds or other certificates of indebtedness for a legal purpose, any portion of which might be or is to be expended, for the purposes in the said act enumerated, within the State, although part of the proceeds of the sale of such bonds or securities is to be used for the purposes outside of the State would legalize that portion of the issue pertaining to the State of Ohio, and would at the most be simply surplusage as to all those bonds or securities the proceeds of which are to be expended for the purposes enumerated in said act outside of the State; and, therefore, I believe in the case of the application of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company that there is no legal prohibition against your Commission authorizing the issuance of said bonds or securities, the consent for which was applied for to your Commission, so long as you find the same to be for the legal purposes in said act aforesaid enumerated.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

505.

PUBLIC UTILITIES COMMISSION MAY NOT COMPEL GAS COMPANY TO EXTEND MAINS—POWERS OF COUNCIL.

The Public Utilities Act does not confer upon the Commission the power to compel "extensions" of the equipment or service of Public Utilities. Such power is conferred upon the council, however, by Section 53 of said Act.

When an allotment addition is made to a city, therefore the Utilities Commission may not upon its own initiative compel a Gas Company to extend its mains thereto. Council, however, may compel the provisions of a contract with such company providing for extensions, and after council has taken action thereon the Commission is empowered to review the proceedings by virtue of Section 46 and 48 of said Act.

July 11, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication of May 3rd, 1912, received. You recite therein the following facts:

> "Certain residents of what is known as 'Crestview Addition' to the city of Columbus, brought to your Commission an informal complaint against the Federal Gas and Fuel Company, alleging that that utility had refused to furnish them gas in said addition. That an informal conference was held at which appeared representatives of the Gas Company and a number of citizens of said addition, and that at

said conference it developed that said addition to the city of Columbus was recently made and has so far been sparsely built up although building is going on rapidly. That subsequently your Commission *'took up the matter on its own initiative, made necessary entries, summoned the witnesses and had a formal hearing in the matter.'* That at said hearing it was shown that there are now in said addition thirty-five occupied residences, fourteen of which are supplied with gas (having privately piped the same from the main lines of the company at their own expense) and twenty-one which are not supplied, and certain other facts relative to said addition."

Your Commission requests my opinion as to the legal status of said matter from the facts set forth in the case, and in reply I desire to say that the question involved in the case and the only one necessary for me to consider is:

> *"Whether your Commission has jurisdiction either to entertain a complaint directly from the citizenship of said addition such as recited in your communication or take any action upon its own initiative in the subject matter."*

It will be necessary to examine the act creating your Commission (Sections 501, 502 and 606 of the General Code of Ohio) in order to determine the question as to whether or not jurisdiction is given to your Commission to entertain a complaint or make an order upon its own initiative, such as referred to in your communication. In giving the matter most careful consideration on account of the importance of the issue involved, I have investigated not only the law, but all the facts which are determinative of the issue involved, and I find the facts to be as follows:

(a) The Federal Gas and Fuel Company, a corporation, was granted a franchise by the council of the city of Columbus, Ohio, *many years prior to Crestview's being annexed* to the said city of Columbus, whereby the said company was granted the privilege of laying pipes in the streets, alleys and public places and grounds of the said city of Columbus, and for the purpose of conveying and supplying natural gas to consumers thereof, and now and for many years have been operating under said ordinance (Ordinance No. 15564 of the city of Columbus, Ohio.)

(b) That said company has never extended its pipe lines into said Crestview Addition, and refused to do so, because its franchise does not compel it to do so under the present conditions existing as to prospective consumers of natural gas in said addition.

(c) That no action has ever been taken by the residents of the said addition to the city of Columbus, Ohio, as provided under the terms of said ordinance aforesaid, to secure the services referred to in this controversy.

The sections of the act creating your Commission and defining its powers relative to the matter of jurisdiction of the same to order extensions of mains by said company into a new addition to the city of Columbus are:

> "Section 5. The Public Service Commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate 'public utilities' and 'railroads' as herein defined and provided and to require all public utilities to furnish their products and render all services required by the Commission, or by law."
>
> "Section 14. Every public utility shall furnish necessary and adequate service and facilities which shall be reasonable and just,

and every unjust or unreasonable charge for such service is prohibited and declared to be unlawful."

"Section 15. Every public utility shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just and reasonable, and not more than allowed by law or by order of the Commission. Every unjust or unreasonable charge made or demanded for any service, or in connection therewith, or in excess of that allowed by law or by order of the Commission, is prohibited and declared to be unlawful."

"Section 23. Upon complaint in writing, against any public utility, by any person, firm or corporation, *or upon the initiative or complaint of the Commission* that any rate, fare, charge, toll, rental, schedule, classification or service, or any joint rate, fare, charge, toll, rental, schedule, classification or service rendered, charged, demanded, exacted or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, or unjustly preferential or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by said public utility, or in connection therewith, is, or will be, in any respect unreasonable, unjust, insufficient or unjustly discriminatory or unjustly preferential, or that any service is, or will be, *inadequate or cannot be obtained, the Commission shall notify the public utility complained of that complaint has been made,* and of the time and place when the same will be considered and determined, which notice shall be served upon the public utility not less than fifteen days before such hearing, and shall plainly state the matters or things complained of. The Commission shall, if it appear that there are reasonable grounds for the complaint, at such time and place proceed to consider such complaint and may adjourn the hearing thereof from time to time. The parties thereto shall be entitled to be heard, represented by counsel and to have process to enforce the attendance of witnesses. A public utility may make complaint as to any matter affecting its own product or service with like effect as though made by a person, firm or corporation, in which event the Commission shall publish notice thereof for ten days prior to such hearing in a newspaper of general circulation at the situs of such public utility."

"Section 29. Whenever the Commission shall be of the opinion, after hearing had upon complaint, as in this act provided, *or upon its own initiative or complaint,* served as in this act provided, that the rules, regulations, measurements or practices of any public utility with respect to its public service are unjust or unreasonable, or that the equipment or service thereof is inadequate, inefficient, improper or insufficient, *or cannot be obtained, it shall* determine the regulations, practices and service thereafter to be installed, observed, used and rendered, and fix and prescribe the same by order to be served upon the public utility. It shall thereafter be the duty of such public utility and all of its officers, agents and official employes to obey the same and do everything necessary or proper to carry the same into effect and operation; provided, that nothing herein contained shall be so construed as to give to the Commission power to make any order requiring the performance of any act or the doing of any-

thing which is unjust or unreasonable or in violation of any law of the State or the United States."

"Section 30. Whenever the Commission shall be of the opinion, after hearing had, as in this act provided, *or upon its own initiative or complaint*, as in this act provided, that repairs or improvements to the plant or equipment of any public utility, should reasonably be made, *or that any additions thereto should reasonably be made*, in order to promote the convenience or welfare of the public, or of employes, or in order to secure adequate service or facilities, the Commission may make and serve an appropriate order with respect thereto, directing that such repairs, improvements, *changes or additions be made within a reasonable time*, and in a manner to be specified therein. Every such public utility, its officers, agents and official employes shall obey such order and make such repairs, improvements, changes and additions required of such public utility by such order."

"Section 53. The council of any municipality shall have the power upon filing of an application therefor by any person, firm or corporation, to require of any public utility, by ordinance or otherwise, such additions *or extensions* to its distributing plant within such municipality as shall be deemed reasonable and necessary in the interest of the public, and, subject to the provisions of Section 9105 of the General Code, to designate the location and nature of all such additions and extensions, the time within which they must be completed, and all conditions under which they must be constructed and operated. Such requirements and orders of the council shall be subject to review by the Commission, as provided in Sections 46 and 48 thereof. The council and Commission in determining the practicability of such additions and extensions, shall take into consideration the supply of the product furnished by such public utility available, and the returns upon the cost and expense of constructing said extension and the amount of revenue to be derived therefrom, as well as the earning power of the public utility as a whole."

An examination of Sections five (5), fourteen (14), fifteen (15), twenty-three (23), twenty-nine (29), and thirty (30), above quoted, shows that your Commission is given the following powers:

1. To determine the "*practices*," "*regulations*," and "*service*" thereafter to be installed, observed, used and rendered.

2. To make orders directing that "*repairs*," "*improvements*, "*changes*," or "*additions*" to the plants or equipment of public utilities be made, but nowhere in the said sections does the word "*extensions*" appear, the Legislature having refrained from using it, but employs it for the first time in Section fifty-three (53), above quoted, wherein the Legislature, in my opinion, intended to, and did, confer jurisdiction in the council over the matter of extensions not covered by any of the previous sections of the act above quoted.

The words "*additions*" and "*extensions*" as used in the sections of the act above quoted are not synonymous, and have distinct and different meanings, and especially in view of the fact that the Legislature was so careful to use the same in the different sections conferring powers on different bodies.

The ordinance granted to the Federal Gas and Fuel Company above referred to provided in Section nine (9), in part, as follows:

"It is further provided that when at least ten (10) neighboring householders in the same locality of four hundred feet square and on

the same street file a written request with said company for gas to be used in heating their respective houses thereon, and agreeing to take gas for five years from said company for said purpose of heating their said houses, *then said company shall connect the said property of said subscribers with its gas mains and supply gas to such subscribers.*"

This part of the ordinance above quoted provides for extensions of gas mains into new territory and the furnishing of such subscribers with gas prescribing the conditions and terms under which it becomes the duty of the company to do the things therein enumerated.

It is a well settled law in Ohio that "when a municipal corporation by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitutes a contract and *the rights of the parties thereunder are to be determined by the contract itself.* (The East Ohio Gas Company vs. the City of Akron, 81 O. S., 33.)

Again, for the reason that such contractual relations exist between all utilities and municipalities heretofore granted franchises under the well settled rule of law above quoted leads me to the belief that the Legislature in passing the act creating your Commission intended that Section 53 should give jurisdiction to councils in such matters as "extensions" and not to your Commission.

Therefore, after a careful examination and study of the law creating your Commission and for the reasons heretofore set forth, I am unable to find any section or language in the act which would lead to the conclusion or the slightest inference that the Legislature intended said Act to give your Commission jurisdiction to compel a utility under the circumstances existing in the case submitted to me upon its own initiative or complaint but that said power exists in the council of the municipalities of the State as provided in Section 53 of said Act, and that it must first be exercised by the council, and your Commission can only obtain jurisdiction by reviewing the requirements and orders of council as provided in Sections 46 and 48 of said Act under authority of Section 53 thereof.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

562.

TELEPHONE COMPANIES—POWER OF UTILITIES COMMISSION TO COMPEL CONNECTIONS—BUTLER AND HAMILTON COUNTIES.

It is intended by Section 614-63 G. C., that the Utilities Commission shall be empowered to compel through telephone communication between different localities, or zones of operation of different companies when:

First. Two or more telephone companies have lines which already form a continuous line of communication.

Second. When the lines of said companies could be made continuous by suitable connections or joint use of equipment.

Third. When such companies could transfer messages at a common point.

All three conditions, however, unless public necessity requires otherwise, are subject to the qualifications that such communication cannot be enforced where it is already made by one line alone or where such communication is already otherwise provided for.

Since, therefore, the Cincinnati and Suburban Bell Telephone Company already connect Hamilton and Butler counties by virtue of its own system it cannot be compelled to make connection with the Hamilton Home Telephone Company which runs parallel thereto and is universally located in only one of said counties.

July 24, 1912.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am transmitting you herewith opinion in regard to the law covering the issues between the Hamilton Home Telephone Company and the Cincinnati & Suburban Bell Telephone Company. With your permission I would suggest that you make such entry as that the Home Telephone Company say, if it wishes, submit the statute to the court for interpretation without any prejudice as to the facts. The effect of my holdings as to the law would leave your Commission without jurisdiction to make the order, and I think the entry should be drawn accordingly. If you were to make an order disposing of the question of the application on its merits the Home Telephone Company might be unable to submit the matter to the court without prejudice, because your decision might be based on full consideration of all the facts in the case without reference to the interpretation of the statute. The court, of course, would not interfere with your discretion. It would perhaps be well for you before making the entry to hear from counsel for the Home Telephone Company as to the form of such entry.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

July 24, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication dated June 29th, 1912, received, in which you inquire following statement of facts:

> "In Butler County there are two telephone systems radiating from the city of Hamilton; one known as the Cincinnati and Suburban Bell Telephone Company, (which is a Bell interest and a part of the system having headquarters in Cincinnati); the other the Hamilton Home Telephone Company, known as an independent interest. You

> are probably aware of the fact that in the city of Cincinnati the "Bell" system is supreme; that municipality never having allowed the independent interests to effect an entrance. The city of Hamilton is practically covered by both systems. This is true largely as to the county, but not entirely. Some sections of the county are reached by one system and some by the other. It is fair to say, however, that at the hearing witnesses for the Bell company testified that they were willing to extend their lines to all parts of Butler county to accommodate any prospective patron in the county, but was strenuously denied by complainants who put on witnesses to show that they had applied for Bell service and were unable to get it and in some cases the nearest Bell phone was two (2) miles distance from their residence."

and request my legal opinion as to the meaning of this sentence:

> *"Between different localities which cannot be reached by the lines of either company alone."*

which appears in Section 66 of the Public Utilities Act—Section 614-63 of the General Code of Ohio, the Hamilton Telephone Company having filed its complaint aginst the Cincinnati and Suburban Bell Telephone and the American Telegraph and Telephone Companies, with your Commission whereby they seek to have your Commission make an order directing the defendant companies to establish on equitable terms a *direct toll service* between the Hamilton Home Telephone Company's subscribers in Hamilton, Ohio, and Butler county, and the defendants' subscribers in Cincinnati and its suburbs, so that a subscriber of the complainant company, over his own instrument in his own home, office or place of business, can call up any subscriber of the defendant companies in Cincinnati or its suburbs, or be called up by subscribers of the defendant companies in Cincinnati and suburbs, for the purpose of holding telephone conversations.

You seek my opinion upon the above question upon the facts stated herein and in view of the fact that the defendant companies contend that inasmuch as Cincinnati is reached from Hamilton by the lines of their companies, *that the provisions of law intended by that sentence is satisfied*, and that the word *"either"* means either defendants' line or complainant's line, and inasmuch as the complainant's line does not reach Cincinnati that said Section 614-63 of the General Code is not complied with and that *under said section it is entitled to the right* of connection at Hamilton with the Bell line for the purposes above stated, viz: *"In order that patrons of the Hamilton Home Telephone Company may reach Cincinnati from their own homes."*

The full text of the statute, upon the construction of which these cases turn, is as follows:

> "The Commission shall have the power upon complaint, in writing, by any person, or on its own initiative, by order, to require any two or more telephone companies whose lines or wires form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points, between different localities WHICH CANNOT BE COMMUNICATED WITH OR REACHED BY THE LINES OF EITHER COMPANY *ALONE*, where such service is not already established or provided for, unless

> public necessity requires additional service, to establish and maintain through lines within the state between two or more such localities. The joint rate or charges for such service shall be just and reasonable, and the Commission shall have power to establish the same, and declare the portion thereof to which each company affected thereby shall be entitled and the manner in which the same shall be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such division of expense and labor as shall or may be required by the Commission." Section 614063 G. C.; Sec. 66, Act 102 O. L. 549.

The rule for construction of any statute was laid down by our supreme court, in the case of Slingluff vs. Weaver, 66 O. S. 621, as follows:

> "The intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

The language of the statute above cited is very plain. It says that the Commission may act, either upon complaint filed or on its own initiative, where two or more telephone companies (1) have lines which already form a continuous line of communication, or (2) could be made continuous by the construction and maintenance of suitable connection, or the joint use of equipment, or (3) where such companies could transfer message at a common point, so as to require such companies to transmit calls on such lines already in a continuous line of connection, or to make the necessary connections and then transmit such calls, or transfer messages, between different localities. But all of the foregoing is subject to this qualification, that such orders can only be made for connection between different localities which cannot be communicated with or reached by the lines of either company alone, and where such service is not already established or provided for. But in the latter case, even though some company or companies already have through services between such localities, yet if public necessity requires additional service by the connecting up of more companies whose lines are or could be made continuous, the Commission could make the order.

It, therefore, appears that, to enable the Commission to act, it must first be established that neither one of the companies has lines which communicate with or reach both of the localities. Secondly, it must be shown that the two companies have lines which either form, or can be connected so as to form, a continuous line between the two localities; that is to say, when joined end to end, neither reaching the whole of the necessary distance. The whole context of the section shows that the Legislature did not intend this provision to apply when the lines paralleled. Thirdly. If there is already communication by direct single line or joined continuous lines of some company or companies, then there must be affirmative evidence that public necessity requires the linking up of two new companies, if such there be, whose lines are continuous when joined together, and neither of which reaches both localities by its own independent line.

The word "localities," as used in the act, may be construed by the Commission according to the circumstances of each case, so that no precise and unalterable physical limitations can be placed upon it. But from the context of the statute, it would appear that the Legislature intended it to mean a whole territory, or the zone of operation of any telephone company. In the cases under consideration, the complaint being in behalf of the Hamilton Home Telephone Company, it is apparent that the whole zone covered by the operations of that company is one "locality," as a whole, while the city of Cincinnati, as a whole, is the other, and not subsidiary parts of either.

Therefore, from a full and careful consideration of the facts stated in your communication, and a most thorough reading and consideration of the law and cases cited in the briefs furnished me by counsel for both complainant and the defendants, I am compelled to reach the legal conclusion that the Legislature has not authorized your commission to act where it appears that the defendant company already, without the aid of any other company, connects both localities, in this case, viz.: its own exchanges in Hamilton and Butler counties.

Under the rule of construction, above quoted, as laid down by our supreme court, and applying it to the section involved in the controversy submitted to me, under the plain language of said section I reach the above conclusion, believing the law in its present form is not sufficiently broad to cover a case such as presented by the complainant and only the Legislature can make the necessary change to cover such cases.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

566.

PUBLIC UTILITIES DEFINED IN ACT—PERSONS OR CORPORATION NOT SUCH MAY CONTRACT REGARDLESS OF COMMISSION.

Public utilities are defined by Sections 3 and 4 of the Utilities Act. Firms, persons or corporations which do not come within said definition are not governed by the act and may therefore sell or lease to or contract with one another or with public utilities without regard to Section 63 of the act providing for the consent of the commission when public utilities so act with one another.

COLUMBUS, OHIO, July 31, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication dated July 10, 1912, received in which you request my opinion upon the following question:

> "May a utility property be sold or leased to an individual, firm or corporation not an existing utility without the necessity of securing the consent of the commission under the provisions of Section sixty-three (63) of the utility act?"

and in reply will say that Section 614-2 of the General Code, being Section three (3) of the utility act defiining the words and phases used in the act, in all of said sub-divisions of said section, defines person or persons, firm or firms, co-partnerships or voluntary associations, joint stock associations, company or corporation, wherever organized or incorporated as being public utilities "*when engaged in the respective businesses*" therein specified.

Section 614-2*a* of the General Code of Ohio being Section four (4) of the utility act defines the term "public utility" as used in said act as follows:

> "Shall mean and include every corporation, company, co-partnership, person or association, their leases, trustees or receivers, defined in the next preceding section, etc."

It is plain from the proper interpretation of the above sections of the utility act that only those utilities as therein defined, when engaged in business (*a public employment*) are subject to the provisions of the whole act.

Section sixty-three (63) of the utility act, Section 614-60 of the General Code provides in part as follows:

> "With the consent and approval of the commission, but not otherwise:
>
> "(a) Any two or more public utilities furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state, *may enter into contracts with each other* that will enable such public utilities to operate their lines or plants in connection with each other.
>
> "(b) Any public utility may purchase or lease the property, plant or business of any other public utilitiy.
>
> "(c) Any such public utility may sell or lease its property or business to any such other public utility.
>
> "(d) Any such public utility may purchase the stock of any other such public utility."

As above stated any person, firm or corporation not engaged in the business as specified in Section 614-2 of the General Code is not a public utility and therefore not subject to the provisions of said act.

Under the facts stated in your communication there can be no question that such public utility may be sold or leased to any individual, firm or corporation not an existing utility without the consent of the commission as provided in Section sixty-three (63) of the act.

The intention of the said section was to give supervision to the commission over public utilities engaged in business and thereby protect the public from any injustice by two or more public utilities contracting, leasing, purchasing or owning stock of the other unless consent first had from the commission.

I am, therefore, of the opinion that your commission has no jurisdiction over any "public utility as defined in the act not actually engaged in business as above indicated and that any public utility has the legal right to do any of the things enumerated in Section sixty-three (63) of the act with any individual, firm or corpoartion not an existing public utility as heretofore defined, without the consent of your commission first had as in said section provided.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

615.

PUBLIC UTILITIES—COMPANY SUPPLYING GAS TO OTHER COMPANY FOR DISTRIBUTION NOT SUBJECT TO PUBLIC UTILITIES ACT.

A company organized to drill gas wells on leased preperty and to furnish gas as rental to the company from whom the land is leased ,and to sell any surplus to the East Ohio Gas Companies and other similar companies for distribution, does not supply gas to the consumer and is therefore not a "public utility" within the meaning of the Public Utilities Act.

COLUMBUS, OHIO, August 21, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of August 12, 1912, which is as follows:

> "The commission has been asked to indicate whether a company of the following description must apply to it for authority to issue its stock and otherwise acknowledge its jurisdiction:
>
> "'We are about to organize a small company to drill gas wells on leased property and to furnish gas, if obtainable, to the company from which the property is leased and to sell any surplus to the East Ohio Gas Company or other similar company for distribution. Our company will not distribute or sell to consumers. The gas furnished the owner of the property will be accepted as rental for its use and only the surplus will be sold as above indicated.'
>
> "The commission will be pleased to have your opinion as to whether a company organized for such purposes should be classified as a public utility subject to the provisions of the statutes regulating public utilities."

In determining whether this proposed company is a "public utility" within the meaning of the law, we must examine the act on the subject as found in the statutes of Ohio relating to the Public Service Commission, Title III, Division II, Chapter 1, being Sections 487 to 614-84 inclusive, General Code.

Section 614-2*a* General Code in defining a public utility says:

> "The term 'public utility' as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, *defined in the next preceding section, etc.*"

"The next preceding Section" 614-2, General Code, in defining what constitutes the various kinds of "public utilities," speaking on the subject of natural gas, says:

> "When engaged in the business of supplying natural gas for lighting, heating or power purposes *to consumers* within this state, is a natural gas company."

Clearly the company, as described in your letter, does not fall within this definition. It expressly says the company "*will not distribute or sell to consumers.*"

The arrangement of paying its rental in gas, to the lessor, is not furnishing or supplying *"consumers,"* within the meaning of the act. Neither can it be said that the selling of the remainder of its product in bulk to the gas company, is a sale or wurnishing to *"consumers."*

Both of these transactions are based upon private contracts, upon which the parties have agreed; and in neither of them has the public any interest. Your board could not control or supervise the terms of these contracts any more than in the bargain and sale of other commodities between private individuals. To constitute a natural gas company a "public utility," it must be engaged in selling or furnishing such gas to consumers generally, or doing such a business in that line as would compel it to furnish gas to such of the public as may lawfully demand service at its hands.

Of course, if this company in the future should change its course of business, and engage in selling or supplying gas to consumers, it would become a public utility, and as such, come within your jurisdiction.

Under the facts as set forth in your letter the company is not a "public utility," and therefore your board has no authority over it.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

693.

PUBLIC UTILITIES COMMISSION—CORPORATION ORGANIZED TO FURNISH CARS TO RAILROAD COMPANIES FOR PURPOSE OF EXPERIMENTING WITH RAILWAY EQUIPMENT IS SUBJECT TO THE COMMISSION.

Under Section 501 *General Code, the term "railroad" as employed in the chapter relating to public utilities, includes corporations or companies which "own, operate, manage or control any cars or other equipments" used on a railroad, and under Sections* 614-2*a and* 614-3, *General Code, the public utilities commission has power, jurisdiction and supervision over railroads operated for a profit.*

A corporation, therefore, which is organized for the purpose "of acquiring, leasing, owning and furnishing cars to be used over railway lines not owned, leased or operated by it; and especially for the purpose of experimenting with and exhibiting railway equipments attached to such cars" is a railroad company operated for profits and is, therefore, subject to the supervision and control of the public utilities commission.

COLUMBUS, OHIO, October 16, 1912.

The Public Service Commission, Columbus, Ohio.

GENTLEMEN:—I hereby acknowledge yours of August 15, 1912, which is as follows:

> "The commission has before it an inquiry as to whether the company described is subject to the provisions of the so-called Public Service Commission Act. I quote the following description of the purposes of the corporation:
>
> "'*This company is organized with a capital of* $1,000.00. *It expects to acquire about a dozen cars to which special railroad equipment is to be attached and which cars it then expects to furnish from time to time to railroads that may be willing to use the same for the pur-*

pose of testing the efficiency of the equipment. The cars may be so furnished either for a monthly consideration or without any consideration, the real purpose being to exhibit and have subjected to practical use special equipment of various kinds attached to such cars.

"I understand that this would render the company subject to the provisions of your commission. The cars which will be acquired probably would represent a value of from $10,000.00 *to* $15,000.00, *but it is not intended to issue stock beyond the amount authorized by the charter. to-wits* $1,000.00.'

"The commission will greatly appreciate your early advice as to whether, in your opinion, such car company is a railroad or utility within the meaning of the statute. Inasmuch as the company desires to issue its stock, and the method by which this is to be done depends wholly upon your opinion, the commission asks your prompt consideration and determination of the matter."

I have examined the articles of incorporation of the company above referred to, as recorded in the office of the Secretary of State. The record shows the name of the corporation to be "The Cleveland Railway Equipment Company," organized August 7, 1912. The purpose for which it was formed, as shown by said record, is: "Acquiring, leasing, owning and furnishing cars to be used over railway lines not owned, leased or operated by it; and especially for the purpose of experimenting with and exhibiting railway equipments attached to such cars."

The question is whether this company is a "railroad" or "utility," must be determined from the facts in the case, together with the statutes governing public utilities, and the law on that subject generally.

Section 501, General Code, in defining the term *railroad*, reads in part as follows:

"The term 'railroad' as used in this chapter shall include all corporations, companies, etc., * * * which owns, operates, manages or controls a railroad or part thereof as a common carrier in this state, *or which owns, operates, manages or controls any cars or other equipments used thereon* * * *."

Section 502, General Code, provides that this chapter (formerly Railroad Commission. now Public Service Commission), shall apply to all railroad companies, *equipment companies*, etc.

Section 614-2, General Code, defines and describes various public utilities, and in the last paragraph thereof again says that the term "railroad," when used in this act, includes "equipment companies."

Section 614-2*a* says:

"The term 'public utility' as used in this act, shall mean and include every corporation, company, co-partnership, etc., * * * defined in the next preceding section, except such public utilities as operate their utilities not for profit, etc."

Section 614-3, gives your commission power, jurisdiction and supervision, with authority to regulate "railroads" and "public utilities."

The description of the purposes of this corporation, as quoted in the beginning of this opinion, was written by an officer of the company; and it is admitted, practically, by said company, that the facts as detailed therein, "would render the company subject to the provisions of the commission."

The company says it will acquire about a dozen cars, worth from $10,000.00 to $15,000.00; that it will *equip* them with *special railroad equipment*, and furnish them for consideration in some instances, to railroads. The company, then, is one for profit, although its profits and its business may at the first be small. Yet, it is apparent that the ultimate object of this company is to introduce and sell or lease, these equipments to all railroads which may desire them, at a profit. It owns its own cars and equipments, and its business is, through their use, to sell or lease to railroads generally, these inventions.

The company has properly designated itself as a "Railway Equipment Company," and it is wholly immaterial whether it does much or little business; whether it makes any profit at all; it is engaged in the *equipment business*, and is an *equipment company*, thus falling within the express language of the statutes concerning "railroads" and "utilities." It is immaterial whether *many* or *few* railroads use these cars and appliances. *It is the character of the business that gives the company its status in law.* I am therefore, of the opinion that this company is a railroad or utility, within the meaning of the statue, and should be classed as a public utility. It is therefore, under your jurisdiction as such, and subject to all the provisions of law governing utilities in this state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

721.

PUBLIC SERVICE COMMISSION—TELEPHONE COMPANIES—CERTIFICATE OF PUBLIC NECESSITY AND CONVENIENCE FROM COMMISSION BEFORE ONE COMPANY MAY ENTER TERRITORY OCCUPIED BY ANOTHER—VESTED RIGHTS—CONSTITUTIONAL LAW.

Section 54 of the Public Service Commission Act, (providing that no telephone company shall exercise any permit, license or right, theretofore granted but not exercised, to operate a telephone system in any municipality or locality where there is in operation a telephone company giving adequate service, unless such telephone company first secure from the commission a certificate after public hearing that the exercises of such license, permit or right is proper and necessary for the public convenience) does not interfere with vested rights and is not unconstitutional.

A company which, prior to the passage of this act, therefore has not exercised the right granted by its charter to operate a telephone in a locality where another company is giving adequate service, must be required to obtain said certificate from the commission.

Whether or not the offering of a lower rate for service by the company desiring to enter the locality is sufficient, to justify a certificate from the commission to the effect that the service is a public necessity or convenience is a question of fact depending upon accompanying conditions and circumstances.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of September 16, 1912, the important part of which is as follows:

> "I am handing you herewith briefs of complainant and defendant in the application of The Farmers Telephone Company, of Sidney, Ohio, to extend its lines under Section 54:

"The precise question that the commission desires an opinion from you upon, is whether or not Section 54 of the Utility Act applies when a telephone company was in existence and operating prior to July 1, 1911, and the extensions it proposes to make are within the territory prescribed in the articles of incorporation. It would perhaps be well to give you a brief resume of the history of the present case: The Sidney Telephone Company brought before the commission a complaint, alleging that the Farmers Telephone Company, of Sidney, Ohio, were invading territory occupied by the complainant ,and asking an order from the commission requiring defendent to cease and desist from such extension. When the case came up for hearing The Farmers Telephone Company appeared by counsel to oppose the prayer of the complainant. The commission took the ground that the relief of the complainant was to be obtained by invoking the authority of a court; that if the defendent telephone company were actually invading the territory of the complainant company or threatening to do so in violation of Section 54; that is to say, without having obtained the necessary permit in compliance with Section 54, that the proper procedure of the complainant company was to apply to a court of competent jurisdiction for a writ of injunction. The counsel of the defendent company being present, asked if the commission held that it were necessary for it, before proceeding, to secure from the commission a certificate of public necessity and convenience as contemplated by Section 54. The commission stated that such at that time was their opinion, this having been the holding of Judge Brown in the case of the Clinton Telephone Company against the New Burlington Telephone Company.

"Then and there the defendant counsel stated to the commission that they would do no more constructing until they had made application under Section 54 to the commission, and the commission had acted thereon. Application was duly made by The Farmers Telephone Company and resisted by The Sidney Telephone Company. At the hearing both sides put on evidence. The questions of fact do not, I apprehend, concern you at the present time.

"The commission asked them both to discuss fully whether or not Section 54 actually applied. in view of the fact that The Farmers Telephone Company had been incorporated and in actual operation long before the Utility Act was thought of, and had in fact extended its lines in competition with The Sidney Telephone Company over a large part of Shelby County prior to July 1, 1911. We further asked the counsel to discuss in their briefs this question:

"Assuming that a telephone utility is furnishing adequate service and at a rate that is justified by the investment and operating expenses, but that another utility offers to furnish services as good and at lower rates, and is in position to do so. Would that be considered a public necessity and convenience sufficient to justify permission to the second company to operate in the territory?

"Attached to the defendant's brief you will find a decision, (apparently recent) of Judge Broderick of the Logan Common Pleas Court in the case of the United Telephone Company vs. the Logan County Farmers Telephone Company, in which the exact question upon which you are asked to give an opinion is decided by him. It seems that the second defense of the Logan County Farmers Telephone

> Company was that inasmuch as it has been in operation prior to the enactment of the Utility Law, it were not necessary for it to secure a permit from the Public Service Commission. This defense was demurred to by complainant and demurer sustained. Judge Brown in the case of the Clinton Telephone Company against the New Burlington Telephone Company enunciates practically the same doctrine. Nevertheless, the commission is not entirely satisfied that it has, under Section 54, jurisdiction as to telephone utilities actually incorporated and in operation prior to the enactment of the Utility Law."

You then ask my opinion upon the above questions. Accompanying your request and the briefs of counsel, I have before me the application of the Farmers Telephone Company to exercise franchises within the corporation of Anna, Shelby County, also in that part of the city of Sidney, Shelby County, Ohio not now occupied by it; and also in the rural districts of said Shelby County, Ohio. In that application of the Farmers Telephone Company it says:

> "Your applicant at this time has not entered the village of Anna with its telephone system, and no work in the construction thereof has been done, for the reason that the construction force has been employed elsewhere.
>
> "Your applicant further says that there is a vast rural territory contiguous to said village of Anna, Ohio and connected with said village for business purposes, that had no telephone communication with said village whatever. Your applicant desires to construct a central in said village of Anna with direct and free service with its central at Sidney, Ohio, and to construct a complete telephone system within the village of Anna, Ohio with lines running out upon the public roads, so as to reach the entire community that is connected with said village in a business way."

The application then sets forth the routes by which it expects to enter the village of Anna. The application also recites that its proposed extensions are necessary for the accommodation of those who are unserved in the proper manner with telephone connections. It further recites that said company desires to continue its construction in accordance with its original plan as set forth in the charter.

The complainant further alleges that it was incorporated on the 16th day of April, 1910 and that it has construed various lines of service in territory covered by its charter.

The answer of the Sidney Telephone Company sets forth that for many years prior to the first day of July 1911, it was the owner of and operating a telephone plant and system in the city of Sidney and in the village of Anna, and in other localities, all in Shelby county, and was at all times, and has been and now is ready, able and willing, to furnish full and adequate service to all applicants in said city, in said village and said localities as required by law.

It further says, "that the Farmers Telephone Company had not on the first day of July, A. D. 1911 actually exercised the right of permit to own or operate a plant for the furnishing of telephone service in the city of Sidney nor in the village of Anna, nor in the other localities mentioned in the application herein."

It further says, "that on the first day of July, A. D. 1911 it was not necessary for the public conveniences that such permit or right should be exercised, or that

said Farmers Telephone Company should own or operate a plant for the furnishing of telephone service in said city, nor in said village, nor in the localities mentioned in said application; and it is not now, and never has been necessary for the public convenience, that an additional telephone plant should be constructed in said city nor in said village, nor in any of the localities mentioned in said application."

It further says, "that said applicant does not file said application on any ground of public necessity or convenience, nor does it aver in said application, that the public necessity or convenience requires the exercising by it of any permit or right to own or operate a telephone plant or system in said city, nor in said village nor in the localities mentioned in the petition."

The Sidney Telephone Company says, "that if the applicant is permitted to construct, own and operate its telephone lines and exchanges, as prayed for in its application, the same will be an invasion of its territory and cause great and irreparable damage to its rights and property, and will be contrary to the statutes of Ohio, enacted for the protection of telephone companies in operation and furnishing adequate service on and after July first A. D. 1911."

The various claims of these two companies, as to whether or not any ground of public necessity or convenience exists for the extension of the lines of the Farmers Telephone Company of Sidney, are questions of fact for you to determine, and it is not necessary to answer these questions. I will confine myself to the questions of law submitted by you, and will take them up in their order.

First: Section 54 of the Public Service act provides as follows:

> "No telephone company shall exercise any permit, right, license or franchise that may have been heretofore granted but not actually exercised or that may hereafter be granted to own or operate a plant for the furnishing of any telephone service, thereunder in any municipality or locality, where there is in operation a telephone company furnishing adequate service unless such telephone company first secures from the commission a certificate after public hearing of all parties interested that the exercising of such license, permit, right or franchise is proper and necessary for the public convenience."

I am of the opinion that Section 54 above quoted applies to all telephone companies whether incorporated before July 1st, 1911 or since, providing said telephone companies had not exercised any permit, right, license or franchise within the territory in dispute. In other words, a company organized prior to said date, which had taken up and occupied a portion of the territory covered by its charter, but had not exercised jurisdiction or control over the particular territory in dispute, comes within the provisions of Section 54, and is under the control of the Public Service Commission as to any further extensions or occupancy of disputed territory. The mere fact that the charter granted to the Farmers Telephone Company of Sidney may have covered the territory now in dispute, is not effective to give it the right to proceed with the installation of telephones in such parts of such territory as were not actually developed or occupied by it prior to July 1st, 1911. All of such unoccupied territory, on the part of the complaining company, is subject, so far as the permitting of a competing company to come into the same, to the rules of the commission, under Section 54; for the statute itself, (Section 54), says that no company shall exercise any permit, right, etc., that may have been heretofore granted *but not actually exercised.* The blanket charter, with a right to exercise franchise, license, etc., *if not actually put into execution,* will not protect the complaining company.

The important question raised by the complainant herein is, that Section 54, above quoted, is unconsitutional, in that it interferes with vested rights, and that said section undertakes to grant legislative powers to the commission. This is the important question in this case. The authorities upon this question are very few. The supreme court of Ohio has not, to my knowledge, passed upon it, neither has the supreme court of any other state directly disposed of this question; but I find two decisions of the courts of common pleas of this state, which seem to have disposed of the matter. The first is a decision by Judge Brown, unreported. The case is that of the Clinton Telephone Co. vs. The New Burlington Telephone Co., a type-written copy of which I have before me, as filed in your office.

This was a suit in the common pleas court by the first named company, against the latter. The plaintiff in that case recites that,

> "It is a corporation under the laws of Ohio for the purpose of owning and operating a telephone plant in Clinton county, its principal office being at Wilmington; that it was chartered in 1899 and has a complete telephone system in said county; that the defendant is a similar corporation and has a small plant in and near the unincorporated settlement of New Burlington. The plaintiff states that it has never extended its lines nor attempted to operate its system except in the immediate vicinity of New Burlington, but that the plaintiff has fully covered the territory over which the defendant seeks to extend its lines and is able, willing and ready to give adequate service to all persons in said localities. It states the passage by the Legislature of the Public Utilities Act of May 31, 1911, creating a Public Service Commission and numbered Section 54 of Vol. 102 O. L. p. 564.
>
> "It claims that the true intent of this law was to prevent a multiplicity of telephone systems, and to confine this service to one well regulated company, and that the defendant without applying to or obtaining permission from the Public Service Commission, is extending its lines and causing infringement into plaintiff's territory as alleged; that this will demonstrate the value of plaintiff's property causing irreparable injury for which it has no remedy at law.
>
> "The defendant in its answer admits the general averments as to both parties being telephone systems, and that it has extended its lines from time to time since 1900 and at the time of the granting of the temporary restraining order herein was extending one of its lines to Kingman and a cross line from Oakland towards Harveysburg to be operated under its plant at New Burlington; that it has demands from numerous persons in that territory for its service. It admits the enactment of the Public Utilities Act and the enactment of Section 54, but further says that its rights under its charter and its plant were established in 1909 before said act became regulative and that its proposed extensions over the New Burlington plant are not within the purview of that statute and if said Section 54 be so construed it is contrary to the Constitution of Ohio and void."

The above is all quoted from the opinion of Judge Brown. Judge Brown further says:

> "We are plowing new ground in Ohio in respect to public utilities. There are no decisions upon the subject in any state. Wiscon-

sin is the leading authority upon these questions and its statute has been referred to and submitted by counsel. By carefully considering the purposes of these acts, we readily see that the intention of the Legislature was to avoid multiplicity of telephones as well as to give good service at reasonable rates to the people of the state. There is surely nothing in the enactment and particularly Section 54 which is unconstitutional as against the inherent rights of the defendant, nor was this in fact strongly insisted upon by defendant's counsel. The principal contention of defendant's counsel was that the plant having been established in New Burlington prior to its enactment, has full authority of law to extend its lines within the territory granted by its charter, without interference by the Public Service Commission, created by the act.

"There is no doubt in my mind that where two companies had prior to this enactment extended its lines throughout the same territory, but this could and would not be effective in compelling either company to abandon such territory.

"It is admitted by defendant's counsel that if a new plant would construct for instance in Wilmington, it would be in violation of Section 54, but that the plant having been heretofore established and in continuous operation over New Burlington, Section 54 does not apply.

"* * * The whole intention of the act and the proper interpretation of Section 54, seems without doubt in my mind, to indicate that the Public Service Commission has full authority under the statute in regulating any company which has not actually exercised its permits, rights, licenses or franchises, *by actual extension into the territory authorized by its charter.* I am of the opinion that the answer does not state a good defense in this respect and that the averments of the petition cover the facts which would require an investigation and authority of the Public Service Commission, and that before the defendant *could exercise its franchise in territory already occupied by another telephone company,* that it should comply with Section 54, by securing from the Public Service Commission a certificate that the exercise of its license, right, permit or franchise is proper and necessary for the public convenience before it extends its lines. This can readily be done and after a full hearing, if any injustice is being done, the Public Service Commission under this act can readily remedy the same. It is therefore my duty under this view of the law, which is very clear to me, to sustain the demurrer to the answer which is accordingly done."

Judge Broderick of the common pleas court of Logan county, in the case of The United Telephone Co. v. The Logan County Farmers' Telephone Co., decides the same proposition. This case is not reported in any law book but I have before me a complete typewritten copy of his decision as filed with your Commission. Judge Broderick goes fully into the proposition. This was also a decision on a demurrer filed to the second defense of the Logan County Farmers' Telephone Company which sets up substantially the same propositions as are pled in the answer to which Judge Brown in the above case sustained a demurrer.

In this latter case the defendant was incorporated prior to the enactment of the Public Utilities Act, including Section 54, supra. In this latter case the

defendant company was seeking to extend its lines into territory covered by its charter, in which they had exercised no rights nor had done any construction, or established any line of telephones, said company claiming it had power to do so inasmuch as it was incorporated prior to the passage of this act, and had to a certain extent exercised jurisdiction over part of the territory. Judge Broderick decides as Judge Brown did, that as to unoccupied territory on the part of the defendant which territory was actually occupied by the plaintiff, there was no right on the part of the defendant company to make new extensions after the passage of the act, without obtaining permission from the Commission.

These two decisions being squarely in line with the questions submitted by you, ought to be respected unless authorities can be cited to the contrary. I find no decisions to the contrary. It is stated that Section 54 interferes with vested rights; but it must be remembered that public utilities, such as telephone companies, are creatures of the statute; their powers are all enumerated in the statutes and prior to the enactment of the Public Utilities Act, they were governed by the law as it then existed, but having in view the progress of other states in the control of public utilities, the statute of 1911 was enacted, including Section 54 above cited. This was for the purpose of giving the Commission power to have exclusive control of public utilities and prevent duplicate companies from invading territory already occupied, unless a public necessity existed for the same, which question is exclusively under the control and supervision of your Commission.

Your other question is whether when a telephone utility is furnishing adequate service, and at a rate that is justified by the investment and operating expenses, and another company offers to furnish service as good and at lower rates, would be considered a public necessity and convenience sufficient to justify permission to the second company to operate in the territory.

The question of the right to enter an already occupied territory because of an offer to furnish service at a lower rate is one of fact and must be considered and finally determined as to whether it is a public necessity, and whether adequate service is being rendered by the company already having jurisdiction over the territory. The matter of furnishing service at lower rates does not *per se* mean a public necessity, and this matter is a question of fact to be determined by you. Your Commission is not authorized to permit a competing company to occupy territory already occupied simply because it will do so at lower rates of service. If the occupying company is furnishing satisfactory service, and at satisfactory rates as found by the Commission, it may not be interfered with by a competing company simply because it offers to furnish the same service at lower rates.

Both Judges Brown and Broderick have held that Section 54 above quoted, is not unconstitutional under such circumstances as set forth in the decisions rendered by them.

I am of the opinion that the granting of a charter or franchise by the state to an incorporated company protects the company as to all acts performed under the charter, but as to all acts not performed the right still exists in the state to enact new laws regulating such companies. As an illustration, as to the lines constructed and plants or systems established by the competing company under existing laws at the time of the granting of the charter, the company is fully protected by its charter; but as to all unexecuted matters by the company at the time of the passage of the act changing or amending the laws, a new enactment covering the same companies must be governed by such later legislation.

The Supreme Court of the United States in the case of Pearsall v. Great

Northern R. R. Co. 161 U. S. 680 (40 L Ed. 838) in the first and second syllabi holds:

> "1. A grant of power to a corporation is to be strictly construed against it, and nothing will be presumed to pass by the grant unless it be expressed in clear and unumbiguous language.
>
> "2. Statutes which operate only to regulate the manner in which the franchises of a corporation are to be exercised, and which do not interfere substantially with the enjoyment of the main object of the grant made by its charter, do not impair the contract contained therein."

Mr. Justice Brown in the same case in concluding his opinion says:

> "In conclusion we hold that where by a railway charter a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads, *which has remained unexecuted*, it is within the competency of the Legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease, or consolidation with parallel or competing lines."

I am, therefore, of the opinion that in this case, as affecting the rights of the Farmers' Telephone Company the Public Utilities Act is not retroactive in its effect, and that it does not impair the obligation of contracts and is, therefore, consitutional.

After holding as I do that the act is constitutional, including Section 54, there remains but one question for you to determine in the case submitted to you, and that is, whether the proposed extensions of the Farmers' Telephone Company lines are proper and necessary for the public convenience on account of inadequate service; and whether a public necessity for such extension exists. If none such does exist, then there is no right for the Farmers' Telephone Company to extend its lines into territory not previously occupied or taken possession of by it, prior to the enactment of the Public Utilities law, without the consent of the Commission, and the said company must proceed under Section 54 for its proposed authority to extend.

I am not undertaking to pass upon any of the questions of necessity or public requirement, or inadequate service; those are questions of fact for you to determine, when proper application is made, and are not questions of law at this time.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

761.

PUBLIC UTILITIES—PURCHASE OF STOCK BY FOREIGN CORPORATIONS IN PUBLIC UTILITIES SO AS TO GAIN CONTROL OF LATTER NOT A TRANSFER OF FRANCHISE, PERMIT, LICENSE OR RIGHT TO OWN, MANAGE OR CONTROL.

The purchase of stock of Ohio Public Utility Corporations, from the stockholders thereof, by a foreign corporation to such extent as to enable the latter to gain control over the former, does not come within Section 76 of the Public Utilities Act, providing that no franchise, permit, license or right to own, operate or control any public utility therein enumerated shall be granted or transferred to any corporation not duly incorporated under the laws of Ohio.

December 20, 1912.

The Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am replying to yours of September 20, 1912, which is as follows:

> "I attach herewith a copy of letter received yesterday from John R. Frew, attorney-at-law, Coshocton, Ohio, and would ask if the statement of fact made by him with reference to the corporate relations of The Coshocton Light and Heating Company constitute a violation of Section 76 of the Utility Law?"

The copy of Mr. Frew's letter, containing the statement of facts upon which you ask an opinion, so far as it is important herein, is as follows:

> "In compliance with the request of your chairman to put in writing information leading to my belief that The United Service Company of Scranton, Pa., is violating Section 76 of the Utility Act, I take pleasure in submitting the following account of what I know in regard to the operation of The United Service Company in Ohio and other states.
>
> "The United Service Company is not incorporated under the laws of the State of Ohio. It seems to have been formed by eastern capital for the purpose of obtaining control of, and operating a large number of public utilities in this and other states. Its method of obtaining control seems to be to purchase directly a sufficient amount of the stock of the coveted utility to obain control of it, or to purchase such stock indirectly and become the trustee thereof, thus operating and managing the utility for the benefit of some more or less fictitious third person. The utilities controlled by The United Service Company are operated as independent concerns by a system similar to that employed by The Bell Telephone Company. A representative of the company is installed as the local manager of each utility controlled by it and district managers oversee the work of the local managers.
>
> "The property of The Coshocton Light and Heating Company has passed under the management and control of The United Service Company within the last year in the manner mentioned above. The property of a utility engaged in a similar business at New Philadelphia, Ohio, has fared likewise, and according to the statements of

employees of The United States Service Company many other electric plants in our state have recently been bought up by it, and are now being controlled and managed by it."

In the first place, the letter is indefinite in its statements concerning the manner in which the foreign company acquired stock in, or control of the Coshocton company. *No positive statement is anywhere made touching this vital question.* The alleged acts complained of are stated as possibly occurring in one of two ways—the writer saying:

> "Its method of obtaining control *seems to be to purchase directly* a sufficient amount of the stock of the coveted utility to obtain control of it, or to *purchase such stock indirectly and become the trustees thereof, thus operating and managing the utility for the benefit of some more or less fictitious third person.*"

These allegations are too indefinite and form no certain basis upon which to act. The writer further says, that the foreign corporation operates similarly to The Bell Telephone Company, and installs local managers of utilities controlled by it, and that the Coshocton company passed under the control of the foreign company "*in the manner mentioned above.*" This does not make the matter any more definite, and leaves the whole situation in the dark.

The last paragraph quoted from the letter, as to statements of employes of the foreign corporation, is likewise too uncertain in its allegations.

Section 76, referred to, reads as follows:

> "No franchise, permit, license or right to own, operate, manage, or control any public utility, herein defined as an electric light company, gas company, water works company or heating and cooling company, shall be hereafter granted or transferred to any corporation not duly incorporated under the laws of Ohio."

This section is not very difficult to construe when carefully read. There is nothing in this section which directly or indirectly prevents any one who owns or holds stock in the kinds of utilities named therein, from selling, transferring or making over to any other person or corporation the whole or any part of the stock so owned and held by him. So far as this section is concerned, as it now reads, any stockholder in the Coshocton company had, and now has, the right to sell and transfer his stock to any person, firm or corporation, either domestic or foreign; and if by means of such purchase of stock, a foreign corporation acquired control of the Coshocton Company, there is no violation of this section, or any Ohio law.

The right of a stockholder to sell his stock to any one he may choose is a constitutional and legal right, the same as applies to other property. Corporations, however, may provide by-laws requiring a stockholder to first offer it to the corporation, or to the managing board; but the right to sell the stock at the best price he can obtain is inalienable to any owner thereof.

The most that can be said of the letter quoted is, that it possibly shows that the foreign corporation became directly or indirectly the owner of a controlling interest of the Coshocton company's stock. But it nowhere appears that the foreign company has acquired by transfer or otherwise the "*franchise, permit, license or right to own, operate, manage or control*" of the Coshocton company as a corporation. These words, and this whole section, refer to the

corporation itself—the statutory creature under Ohio laws—not to stock therein held or owned by anyone.

The section cited seeks to prevent the granting to a foreign corporation of the franchise, permit, license, etc., giving corporate powers to the class of utilities therein mentioned; and to also prevent the transfer of these corporate powers and privileges in such utilities to foreign corporation by the domestic corporations to which they were originally granted. The Coshocton company is to all effects and purposes still an Ohio corporation, with all its powers, franchises, etc., intact; but the majority of the stock may be owned by outside parties and controlled by the foreign corporation.

Under this state of facts there is no violation of Section 76, and there can be no relief until the Legislature enlarges the provisions of this section to cover such cases as contemplated in the communication.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Superintendent of Banks)

44.

SAVINGS BANK—POWERS OF, TO LOAN ON A MORTGAGE OF A LEASEHOLD ESTATE HAVING NO CLAUSE OF RENEWAL THEREIN—"REAL ESTATE" DEFINED.

Under paragraph F. of Section 9758, General Code, as a savings bank cannot legally invest its funds in a mortgage on leasehold estate for any term of years, which does not contain a clause for the renewal thereof forever, and class such as a mortgage on real estate.

A mortgage on a leasehold estate can be taken by a savings bank, when properly assigned, as collateral security for a loan, under Par. C. of Section 9765; or if such mortgage on a leasehold estate secures bonds issued by a corporation, a savings bank may invest its capital, surplus and deposits in and buy and sell such bonds under paragraph "B" of Section 9765, General Code.

COLUMBUS, OHIO, January 19, 1912.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—In your letter of September 6, 1911, you request my opinion upon the following questions:

"1. Can a savings bank legally invest its funds in a mortgage on a leasehold estate which terminates it 25, 50 or 99 years, without any clause providing for a renewal thereof?

"2. If your answer to the first question is yes, then I desire to know how such an investment shall be classified by the bank; that is, is it a real estate loan, a commercial loan, or a loan on collateral?

"3. If your answer to the second question is, as a real estate loan, then I desire to know how the lessors first lien for rent should be regarded?"

Section 9765 of the General Code specifies the manner in which the funds of a savings bank shall be invested, and is as follows:

"A savings bank may invest the residue of its funds in, or loan on, discount, buy, sell or assign promissory notes, drafts, bills of exchange and other evidences of debt and also invest its capital, surplus and deposits in, and buy and sell the following:

"a. The securities mentioned in Section ninety-seven hundred and fifty-eight, subject to the limitations and restrictions therein contained, except that savings banks may loan not more than seventy-five per cent. of the amount of the paid-in capital, surplus and deposits on notes secured by mortgage on real estate. But all loans made upon personal security shall be upon notes with two or more signers or one or more indorsers, payable and to be paid at a time not exceeding six months from the date thereof. In the aggregate, not exceeding thirty-five per cent. of the capital, surplus and deposits of a savings bank shall be so invested.

"b. Stocks, which have paid dividends for five consecutive years next prior to the investment, bonds and promissory notes of corpora-

tions, when this is authorized by an affirmative vote of a majority of the board of directors or by the executive committee of such savings bank. No purchase or investment shall be made in the stock of any other corporation organized or doing business under the provisions of this chapter. The superintendent of banks may order any such securities which he deems undesirable to be sold within six months.

"c. Promissory notes of individuals, firms or corporations, when secured by a sufficient pledge of collateral approved by the directors, subject to the provisions of Sections ninety-seven hundred and fifty-four and ninety-seven hundred and fifty-five."

Under paragraph "a" of said section it will be noted that the first class of securities in which said funds may be invested are those mentioned in Section 9758. This section as amended and now found in 102 O. L., 173, is as follows:

"Subject to the provisions of the preceding section commercial banks may invest their capital, surplus and deposits in, or loan them upon:

"a. Personal or collateral securities.

"b. Bonds or other interest-bearing obligations of the United States, or those for which the faith of the United States is pledged to provide payment of the interest and principal, including bonds of the District of Columbia; also in bonds or other interest-bearing obligations of any foreign government.

"c. Bonds of interest-bearing obligations of this or any other state of the United States.

"d. The legally issued bonds or interest-bearing obligations of any city, village, county, township, school district or other district, or political subdivision of this or any other state or territory of the United States and of Canada.

"e. Mortgage bonds or collateral trust bonds of any regularly incorporated company, which has paid, for at least four years, dividends at the rate of at least four per cent. on their capital stock. Such loan shall not exceed eighty per cent. of the market or actual value of such bonds, the purchase of which first has been authorized by the directors. All such securities having a fixed maturity shall be charged and entered upon the books of the bank at their cost to the bank, or at par, when a premium is paid, and the superintendent of banks shall have the power to require any security to be charged down to such sum as in his judgment represents its value. The superintendent of banks may order that any such securities which he deems undesirable be sold within six months.

"f. Notes secured by mortgage on real estate, where the amount loaned thereon inclusive of prior incumbrances does not exceed forty per cent. of the value of the real estate if unimproved, and if improved sixty per cent. of its value, including improvements, which shall be kept adequately insured. Not more than fifty per cent. of the amount of the paid in capital, surplus and deposits of such bank at any time shall be invested in such real estate securities."

The first question to be determined is whether a savings bank can loan its funds in notes secured by mortgage on a leasehold estate, and, therefore, whether a leasehold estate, say for twenty-five, fifty or ninety years, without a clause providing for the renewal thereof, can be classed as real estate, and a proper investment

for savings banks under paragraph "f" of Section 9758. My opinion is that such a leasehold estate cannot be classed as real estate.

> "Real property or real estate has been defined as the interest which a man has in lands, tenements, or hereditaments, and also as such things as are permanent, fixed and immovable, and which cannot be carried out of their places, as lands and tenements * * *. As an estate or interest, real property or real estate empowers at least an estate of *freehold,* which is an estate of inheritance or for life, but it includes all freehold estates, whether corporeal or incorporeal, and whether in possession, reversion or remainder. It therefore includes hereditaments, whether corporeal or incorporeal, such as easements * * *. Properly speaking, real estate does not include any estate less than a *freehold,* such as leaseholds and estates for years, ordinarily termed 'chattels real' and classed as personal property.
>
> "Personal property includes chattels real as well as chattels personal. Chattels real are such as concern or savor of realty and include all estates and interests in real property less than estates of freehold, a freehold being an estate of inheritance or for life. And so * * * all lessor estate or interests, such as leaseholds and estates for years are personal property."

32 Cyc. Sec. 662 et sep.

> "At common law, a leasehold interest in lands, no matter for what term of years, was a chattel, and in the absence of statute to the contrary may be levied upon and sold as personal property."

17 Cyc., Sec. 153.

> "Leases between individuals for ninety-nine years may be sold in execution as chattels."

Leases of Bisbee vs. Hall, 3 O. 449.

In this case it was decided that a leasehold for ninety-nine years, renewable forever, was personal property and subject to levy and sale on execution.

In the case of Murdock et al. vs. Ratliff et al. 7 O. 119, it was decided that,

> "A lease of lands for ninety-nine years, renewable forever, is a chattel that, upon the owners decease, passes to his executor or administrator as any other chattel interest."

But afterwards, in the case of Loring vs. Melondy et al. 11 O. 355, it was decided by the court that permanent leasehold is not a chattel, but is realty and subject to all the laws and rules which attach to land. The court says on page 358:

> "By the act of June 20, 1821, Chase's L. 1185, it is declared that permanent leases, in cases of judgments and executions levied thereon, shall be considered as real estate, and shall be governed, in their sale, by the laws applicable to the sale of real estate then in existence, or such as may be enacted. By the act of March 5, 1839, Swan's Stat. 289, permanent leasehold estates, for the purposes of descent and distribution, and for sale on execution, are subject to the same laws that apply to estates in fee.
>
> "Since the passage of this last act, we may feel ourselves admonished by the uniform policy of our legislature by calling things by their

real names, to harmonize our whole system of land jurisprudence. To withdraw permanent leasehold estates from their anomalous position, between chattel and realty, and by calling them what in truth they are, lands, we believe them from all doubt as to the principles and laws which shall control them, and assign to them a certain and fixed place in the law. A permanent leasehold estate is not a chattel, but is, in truth, land, carrying the fee. Such is the nature of the estate, and so it has been considered and treated in the legislation of our state. We therefore declare that permanent leasehold estates are lands subject to all the rules and laws which attach to land for all purposes, and that judgment liens attach to them as lands."

In the case of Bank vs Rosa, et al, 13 O. 335, it was held that,

"For all purposes connected with the laws regulating judgments, executions, sales, and descents, permanent leasehold estates are to be regarded as if they were freeholds and not chattels."

It is settled by these cases that permanent leasehold estates, that is, leaseholds which contain a clause providing for the renewal thereof forever, are to be treated as real estate. But your first question states that in the leaseholds to which you refer there is no such clause and, therefore, they must come under the rule which classes all leaseholds, excepting permanent leaseholds, as chattel property or chattels real. In the case of Acklin vs. Waltermier, 19 O. C. C. R. 372, this subject is fully treated, and as the case is somewhat lengthy, I shall only quote the following paragraph: After determining another question the court says:

"That does not determine the question whether this leasehold interest in this property is to be treated as land or as chattels with respect to judgments and levies. We regard this interest of the second party in this oil lease as being in the nature of a leasehold for years. It is for a term of five years, with an uncertain period to follow if oil and gas is found in paying quantities; but that uncertain period may be made certain by the effects of the venture. It is nevertheless but a term of years and does not rise to the dignity of a freehold estate and is but a chattel interest; and if it were not for the express provisions of Section 4104, Revised Statutes, on the subject, we could suppose it would be subject to leasehold mortgage."

The court then goes on to quote from Kent's Commentaries and from other authorities, and sustains the view that leaseholds, except permanent leaseholds, are to be classed as chattel property.

My opinion, therefore, is that a savings bank cannot legally invest its funds in a mortgage on a leasehold estate, for any term of years, which does not contain a clause providing for the renewal thereof forever, under paragraph "f" of Section 9758 of the General Code of Ohio.

This also disposes of your third question, as such a lien, if made, cannot be regarded as a real estate loan, and the lien of the lessor for rent would be superior to it.

In answering your second question, I desire to state that, in answering your first question, my opinion is not to be construed as holding that a savings bank can not legally invest its funds in a mortgage or a leasehold estate, in any event, but the holding is, that such an investment can not be directly made in such a

mortgage, and classed as a mortgage on real estate. A mortgage upon a leasehold estate could be taken by a savings bank, when properly assigned, as collateral security for a loan, under paragraph "c" of Section 9765; or, if the mortgage upon such leasehold secures bonds issued by the corporation, then, a savings bank may invest its capital, surplus and deposits in, and buy and sell, such bonds, under paragraph "b" of Section 9765.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

92.

STATE BANKS—OFFICERS AND DIRECTORS MAY BE PROXIES

As there is nothing in the statutes to prohibit an officer or director of an Ohio state bank or corporation from becoming a proxy, there is nothing illegal in the same.

COLUMBUS, OHIO, February 1, 1912.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—I am in receipt of your letter of January 19, 1912, which is as follows.

> "Please render me an opinion as to whether an officer or director of a state bank of Ohio can vote the proxies of other stockholders. The law seems to be clear to us that proxies are permissible but the question has been raised by one of our banks as to whether or not *officers* and *directors* are not excluded from the privilege of voting such proxies."

The banking act as found in Sections 9702, et seq. of the General Code, has no reference to voting by proxies, except in Section 9711, which provides for notice to stockholders of the meeting for choosing directors, the last sentence of this section is as follows:

> "* * But if all subscribers are present in person or by proxy, such notice may be waived in writing."

Section 9712 is as follows:

> "At the time and place appointed, directors shall be chosen in the manner provided for other corporations."

Section 9714 is as follows:

> "In all other respects, such corporation shall be created, organized, governed and conducted in the manner provided by law for other corporations in so far as not inconsistent with the provisions of this chapter."

Section 8636 of the General Code, being one of the general provisions relative to corporations, is as follows:

> "At the time and place appointed, directors shall be chosen by ballot, by the stockholders who attend, either in person or by lawful proxies.

> At such and all other elections of directors, each stockholder shall have the right to vote in person or by proxy the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate his shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock equals, or to distribute them on the same principle among as many candidates as he thinks fit. Such directors shall not be elected in any other manner. A majority of the number of shares shall be necessary for a choice, but no person shall vote on a share on which an installment is due and unpaid."

It will be seen from the above that voting by proxy is clearly authorized by the laws of Ohio. A careful examination of the General Code, also fails to disclose any prohibition to a stockholder giving his proxy to an officer or director of a bank, or to any officer or director of the corporation, or any prohibition against an officer or director voting proxies; therefore, in the absence of any such prohibition, and in consideration of the fact that the United States Banking Law contains an express provision that officers or directors of a bank shall not vote proxies of stockholders, it is my opinion that an officer or director of a state bank of Ohio can vote the proxies of stockholders given to him for that purpose.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

99.

BANKS AND BANKING—REPORTS TO SUPERINTENDENT OF BANKS —POWERS OF ENFORCEMENT—PRIVATE AND CO-PARTNERSHIP BANKING BUSINESS.

Though Section 737 of the General Code requires every person or co-partnership doing a banking business to make reports to the superintendent of banks, not less than four times a year, nevertheless, the statutes do not make provisions for the enforcement of this requirement with respect to these specific kinds of banking business. Private persons and co-partnerships are not included in the statute providing for the penalty for non-compliance with the aforesaid requirements.

COLUMBUS, OHIO, October 31, 1911.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—In reply to your letter of July 28th, which is as follows:

> "Coincident with every call for reports of condition of the incorporated banks issued by this department, under Section 737 of the General Code, there was mailed to each of the persons or co-partnerships known to be doing a banking business in this state a proper notice or request for such report. A large proportion of such private banks, varying from 30 to 40 per cent. of the total number, has failed to render these reports. My predecessor established the precedent not requiring a strict compliance with this provision insofar as the private banks were concerned, and in no case resorted to the power granted the superintendent of banks under Section 741, which provides a penalty for failure to render reports on call.
>
> "The right of the superintendent of banks to require these reports

to be rendered to this department is questioned in some quarters and in order that I may act advisedly in the matter, I will be pleased to have you render to me an opinion as to both my right and duty in the premises.

"Section 737 of the General Code specifically mentions that reports shall be rendered by every person or co-partnerships doing a banking business; but in providing a penalty for failure to report, Section 741 does not specifically mention such institutions, unless it can be construed that they would come under the head of a society or association.

"I would like to be advised especially as to whether or not it is my duty to require of the unincorporated institutions such reports of conditions, and if so, whether I have the further right to require that same be published in accordance with Section 739."

I desire to say that Section 737 of the General Code, to which you refer, is as follows:

"Not less than four times during each calendar year each banking company, savings bank, savings and trust company, safe deposit and trust company, society for savings, or savings society, chartered or incorporated under any law of this state, and every person or co-partnership doing a banking business shall make a report to the superintendent of banks. Such reports shall be made at such times as required by the superintendent on forms prescribed and furnished by him, and, so far as possible, they shall be made on the same day on which reports are required from national banking associations by the comptroller of the currency."

Section 741 of the General Code is as follows:

"Every company, corporation, society or association failing to make and transmit to the superintendent of banks any of the reports required by this chapter, or failing to publish the reports as required by law shall forthwith be notified by the superintendent, and, if such failure continues for ten days after receipt of such notice, such delinquent company, society or association shall be subject to a penalty of one hundred dollars for each day after the time required for making such report. In case of delay or refusal to pay the penalty herein imposed for failure to make and transmit a report, the superintendent shall maintain an action against the delinquent company, society or association, for the recovery of such penalty, and all sums collected by such action or paid as such penalty shall be paid into the state treasury to the credit of the banking fund."

My opinion is that only banks, savings banks, savings and trust companies, safe deposits and trust companies, societies for savings, or savings societies, chartered or incorporated under any law of this state, can be compelled by you to furnish the reports specified by the said Section 739 et seq. as Section 741 makes no attempt to prescribe a penalty against unincorporated institutions.

Section 711 of the General Code is as follows:

"The superintendent of banks shall execute the laws in relation to banking companies, savings banks, savings societies, societies for savings, savings and loan associations, savings and trust companies, safe deposit companies and trust companies and every other corporation or association

having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state. Nothing in this chapter contained shall apply to building and loan associations."

You will note from this section that you are only charged with the duties of executing the laws in relation to banking corporations, chartered or incorporated under the laws of this state.

Section 9793 of the General Code, which is as follows:

"Every banking company, savings bank, savings and loan association, savings and trust company, safe deposit and trust company, society for savings, savings society and every other corporation or association, except building and loan associations, empowered to receive, and receiving money on deposit, now existing and chartered or incorporated, or which hereafter becomes incorporated shall be subject to the provisions of this chapter, except that no such corporation or association having a less capital stock than the minimum amount provided in section ninety-seven hundred and four, shall be required to increase its capital stock in order to conform to the provisions of such section."

specified the corporations which are to be governed by the banking laws of this state.

All of the sections given above are portions of the banking act of 1908, O. L. 269, and this act in all its provisions relates to incorporated institutions. Undoubtedly Section 737 of the General Code, above quoted, requires that every person or co-partnership doing a banking business shall make reports to you at the time and in the manner prescribed by law. The difficulty is that you are without power to enforce compliance with this requirement. As stated above, the act, as found in 99 O. L., 269, was intended to regulate banking corporations, and it has been held that as a criminal statute it applies only to corporations and not to unincorporated banks; but I think that if persons and co-partnerships as specified in Section 737, had been specified in the same manner in 741, which provides the penalty for failure to file the reports, then you could enforce the filing of these reports, but as these words appear in Section 737, and as they do not appear in Section 741, it is my opinion that you are without authority to enforce the penalty against persons or co-partnerships who fail to file the reports required by law.

Since writing the above I have examined the case of State ex rel. Gilbert, Auditor, vs. Kilgour et al. reported in 8 Nisi Prius, N. S., 617. This was an action brought to compel the reports required to be made to the auditor of state by Sections 3817 and 3818 of Bates' Revised Statutes, and it was held that a banking partnership is not an institution within the meaning of said sections. In deciding this case the attention of the court was called to the provisions of the bank act passed May 1, 1908, 99 O. L., 269, above referred to, and the court in speaking of Section 112 of the said act, which is now Section 741 of the General Code, above quoted, said:

"By Section 112, *every company, society or association* failing to make or publish the reports required by the act, shall be subject to a penalty of $100 for each day they are delinquent after ten days' notice, but no penalty is imposed on the 'person' or 'co-partnership' doing a banking business who fails to make the reports. It would seem, therefore, that even new, 'persons' and 'co-partnerships' can not be proceeded against for failure to make these reports, although they are especially required so to do by Section 108 of the act, nor are they required to verify their reports so far as the act of May 1, 1908, is concerned, and if this be true

under an act which specifically enjoins upon 'persons' and 'co-partnerships' the duty of making these reports, how can it be claimed that where 'persons' and 'co-partnerships' are not mentioned in the statutes, Sections 3817 and 3818, nevertheless, by implications and intendment, the word 'institutions' includes 'persons' and 'co-partnerships' and requires them to make reports through officers having no existence."

I regret this conclusion, and I think it is apparent to everyone that private banks, persons and co-partnerships transacting banking business, and unincorporated banks are the institutions from which reports should be required at all events. It seems to me that such institutions would make these reports voluntarily; however, if they do not you are without power to compel the same.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

118.

BANKS AND BANKING—LIQUIDATION BY SUPERINTENDENT OF BANKS—INTEREST ON DEPOSITS—PRESENTATION OF CLAIMS—INTEREST — DIVIDENDS — STATUTORY REQUIREMENTS — PERSONAL LIABILITY OF SUPERINTENDENT OF BANKS.

Interest can be paid on claims against a bank undergoing liquidation, only when the assets of the bank are more than sufficient to pay all the principal debts.

In the case of deposits, interest at the rate of 6 per cent, shall be paid from the date of suspension and demand is not necessary as a determination of the time interest begins to run.

Deposits however, which were made for a specified time are entitled only to the interest contracted for up to the time the depositor could have demanded his money. But from this time 6 per cent should be allowed.

Claims other than deposits bear interest from the date of proof and allowance of claim and only upon the amount allowed.

Interest cannot be allowed on any claims, however, which have not been presented to the trustees, receiver, or liquidating agent, before the lawful opportunity to present claims, expires.

Dividends made by the superintendent of banks before the expiration of one year from the first publication of notice or in any other way contrary to Section 7427 General Code to creditors are made at his own risk.

COLUMBUS, OHIO, February 1, 1912.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—I am in receipt of your letter of January 25, 1912, requesting that I amplify my opinion rendered to you on December 13, 1911 upon the subject of the right of creditors of a bank in process of liquidation by your department to interest on their claims. That opinion simply held that in case of book accounts in favor of depositors interest would commence to accrue as against the bank from the date of its suspension.

I shall therefore, cover the question more fully in this opinion.

1. The question of interest can only be considered when the assets of the bank in process of liquidation are more than sufficient to pay all the principal debts, for it is a general rule that interest does not run in favor of one creditor at the expense of

another while the law is administering the assets of an insolvent estate, when the assets of the estate are insufficient to pay the original claims in full, or sufficient only for that purpose; and in such cases where the claims are interest-bearing claims, the interest will only be calculated, at the rate contracted for, up to date of the suspension of the bank; in brief, in such cases interest, on claims which were bearing interest, ceases on the date on which the law (i. e. the receiver or assignee or other court officer) takes possession of the assets for the purpose of distribution among the creditors. The People vs. American Loan and Trust Company, 172 N. Y., 371 Bank Commissioners vs. New Hampshire Trust Company, 69 N. H., 621, and other cases.

2. When interest is paid, by receiver, or liquidating agent, the rate in this state is six per cent. In this I refer to the payment of interest which will be hereafter specified and not to payment of interest referred to in the first subdivision of this opinion, payment when made under that subdivision, as therein stated, would be at the rate contracted for. Six per cent. is the legal rate of interest in this state, and therefore all claims which are entitled to interest will bear interest at that rate, for the reason that a claim when proved and allowed occupies the same position as a judgment, and bears interest as judgments would. (See case of The National Bank of the Commonwealth vs. The Mechanics National Bank of Trenton, N. J., 94 U. S., 441.)

3. In the case of all depositors, it is my judgment that, they are to be allowed interest on their deposits from the date of the suspension of the bank. Further, that it is not necessary, in the case of deposits, whether represented by pass books, certified checks, or otherwise, to make demand. (See Ex Parte Stockman 70 S. C., 31, where it was held that deposits were entitled to interest as against the bank from the date of suspension, the suspension being treated as a waiver of demand.) (See also the case of Richmond et al. vs. Irons, et al. 121 U. S., 27) The language of the court upon this question is as follows:

> "The first question is whether interest upon the debts of the bank should be allowed as against the stockholders from the date of suspension. As the liability of a shareholder is for the contracts, debts, and engagements of the bank, we see no reason to deny to the creditors as against the shareholders the same right to recover interest, which, according to the nature of the contract or debt, would exist as against the bank itself; of course, not in excess of the maximum liability as fixed by the statutes. In the case of book accounts in favor of depositors, which is the nature of the claims in this case. interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should be computed upon the amount then due as against the shareholders to the time of payment."

It seems, therefore, that interest in favor of depositors should be calculated from the date of the suspension of the bank.

In the case of Flynn vs. The American Banking and Trust Company et al. 69 Atlantic, 771 (19 L. R. A. N. S., 428), being a decision of the supreme judicial court of Maine, it was held:

> "Demand for payment of deposits from a bank which stops payment and the assets of which are sequestered by the court is not necessary to entitle them to bear interest from the time of such stoppage."

In this case the court says (at page 437 of the L. R. A. Report):

> "When the bank or corporation voted to stop payment and its assets were sequestered, all its deposits became immediately due and payable, without formal demand, except such as were on some specified time, which had not then elapsed. Whatever interest the bank had agreed to pay upon these deposits, it became liable for the legal rate of six per cent. from and after its default, unless otherwise stipulated, which does not appear to have done as to any deposit in this case."

There may be some difficulty in the case of deposits which are made for a specified time, which time has not elapsed at the time the bank suspends payment, but it seems to me the proper rule to adopt in this class of cases is, to calculate interest at the rate contracted for up to the time when the depositor could have demanded his deposit had the bank not failed, and to calculate interest at the rate of six per cent. from that time until the date of final distribution by the receiver or liquidating agent.

4. In the case of claims other than for deposits, the claims would bear interest from the date of their presentation and proof, and would be, of course, for the amount allowed.

5. In all cases claims must be presented to the trustees, receiver, or liquidating agent. By holding, as I do, that demand is not necessary in the case of deposits, I do not wish to be understood as holding that it is not necessary for each and every person having a claim against the insolvent bank, whether by way of deposit or otherwise, to present his claim to the assignee, receiver or liquidating agent. The receiver, or liquidating agent, would not be authorized in paying any claim that had not been presented to him. In the case of Richmond et al. vs. Irons et al., cited above, it was held, as the 10th paragraph of the syllabus:

> "That no creditor is entitled to recover who does not come forward to present his claim."

The receiver, or the liquidating agent, would not be authorized to make distribution when he knew there were certain depositors owning deposits in a bank whose affairs he was administering, who had not presented their claims, in distributing the entire assets in his hands to those who had presented their claims, and reserving nothing for those who might present their claims in the future. He should not make final distribution until the full period provided by law had expired, and every claimant had given all lawful opportunity to present his claim.

6. The matter of the final dividend, by the superintendent of banks, when he has taken charge of a bank for the purpose of liquidation, is governed by Section 742-7 of the General Code. This section is as follows:

> "At any time after the expiration of the date fixed for the presentation of claims, the superintendent of banks, out of the funds remaining in his hands after the payment of expenses, declare one or more dividends, and after the expiration of one year from the first publication of notice to creditors he may declare a final dividend, such dividends to be paid to such persons and in such amounts and upon such notice as may be directed by the common pleas court of the county in which the office of such corporation, company, society or association was located."

My opinion is that if you, as superintendent of banks, make a final dividend, before the expiration of one year from the first publication of notice to creditors of

a bank of which you have taken charge, that you would make such dividends at your own risk. Further that the dividends must be made as directed by the said section.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

197.

BANKS AND BANKING—"CERTIFICATES OF STOCK"—AND "SHARES OF STOCK"—"STOCK PAID IN"—CERTIFICATES FOR 50 PER CENT. OF STOCK AND RELIANCE ON CODE LIABILITY FOR BALANCE, ILLEGAL.

A distinction is to be drawn between certificates of stock and shares of stock, the latter being substantial property and the former being a mere evidence of ownership of the latter.

As the statutes require that a savings and loan association may not commence business until 50 per cent. of the capital is paid in, and all of the capital stock subscribed for, and that stockholders may only receive certificates for "paid up stock," it would, therefore, not be legal procedure for a bank having an authorized capital stock of $25,000, 50 per cent. of which had been paid in, to issue certificates representing $12,500 fully paid and to rely upon the code liability to hold the stockholders for the balance. The fact that $12,500 was paid in, would not comply with the statute unless said $12,500 represented 50 per cent. on subscribed shares of $25,000.

COLUMBUS, OHIO, March 11, 1912.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—I have received from you the following request:

> "Please render to me an opinion concerning the issue of stock certificates by a bank under the following conditions:
>
> "A bank was organized under Section 3797 and relative sections R. S. (before the passage of the present banking law) with an authorized capital of $25,000.00, same being fully subscribed and 50 per cent. thereof paid in.
>
> "Would it be legal procedure to issue certificates representing $12,500.00 fully paid, and rely upon a provision in the code of regulations to hold a further stock liability against the subscribers thereof?
>
> "This department has heretofore held that banks should issue certificates representing the full number of shares authorized and unless fully paid in should endorse thereon the percent. thereof paid. The legality of this ruling of the department is questioned in some quarters, and I would be pleased therefore to have you cover the matter fully for our future guidance."

Section 3797 of the Revised Statutes, under which the bank referred to was organized as follows:

> "The secretary of state shall submit the articles of incorporation of any savings and loan association received by him to the attorney

general, who shall, if the same are in conformity to law, and sufficient, certify thereto on the same, and the secretary of state shall then record the same; and no such association shall commence business with a subscribed capital of less than fifty thousand dollars, except in villages having a population at the federal census of 1880, or at any federal census to be taken thereafter, of less than twenty-five hundred, and in such villages no such associations shall commence business with a subscribed capital of less than twenty-five thousand dollars, which shall be divided into shares of one hundred dollars (each), nor until at least one-half of each subscription has been fully paid up."

There being no specific direction in this or the following sections as to the issuing of certificates of stock the same would be governed by the general corporation statute upon this subject. This section is 3254 Revised Statutes and is as follows:

"Stockholders shall be entitled to receive (certificates) of their paid up stock in the company; and the president and secretary of the company shall on demand, execute and deliver to a stockholder a certificate showing the true amount of the stock held by him in the company. And it shall be the duty of the directors of such corporation, when organized, to keep a record of all stock subscribed and transferred, and of the secretary or recording officer of such corporation to register therein all subscriptions and transfers of stock. For that purpose a book shall be kept and whenever any certificate or certificates of stock are assigned and delivered by a stockholder, the assignee thereof shall be entitled on demand to have the same duly transferred upon said book by such secretary or recording officer, whose duty it shall be at the same time to enroll therein also the name of said assignee as a stockholder, and the books and records of such corporation shall at all reasonable times be open to the inspection of every stockholder."

It is apparent from the language of this section, "Stockholders shall be entitled to receive (certificates) of their paid up stock in the company," that before the stockholders are entitled to certificates their stock must be paid up, and this seems to be the general rule in regard to the issuing of certificates of stock, that is, that the stockholder is not entitled to a certificate until his stock is paid for.

"A subscriber cannot require the issuance of a share certificate until he has fulfilled his part of the contract of subscription. If payment is a condition precedent he is not entitled to his certificate, until he has paid the stipulated amount. * * * In a case where subscriptions were payable in installments, it was held that the corporation was not bound to issue the certificates before getting the installments, but that a readiness and willingness to issue them at the time when payments were to be made was all that could be required of it and hence in an action to recover an installment, and averment of its readiness and willingness to issue the certificates was necessary. * * *.

"Thompson on Corporations 2nd Ed. Vol. 4, Sec. 3511.

"Our general statute as to corporations (Revised Statutes Sec. 3254) seems to require that certificates may be issued only when the stock is fully paid up.

"State vs. Davis 85 O. S. 28. Ohio Law Vol. 9 No. 339 Jan. 1, 1912."

In this conection I wish to call attention to the language of the court in the last cited case as to the distinction between the certificates of stock and the shares of stock in a corporation. As to this the court says, page 33:

> "As we advance in the consideration of this matter it is necessary to keep in view the well marked distinction between shares in the capital stock in a corporation and the certificates issued therefor. The shares are the substance. The certificates are the evidence of things not seen. The shares are actual property of the stockholders. The certificates are the mere attestations of the stockholder's ownership of the shares. The certificates are no more actual property than a man's deed is his farm. They are no more than an admission on the part of the corporation that the person to whom they were issued has, *pro tanto,* performed his part of the contract in becoming a stockholder. They are not negotiable; and even a *bona fide* purchaser of certificates of stock acquires no title as against equities existing against the vender."

It seems to me, therefore, that the proper course would be not to issue certificates until the stock was fully paid up, and that this method of procedure is contemplated by the statue. As the shares of stock are the substance a stockholder would be protected at all times by a receipt for the amount he had paid on each share, and when the shares were fully paid up he would then be entitled to a certificate showing that he was the owner of said stock and that the same was fully paid for.

As to your specific question, "Would it be legal procedure to issue certificates representing $12,500.00, fully paid, and rely upon a provision in the code of regulations to hold a further stock liability against the subscribers thereof," if I understand your question correctly, my answer is No, as the statute provides that the capital stock must be $25,000.00 which shall be divided into shares of $100 each, and that no such association shall commence business until at least one-half of each subscription has been fully paid up; this provision, it seems to me, is plain. The whole $25,000.00 must be subscribed and at least fifty per cent. paid in and the fact that $12,500.00 was paid in would not comply with the statutes unless said $12,500.00 represented fifty per cent. on subscribed shares of $25,000.00.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

222.

BANKS AND BANKING LIQUIDATION BY SUPERINTENDENT OF BANKS—FUNDS RECEIVED BY LIQUIDATED BANK FOR TAX COLLECTION—TRUST FUNDS—RIGHTS OF COUNTY TREASURER AND TAX PAYERS.

When a bank, which has collected taxes from certain tax payers for a county treasury, sends a draft to said treasurer for the amount collected, upon a second bank and the first bank goes into liquidation, whereupon the second bank refuses to devote what funds it holds to the credit of the first bank, to the purpose of cashing the draft, held:

That the second bank is not obliged to cash the draft, but if any of the moneys so collected for taxes can be traced into the hands of the liquidating agents, they must be treated as trust funds held by the bank as agent for the county treasurer, and as such must be recognized as a preferred claim in behalf of that official.

If any objections are held to such claim, however, its validity may be tested in a friendly suit by the treasurer against the Superintendent of Banks or by submission to the common pleas court under Section 742-8 General Code.

COLUMBUS, OHIO, March, 16, 1912.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—I am in receipt of your request for an opinion which is as follows:

> "Please render to this department an opinion covering the question involved, based on the statement of facts set out in the enclosed communication to this office from Mr. D. J. Schurr, special deputy in charge of the liquidation of The Albany State Bank."

The statement of facts as to this matter, as given by Mr. D. J. Schurr, your special deputy in charge of the liquidation of The Albany State Bank is as follows:

> "Last December Mr. Webb as cashier of the Albany bank received from the treasurer of the county a list of the tax payers in the vicinity of Albany for the purpose of receiving tax money at the Albany bank thus save the time and expense of going to Athens. About two hundred tax payers took advantage of this custom and paid their tax money into the bank at Albany amounting to about $1,800.00. This payment of taxes continued from December 5, 1911, to January 27, 1912.
>
> "On January 27, 1912, Mr. Webb as cashier of the Albany bank sent the treasurer of Athens county a draft on the Second National at Parkersburg for the amount of tax money received at the bank of Albany. The treasurer accepted the same and forwarded it to the Second National at Parkersburg, but in the meantime the bank at Albany had been closed by the State Department of Banks and Banking and the Second National at Parkersburg refused payment of draft.
>
> "The contention is on the one hand that the bank of Albany was not a depository for tax money but was acting as a collecting agency for the treasurer and therefore the tax money should not be considered as a part of the business of the bank proper. On the other hand, the money was received at the bank and entered on the books of the bank in an account in the name of 'Tax Accounts.'

"The list of those paying their taxes was sent in to the treasurer by Mr. Webb and the treasurer sent the tax receipts of same back to Mr. Webb and quite a number had been handed out to those entitled to same when the payment was stopped. The treasurer then came down to Albany and took possession of those receipts still in the hands of the cashier. As it now stands some have their receipts as having paid their taxes and others have only a deposit slip for the amount of their taxes.

"The question is, shall the tax payers have to pay their taxes again into the treasury or shall the account be considered as a preferred account in the bank, or shall the treasurer file his claim against the bank the same as any other claimant against the bank?"

In addition to the fact as detailed by Mr. Schurr, the following facts, which are not in dispute, may be stated as to this matter:

It was customary for taxes to be paid into this bank, as was done in this instance, and for the bank to remit the amount of same to the treasurer, and for the treasurer to then send receipt for taxes which had been paid to the bank, which receipts were delivered by the bank to the taxpayers.

In the present case, on or about December 1, 1911, the cashier of the bank called the treasurer by telephone and asked if he (the treasurer) would send to the bank a list of the tax payers so that the tax payers could pay the amount of their taxes into the bank and that the bank would then remit the amount of the same to the treasurer. The treasurer said that it was immaterial how he received the money and that upon receipt of the money he would send tax receipts, and agreed and did mail to the cashier a typewritten list of the tax payers residing in the vicinity of The Albany State Bank, with the amount of taxes due from each set opposite their respective names. The bank posted a notice that it would receive moneys for taxes. Tax payers called at the bank and paid in moneys as taxes to the amount of $1,807.42. No account was opened by the bank with either the depositors or the treasurer. A memorandum entitled "Tax Account" was kept by the bank, naming the depositors and the amount paid by each. The cashier sent the amount so paid in as taxes ($1,807.42) to the treasurer in the form of a draft on the Second National Bank of Parkersburg, W. Va. On receipt of this draft, the treasurer mailed to the bank of Albany the tax receipts represented by the moneys which had been paid into the bank. The treasurer at once deposited the draft for collection. The Parkersburg bank, admitting that it had funds to the credit of The Albany State Bank sufficient in amount to pay said draft, refused to pay the same for the reason that it had been advised by the Superintendent of Banks of the failure of The Albany State Bank and ordered not to pay out any funds on deposit to the credit of said bank. The said sum of $1,807.42 had not been received by the treasurer nor paid back to the tax payers.

While it is not definitely stated, I assure that the draft sent by the cashier of The Albany State Bank to the treasurer was sent prior to the closing of the bank.

I am also in receipt of letters from Sirs Wood and Wood, Attorneys of Athens, Ohio, as to this matter, and of a most comprehensive brief prepared by them upon the questions involved.

The question involved in this case in a manner opens the whole subject as to general and special deposits in a bank, and belongs to that class of cases where there is a great confusion of authorities, namely, where money is deposited with a bank with respect to which the bank has but a single duty to perform and it was no part of the contract that this duty was to be performed with the identical coin deposited, but with an amount equal to that deposited, whether it be the same coin or not. As I have stated, cases of this character are generally difficult; many of the

decisions are confusing and in many instances there is a conflict in different jurisdictions; it is easy to state the general rule, but as the facts in each case vary, the modifications and refinements of the general rule make the same difficult of application, and it becomes necessary to decide each question upon the facts peculiar to it.

Therefore, as I find in our Ohio decisions authorties in support of the view I take as to this matter, I deem it unnecessary in this opinion to go into a general discussion of this subject. Such a discussion would be profitless, because in the end it would be applicable only to this case, and when another case would arise there would be some distinguishing facts which would make this opinion not applicable.

The facts in this case seem to me to be strikingly similar to the facts in the case of Madison, Receiver, National Bank, vs. Melhorn et al. 8 C. C., 191. The facts in that case in brief are as follows:

> "On June 21, 1893, the plaintiff delivered to the Citizens Bank by mail a promissory note for collection, of which the plaintiff was the owner. The note was delivered with the following instructions: 'For Collection and Return.'
>
> "On July 14, 1893, the Citizens Bank collected said note and on the same day drew its draft in favor of the plaintiff on the Chase National Bank of New York, of New York City, for the amount of said collection, less a small sum due the Citizens Bank from the plaintiff.
>
> "On July 18, 1893, the Citizens Bank made an assignment for the benefit of its creditors. Plaintiff forwarded the draft delivered to it by the Citizens Bank (on July 14th) by due course of mail, and on the 19th day of July, 1893, it was duly presented for payment to the Chase National Bank; payment was refused by the Chase National Bank for the reason that it had been notified of the assignment of the Citizens Bank; that the Citizens' Bank had at that time to its credit in the Chase National Bank funds more than sufficient to pay said draft.
>
> "At the time of the assignment of said Citizens Bank it had on hand, and there was passed to its assignee, a sum more than sufficient to pay said draft.
>
> "The evidence shows that the collection made by the Citizens Bank for the plaintiff was put in the funds of the bank and passed to the assignee.
>
> "Upon these facts, the plaintiff claimed the collection made by the Citizens Bank was a trust fund in its hands and as such passed to the assignees to be paid by them to the plaintiff. This was resisted by the general creditors of the Citizens Bank who claimed that plaintiff was only a general creditor of the bank and should share with other general creditors.
>
> "Upon this state of facts, the opinion of the court is as follows:
>
> "When the plaintiff transmitted to the Ada Bank the note for 'collection and remittance,' the relation of principal and agent was created. The bank, as the agent of the plaintiff, had transmitted to it, and it received as agent of the plaintiff, the note for collection. As such agent, it was its duty to collect, and remit the collection to the plaintiff. The fact that the note was changed into money did not terminate the agency. Without the consent of the principal the agency would not terminate until the agent remitted the collection. The fund or the proceeds of it, so long as it could be traced to the Ada Bank or its assignees, would be held in trust for the plaintiff, just as much as the original note would have been held by them.

"The Ada Bank undertook to trasmit the proceeds of the collection by draft on the Chase National Bank. The plaintiff was not negligent in presenting such draft for payment; payment was refused, and the draft went to protest. This gave the plaintiff no right against the Chase National Bank whatever. (Covert vs. Rhodes, 48 Ohio St. 66)

"The Ada Bank did not by its draft to the plaintiff the proceeds of collection. It did not by such act terminate the relation of principal and agent, and create that of debtor and creditor. The Ada Bank, as we have found, had still in its possession the proceeds of the collection. As the agent of plaintiff it held such in trust for its principal, and it passed to the assignees with the trust impressed upon it. It is not the case where the agent disposed of the money by the purchase of a draft. In such case the proceeds of the collection would no longer remain with the agent. In the case at bar the agent sent his own check or draft, and retained in his own possession the proceeds of the collection, which have passed to the assignees.

"We think these views are fully sustained by our Supreme Court in the case of Jones et al. vs. Kilbreth, 49 Ohio State, 401."

I can see no essential difference in the facts in the present case and the facts in the case cited above, and it seems to me, therefore, that if it can be shown that the fund paid in on this Tax Account passed into the hands of the liquidating agents in charge of the bank, then that the same are impressed with the trust with which they were deposited; that the bank became the agent for the treasurer for these collections, and the agency would not terminate until the agent remitted the collection. The fund, so long as it remained in the Albany State Bank, would be held in trust for the treasurer.

"When paper is deposited for collection, the relation between the depositor and the bank is that of principal and agent. If an agent for that special purpose collects or sells the paper of his principal he becomes a fiduciary, and will hold the proceeds in trust for the principal; if the agent fails there will be no reason why these general creditors should invade such proceeds to satisfy their claims, if the principal can trace or ascertain his property in the substituted form. Whether, in a given case, the proceeds have been sufficiently traced and identified, must rest in the judgment of the chancellor who is called upon to declare the proceeds subject to a distinct trust.

"(Jones et al. vs. Kilbreth, 49 O. S. 401, at page 413.)"

Its seems, therefore, that there can be no question but that in this case this deposit was a trust deposit, which, when made belongs to the treasurer of the county. The bank being the agent of the treasurer held the funds in trust for its principal, and if said funds passed into the hands of the special deputy in charge of the liquidation of this bank, they are now in his hands with said trust impressed upon them, and the claim of the treasurer for the payment of the amount of said funds is entitled to priority.

If there is any serious question raised by the general creditors as to the payment of this amount to the treasurer as a preferred claim, I suggest that the matter be presented to the common pleas court of the county in which the bank is situated, as provided by Section 742-8 of the General Code, which is as follows:

"Objection to any claim not rejected by the superintendent of banks may be made by any party interested by filing a copy of such objection

with the superintendent of banks, who shall present the same to the common pleas court of the county in which the office of such corporation, company, society or association was located, upon written notice to the party filing the same, said notice setting forth the time and place of the presentation. The court upon return day of said notice shall hear the objections raised to said claim, or refer the determination of said objections to a referee for report, or upon demand of either the superintendent of banks or the party filing the objections direct that the issues be tried before a jury. The court may make proper provision for unproved or unclaimed deposits."

This could be done by having some one of the general creditors file objection to the allowance of the claim of the treasurer as a preferred claim.

Or, the matter could be determined by a friendly suit by your rejecting the claim of the treasurer and having him bring suit for its allowance and payment as a preferred claim. This would be under Section 742-3, which is as follows:

"The superintendent of banks shall cause notice to be given by advertisement in such newspaper as he may direct weekly for three consecutive months, calling upon all persons who may have claims against corporation, company, society or association, to present the same to the superintendent of banks, and to make legal proof thereof at a place and within a time not earlier than the last day of publication to be therein specified. The superintendent of banks shall mail a similar notice to all persons whose names appear as creditors upon the books of the corporation, company, society or association. If the superintendent of banks doubts the justice and validity of any claim, he may reject the same and serve notice of such rejection upon the claimants, either by mail or personally, and an affidavit of the service of such notice, which shall be prima facia evidence thereof, shall be filed in his office. An action upon a claim so rejected must be brought within six months after such service. Claims presented and allowed after the expiration of the time fixed in the notice to creditors, shall be entitled to be paid the amount of all prior dividends therein if there be funds sufficient therefor and share in the distribution of the remaining assets in the hands of the superintendent of banks equitably applicable thereto."

However, I do not deem a suit necessary, as I am of the opinion as above indicated, that this is clearly a trust deposit, and as such is entitled to preference.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

289.

COGNOVIT NOTE—LAWYERS' FEES AND OTHER COSTS OF COLLECTION MAY NOT BE INCLUDED.

Upon principles of public policy, the authorities will not permit the expense of lawyers' fees or other costs of collection to be incorporated as a liability upon a cognovit note.

COLUMBUS, OHIO, April 13, 1912.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

MY DEAR SIR:—I have your letter of April 2, 1912, in which you ask for my opinion upon the following subject:

> "Please render me an opinion as to whether or not a cognovit note can be made to read that the maker of the note can be held for attorney's fees charged in connection with the colection of the said note.
>
> "I am herewith enclosing an inquiry on this subject, together with a sample form of note, which is self-explanatory."

The form which gives rise to this inquiry is as follows:

> $_____ _____Ohio, _____191____
>
> On the _____ day of _____ next after date, I, we, or either of us, promise to pay to the order of _____ _____ _____ Dollars, payable at _____ Value received
>
> With eight per cent. interest from date, if not paid when due, and *attorney fees.*
>
> And I, we, and each of us hereby authorize and empower an attorney at law at any time after this obligation becomes due, to appear for me, us or either of us, before any court of records in the State of Ohio, or elsewhere, and waive the issuing and service of process and confess judgment against me, us, or either of us, in favor of the payee above named, or assigns, for the sum due hereon, interest and costs, and thereupon to release all errors and waive all rights and benefits of a second trial or appeal in our behalf. The drawers and endorsers severally waive presentment for payment protest and notice of protest and non-payment of this note.
>
> Witness _____ _____
>
> No. _____ Due _____ _____
>
> _____

Section 8303 of the General Code is as follows:

> "The parties to a bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any time not exceeding eight per cent. per annum, payable annually."

It will be noted that the form of note copied above provides for the full

legal rate of interest for which the parties to the same may stipulate and anything in excess would be usurious.

In the case of the State of Ohio vs. Taylor et al., 10th Ohio, 378, the question as to the validity of the stipulation to be paid, a certain percentage as collection fees, in addition to the legal interest for money loaned, was passed upon by our supreme court. In deciding this case, Judge Wood uses the following language which forcibly expresses the view taken by the court of agreements of this character:

> "It is said, however, that the five per centum in this case is by the agreement of the parties, to be added to the seven per cent., not as interest, but as costs, agreed upon as such, for collection, by the parties.
>
> "Now, it seems to us to be of little consequence, in this case, what this five per cent. may be called, but the inquiry is what is the thing itself? However it may be disguised, it is very clear to us it is a mere shift or device by which twelve per cent. is retained, as interest, upon this loan, and in this view of the case cannot be enforced. This court has decided that under the laws of Ohio, but six per cent. interest is recoverable, though the parties contract for more or higher rates.
>
> "But is it such a contract as public policy should execute? What may be supposed as the natural result to the community from the execution of this agreement? It would be the condition of future loans, at banks, that the borrower should pay the expenses of collection, and perhaps, the tax thereon. The brokers in this state would hold a general jubilee; and as their sense of morality and law usually expands with their hopes of gain, in proportion to the borrowers' necessity they would find probably additional items of *cost,* as the means of a legalized extortion upon their loans. In our opinion, such agreements are against the public policy of the country, and ought not to be enforced in courts of justices. They have, by this court, on the circuit, been denied to be obligatory, and further reflection confirms us in the correctness of such opinion."

In the case of Shelton vs. Gill, 11th Ohio, 417, it was held:

> "A stipulation in a warrant of attorney to pay collection fees, in addition to the principal debt and interest, is against public policy, and void."

In the case of Martin vs. Trustees, etc., 13th Ohio, 250, it is held:

> "It is error to include attorney's fees in a judgment confessed."

In this case, the court says (at page 258):

> "The case of the State of Ohio vs. Taylor, 10 Ohio, 378; of Shelton vs. Gill, 11 Ohio, 417, and Spalding vs. The Bank of Muskingum, 12 Ohio, 544, settle the principle that an agreement to pay a percentage as collection fees, in addition to the legal rate of interest, is against public policy, and void. With those decisions we are satisfied."

I might cite numerous other cases from this, as well as other, states to this same effect, but the citations above given indicate clearly the rule in Ohio, and, therefore, my opinion is that the maker of a note can not be held for attorney's

fees charged in connection with the collection of the note, and that the form of note which is given above is not authorized by the law of Ohio, is void as to the stipulation for attorney's fees, and the use of the same should be discontinued by the bank.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

307.

BANKS AND BANKING—LIQUIDATION BY SUPERINTENDENT OF OF BANKS—"MAJORITY OF STOCK"—AUTHORIZATION OF SUPERINTENDENT OF BANK OR OF AGENT TO CONTINUE LIQUIDATION.

The presence of the words "majority of stock present and voting" in Section 742-13 making the same necessary, for the election of an agent to liquidate the affairs of a defunct bank after the superintendent of banks has cared for depositors and creditors, and the absence of these words "present and voting" in Section 742-12 providing that a "majority of the stock" shall be necessary to authorize the superintendent of banks to continue to administer the affairs of the bank, is indicative of the legislative intent that upon this latter proposition, it is necessary that a majority of all stock issued and outstanding, must be represented.

COLUMBUS, OHIO, April 23, 1912.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—I am in receipt of your letter of April 17, 1912, in which you request my opinion as follows:

> "Please render to me an opinion as to what percentage of stock is necessary to determine whether the superintendent of banks shall continue to administer affairs of a bank as provided in Section 742-11."

Sections 742-11, 742-12 and 742-13 are as follows:

> "Section 742-11. Whenever the superintendent of banks shall have paid to each depositor and creditor of such corporation, company, society or association (not including stockholders) whose claim or claims as such depositor or creditor shall have been duly proved and allowed, the full amount of such claims, and shall have made proper provision for unclaimed or unpaid deposits or dividends, and shall have paid all the expenses of the liquidation, the superintendent of banks shall call a meeting of the stockholders of such corporation, company, society or association, by giving notice for thirty days in one or more newspapers published in the county wherein the office of such corporation, company, society or association was located.
>
> "Section 742-12. At such meeting the stockholders shall determine whether the superintendent of banks shall continue to administer its assets and wind up the affairs of such corporation, company, society or association, or whether an agent or agents shall be elected for that purpose; and in so determining *the said stockholders shall vote by ballot in person, or by proxy, each share entitling the holder to one vote and*

the majority of the stock shall be necessary to a determination. In case it is determined to continue the liquidation of the affairs of such corporation, company, society or association, and after paying the expenses thereof, shall distribute the proceeds among the stockholders in proportion to the several holdings of stock, in such manner and upon such notice as may be directed by the common pleas court of the county in which the office of such corporation, company, society or association was located.

"Section 742-13. In case it is determined to appoint an agent or agents to liquidate, the stockholders shall thereupon select such agent or agents by ballot,—*a majority of the stock present and voting, in person or by proxy,* being necessary to a choice. Such agent or agents shall file with the superintendent of banks a bond to the state of Ohio in such amount and with such sureties as shall be approved by the superintendent of banks for the faithful performance of all the duties of his or their trust, and thereupon the superintendent of banks shall transfer to such agent or agents all the undivided or uncollected or other assets of such corporation, company, society or association then remaining in his hands; and upon such transfer and delivery the said superintendent of banks shall be discharged from all further liability to such corporation, company, society or association and its creditors."

From the language used in Sections 742-12 and 742-13, I take it that there can be no doubt but that in determining whether the superintendent of banks shall continue to administer the affairs of the bank, it is necessary that a majority of all the stock, issued and outstanding, must be represented at the meeting and voted in favor of the continuance of the administration by the superintendent of banks. This is really self-evident from the term used in Section 742-12, namely "the majority of the *stock;*" and is made all the plainer by the provision of Section 742-13, where it is provided that an agent to liquidate the affairs of the bank may be selected by a majority of the stock *present and voting, in person or by proxy;* and without taking into consideration anything else but a familiar rule of statutory construction, the presence of those words, *"present and voting,"* in Section 742-13, and their absence in Section 742-12 must be considered as conclusive of the intention of the legislature, which intention, thus expressed, is plainly that a majority of the stock issued and outstanding must be represented and voted in favor of the continuation of the administration of the affairs of the bank by the superintendent of banks, as provided in Section 742-12.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

350.

TRUST COMPANIES—POWER TO ESTABLISH GENERAL TRUST FUND WITH ALL MONEYS HELD IN TRUST AND TO INVEST SAME IN GROUND RENTS.

The statutes authorize a trust company to establish a general trust fund, wherein all moneys and properties held by it as trustee may be invested, so that each particular trust would be chargeable with its proportionate share of the expense of managing said general trust fund and also credited with its particular share of the increment, except however, that the authority naming the trustee may direct that his particular trust be invested in a particular way.

Such general trust fund by virtue of Section 9782 General Code, may be invested in ground rents when authorized by a vote of the board of directors and such investment must be kept separate and apart from other investments.

Title to the ground rent should be taken in the name of the company as trustee.

COLUMBUS, OHIO, May 9, 1912.

HON. F. E. BAXTER, *Superintendent, Department of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Under date of April 4, 1912, you ask my opinion as follows:

> "Please render to me an opinion as to what is meant by 'general trust fund of the corporation' as used in Section 9788 of the General Code; and in connection with the above inquiry, kindly advise me as to whether or not it would be legal for a trust company to place all of the funds which it holds as 'trustee' in a general fund and with that fund purchase a ground rent, charging each estate or account with its share of the investment; and if so, could the ground rent be taken in the name of the trust company direct, and in so doing would it be guaranteed the investment under said law."

In answering your question it is necessary to consider the following sections of the General Code:

Section 9782 General Code provides:

> "All moneys or properties received in trust by such company, unless by the terms of the trust some other mode of investment is prescribed, together with the capital and surplus of such corporation, also may be invested in ground rents, when authorized by a vote of the board of directors."

Section 9786 General Code provides:

> "All moneys or property held in trust shall constitute a deposit in the trust department, and the accounts and investments thereof shall be kept separate. Such investment or loans shall be especially appropriated to the security and payment of all such deposits, and not be subject to any other liabilities of the corporation. For the purpose of securing the observance of these requirements, it shall have a trust department in which all business pertaining to such trust property shall be kept distinct from its general business."

Section 9788 General Code provides:

"In the management of money and property held by it as trustee, under the powers conferred in the foregoing sections, such trust company may invest them in a general trust fund of the corporation. But the authority making the appointment, upon the conferring of it, may direct whether such money and property shall be held separately or invested in a general trust fund of the corporation; except that such corporation always shall follow and be governed by all directions contained in any instrument under which it acts."

Section 9789 General Code provides:

"No money, property or securities received or held by such corporation under this chapter, establishing a trust department, shall be mingled with the investments of the capital stock or other moneys or property belonging to it, or be liable for its debts or obligations."

The statute is silent as to the definition of a general trust fund of the corporation, but I take it from the above sections, especially Sections 9786 and 9788 General Code, that a trust company may establish a general trust fund. That is, a fund in which all the money and property held by it as trustee may be invested, and each particular trust would be chargeable with its proportionate share of the management of said trust fund and credited with its proportionate share of the increment earned by the same. It will be noted from Section 9788 General Code, that the authority naming the trustee may direct whether the money and property constituting the trust estate shall be held separately or invested in a general trust fund, but in the absence of such direction it would seem that money or property held by a trust company could be invested in such a fund, which fund, of course, must be managed by the statutes as to all trust funds. By virtue of Section 9782 General Code such a fund or any part of the same could be invested in ground rents when authorized by a vote of the board of directors. Investments made of trust fund whether in ground rents or in other investments authorized by Section 9761 General Code, must always constitute a trust deposit, and cannot be mingled with investments of the capital stock or other moneys or property belonging to such corporation. (See Section 9786 and 9789 General Code).

The title to a ground rent if purchased out of the general trust fund, or out of any funds constituting a part of the trust estate, should be taken in the name of the trust company as *trustee* and not in the name of the trust company direct.

Yours truly,

TIMOTHY S. HOGAN.
Attorney General.

408.

BANKS AND BANKING—RIGHT OF SUPERINTENDENT TO PAY CLAIMS AGAINST LIQUIDATED BANK BEFORE TIME LIMIT—PERSONAL LIABILITY.

When a bank in the hands of the superintendent of banks for liquidation, has sufficient funds to enable payment of all claims before the expiration of the ninety days' time fixed by statute for the presentation of claim, the superintendent is not legally prevented from paying all claims before said time limit. If he does so, however, he acts at his own peril and may be personally liable for possible subsequent valid claims arising.

COLUMBUS, OHIO, May 28, 1912.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—I am in receipt of your letter of May 15, 1912, in which you make the following request for my opinion:

> This department is confronted with the peculiar condition of a bank having come into its hands with every prospect of yielding to us immediately sufficient funds to pay all its debts now known to exist. The statutes provide that this department give ninety days' notice to creditors in which to file proof of claim, and insofar as I am able to ascertain no dividend on these claims can be paid until after the expiration of the ninety days.
>
> "However, in view of the fact of that this department could arrange immediately to pay all these claims in full, I beg to request an opinion as to whether or not there is anything in law to justify such action."

Section 742-3 of the General Code provides that the superintendent of banks upon taking possession of the property and business of such corporation shall cause notice to be given by publication for three consecutive months, calling on all persons who may have claim against such corporation to present the same to him, and to make legal proof of such claim not earlier (later) than the last date of the publication. It also provides that claims presented and allowed after the expiration of the time fixed in the notice for presenting claims, shall be entitled to be paid the amount of all prior dividends and to share in the distribution of the remaining assets, if there be sufficient funds.

Section 742-5, among other things, requires that upon the expiration of the time for the presentation of claims, the superintendent of banks shall make and file a list of the claims presented, as provided by this section.

Section 742-7 provides:

> *"At any time after the expiration of the date fixed for the presentation of claims, the superintendent of banks may, out of the funds remaining in his hands after the payment of expenses, declare one or more dividends, and after the expiration of one year from the first publication of notice to creditors, he may declare a final dividend, * * * * *"*

It is unnecessary to cite you to other statutes governing the liquidation of banks by you, and the course to be followed by you when all the depositors and creditors of the banking corporation have been paid, for, from the sections cited above, it is plain that the date fixed for the presentation of claims by the creditors

is an important date in the performance of your duties. You can be absolutely safe in the matter of liquidating a bank by following these statutes as to the time strictly. In other words, if payment to all the creditors and depositors were made by you before the expiration of the time fixed by law for the presentation of claims, and then after such payments had been made, and before the expiration of such time, valid claims were presented, in the absence of sufficient assets of the bank to pay the same, you would probably be liable.

I do not wish to state that you are absolutely prevented from paying dividends or the final dividend before the period prescribed by law, but it is a matter in which you must act at your own peril. If you know that all the claims are in, or that there will be sufficient funds with which to pay all claims that might be presented, then you would probably be justified, and it would be best to pay all claims in full as rapidly as possible, but you should take this course only when no doubt whatever exists, and wherever there is any doubt at all, follow the statute strictly.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

493.

BANKS AND BANKING—INCREASE OF CAPITAL STOCK—AFTER ORGANIZATION, INCREASED STOCK NEED NOT ALL BE SUBSCRIBED.

Under Section 9725 and 8698 of the General Code a bank incorporated in Ohio prior to the passage of the present banking act may increase its stock from $100,000 *to* $250,000, *obtain subscribers for* $100,000 *of the increase and retain the* $50,000 *balance as treasury stock.*

After a bank has completed its organization there is no requirement that all of its stock be subscribed.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—In your letter of May 17, 1912, you make the following request for my opinion:

> "A certain bank incorporated under the laws of Ohio prior to the passage of the present banking act has an authorized capital of $100,000.00 which is fully paid and issued. It now desires to increase this authorized capital to $250,000.00, obtain subscribers for $100,000.00 and retain the remaining $50,000.00 as treasury stock.
>
> "Please advise me as to whether or not in your opinion this action would be legal, providing the present stockholders waive their rights to this $50,000.00 increased capital."

Section 9742 of the General Code provides that after April 1, 1910, all banking corporations or associations organized prior to the passage of the present banking act must conform their business and transactions to the provisions of the present law.

Authority to increase capital stock is given to banks by Section 9725, which is as follows:

> "A corporation doing business under the provisions of this chapter, may increase its capital stock as provided for other corporations. In

case of such increase, the board of directors first shall offer such additional stock pro rata to all stockholders of record, at such price, not less than par, as they deem best for the interest of the corporation. Shares remaining unsold then may be sold to any person on the same or better terms."

The provision for the increase in capital stock by a corporation, referred to in Section 9725, is Section 8698 of the General Code, which is as follows:

"After its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, a corporation for profit, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which it is divided, prior to organization, by the unanimous written consent of all original subscribers. After organization the increase may be made by a vote of the holders of a majority of its stock, at a meeting called by majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation, and by letter addressed to each stockholder whose place of residence is known. Or, the stock may be increased at a meeting of the stockholders at which all are present in person, or by proxy, and waive in writing such notice by publication and letter; and also agree in writing to such increase, naming the amount thereof to which they agree. A certificate of such action shall be filed with the secretary of state."*

It would seem, from the sections above quoted, that authority is given to banks to increase capital stock, and that it is not necessary that all of said increase be subscribed for.

Section 9704 provides the amount of capital stock that the different kinds of banks are required to have; and Section 9716 provides that all of the stock must be fully subscribed, and fifty per cent. of each share paid in before it may be authorized to commence business. But these sections, I take it, relate to the preliminary organization of the bank and the initial conditions that must be complied with before it can begin business. But after these conditions have been complied with, and it is actually doing business, it seems that Section 9725 clearly gives the authority to increase the capital stock, and I fail to find any restriction or limitation as to the amount of this stock that must be subscribed. Therefore, in the absence of such a limitation or restriction, it seems to me that the action spoken of in your letter would be legal.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

552.

BANKS AND BANKING—DEPOSITS OF TOWNSHIP FUNDS IN BANKS OUTSIDE OF COUNTY—CONDITIONS PRECEDENT.

When any of the conditions enumerated in Section 3323 of the General Code exist, the township trustees may enter into a contract with one or more banks that are conveniently located within the county or with one or more banks in an adjacent county of which the township is a part, and which offer the highest rate of interest (which in no case shall be less than two per cent.) upon the funds deposited.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—On July 9, 1912, you submitted the following question for my opinion:

> "Can township funds be deposited outside the county, when an outside bank bids a higher rate of interest than those within?"

Section 3320 of the General Code provides as follows:

> "The trustees of any township shall provide by resolution for the depositing of any or all moneys coming into the hands of the treasurer of the township, and the treasurer shall deposit such money in such bank, banks or depository within the county in which the township is located as the trustees may direct subject to the following provisions,"

The provision of this section that the funds shall be deposited in banks or depositories within the county in which the township is located is qualified by the following sections:

Section 3322 of the General Code provides ar follows:

> "In townships containing two or more banks, such deposits shall be made in the bank or banks situated in the township that offer, at competitive bidding the highest rate of interest upon the daily balance on such funds, which in no case shall be less than two per cent. for the full time the funds are on deposit. Such bank or banks shall give a good and sufficient bond to be approved by the township trustees, for the township trustees, for the safe custody of such funds in a sum at least equal to the amount deposited. No bank or depository shall receive a larger deposit of such funds than the amount of such bond and in no event to exceed three hundred thousand dollars. The treasurer of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such treasurer and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

Section 3323 is as follows:

> "In a township in which but one bank is located, and the location thereof is convenient to the township treasurer, the funds of the township shall be deposited in such bank at a rate of interest not less than two per cent. on the average daily balance, but when the trustees have reason to believe that such bank is not a safe depository, or when the location

thereof is inconvenient to the township treasurer, or when such bank refuses to pay at least two per cent. interest, or where there are two banks in a township and either one or both refuse to pay at least two per cent. interest on such deposits, or in a township in which no bank is is located, after the adoption of a resolution providing for the deposit of its funds, the trustees may enter into contract with one or more banks within the county, or in a county adjacent to the county of which the township is a part, that are conveniently located and which offer the highest rate of interest on the average daily balance, and which in no case be less than two per cent. for the full time the funds are on deposit."

The language used in Section 3323 makes the question somewhat difficult; for it would seem from it that township funds may be deposited in a bank situated in a county adjacent to the county of which the township is a part when any one of the following conditions exist:

a. When the trustees have reason to believe that the bank in the township is not a safe depository.

b. When the bank in the township is not convenient to the township treasury.

c. When the bank refuses to pay at least two per cent. interest.

The above conditions apply to a township in which only one bank is located; but according to the language of this section they seem also to apply to a township in which more than one bank is located; and in addition the following conditions are provided by the statute:

d. Where there are two banks in a township and either one or both refuse to pay at least two per cent. interest on deposits.

e. When there is no bank located in the township.

It would seem from this section that in a township in which any one of the conditions above enumerated exist, the trustees, after the adoption of a resolution providing for the deposit of its funds, may enter into a contract with one or more banks within the county, or with one or more banks in a county of which the township is a part, that are conveniently located, and which offer the highest rate of interest (which in no case, can be less than two per cent.) upon the funds deposited.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

564.

FOREIGN CORPORATION—USE OF MISLEADING NAME ILLEGAL —"BANK" OR "TRUST COMPANY."

A foreign corporation cannot do business in Ohio under the name of a banking and trust company business when it does not intend to engage in such business for the reason that such a name would mislead the public in violation of Sections 8628 *and* 178 *General Code.*

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—I am in receipt of your letter of August 1, 1912, in which you ask whether a foreign corporation authorized to do, and doing business in Ohio, but not engaged in banking or trust company business, may use a name in which "bank" or "trust company" appears.

I do not find any definite provision of law governing this matter. It seems to me that under Section 8628 of the General Code, which is as follows:

"The secretary of state shall not file or record any articles of incorporation wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes, nor if such name is that of an existing corporation, or so similar thereto as to be likely to mislead the public, unless the written consent of the existing corporation, signed by its president and secretary, be filed with such articles."

and Section 178 General Code,

"Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

a foreign corporation which wished to obtain authority in this state to do business, and which, while it had in its name the words "bank" or "trust company," intended to engage in neither the banking or trust company business in this state, should be refused such authority on the ground that the name of the corporation is likely to mislead the public.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

603.

BANKS AND BANKING—BANKS MAY FURNISH SURETY BONDS TO PROTECT DEPOSITORS.

The power conferred upon a bank to contract and to be contracted with is broad enough to enable it to furnish a surety bond for the protection of its depositors.

COLUMBUS, OHIO, August 22, 1912.

Hon. F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—In your letter of August 9, 1912, you ask whether or not a bank, under the laws of Ohio, can purchase a bond for the protection of its depositors, the same as now done by banks to secure deposits of public funds.

I find no provision of the statutes governing this subject nor bearing even remotely upon it. Section 9708 of the General Code provides for the general powers which shall be given to banks by the state. In brief these are, that the persons forming a banking corporation shall, upon compliance with the statutes, become a body corporate, with succession, and shall have power to adopt and use and alter a corporate seal; to contract and be contracted with; to sue and be sued; to adopt

regulations for the government of the corporation not inconsistent with the constitution and laws of the state; and, finally, to do all needful acts to carry into effect the objects for which it was created.

The power given to contract and be contracted with, and to do all needful acts to carry into effect the objects for which it was created, of course, give to a bank very broad powers and, in the absence of any provision prohibiting, even by implication, a bank from securing its depositors by a surety company bond, it seems that this power or right can well be implied.

In Morse on Banks and Banking, 4 Ed., Section 65, in speaking of the endorsement or guaranty of a note by a bank, it is stated that a bank can not be surety for another in any business in which it has no interest and can derive no profit, but

> "a warranty of goods sold by the bank, or an endorsement or guaranty of a note negotiated by it, is perfectly lawful; for, besides being rendered necessary and proper by the usual habit of business and by the nature of the case, such transactions are not open to the objections above. They are not contracts upon air; the bank receives value and has a real interest; * * * and even if loss occurs it is attributable to the carelessness or misfortune of the bank in acquiring the subject matter, not in guaranteeing it, and such agreements are not dangerous to the financial health of the community, but beneficial to it."

It seems to me that, as stated by Mr. Morse, it would be decidedly beneficial to the public to have a bank purchase a bond from some substantial surety company as an additional safeguard to its depositors, and that anything that tends to make the deposits of the public in banks more secure should commended.

I am, therefore, of the opinion that under our laws a transaction of this charter would be perfectly legitimate.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

686.

BANKS AND BANKING—CONSTITUTIONAL AMENDMENT PROVIDING FOR DOUBLE LIABILITY APPLIES TO AMOUNT OF STOCK SUBSCRIBED.

*The language of Article XIII, Section 3 of the amended Constitution, providing for double liability of stockholders of corporations authorized to receive money on deposit, to-wit: "shall be held individually * * * to the extent of the amount of their stock therein, in addition to the amount invested in such shares," must be construed to require liability for double the amount subscribed and not merely for double the amount paid in.*

COLUMBUS, OHIO, October 22, 1912.

Hon. F: E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—On September 25th you sent me a request received by you from Mr. L. B.—asking for an opinion as to whether the constitutional amendment providing for the double liability of stockholders of corporations authorized to receive money on deposit means that the stockholders of banks having half of their capital stock paid in will be liable to pay in the unpaid portion of their subscription, and

then double that, or whether in banks where only one-half of the capital stock is paid in, it will mean that the stockholders will only be called upon to pay the full amount of their subscription.

The proposal which gives rise to this inquiry is No. 34, which, by its adoption at the election held on September 3, 1912, becomes Section 3 of Article XIII of the Constitution, and is as follows:

> "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her: except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally, ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word 'bank,' 'banker' or 'banking,' or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state."

This constitutional provision, Section 3, Article XIII, of the Constitution, as it stood prior to the amendment, was as follows:

> "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

It will be seen that the original section is incorporated in the amendment and the single liability for all corporations, including banking corporations, is the same, but in addition stockholders of banking corporations (corporations authorized to receive money on deposit) are held liable to the extent of the amount of their stock in such corporations, at the par value thereof, in addition to the amount invested in such shares.

I do not take it that the words "to the amount invested in such shares" means that the stockholder is only liable primarily to the amount he has paid in on the stock subscribed by him, for that would be in contradiction to the first part of the provision, which is that in all corporations stockholders are liable for the unpaid stock owned by them. In other words, that they are liable to the full extent of the stock subscribed, no matter how much may be paid in on the same. This is the primary liability and the amendment applies to the increase, and it seems to me it is plain that it means that this additional liability shall be the extent of the par value of the stock subscribed, no matter whether fifty per cent. has been paid in or not. In other words, for instance, if a person subscribes for one share of stock and pays in fifty per cent. of the value of the same, he would be liable for the fifty per cent. remaining unpaid on his subscription and to one hundred per cent. in addition.

Very truly yours,

TIMOTHY S. HOGAN.
Attorney General.

687.

BANKS AND BANKING—CONSTITUTIONAL AMENDMENT—DOUBLE LIABILITY OF STOCKHOLDERS EFFECTIVE JANUARY 1, 1913—PROHIBITION OF USE OF WORD "BANK" WITHOUT EXAMINATION, REGULATIONS, ETC., NOT EFFECTIVE UNTIL PASSAGE OF LAWS THEREFOR.

That part of Section 3, Article XIII, of the Constitution as amended which provides that "stockholders of corporations authorized to receive money on deposit shall be liable for all debts, contracts and obligations of such corporations to the extent of the amount of the par value of their stock therein, in addition to the amount invested in such shares," is self executing and shall be effective from the 1st day of January, 1913.

The second part of said constitutional provision which prohibits persons, partnerships, corporations or associations from using the bank in a business name without submitting to inspection, examination and regulation "as may hereafter be provided by the laws of this state," can take effect only in accordance with laws yet to be enacted providing for such inspection, regulation and examination.

COLUMBUS, OHIO, October 22, 1912.

Honorable F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—In your letter of August 20th, you make the following request for my opinion:

> "Please render me an opinion as to whether or not the provisions of Proposition No. 34—Amendment to the Constitution—will automatically go into effect without subsequent action of the legislature, in the event of approval by the electors on September 3rd; and, if so, upon what date?"

This proposal, having been adopted at the election held on September 3, 1912, becomes Section 3, Article XIII, of the Constitution, and is as follows:

> "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word 'bank,' 'banker' or 'banking' or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state."

By the schedule to the Constitutional Amendments voted for on September 3, 1912, which schedule is also adopted, the several amendments adopted at said election

becomes effective on the 1st day of January, 1913, and therefore this amendment would become effective at that time. The first part of the amendment, providing for dues from private corporations and for the double liability of stockholders of corporations authorized to receive money on deposit, is self-executing and becomes effective without any action by the legislature.

The second part of the said provision, which is primarily intended to prevent persons or associations using a business name including the word "bank," "banker," or "banking" unless such person or association submits to examination by the proper state officials, is not self-executing for the reason that our present banking laws only provide for the inspection and examination of banking corporations organized under the laws of Ohio.

Section 711 of the General Code is as follows:

> "The superintendent of banks shall execute the laws in relation to to banking companies, savings banks, savings societies, societies for savings, savings and loan associations, savings and trust companies, safe deposit companies and trust companies and every other corporation or association having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state. Nothing in this chapter shall apply to building and loan associations."

Section 724 of the General Code provides:

> "At least twice each year, and also when requested by the board of directors or trustees thereof, the superintendent of banks or an examiner appointed for that purpose shall thoroughly examine the cash, bills, collateral or securities, books of account and affairs of each bank, savings bank, safe deposit and trust company, savings and loan society or association incorporated under any law in this state. Such examination shall be made in the presence of the members of the executive committee or a majority thereof. He shall ascertain if any such corporation, company, society or association is conducting its business in the manner prescribed by law and at the place designated in its articles of incorporation."

From these sections it appears that the jurisdiction of the superintendent of banks as to their inspection and examination applies only to banks incorporated under the laws of this state, and it has been so held. Therefore, the power to examine and inspect persons, partnerships, or associations other than banking corporations not being lodged in the superintendent of banks, and not being given by law to any other state official, it will be necessary for the legislature to include the power to inspect and examine such persons, partnerships or associations in the other powers and duties cast upon the superintendent of banks, or to grant this power and designate these duties to some other official or board, and this portion of this constitutional provision cannot become effective until this is done.

Very truly yours,

TIMOTHY S. HOGAN

Attorney General.

737.

BANKS AND BANKING—NO POWER OF STATE BANKS IN OHIO TO ISSUE BILLS OR NOTES FOR CIRCULATION.

By virtue of Section 13097, General Code, no banks in this state have the power to issue bills or notes for circulation.

COLUMBUS, OHIO, August 27, 1912.

Honorable F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—In your letter of August 1, 1912, you submit the following inquiry received by you from Honorable Henry J. Ford, Commissioner of the Department of Banking and Insurance, in the state of New Jersey, and you ask if I will give you an opinion as to the same:

> "This Department desires to ascertain the present situation in the several states with regard to the power of the state banks to issue bills or notes for circulation. It is, of course, well known that such power in state banks cannot be actually exercised because of the prohibitive tax of ten per cent. imposed by the federal government upon circulating notes other than those issued by national banks; but it is desired to learn to what extent the power still exists, although not now exercised.
>
> "I shall, therefore, be obliged if you will advise me whether the laws of your state permit banks to issue notes or bills for circulation, and if so, upon what conditions."

Prior to 1851 in the legislation and decisions of Ohio, the words "banking institution" or "banks" seem to have been applied almost entirely to corporations which were authorized to issue bills and notes for circulation as currency.

In 1815 (13 O. L., 152) the first act was passed which prohibited companies or individuals from issuing bank notes unless the individual was expressly authorized by law, or the company incorporated by law for that purpose. Many special laws were passed incorporating banking companies to do a banking business up to 1845, when an act was passed (43 O. L., 24) providing for the incorporation of a state bank and other banking companies. This act provided for the organization, management, privileges and liabilities of such banks and for currency to be issued by them. The duration of the franchise to be exercised under this act was limited to twenty-one years, expiring May 21, 1866.

The financial troubles through which the people of this state passed prior to 1851 were largely blamed upon the banking system as it then existed, i. e., the paper currency issued by the banks. On account of the feeling against the banks and the agitation against special privileges granted to them and the power to issue currency, the constitutional convention of 1851 adopted Section 7 of Article 13, which is as follows:

> "No act of the general assembly, authorizing associations with bank-powers, shall take effect until it shall be submitted to the people at the general election next succeeding the passage thereof, and be approved by a majority of all the directors voting at such election."

This section relates solely to banks of issue. (See Dearborn vs. The Northwestern Savings Bank, 42 O. S., 617)

The legislature of Ohio, on March 21, 1851, passed an act known as the "Free Banking Act," (49 O. L., 41). This act, though passed after the adoption

of the constitution by the convention, was by virtue of Section 1 of the schedule to the Constitution (which provided that all laws in this state in force on September 1 not inconsistent with the Constitution should continue in force until amended or repealed) a valid enactment. It provided for the issue of currency by such banks, and also provided by Section 10 of the act, that the charters of the companies formed under the act should extend until the year 1872. On April 24,1879, the Ohio Legislature, by an act found in 76 O. S., 72, repealed all the sections of the Free Banking Act authorizing the issuance of currency, and also amended Section 17 of the original Free Banking Act (which section as originally enacted prohibited the issuance and circulation of currency, except as authorized by the act) to read as follows:

> "No banking company, either heretofore or hereinafter organized under this law, shall at any time issue, or have in circulation, any note, draft, bill of exchange, acceptance, certificate of deposit, or any other evidence of debt, which, from its character, form, or appearance, shall be calculated or intended to circulate as money; * * *."

This section is now found as Section 13097 of the General Code.

The Free Banking Act exists today practically as originally enacted, with the exception of the repeal of all the sections allowing such banks to issue currency. There are, I think, a few banks still in existence in this state which were incorporated under the Free Banking Act, but they do not, of course, now possess the power to issue currency.

No banks in this state have at this time the power to issue bills or notes for circulation. As shown above, this is expressly forbidden to banks by Section 17 of the act of 1879, and there has been, so far as I know, no attempt to authorize the incorporation of such an institution as provided by Section 7 of Article 13 of the constitution.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

750.

BANKS AND BANKING—CLAIMS OF CREDITORS OF DEFUNCT BANK IN HANDS OF SUPERINTENDENT OF BANKS ENTITLED TO PARTICIPATION OF FUNDS IN HAND OF SUPERINTENDENT WHEN PRESENTED AFTER DATE OF FINAL DISTRIBUTION.

The effect of Section 742-3 General Code, providing for notice to conditions of a defunct bank by the superintendent of banks, setting a definite date for the presentation of claims, is to give the claims presented within such date priority. In accordance with the latter part of said section, valid claims presented later than such date, or even later than the date of final distribution, a year after the first publication of notice to creditors, must be allowed by the superintendent so long as there are any funds in his hands applicable to the payment thereof.

Under Section 742-16, unclaimed deposits and dividends upon claims in the hands of the superintendent for six months after the declaration of the final dividends must be deposited in accordance with said section and cannot be distributed to stock holders.

COLUMBUS, OHIO, December 12, 1912.

Honorable F. E. Baxter, Superintendent of Banks, Columbus, Ohio.

DEAR SIR:—I am in receipt of your letter of November 16, 1912, in which you make the following request for my opinion:

"Please render to this office an opinion as to whether or not claims filed by creditors of defunct banks after the expiration of one year from date of notice, should be allowed and paid by this department."

Section 742-3 of the General Code provides for notice to be given by the superintendent of banks when he has taken possession of the property and business of the banking corporation. I wish to call your attention particularly to the last sentence of this section. The section is as follows:

"The superintendent of banks shall cause notices to be given by advertisement in such newspaper as he may direct weekly for three consecutive months, calling on all persons who may have claims against such corporation, company, society, or association, to present the same to the superintendent of banks and to make legal proof thereof at a place and within a time not earlier than the last day of publication to be therein specified. The superintendent of banks shall mail a similar notice to all persons whose names appear as creditors upon the books of the corporation, company, society or association. If the superintendent of banks doubts the justice and validity of any claim, he may reject the same and serve notice of such rejection upon the claimants either by mail or personally, and an affidavit of the service of such notice, which will be prima facia evidence thereof, shall be filed in his office. An action upon a claim so rejected must be brought within six months after such service. *Claims presented and allowed after the expiration of the time fixed in the notice to creditors, shall be entitled to be paid the amount of all prior dividends therein if there be funds sufficient therefor and share in the distribution of the remaining assets in the hands of the superintendent of banks equitably applicable thereto.*

Section 742-7 provides as follows:

"At any time after the expiration of the date fixed for the presentation of claims, the superintendent of banks may, out of the funds remaining in his hands after the payment of expenses, declare one or more dividends, and after the expiration of one year from the first publication of notice to creditors, he may declare a final dividend,—such dividends to be paid to such persons and in such amounts and upon such notice as may be directed by the common pleas court of the county in which the office of such corporation, company, society or association was located."

Section 742-16 is as follows:

"Dividends and unclaimed deposits remaining in the hands of the superintendent of banks for six months after the order for final distribution shall be by him deposited in one or more state banks of deposits, savings banks or trust companies to the credit of the superintendent of banks in his name of office, in trust for the several depositors or creditors entitled thereto. The superintendent of banks may pay over the moneys so held by him to the persons respectively entitled thereto, upon being furnished satisfactory evidence of their right to the same. In case of doubt or conflicting claims he may apply to the common pleas court of the county in which the office of such corporation, company, society or association was located for an order authorizing and directing the pay-

ment thereof. He may apply the interest earned by the money so held by him toward defraying the expenses of the payment and distribution of such unclaimed deposits or dividends to the depositors and creditors entitled to receive the same, and he shall include in his annual report to the governor a statement of the amount of interest earned by such unclaimed dividends."

Section 742-11 provides as follows:

"Whenever the superintendent of banks shall have paid to each depositor and creditor of such corporation, company, society, or association (not including stockholders) whose claim or claims as such depositor or creditor shall have been duly proved and allowed, the full amount of such claims, and shall have made proper provision for unclaimed or unpaid deposits or dividends, and shall have paid all the expenses of the liquidation, the superintendent of banks shall call a meeting of the stockholders of such corporation, company, society or association, by giving notice thereof for thirty days in one or more newspapers published in the county wherein the office of such corporation, company, society or association was located."

Briefly, the above quoted sections provide, first, for notice to be given by the superintendent of banks, upon taking possession of the property and business of the banking corporation, calling on all persons who have claims against such corporation to present same within the time mentioned in the notice, and it seems clear from the last sentence of section 742-3, and from the other sections that I have quoted, that the intent of these statutes is not to bar the holder of valid claims from participating in the distribution of the funds of the bank, if his claim is not presented in the time named in the notice, or within one year from the date of the first publication of the notice, but is to give priority to the creditors who present their claims within the time named, i. e., any claimant who fails to file his claim within the time named in the notice, or within one year from the date of the first publication of the notice to the creditors takes the risk of having the funds in the hands of the superintendent of banks entirely distributed before his claim is presented, in which event he would have no recourse; but even though the year mentioned in Section 742-7 has expired, and the superintendent of banks has paid all claims which have been filed and there still remain funds belonging to the defunct bank in his charge, the holder of the claim would surely be entitled, upon proper proof of same, to payment.

Under Section 742-16, unclaimed deposits and dividends upon claims remaining in the hands of the superintendent of banks for six months after the order for final distribution (which I take it to be the final dividend referred to in Section 742-7) must be deposited in one or more state banks of deposit, savings banks or trust companies to the credit of the superintendent of banks in trust for the several depositors or creditors entitled thereto. This section is specific and mandatory and wherever there are unclaimed deposits, or amounts due by way of dividends to creditors upon claims which have been presented, and which amounts have not been claimed, it is the duty of the superintendent of banks to deposit them as provided in said section, and he cannot include such unclaimed deposits or dividends to depositors or creditors in funds to be distributed by him, and Section 742-11 provides that such provision must be made for unclaimed or unpaid deposits or dividends before the superintendent of banks holds the stockholders' meeting to determine whether the superintendent of banks shall continue to administer

the assets of the said corporation, or whether an agent shall be appointed so to do by the stockholders of said corporation.

The latter part of this opinion is not specifically asked for in your letter, but as I feel that it is connected with the question first asked by you, I have included my view on it.

In brief my opinion is that valid claims against a banking corporation, and duly proved and presented, must be allowed by the superintendent of banks so long as there are any funds in his hands applicable to the payment thereof, i. e., at any time prior to the final distribution among stockholders of the remaining assets of the bank; and second, that unclaimed deposits and dividends upon claims in the hands of the superintendent of banks for six months after the declaration of the final dividends must be deposited as provided in Section 742-16, and cannot be distributed to stockholders.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Superintendent of Insurance)

235.

INSURANCE—BURIAL ASSOCIATIONS—INDEMNITY CONTRACTS—BUSINESS BY UNDERTAKERS OF REDUCING FUNERAL EXPENSES UPON PAYMENT OF MEMBERSHIP FEE, ILLEGAL.

A burial association which, upon the payment of a prescribed fee, issues a certificate which entitles the holder to a 50 per cent. reduction upon the funeral expenses of any member of the family, is engaged in the business of indemnity contracts and is therefore, an insurance business within the meaning of Section 665 General Code and must comply with statutory provisions with reference to that business, as a condition precedent to operation.

COLUMBUS, OHIO, April 3, 1912.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of March 2nd in which you request my opinion as follows:

> "Several years ago a number of burial associations were organized in this state in connection with undertaking establishments, which undertook to pay to designated undertakers, a certain amount upon the death of any member, to take care of the funeral expenses of such member.
>
> "While the various schemes differed in form, yet the effect was the same, and an act was passed that is now embodied in Section 666 of the General Code, inhibiting any such contracts.
>
> "Certain undertaking companies, in this state, have undertaken to operate in connection with their business, so-called Mortuary Associations, and issue Mortuary Certificates, by the terms of which, it is provided that upon the payment of the sum of one dollar to such association, the holder of fifty (50%) per cent. discount on funeral expenses. These contracts apparently run for a period of one year and are automatically renewable each year upon the payment of a like sum.
>
> "It has appeared to this department that this contract is both in the nature of insurance and is also within the purview of the section referred to.
>
> "Issue having been taken with the department upon this question, it is hereby referred to you for your opinion."

You also enclose a pamphlet issued by one of these associations, defining its method of business, a copy of which pamphlet is as follows:

THE MORTUARY ASSOCIATION.

.....President.
.....Treasurer.
.....Secy. and Gen. Mgr.

Headquarters
..... Undertaking Co.
Auto-Ambulance Service.
.....Street,
..... Ohio.

"Something to Think About."

Article 1. Are you and your family members of this association? If not, this is worth your consideration.

Article 2. By paying our representative ($1.00) One Dollar, you and your family become members.

Article 3. In case of death in your family, present to us your certificate of membership and you get 50% discount on the funeral expenses.

Article 4. You are entitled to this discount

Bell Phone .....
Citz. Phone..... Res. Citz.....
..... Undertaking Co.
Undertakers and funeral directors,
.....Street. .....Ohio

upon payment of $1.00 to our agent, who will issue your certificate.

Article 5. All these certificates are issued in good faith, and we guarantee that your expense will be only 50% of what it would be, were you not a member.

Article 6. This proposition appeals to all classes. You may just as well save the 50 cents on the dollar, when we guarantee our service just as good as the others.

Article 7. The main object of this association is to put within the reach of all classes a respectable burial.

Article 8. No medical examination; no age limit; and no person is barred from becoming a member.

Article 9. Pay the agent $1.00, and he will issue your certificate, that entitles you to 50% discount at once.

Article 10. The dues of this association shall be One Dollar ($1.00) per year, payable in advance.

Article 11. The 50% discount will apply on everything we do for you, except the cost of hacks. No discount will be allowed on them.

Article 12. The family as therein mentioned, shall consist only of the Father, Mother and all unmarried children, unless otherwise stated.

Article 13. A dollar today may save you many dollars tomorrow. Call us on the phone for further information and we will send our agent to you.

You also enclose a copy of certificate by this association. This certificate is as follows:

No.....
Name .....
Street .....
Town .....
Family .....
Date .....
.....
Agent.

No_____ Good For One Year from Date $1.00

THE MORTUARY ASSOCIATION

of _____, Ohio

This certifies that _____and family are entitled to a discount of 50 per cent. on Funeral Expenses, including Casket, Robe, Shroud, Hearse, Embalming and Services.

Providing, said funeral be purchased of_____ Undertaking Co., _____Street, and is in immediate Benefit for the full amount.

Date _____ _____

Citizen Phone_____ Bell Phone _____

Residence, Citizen_____

Auto Ambulance Service. Private Chapel for Services.

Section 666 of the General Code provides as follows:

"No company, corporation or association engaged in the business of providing for the payment of the funeral, burial or other expenses of deceased members, or certificate holders therein or engaged in the business of providing any other kind of insurance shall contract to pay or pay such insurance or its benefits or any part of either to any official undertaker or to any designated undertaker or undertaking company or to any particular tradesman or business man, so as to deprive the representative or family of the deceased from, or in any way to control them in, procuring and purchasing such supplies and service in the open market with the advantages of competition, unless expressly authorized by the laws of this state and all laws regulating such insurance or applicable thereto have been complied with."

I do not think that this particular plan of business would come under this section, but the vital question to be determined is, whether this association, or these persons, are engaging in the business of insurance.

Section 665 of the General Code is as follows:

"No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

Mr. May, in his work on insurance, at the very beginning, defines the term (Section 1, Chapter 1, May on Insurance) as follows:

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

Judge Crew of the Supreme Court says, in delivering the opinion of the court in the case of State, ex rel vs. Laylin, Secretary of State, 73 O. S. 90, at page 96:

"While we have in Ohio no general statutory definition of insurance, it has been repeatedly held by this court, in numerous cases, that the contract of insurance, is a contract of indemnity."

Mr. Vance in his work on insurance (Chapter 2, page 42) in speaking of the nature of a contract of insurance says:

"The contract of insurance is characterized by the features possessed by other contracts * * *. The primary requisite essential to the existence and validity of every contract of insurance is the presence of a risk of actual loss. The insurer in all cases agrees to assume this risk, in return for a valuable consideration paid to him by the insured. Whenever such an actual risk exists, and that risk is assumed by one of the parties to the contract, whatever be the form which the contract may wear, or the name which it may bear, it is in fact a contract of insurance."

Taking the above definitions in connection with Section 665 above quoted,

I am of the opinion that the contracts entered into by this association with its certificate holders amount "substantially" if not "directly" to insurance. There is the presence of a risk of actual loss, that is, the death of one of the members of the family of the certificate holder which would necessitate the expenditure for a funeral. The association, or individuals styling themselves an association, for the consideration of $1.00 agrees to assume fifty per cent. of this loss; therefore, it seems to me that this must be classed as insurance, and therefore prohibited by Section 665 for the reason that this association or these persons are not authorized by the laws of this state to engage in insurance, and they have not complied with the laws of the state in regard to insurance.

The form of circular issued by this company and its certificates seem to give the impression that it is some sort of a corporation doing an authorized business. It is very questionable then whether, under the doctrine announced in the case of State ex rel. vs. Ackerman, 51 O. S., 163, these individuals do not constitute an association of persons acting as a corporation within this state without being legally incorporated, and would, therefore, be prohibited from engaging in this class of business. But as I have held that the contracts really amount to insurance, and are therefore unauthorized, I do not deem it necessary to go into this matter.

In one of the letters sent to me accompanying this request, the following remarkable statement is made:

> "Undertakers usually make a profit of from 80 to 85 per cent. on all caskets sold, and that the undertaker can afford to, and does, give a 50 per cent. discount on the usual selling price of caskets, and still makes a satisfactory profit."

If this statement be true, and I have no doubt that it is, it seems to me that there is something wrong with the undertaking business, and that citizents, perhaps because payment for undertaking bills is made at a time of great mental distress, are being most outrageously imposed upon. We have had investigations in late years as to the high cost of living, and in view of this statement it seems to me that it would only be proper for an investigation to be made as to the high cost of dying.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General

509.

FOREIGN INSURANCE CORPORATIONS—COMITY—SINGLE PURPOSE—COMPANY AUTHORIZED TO DO CASUALTY BUSINESS AGAINST LOSSES FROM CAUSES OTHER THAN FIRE MAY NOT INSURE AGAINST "LOSS OF USE" OF AUTOMOBILE FROM FIRE—AETNA ACCIDENT LIABILITY COMPANY.

A foreign insurance company organized to do a casualty business other than fire may not be authorized to insure in Ohio against the "loss of the use of an automobile" or for other loss caused to said automobile by fire; for the reasons:

1st. The statutes of Ohio do not authorize such insurance and it is therefore prohibited. Comity will recognize the authorization of other states only when such authorizations extend to rights which may be permitted by Ohio laws.

2nd, Insurance against casualties resulting from other causes than fire, and also against losses caused by fire would be a violation of Sections 9510 *and* 9511 *of the General Code, which restricts insurance to only one of said purposes.*

3rd. Insurance against losses from both causes would work a nullification of said Sections 9510 *and* 9511 *of the General Code.*

HON. EDMOND H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—You ask for my opinion as to whether or not the law of Ohio warrants you to issue licenses to *The Aetna Accident and Liability Company* enabling them to issue combination policies. The question you wish determined, as I understand it, is whether or not under the statutes of Ohio and the laws of Ohio The Aetna Accident and Liability Company, a foreign company organized to do casualty business other than fire, may issue a policy insuring against loss of the automobile * * * cab or other consequential loss resulting from damage to or destruction of said automobile * * * provided such damage or destruction * * is caused by fire arising from any cause whatever, including self-ignition.

Upon receiving your request Mr. J. W. Mooney, representing The Old Colony Insurance Company, of Boston, Mass., expressed the desire to be heard in argument, taking the view that the issuance of such license was contrary to law. Thereupon I requested him to file written brief stating his reasons why such license should not issue, at the same time advising Messrs. Lemuel J. Collins, C. C. Benner and Edward T. Powell, attorneys for The Aetna Accident and Liability Company, to file their brief setting forth reasons why such license should issue. These gentlemen quickly filed their briefs, copies whereof I am sending you herewith. These briefs were of great aid to me in arriving at a conclusion.

Mr. Mooney's contention is that permission to issue a policy containing the provisions of Clause One of the policy proposed to be issued by The Aetna Accident and Liability Company should be denied for the following reasons:

> "1. The statutes do not permit and therefore deny the right to insure the loss of the use of property.
>
> "2. For the reason that Clause One of the policy in question when issued by a casualty company squarely violates Sections 9510 and 9511 of the Code.
>
> "3. For the reason that the effect of granting the permission to issue the proposed policy would nullify Sections 9510 and 9511 of the Code."

As to Objection One counsel for The Aetna Accident and Liability Company

insist that the case of the State ex rel. Sheets, Attorney General, vs. The Aetna Life Insurance Comany, 69 O. S. 317 is decisive in favor of their position.

The first reading of the syllabi in that case would seem to sustain this position, but a closer analysis of it proves the contrary.

The syllabi in said case are as follows:

> "1. A life insurance company incorporated and organized under the laws of another state and authorized by its charter to engage in the business of 'indemnifying employers against loss or damage for personal injury or death resulting from accident to employes or persons other than employes,' may, upon complying with the statutory requirements regulating deposits by foreign corporations, be licensed and permitted, under favor of Section 3596, Revised Statutes, to engage in and transact such employers' liability insurance in this state.
>
> "2. In the absence of any statute in Ohio regulating life insurance companies from doing an employers' liability insurance in this state, *and the business itself being by statute expressly authorized;* a life insurance company incorporated and organized under the laws of a sister state and empowered by its charter to engage in the business of employers' liability insurance, may, by the comity that prevails between the states, be licensed and permitted to transact such business in this state, although our statute has not in express terms conferred upon domestic life insurance companies authority to engage in or transact that particular kind of insurance."

The present case does not come within the principles of either syllabus. The Sheets case was readily decided so far as the merits went under Syllabus One, coming entirely under favor of the then Section 3596 Revised Statutes. The Court, however, went beyond the requirements of that case and made, the conditions under which, in the absence of any statute prohibiting life insurance companies from doing an employers' liability insurance in this state such foreign companies might still be licensed. One of the principal conditions in said Second Syllabus is "and the business itself being by statute expressly authorized." I take it that by the very expression of comity means that the company from a foreign state may do business that is authorized by the laws of our own state. To permit a foreign company to do a kind of business no authorized to be done by any kind of domestic corporation transcends the limitations of comity.

Moreover, the provisions of Section 665 of the General Code seem quite comprehensive. They are as follows:

> "No company, corporation, or association, whether authorized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, *unless it is expressly authorized by the laws of this state,* and the laws regulating it and applicable thereto, have been complied with."

The decision of the supreme court upon which the applicant relies is not out of harmony with Section 665, but in complete conformity thereto. That is shown from the language "unless it is expressly authorized by the laws of this state." The essential question is not that a particular line of insurance companies may be authorized to do a particular kind of business, but is the business that is of concern expressly authorized to be done by the laws of this state in the hands

of any kind of corporation? If so, the foreign company could lawfully be licensed because the statutes do not disclose that the carrying on of such business was not contrary to public policy, but when the statute forbids any company, corporation or association, whether organized in this state or *elsewhere* to engage in the business of insurance unless it is expressly authorized by the laws of this state, there is no room for comity as to any matters embraced within the statutes.

Having determined this question upon the first ground of objection further investigation would seem unnecessary. However, it may not be amiss to take up the second ground of the objection, to-wit:

> "For the reason that clause one of the policy in question when issued by a casualty company squarely violates Sections 9510 and 9511 of the Code."

I will not quote these two sections on account of their length. Sufficient to say, that under Section 9511 no company shall be organized to issue policies of insurance for more than one of the four purposes mentioned in Section 9510, and no company organized for either one of such purposes shall issue policies of insurance of any other.

The only question to be determined is, therefore, whether Clause One provides for insurance against loss arising from fire. It evidently does. No discussion is needed on this point. In addition to that, I have the form of the advertisement placed in my hands by counsel for The Aetna Accident and Liability Company which reads under the heading "County Fire Office."

COUNTY	Fire
FIRE	Consequential Loss Following Fire,
OFFICE	Personal Accident and Disease,
Limited,	Workmen's Compensation,
30 Regent St. N.	Domestic Servants,
and	Third Party and Drivers' Risks,
4 Lombard St.	Burglary, Plate Glass,
London	Fidelity Guarantee.

INSURANCE EFFECTED ON THE MOST FAVOURABLE TERMS. THE BUSINESS OF THIS OFFICE IS CONFINED TO THE UNITED KINGDOM.

Full particulars upon application.

It is not a sufficient answer to the objection to say that the fire insurance is but an incident. If the fire insurance be a species that is part of the genus. Whatever forbids the genus forbids the species. The whole includes the part. The objection made on this ground is in my judgment legally taken. Furthermore, Sections 9510 and 9511 General Code apply to foreign insurance companies as well as domestic, the provisions applicable exclusively to domestic insurance companies only commencing under the head of "Domestic" with Section 9512. The opening language of Section 9510 which fixes the scope of the statutes, expressly refers to foreign insurance companies which are admitted to do business in this state as to domestic corporations, The language is:

> "A company may be organized or *admitted* under this chapter to insure, etc."

Other reasons could be given in support of this view, but it is not considered necessary to give them.

The third objection is in my judgment well taken, to-wit:

> "For the reason that the effect of granting the permission to issue the proposed policy would nullify Sections 9510 and 9511 of the Code."

This involves the same reasoning as found in the second objection.

Before having examined the statutes I was of the general impression that the license should issue in this case. Arguments proper to be addressed to the legislature are weighty in support thereof, but this department as well as the great department over which you preside are limited to the interpretation and application of the law as we find it upon the statute books and as construed by the courts.

My conclusion, therefore, is, for the foregoing reasons, that you are not warranted in law in issuing the license to the applicant.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

BRIEF ON BEHALF OF OLD COLONY INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, AGAINST APPLICATION OF THE AETNA ACCIDENT & LIABILITY COMPANY OF HARTFORD, CONNECTICUT, FOR PERMISSION TO ISSUE A CERTAIN FORM OF POLICY IN THIS STATE.

The question for determination is whether or not, under the statutes of Ohio, The Aetna Accident & Liability Company, a foreign insurance company organized to do a casualty business other than fire, may issue a policy insuring

> "against loss of the use of the automobile * * and or other consequential loss resulting from damage to or destruction of said automobile * * provided such damage or destruction * * * is caused by fire arising from any cause whatever, including self ignition."

We contend that permission to issue a policy containing the provisions of clause one of the policy proposed to be issued by The Aetna Accident & Liability Company should be denied for the following reasons:

(1) The statutes do not permit and therefore deny the right to insure the loss of the use of property.

(2) For the reason that clause one of the policy in question when issued by a casualty company squarely violates Sections 9510 and 9511 of the Code.

(3) For the reason that the effect of granting the permission to issue the proposed policy would nullify Sections 9510 and 9511 of the Code.

THE LAWS OF OHIO DO NOT EXPRESSLY AUTHORIZE AND THEREFORE PROHIBIT INSURANCE AGAINST THE LOSS OF THE USE OF PROPERTY

The proposition is well settled that in this state no insurance company, whether domestic or foreign, may transact insurance business of a kind not expressly authorized by the statutes of this state.

Section 665 of the Code (R. S. 289) provides:

"Section 665. No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

As to domestic insurance companies, our supreme court in the case of State vs. Pioneer Live Stock Co., 38 O. S., 347, has squarely held that the purposes for which a domestic insurance company may be incorporated are limited to those purposes which are specified in the statutory provisions as to insurance companies, and that the general corporation statutory provisions which permit incorporation for any purpose for which individuals may lawfully associate themselves, are not applicable to insurance corporations.

The syllabus is as follows:

"Section 3235, Chapter I, title 2, of Revised Statutes, which reads: 'Corporations may be formed in the manner provided in this chapter, for any purpose for which individuals may lawfully associate themselves together, except for dealing in real estate or carrying on professional business, must be construed as not authorizing the incorporations of insurance companies, as the organization of such companies is specially provided for in chapters X and XI of same title."

The holding of the above case is approved in State ex rel, vs. Taylor 55 O. S. 61, 68.

In as much, therefore, as the purposes for which a domestic insurance company may be incorporated, and the kinds of insurance it may write, are limited to those purposes and to those kinds of insurance which are expressly authorized by statute, it necessarily follows that the same limitations apply to a foreign insurance company when engaged in the business of insurance in this state, and that a foreign insurance company may engage in only such insurance business as is expressly permitted a domestic insurance company. Any other rule would involve holding that the legislative intent underlying the insurance statutes of this state was to confer upon foreign insurance companies more comprehensive powers as to the nature of the insurance business which they may transact than is conferred upon domestic insurance companies. The statutes contain no sanction for such an inference as to the legislature's intent. Every inference legitimately arising from existing insurance legislation is to the contrary.

Therefore, even apart from Code Section 665, we contend that foreign insurance corporations have no more comprehensive powers as to the kind of risks they may assume than have domestic corporations, and that like domestic insurance companies, they must look to the statutes of Ohio for express authority to do insurance business of the nature which they propose to do.

The proposition that an insurance company, domestic or foreign, is strictly limited to the insurance of such risks as are expressly authorized by statute, is further established by the history of insurance legislation in this state. Thus, in order to enable fire insurance companies to insure also against loss or damage by lightening, explosions and tornado, an express statute (R. S. 3641*a*) was enacted.

Thus again, in order to extend the power of fire insurance companies to insure also against "loss or damage by water caused by the leakage of sprinklers, pumps, tanks, water tanks and fixtures connected therewith," and further to insure against

"loss by theft of automobiles and accessories and against damage thereto from this cause," a further amendment to R. S. 3641, expressly to that effect, found in 102 O. L. 359, (Code Sec. 9556) was enacted in 1911.

So too as to casualty companies. When it was desired so to enlarge the powers of casualty companies so as to enable these companies to guarantee the performance of contracts, and to execute and guarantee bonds and undertakings required in actions or proceedings or by law allowed, an express statute to that effect (90 Ohio Laws, page 157, 1893) was enacted.

Again, in order to permit the further enlargement of the powers of casualty companies by permitting these companies to guarantee the validity of titles to real property, an express statute to that effect (93 O. L., page 179) was enacted in 1898.

Again, in order to affect a further extension of the powers of casualty companies and thereby to empower those companies to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes, and further to indemnify persons other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations, an express statute to that effect was deemed necessary and was enacted in 1904. (97 O. L. page 408).

The fact that the Legislature deemed it necessary to enact prositive statutes in order to empower fire insurance companies and casualty insurance companies to insure these additional risks is strongly corroborative of the rule that the risks which an insurance company may insure are limited to those risks which are expressly permitted by statute and that insurance companies have no power to issue insurance of a kind not expressly authorized by statute.

In the legislation of Ohio there is no statute expressly or even impliedly authorizing insurance against the loss of the use of personal property. It necessarily follows from the absence of any such express statutory power conferred upon casualty or accident companies to insure against "loss of the use" of property, that no such power exists.

"Clause One" of the policy of The Aetna Accident & Liability Company wherein that company purports to exercise the non-existing power to insure against "loss of the use" is therefore conclusive against the right of that company to issue in this state a policy which contains a clause purporting to exercise that non-existing power.

CLAUSE ONE OF THE POLICY IN QUESTION VIOLATES SECTIONS 9510 AND 9511 OF THE CODE.

Apart from the fact that insurance against damage by "loss of the use of property" is utterly unauthorized and therefore forbidden by the laws of this state, the language of "clause one" of the policy in question shows upon its face that "clause one" of this policy is a mere subterfuge to evade the express provisions of Section 9510 and 9511 of the Code, wherein a company organized to make insurance against loss or damage resulting from accident to property from causes other than fire, is expressly prohibited from issuing policies in this state insuring against loss or damage by fire.

Code, Section 9510 so far as is material is as follows:

> "Section 9510. A company may be organized or admitted under this chapter to:
>
> "1. Insure houses, building and all other kinds of property in and out of the state against loss or damage by fire, lightening and tornadoes, and make all kinds of insurance on goods, merchandise and other

property in the course of transportation, on land, water, or on a vessel, boat or wherever it may be.

"2. Make insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; make insurance against loss or damage resulting from accident to property, from cause other than fire or lightning: guarantee the fidelity of persons holding places of public or private trust, who are required to, or, in their trust capacity do receive, hold, control, disburse, public or private moneys or property; guarantee the performance of contracts other than insurance policies, and execute and guarantee bonds and undertakings require or permitted in all actions or proceedings, or by law allowed; make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accident to other persons or corporations. But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance for the benefit and security of all its policy holders, fifty thousand dollars in bonds of the United States or of the state of Ohio, or of a county, township, city or other municipality in this state, shall not be received by the superintendent at a rate above their par value. The securities so deposited may be exchanged from time to time for other securities. So long as such company continues solvent and complies with the laws of this state it shall be permitted by the superintendent to collect the interest on such deposits."

Code, Section 9511 expressly provides:

"Section 9511. No company shall be organized to issue policies of insurance for more than one of the above four mentioned purposes, and no company organized for either one of such purposes shall issue policies of insurance of any other."

It will be observed that Code, Section 9510, supra, divides insurance companies of the kinds there enumerated into four distinct classes with reference to the purpose for which they may be organized and may issue policies upon property as follows:

1. Insurance companies covering against fire, lightning, tornado and insurance companies covering upon goods in the process of transportation.
2. Insurance companies covering against casualty other than fire.
3. Live stock insurance companies, and
4. Deposit insurance companies insuring the safe keeping of books, stock, etc.

By Code Section 9511 it is expressly provided that no company shall be organized to issue policies of insurance for more than one of the above four mentioned purposes and no company organized for any one of said purposes shall issue policies of any other.

It will be observed that the above statutes apply as well to foreign insurance companies as to domestic, the provisions applicable exclusive to domestic insurance companies only commencing under the head of "Domestic" with Section 9512. Moreover, the opening language of Section 9510, which fixes the scope of the statute, expressly refers as well to foreign insurance companies which are admitted to do business in this state as to domestic insurance companies. The language is:

"A company may be organized *or admitted* under this chapter to insure, etc."

Furthermore, subdivision two of Section 9510 contains certain requirements which apply only to foreign liability companies insuring employers, etc. It necessarily follows from the insertion of these special requirements as to foreign liability companies, that apart from these special requirements upon foreign liability companies, the provisions of 9510 and 9511 of the Code apply as well to foreign as to domestic insurance companies.

Since, therefore, the provisions of Sections 9510 and 9511 apply to The Aetna Accident & Liability Company, though that company is a foreign company, do the provisions of clause one of the policy in question violate the provisions of Sections 9510 and 9511? We contend that clause one of the policy in question clearly violates those statutes.

The agreement contained in "clause one" of the policy proposed to be issued to "indemnify against other consequential loss resulting from damage or destruction * * by fire," is clearly an express agreement to insure against loss or damage by fire, and therefore falls squarely within the first subdivision of Section 9510 of the Code.

The policy in question by "clause three" insures against "loss or damage * * if caused solely by collision * * (excluding from coverage under this clause all loss or damage by fire)," This clause of the policy therefore falls squarely within subdivision two of Section 9510 of the Code, which permits insurance to be issued "against loss or damage resulting from accident to property from cause other than fire."

The policy in question by "clause five" insures against "loss or expense arising from claims upon the insured for damages on account of bodily injuries and/or death accidentally suffered by reason of the ownership, maintenance and/or use of the automobile." This clause also clearly falls within subdivision two of Section 9510 of the Code, which permits insurance to be issued to indemnify persons other than employers against loss or damage for personal injury or death resulting from accidents to other persons.

The right of The Aetna Accident & Liability Company to insure the hazards covered by clauses three and five, supra, of the policy in questions, is freely conceded. These are risks expressly permitted to a casualty company by subdivision two of Code Section 9510. But our contention is that The Aetna Accident & Liability Company, which is concededly a casualty company, and which is concededly by clauses three and five of the policy in question, issuing a casualty policy, is expressly prohibited by Code Section 9511 from insuring against loss or damage by fire as it purports to do in clause one of the policy by use of the words "against other consequential loss resulting from damage or destruction * * by fire." The presence of these words alone in clause one of the policy should therefore be conclusive against granting to this company the privilege of issuing such a policy in this state.

More subtile, but no less squarely in conflict with the provisions of Code Section 9510 and 9511, is the further language in clause one of the policy insuring against "loss of use * * resulting from damage or destruction * * by fire."

As to this language one of two alternatives must be true:

Either this language constitutes an assumption of liability for loss or damages by fire, or else it does not. If it does not constitute an assumption of liability for loss or damage by fire, then it is a device to defraud the insuring public by a pretense of assuming a liability which is not actually assumed. We feel confident that this department would not desire to be a party to such device by permitting the issuance of such a policy.

If, on the other hand, this language does constitute an assumption of liability for loss or damage by fire, then, as in the case of the other language of clause one heretofore discussed, we have a policy purporting to insure against loss or damage from accident *other than fire* and simultaneously by this language of clause one purporting to insure against *loss or damage by fire.*

The proposition that the agreement to insure against "loss of the use" of property by fire, is in fact an agreement to insure against loss or damage to the property itself by fire is conclusively established by reference to the provisions in the policy in question as to payment of the loss.

The following provision is a part of clause one of the policy:

> "Provided further that all loss of use and/or other consequential loss insured under this clause of the policy shall be liquidated in full by the *suitable replacement* of the parts destroyed and repair of the damage sustained and payment to the assured of a daily indemnity as provided in condition thereof while repair or replacement is being effected (the company *reserving the right to replace* and retain the damaged automobile and/or its operating equipment or, at the option of the company and *in lieu of all other indemnity* under this clause of the policy, *by payment to the assured of the sum provided for total liability in condition N hereof,* the company retaining the salvage if any."

Clause N of the policy is as follows:

> "N. The company's total liability for loss of use and/or other consequential loss (including daily indemnity) as defined in clause one of this policy is limited to----------Dollars ($----); and, within such limit, the company's liability for daily indemnity as defined in said clause one shall be ----------Dollars ($----) per day beginning on the eighth day after mailing or delivery of notice as provided in condition F hereof."

The company under this policy therefore reserves the express right to liquidate all claims for "loss of use" and for "other consequential damage," by a suitable *replacement* of the parts destroyed, or at its option in lieu of all other indemnity under this clause of the policy *by payment of the sum provided for total liability.* In other words, the use of this language in clause one of the policy is simply a device under the guise of indemnifying for the *"loss of the use by* fire of the automobile, instead to place in the hands of the insured what *is in fact indemnity for the value of the property,* the automobile itself, and for loss and damage by fire thereto.

If, then, this language of clause one constitutes an agreement to insure against loss or damage by fire, this language therefore constitutes a square violation of Section 9510 and 9511 of the Code.

We submit that Sections 9510 and 9511 of the Code squarely prohibit the issuance by any insurance company of a policy which insures against liability for personal injuries or death to other persons, and against loss or damage to property by accident *other than fire,* and which at the same time insures against loss or damage *by fire.*

THE EFFECT OF PERMITTING THE ISSUANCE OF SUCH A POLICY

The desirability of an automobile policy which would insure against loss or damage by fire and at the same time against loss or damage resulting from accident

other than fire, is utterly beside the point in the determination, of the question. The desirability of such a policy may be conceded. Yet the existing legislation, with its clear prohibition against such a policy, must exclude any company from the right to issue such a policy in this state. If such a policy is desirable and for public interest, then that fact should have weight with the legislature. That fact can have no force with this department, whose only duty and whose only power is to construe and enforce the law as it finds the law.

To permit the issuance of such a policy as is here proposed would overthrow all of the statutory safe guards which the legislature has sought to throw about the insuring public. The rule of Sections 9510 and 9511 which prohibit insurance companies belonging to one subdivision under the classification of Section 9510, to issue policies insuring risks belonging to any other subdivision under that classification has for its sole purpose the increase of the security of the insuring public. Yet the right, if it were conferred by this department, to issue such a policy as is here proposed would leave not this company alone, but all companies with no restriction whatever as to the nature of risks which they may assume.

If this company, by the magic words "loss of the use" * * * by fire," may evade the statute and while insuring against accident, may at the same time insure against loss or damage by fire, then all *fire insurance companies* may likewise evade the statute and insure against accident by the same magic words, "against loss of the use *by accident.*"

If this is true as to automobile insurance, it is true as to all other insurance of property against loss and damage. If this company may disregard Sections 9510 and 9511 of the Code, then all companies may do so, and in a single policy we may have accident insurance, fire insurance and liability insurance. The far reaching and disastrous consequences which would follow the granting of the permission here sought can not be overestimated. The granting of such permission would, we submit, amount to nothing short of nullification, both in letter and in spirit, of Sections 9510 and 9511 of the Code.

We earnestly urge that permission to issue such a policy in this state as is here proposed by The Aetna Accident & Liability Company should be refused.

Respectfully submitted,

J. C. Mooney,

Attorney for the Old Colony Insurance Company, of Boston, Massachusetts.

IN THE MATTER OF THE AETNA ACCIDENT AND LIABILITY COMPANY FOR COMMISSION TO ISSUE COMBINATION POLICY.

HON. T. S. HOGAN, *Attorney General, State of Ohio, State Capitol, Columbus, Ohio.*

SIR:—With reference to the application of this company for authority to issue its combination automobile policy in Ohio, we understand no objection is made to the coverage furnished by this policy except that the question is raised whether, under clause one of the policy, whereby this company undertakes to insure against loss and use and other consequential loss resulting from damage to automobiles, the company is in effect undertaking to transact what is commonly known as fire insurance, or, as termed in Subsection 1 of Section 9510 General Code of Ohio, "loss or damage by fire."

We submit that loss of use insurance or, as it is called in Europe, consequential loss insurance is not fire insurance as commonly understood nor as contemplated by the section of your statutes above quoted.

In order to make clear this point, it will be necessary to recite briefly the origin of consequential loss insurance. This form of insurance originated in

England some ten years ago, and since has been introduced into other European and foreign countries as a scientific but entirely distinct form of coverage from fire insurance.

Consequential loss insurance sets out to differentiate between actual material damage loss (usually called loss or damage) and the financial loss caused by the interruption of a business or industry due to the loss of use of machinery or other means of carrying on such business or industry.

In other words, the original insurers of this new form of insurance discovered that in certain lines of industry it frequently happened that the material damage loss (actual loss or damage) might be infinitesimal, while the consequential loss, due to the interruption of an entire business, might be very large indeed; and furthermore, that fire was only one of many causes of such consequential loss or loss of use.

As an illustration: The engine house of a large factory might be damaged or destroyed. The material damage loss (actual loss or damage) would be very small compared to the consequential loss due to the stoppage of the whole of the plant on account of a vital part thereof having been affected. Also, the cause of such consequential loss might be due to an explosion, collapse of building, sprinkler leakage or other cause than fire.

Thus, insurance against consequential loss sets out primarily to insure against the financial loss due to interruption or stoppage (i. e. loss of use) of a business or industry by undertaking to pay a daily, weekly or monthly indemnity for such consequential loss; but in practice the insurer minimizes the payment of such indemnity for loss of use (to the benefit of the assured) by taking in hand the repairs or replacements necessary to enable the assured to resume his business operations, and in doing so the insurer will be willing to spend much more than the regulation sums necessary to repair or replace in order to expediate the resumption of business in much less time than the normal.

A fire insurance policy insures a specific value against damage to property by fire. It pays $5 if the actual damage loss by fire is $5, or $500 if the actual damage loss by fire is $500.

A loss of use or consequential loss insurance policy pays the same daily, weekly or monthly indemnity during interruption or stoppage (loss of use) regardless of whether the actual damage loss is $5 or $5,000; and it does not limit the cause of loss to fire.

It also undertakes expeditious repairs or replacement as being part of the consequential loss sustained, and in order to put a stop to the interruption or loss of use.

In short, there are now two forms of insurance in Europe, namely:

> "(1) Consequential loss insurance, which insures against actual loss or damage by fire and which, of course, continues to be the principal form of protection used by traders and others to cover against actual loss or damage to property by fire.
>
> "(2) Consequential loss insurance, which is used in those cases where fire is only one of the causes of loss, and where the danger of consequential loss due to interruption or stoppage would be very serious as the result of even slight material damage to some vital part of a concern's operation.

Such loss of use insurance is particularly adaptable to automobiles, since slight damage to vital parts of the mechanism so frequently cause total loss of use of an automobile during repairs.

This company's charter specifically authorizes it to insure against consequential

loss or loss of use insurance as above outlined, but it is only seeking permission under its combination automobile policy to insure against loss of use or other consequential loss resulting from damage to or destruction of automobiles from accidental and external causes, of which fire happens to be one, albeit, it is only an incident that it is one.

It is submitted that Subsection 1 of Section 9510 General Code of Ohio, in prescribing loss or damage by fire, could not and did not contemplate scientific loss of use or consequential loss insurance.

It is therefore submitted that since such form of insurance is neither specifically permitted nor prohibited by statute in Ohio, and since the company is authorized by its charter to write this special form of insurance, therefore, it should be within the discretion of the Insurance commissioner to authorize this company to issue its combination automobile policy in Ohio, inasmuch as there is nothing in such form of insurance against public policy.

As bearing upon this question, a communication received by this company from the insurance commissioner of Tennessee (copy herewith) may be of interest.

Respectfully submitted,
LEONARD J. COLLINS,
C. C. BENNER,
E. T. POWELL,
Attorneys.

DEPARTMENT OF INSURANCE
STATE OF TENNESSEE

G. T. TAYLOR, Commissioner, C. M. JOSEPH, Deputy

NASHVILLE, June 10. 1912.

The Aetna Accident & Liability Co., Hartford, Conn.

GENTLEMEN:—I am in receipt of yours of the 6th inst., attaching specimen of your combination automobile policy, and have carefully examined clause one relating to the loss of use of an automobile resulting from external and accidental causes (fire included) and after this examination, together with your explanation of the policy in question, this department will have no objection to the issuance of this contract in Tennessee under your license as it now stands.

Very truly yours,
G. T. Taylor, Ins. Com.
By C. M. Joseph, Deputy.

Note the company's license does not authorize "Fire Insurance."

REPLY BRIEF

HON. T. S. HOGAN, *Attorney General, Columbus, Ohio.*

SIR:—In reply to brief of Attorney J. M. Mooney, filed ostensibly in behalf of the Old Colony Insurance Company, of Boston, Mass., as objecting to the petition of The Aetna Accident and Liability Company for permission to write loss of use and other consequential loss insurance on automobiles under its combination automobile policy:

The gist of said brief aims at showing a domestic insurance company in Ohio could not be organized to transact any form of insurance not specifically prescribed by statute; and that, therefore, a foreign insurance company operating in Ohio cannot be authorized to transact a form of insurance in Ohio not specifically pre-

scribed by Ohio statute, although such company may be authorized by its charter to transact such insurance.

We believe such a contention would find no favor with you provided the form of insurance was not against public policy, and we think we need go no further in support than to cite the decision rendered by the Supreme Court of Ohio in 1904, State ex rel. Sheets Attorney General, vs. Aetna Life Insurance Company. 69 N. E. 608, from which may be quoted, 69 O. S. 317.

> "An insurance company organized under the laws of a sister state, and authorized by its charter to write * * insurance may, by the law of comity, be licensed and permitted to write such insurance in this state upon complying with the requirements of the statutes of this state as to deposits, etc., even though the right to transact that particular kind of insurance may not have been exercised by, or conferred upon domestic * * insurance companies by positive statutory grant.
>
> "If the business is within the charter powers of such foreign company, it is enough that such business is not prohibited in this state, is not obnoxious to the policy of our laws, and is not against the interests of our citizens.
>
> "The rule is that, where there is no positive statute, the presumption, under the law of comity that prevails between states of the Union is that the state permits a corporation organized in a sister state to do any act authorized by its charter or the law under which it is created, except when it is manifest that such act is obnoxious to the policy of the law of this state."

Regarding contention in objector's brief that the language of clause one of the Aetna's combination automobile policy either:

> "(a) Constitutes an assumption of liability for loss or damage by fire, or
>
> "(b) Is a device to defraud the insuring public by a pretense of assuring a liability which is not actually assumed."

The Aetna's brief dated June 22nd (copy wherewith) declaring with the character of loss of use and consequential loss insurance, will conclusively show that such insurance is not insurance against loss or damage by fire as generally understood or as contemplated by your statutes at the time of their enactment.

Perusal of the policy contract, as well as the generally acknowledged integrity and reputation of the Aetna, is the answer to the contention "(b)."

Permission to write the combination automobile policy is sought by the Aetna on the broad ground of furnishing the public with what they need, and should surely not meet with any opposition from fire insurance companies, who, without opposition from casualty companies, have invaded the casualty field in Ohio, as elsewhere, in their laudable desire to write insurance on automobiles so as to give the policy holders not only protection against loss or damage by fire and lightning, but also loss or damage by theft and collision.

Although fire insurance companies are now authorized by statute to write theft insurance on automobiles in Ohio, they are not, on Attorney Mooney's own showing, authorized *by statute* to write collision insurance, as is being done by some of them in that state.

The broad minded attitude of the state of Ohio in allowing this, is doubtless actuated by a desire to foster competition in the best interests of the people, as expressed by the Supreme Court in the decision above cited, and from which we again quote:

"It is not the policy of the state to repeal or discourage solvent, reputable foreign corporations from doing business within its borders, and the courts will not anxiously seek an excuse in the statutes to drive them out."

Respectfully submitted,
LEONARD J. COLLINS,
C. C. BENNER,
E. T. POWELL,
Attorneys.

554.

INSURANCE—REBATING PROHIBITION DOES NOT PREVENT EXTENSION OF CREDIT BY AGENTS TO CUSTOMERS IN PAYMENT OF PREMIUMS.

It is the intention of Section 1 of the Act of 102 (O. S.) P. 81 to prevent rebating and such section does not extend to the requirement that all payments of premiums shall be made in cash.

The practice universally indulged in by agents therefore of extending credit to customers in the payment of premiums is not illegal.

COLUMBUS, OHIO, July 19, 1912.

HONORABLE E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On July 9, 1912, you made the following request for my opinion:

"House Bill No. 188, page 81, Vol. 102,Laws of Ohio, was designated to prevent rebating under fire insurance policies, and I wish to inquire concerning the bearing of this law upon the subject of credit given to policy holders for the payment of premiums.

"For instance, local agents—and the practice is uniform so far as most agents are concerned—are given by the companies they represent a certain period of time in which to make collection and remittance of premiums on the fire insurance policies issued by them. This period does not exceed, at its maximum, forty-five days, at which time the companies expect a remittance covering every premium due.

"It is a practice indulged in by many agents who wish to favor a customer, to often carry a particular customer for an extended term, advancing the premium when required by the company, and allowing the favored customer additional time—the account many times running for three, six, nine, and even twelve months and longer.

"At times, the agent will take his customer's note for from one to four months, bearing interest, and will let his bank carry the note— the agent, of course, endorsing the note and standing good for its payment when due. Not infrequently, when the note is due, the agent will accept a partial payment, taking a further note for the difference, and that in turn is carried for his account at his bank, thus giving the customer still further time for payment. More frequently than through the method of a note, the agent will simply advance his customer's premium and carry it for an indefinite period as an open account without interest."

I should like very much to have your opinion upon the following points:

"Is the giving of credit by an agent to his customer, *beyond the time at which the premium is required by his company,* say forty-five days, through the medium of a note given by the customer to the agent who in turn endorse it, such note bearing interest and being given to the agent within the forty-five days or such period of credit given the agent by his customer, the agent advancing the premium to the company and either carrying the note till it matures or turning it over to his bank and receiving credit for it from his bank—is this practice in violation of the law referred to?

"If the above practice is in your opinion legal, would it be in violation of the law to accept a note as above *without interest,* the agent, in order to favor his customer, either carrying the account in that shape, or, if he discounts the note at his bank, standing the discount himself.

"Or, is it legal for the agent under any circumstances to advance a premium to his company without any settlement with his customer, the account being carried by him for an indefinite term, without a note or other evidence of indebtedness being given him, and either with or without a charge for interest on the outstanding premium when it may be subsequently paid."

The act to which you refer, House Bill No. 186, passed April 13, 1911, (102 Ohio Laws, page 81) is as follows (I only quote Section 1 of said act, as that is the only section necessary to consider with reference to your request) :

"Section 1. No corporation, association or co-partnership engaged in the state of Ohio in the guaranty, bonding, surety or insurance business, other than life insurance, nor any officer, agent, solicitor, employe or representative thereof shall pay, allow or give, or offer to pay, allow or give, directly or indirectly, as inducements to insurance, and no person shall knowingly receive as an inducement to insurance any rebate of premium payable on the policy, nor any special favor or advantage in the dividends or other benefits to accrue thereon, nor any paid employment or contract for services of any kind or any special advantage in the date of the policy or date of the issue thereof, or any valuable consideration or inducement whatsoever not plainly specified in the policy or contract of insurance or agreement of indemnity, or give or receive, sell or purchase, or offer to give or receive, sell or purchase, as inducements to insurance or in connection therewith any stock, bonds, or other obligations of an insurance company or other corporation, association, partnership or individual. But the provisions of this act shall not apply, however, to prevent the payment to a duly authorized officer, agent or solicitor of such company, association or co-partnership of commissions at customary rates on policies or contracts of insurance effected through him by which he himself is insured, provided such officer, agent or solicitor holds himself out as such and has been engaged in such business in good faith for a period of six months prior to any such payment; nor shall this act prohibit a mutual fire insurance company from paying dividends to policy holders at any time after the same has been earned."

The question to be answered is, whether the giving of credit by an agent to his customer is forbidden by the provision of the above quoted section, that "no agent * * * shall pay, allow or give, or offer to pay, allow or give, directly or indirectly, as inducements to insurance, * * * any valuable consideration or induce-

ments whatsoever not plainly specified in the policy or contract of insurance * * *," for it must be conceded that no other provision of this law could possibly cover this practice.

The question really is, can time within which to pay an insurance premium be given to a customer by an agent at all? The law does not specifically mention this practice, nor does it provide any time within which premiums shall be paid to the insurance companies. Therefore, the fact that companies extend to agents a period of forty-five days, or any other period, within which to settle for premiums collected by them, cannot enter into the consideration of this question; nor does the question depend for its solution in any way upon the fact as to notes being taken or not taken by the agent for the premium, or upon time when such notes are to become payable.

Sifting the question still further, it amounts to this, under the section above quoted, must all premiums for insurance be paid by the insured to the agent *in cash?* For, if credit is forbidden upon the assumption that for the agent to give credit to the insured amounts to a valuable consideration or inducement to insurance, then the extent of the credit is immaterial, and credit extended for one day would violate the requirements as well as credit extended for a longer period of time. It would be a favor granted to the insured.

Now, is it the intention of the law to prevent this? That is, to distinguish the business of insurance from all other classes of business so far as extending credit is concerned, and to provide that all payments made to insurance agents must be made in cash. It does not seem to me that this can be taken as the intention of this law. Its intention is to prevent rebates, that is, in its primary sense, payment back to the insured by the agent of some part of his premium, and the law has been so drawn as to cover such rebates in any possible form they might be made, but the practice above referred to does not amount to rebating; the full premium is paid to the company, and no concession, rebate or consideration not expressed in the policy whatever is given by the company to the insured; as between the company and the insured, the transaction is entirely closed when the company settles with the agent. To hold that the agent cannot extend credit to his customers, it seems to me, would work a great hardship, both upon the agent and upon the public, without, as I view it, any sufficient reason. It may be said that the practice of giving credit by agents to customers whose credit is good, and upon whom they may rely for payment, works a hardship upon the customer who is refused credit and compelled to pay cash. This may be true, but it is equally true of every branch of business in existence in which credit is extended, and this practically includes all business. It seems to me, therefore, that if the legislature had intended to prevent the giving of credit by agents to persons who insure with them, in other words, to require that all insurance premiums be paid in cash by the insured to the agent, it would have so provided in unequivocal terms. The practice is of such long existence, in such universal use, and so well known that I cannot conceive that, had the legislature thought it wise to prevent it, it would have done so by inference only.

I am, therefore, of the opinion that this practice cannot be included within the inhibitions of the act above quoted, and, for the reasons above stated, that the act is entirely silent upon this question, the questions propounded seriatim by you as to the giving of notes, the time of the same, etc., are all answered by the above conclusion, for the question is whether credit can be extended at all, and not as to the character or amount of the credit.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

677.

TRAVELING EXPENSES AND EXPENSES OF CONVENTIONS OF NATIONAL INSURANCE COMMISSIONERS ALLOWED.

Inasmuch as conventions of the National Insurance Commissioners are of vital interest to the proper administration of the state insurance department, and necessary to its efficient management, vouchers covering part of the expense of publishing reports of the meetings of its various committees, of stenographers and other like expenses, of yearly publication of a volume showing the value of securities to be deposited with the departments, a copy of which is furnished to each state, may be paid from the fund appropriated (102 O. L. 393) *for traveling expenses of superintendent and employees on official business and at meetings of actuaries and insurance department officials.*

COLUMBUS, OHIO, September 27, 1912.

HONORABLE E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

MY DEAR SIR:—I am in receipt of your letter of September 14, 1912, asking my opinion as to whether or not a certain voucher issued by your department to the secretary and treasurer of the National Convention of Insurance Commissioners, to cover the Ohio Insurance Department's share of the expenses of such National Convention lately held at Spokane, Washington, is legal and should be honored by the auditor of state.

You state that it is only through the conventions of the National Insurance Commissioners that the various state insurance departments keep in touch with one another and with the rulings of the various departments, and many other matters of vital interest to the proper administration of the state insurance department; that through these conventions practical uniformity in insurance legislation is being achieved; that these conventions are attended by the heads of insurance departments and other insurance officers of the states in the Union which maintain insurance departments; and that the expenses of such officials in attending such meetings are uniformly borne by the respective states.

It is also stated that a part of the expenses necessarily attendant upon such meetings are those covered by the voucher to which you refer, which include the expenses of publishing reports of the meetings and its various committees, stenographic and other like expenses, yearly publication of a volume showing the values of securities to be deposited with the various departments, a copy of which is furnished to each state, and other publications of the utmost value to your department in its workings, and that the voucher to which you refer is to pay the share of such expenses assessed to the state of Ohio.

I understand that it is considered by yourself, and was considered by your predecessors in the insurance department, that participation in these conventions was and is essential to the proper and efficient administration of the insurance department of Ohio.

I have ruled from time to time that in cases of state officers, where no specific appropriation is made, and where the statutes simply provide that such officers should be entitled to their actual and necessary expenses in the performance of their duties, that the expense of attending conventions and meetings of the heads of department could not be considered and allowed as an expense properly payable out of the appropriations for their departments, and that the only expenses that could be allowed to such officers were those actually incident to the performance of their duties.

But as I view it, the situation in regard to your department, and particularly in regard to the convention to which you refer, is different. In the general Appropriation Act (102 O. L., 393), at page 402, in the appropriations for the insurance department is found the following:

> "Traveling and other expenses of superintendent and employes on official business and at meetings of actuaries and insurance department officials----------$3,700.00"

This appropriation is in addition to the appropriation for contingent expenses, and the appropriations for furniture and carpets made to your department. As this appropriation has been made in this way for several years by the legislature, and from it is has been the custom to pay the assessment of the state of Ohio for the purpose of this convention, and no question has ever been raised as to such payment, and as from your letter and from other facts that have come to my knowledge, I coincide with your views that it is of the greatest assistance to the efficient administration of your department to participate in these conventions; it seems to me that it must be considered that this appropriaion was made by the legislature for the particular purpose of providing a fund from which you could pay the assessment of the state of Ohio on account of these conventions, and the necessary traveling expenses in attending the same.

My opinion, therefore, is that the voucher to which you refer is properly issued against this appropriation, and should be honored by the auditor of state.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

706.

INSURANCE COMPANIES—REQUIREMENT THAT ALL CAPITAL STOCK OF NON-DOMESTIC LIFE INSURANCE COMPANIES BE PAID UP, APPLIES TO COMPANIES WHOSE STOCK HAS BEEN INCREASED—WISCONSIN NATIONAL LIFE INSURANCE COMPANY.

Under Section 9366, General Code, non-domestic life insurance companies are not permitted to transact any business in this state unless the entire capital stock of the company is fully paid up and invested as required by the laws of its own state.

This section must be construed to require all of the capital possessed by a company at the time it sought to qualify to do business in this state, to be fully paid up and applies to increases of stock. A company, therefore, whose capital stock was originally $100,000 *when it was authorized to do business in Wisconsin, but subsequently had increased its capital stock to* $400,000, *cannot be permitted to do business in this state until the entire* $400,000 *has been paid up.*

COLUMBUS, OHIO, October 28, 1912.

HONORABLE EDMUND H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On August 27, 1912, you made the following request for my opinion:

> "Section 9366 with reference to the admission of non-domestic life insurance companies provides:

"'Any such company shall not take risks or transact any business of insurance in this state, unless possessed of the amount of actual capital required of similar companies organized in this state under the provisions of this chapter, nor unless the entire capital stock of the company is fully paid up and invested as required by the laws of the state where organized.'

"It has been the uniform ruling of this department under my predecessors, and I have placed the same construction on the statute, that at the time of the admission of any company making application therefor, its authorized capital stock should be fully paid up and invested, as provided in the statute.

"The Wisconsin National Life Insurance Company now makes application for admission to this state and takes issue with such ruling. Its capital stock was originally $100,000 when it was licensed to transact business in the state of Wisconsin. Subsequent to its admission, its capital stock was increased to $400,000, of which it has now issued about $318,300.

"Can this company, while the full amount of its authorized capital is not paid up and invested, as provided by the laws of its state, be admitted to transact the business of insurance within this state?"

Section 9365 of the General Code provides:

"No company organized by act of congress, or under the laws of any other state of the United States, shall transact any business of insurance defined in section ninety-three hundred and eighty-five, on the capital stock or mutual plan, in this state, until it procures from the superintendent of insurance a certificate of authority so to do; nor shall any person or corporation, directly or indirectly act as agent in this state for such a company, either in procuring applications for insurance, taking risks, or in any manner transacting the business of insurance, until such person or corporation procures from the superintendent of insurance a license so to do, in which he shall state that the company has complied with all requirements of the laws of this state applicable to it, and deposits a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent is established; for which filing the recorder may charge ten cents."

Section 9366 of the General Code provides:

"Any such company shall not take risks or transact any business in this state, unless possessed of the amount of actual capital required of similar companies organized in this state under the provisions of this chapter, nor unless the entire capital stock of the company is fully paid up and invested as required by the laws of the state where organized. But if it is a mutual company, actual cash assets of the same amount and description, invested and deposited as required by the laws of the state where it was organized, shall be accepted in lieu of capital stock."

I suppose that the contention in this matter has arisen because the original capital stock of the said company, namely $100,000, was fully paid up and was the full amount of capital stock required of a similar company in this state by Section 9343, and therefore it is claimed the words "the entire capital stock of the company is fully paid up" refer to the words "possessed of the amount of actual capital

required of similar companies organized in this state," that is, that if a company has the amount of capital stock required of similar companies in this state and said capital stock is fully paid up, then, that the requirement as to the capital stock being paid up is fully complied with, and that it would not attach to a subsequent increase of stock. To this view I am unable to give my assent. I realize that quite an ingenious argument could be based upon the contention, but Section 9366 seems to be plain in its meaning and this meaning, as it appears, should be given effect.

The first requirement is that the company must be possessed of the amount of capital required of similar companies organized in this state, and, secondly, that the entire capital stock of the company must be paid up.

There is no statement that its capital stock must only be paid up to the amount of one hundred thousand dollars. The requirements are distinct, and there is nothing in the statute as it stands from which it can be inferred that the requirement that the entire capital stock of the company must be fully paid up means anything more than what it says. In fact, as I view it, the use of the word "entire" indicates clearly that the legislature intended that all of the capital possessed by a company at the time it sought to qualify to do business in the state must be fully paid up.

Very truly yours
TIMOTHY S. HOGAN,
Attorney General.

546.

BUILDING AND LOAN ASSOCIATIONS—CONSTITUTIONAL RULE OF MEMBERSHIP—CONFLICT OF CONSTITUTION AND BY-LAWS

When the constitution of a building and loan association provides that a person can only become a member of the company by subscribing for or becoming the owner of stock, a by-law of such association providing that a person desiring to make straight loans may become a member by depositing $10 *is illegal and void.*

COLUMBUS, OHIO, July 17, 1912.

HON. E. H. MOORE, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—In your letter of June 22, 1912, you make the following request for my opinion:

> "A certain building and loan association, a copy of whose constitution and by-laws is enclosed herewith, provides in Article I of the constitution that its object shall be 'the raising of money *to be loaned to its members* and for such other purposes as are authorized by law' and the same provision is contained in Section 26 of the by-laws. They provide for installment and straight loans and in that same section (top of page 17) is contained the following:
>
> "'By depositing the sum of ten dollars persons desiring to make straight loans can become a member of this company.'
>
> "Will you kindly advise whether, in the absence of provisions in the constitution for the making of loans to other than members, they are authorized to make loans under the condition contained in the above-quoted clause?"

Article 1, of the constitution of the company to which you refer is as follows:

"Section 1. The name of this company shall be The———Company and its principal office shall be located in ——, in ——, in the state of Ohio, and the object and purpose of this company shall be the raising of money to be loaned to its members and for such other purposes as are authorized by law."

Article III, Section 1, defines who shall be members of this association, and is as follows:

"Section 1. Any person, upon subscription for, or in any way becoming owner of one or more shares of the capital stock of this company or the fraction of a share of said stock, shall become a member thereof, and as such shall be entitled to all the benefits and privileges and subject to all the liabilities and duties of membership as prescribed by the constitution and by-laws."

It will be noted from this article of the constitution that a person can only become a member of this company upon subscribing for, or in some way becoming the owner of one or more shares of the capital stock of the company or a fraction of a share of such stock.

Coming now to the by-laws of this company, Section 26 of the same provides for a loan to members of the company. The first paragraph of this section is as follows:

"Section 26. The funds of the company may be loaned to the members thereof upon real estate, and upon such terms as the board of directors may determine. The board shall have the privilege of rejecting any and all loans, having regard for the character of the applicant as well as the security offered.

This section then goes on to provide for the security which shall be given for loans on real estate; for the application to be made for the same, and classifies such loans as installment and straight loans; installment loans being those to be repaid by weekly payment of dues, interest and premiums; straight loans are those contracted to be paid at a definite future date, with quarterly or semi-annual interest; then follows the following provision:

"By depositing the sum of ten dollars persons desiring to make straight loans can become a member of this company."

It is my opinion that under the laws of this state, and under Section 1 of Article 3 of the constitution of this company, a person can only become a member of this company by subscribing for, or becoming the owner of stock, and that the above-quoted provision of Section 26 of the by-laws of said company is void insofar as it provides that a person can become a member of the company simply by making a deposit of $10.00.

Section 9657 of the General Code is as follows:

"To make loans to members and others on such terms, conditions and securities as may be provided by the association."

Therefore, this company, in order to make loans to persons not members of it,

must make proper provision therefor by amendment to its constitution and by-laws; no such provision being incorporated in its constitution as it now stands.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

575.

BUILDING AND LOAN ASSOCIATIONS—"CONTINGENT LOSS" RESERVE FUND—PAYMENT OF TAXES AND COURT COSTS IN FORECLOSING PROCEEDINGS—ATTORNEYS' FEES PAID FROM EARNINGS AS "EXPENSES."

The term "contingent losses," as employed in Section 9671 of the General Code, requiring building and loan associations to pay all such out of a reserve fund created for that purpose, must be distinguished from the term "expenses," which, in accordance with Section 9672 and 9673 of the General Code, are required to be paid out of the earnings.

Ordinarily, when an investigation is being carried upon the books of the company at a profit, the costs of foreclosure, such as taxes, court costs, attorneys' fees, etc., should be charged as expenses and paid out of the earnings.

In a foreclosure proceeding, however, when property mortgaged to the company, is sold at a loss, the term "losses" means "the difference between the amount invested by the loan association in a given case and the amount received back by the company when the investment is terminated." In such a foreclosure, therefore, the difference between the amount loaned and the amount received for the property, after the costs and taxes are paid out of the proceeds of sale, must be charged to the reserve fund authorized under Section 9659 of the General Code for the payment of "contingent losses."

Attorneys' fees in such proceedings not being paid out of the proceeds, and being entirely under the control of the company, should be paid as expenses out of the earnings of the company.

COLUMBUS, OHIO, July 30, 1912.

HON. E. H. MOORE, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—In your letter of May 10, 1912, you request my opinion on the following:

> "Section 9659 General Code authorizes building and loan associations
>
> "'To accumulate from the earnings a "reserve fund" for the payment of contingent losses, and an "undivided profit fund," both of which may be loaned and invested as other funds.'
>
> "Will you kindly advise whether such authority to use the reserve fund for the payment of 'contingent losses' includes the right to charge against such fund amounts expended to cover taxes, court costs, attorney fees, etc., in foreclosure proceedings or only the actual loss represented by the difference between the amount due the association and the amount realized from a subsequent sale of real estate acquired by the association in the above manner, the payment of amounts due for taxes, court costs, attorney fees, etc., to be made out of earnings the same as other expenses?"

Section 9659 General Code provides as follows:

"To accumulate from the earnings a 'reserve fund' for the payment of contingent losses, and an 'undivided profit fund,' both of which may be loaned and invested as other funds of the association."

Section 9671 General Code provides:

"The amount to be set aside to the reserve fund for the payment of contingent losses shall be determined by the board of directors, but in all permanent or perpetual associations, at least five per cent. of the net earnings shall be set aside each year to such fund until it reaches at least five per cent. of the total assets. All losses shall be paid out of such fund until it is exhausted. When the amount in such fund falls below five per cent. of the assets as aforesaid, it shall be replenished by annual appropriations of at least five per cent. of the net earnings as hereinbefore provided until it again reaches such amount."

Section 9672 of the General Code provides:

"All expenses of such association shall be paid out of the earnings only, and so much of the earnings as may be necessary must be set aside each year for such purpose. But charges incident to a loan, if paid by the borrower, shall not be deemed a part of the current expenses."

Section 9673 of the General Code provides:

"After payment of expenses and interest, a portion of the earnings to be determined by the board of directors, annually or semi-annually, shall also be placed in the reserve fund for the payment of contingent losses, as hereinbefore provided, and a further portion of such earnings to be determined by the board of directors, shall be transferred as a dividend annually or semi-annually, in such proportion to the credit of all members as the corporation by its constitution and by-laws provides, to be paid to them at such time and in such manner in conformity with this chapter as the corporation by its constitution and by-laws provides. Any residue of such earnings may be held as undivided profits to be used as other earnings, except that such undivided profit fund at no time shall exceed three per cent. of the total assets of the association."

Section 9674 of the General Code provides:

"All losses shall be assessed in the same proportion and manner on all members after the amounts in the reserve fund and the undivided profit fund have been applied to the payment thereof."

It will be seen that Section 9659 General Code gives the authority for creating a "reserve fund" and an "undivided profit fund," and the other sections quoted provide for the creation and management of these funds. The statute states the "reserve fund" is for the payment of "contingent losses," and from the language used in Section 9671 General Code "all losses shall be paid out of such fund until it is exhausted, I take it that the words "contingent losses" means whatever losses may occur must be paid out of this fund. It is also seen that the words

"contingent losses" as used in these sections are used in contradistinction to the term "expenses" as used in Section 9672 and 9673 General Code, and that all "expenses" must be paid out of the earnings and not out of the reserve fund.

The question you ask arises from a foreclosure proceeding, and, though it is not so stated, I take it that the association was compelled to buy in the property, and afterwards sold the same, and that, after this sale it charged the amount expended as costs, taxes and attorney fees to the reserve fund. This question should be decided without reference to whether the property is bought in by the company or is purchased at foreclosure sale by some third person, and the procedure as to charging whatever loss occurs, and expenses connected with the foreclosure should be the same in either event. The question is one of fact whether the items named by you should be classed as "losses" or "expenses" for the statute makes it plain that all "losses" must be paid out of the reserve fund and "expenses" must not. I take it that the word "losses" as used in this connection means the difference between the amount invested by the loan association in a given case and the amount received back by the company when the investment is terminated. That is, an actual depreciation of the principal sum invested. For instance, under the statutes quoted the interest on an investment after it is made is credited to the earnings of the company. The amount paid out during the year for repairs, taxes, insurance, etc., would be classed as "expenses" paid out of the earnings under Section 9672 General Code, while the investment would be carried on the books of the company in the actual amount placed by the company in the same. An illustration is perhaps helpful in deciding a question of this character. Suppose the building and loan association has $2,000.00 loaned upon a tract of real estate, said loan being secured by mortgage; it becomes necessary to foreclose the mortgage. The real estate is brought to sale through the foreclosure proceeding; it sells to a third person for $1,500.00. The costs amount to $150.00, the taxes to $150.00 and the attorney fees to $100.00. The purchaser would pay to the sheriff the full amount of his bid, viz. $1,500.00; out of this the court would order paid the costs and taxes amounting to $300.00 and the balance of the purchase price amounting to $1,200.00 to be paid to the association. The attorney fees could not be charged as part of the costs, and, of course, would have to be taken care of by the association irrespective of the amount realized from the sale of the property. Therefore, the loss to the company would be the difference between the amount invested in this real estate, namely, $2,000.00 and the amount received from the sheriff, namely $1,200.00, and would be $800.00, which undoubtedly should be charged to the "reserve fund."

The attorney fees, it does not seem to me, should be so charged, but they should be paid as all the ordinary expenses incurred by the company during the year are paid.

"Expenses" primarily means money paid out. In this instance, the only money paid by the company is the attorney fees, for the costs and taxes are paid out of the proceeds of the sale of the real estate, and it would have to pay its attorney fees irrespective of whether the property sold for more or less than it had invested in the mortgage. Then too, the company has no control whatever over the amount of court costs or taxes, but it does to a certain extent have control of the amount of the attorney fees; that is a matter about which it can contract, and in case it has an attorney employed by the year, who is to perform all its legal services at a given compensation the amount expended by it in a given year as attorney fees would not be affected at all by the foreclosure proceedings. The costs and taxes are inseparable from the foreclosure proceedings; that is, they have a distinct bearing upon the result to the company for they must be paid out of the proceeds of the sale of the real estate, and in case the real estate is bid in by the company it must pay these costs and taxes before it can obtain a deed to the property. This is not true as to attorney fees.

Referring again to the case I have stated suppose the property instead of being bought in by a third person is bought in by the company, it seems to me that the procedure would be the same. From the amount bid by the company for the property should be deducted the amount of taxes and costs which it would have to pay before receiving a deed, and the remainder should be subtracted from the amount due the company on its mortgage, and this difference should be immediately charged to the "reserve fund," and the real estate then carried on the books of the company at the amount bid for the same less said costs and taxes.

The transaction should be closed at the time the foreclosure is terminated. and whatever loss has been incurred by the company should be charged to the "reserve fund" at that time, and the property thereafter carried on the books of the company at the cost of the same to the company in the foreclosure case.

I take it from your letter that perhaps no definite rule has been heretofore announced by your department as to the method of charging these items of costs, taxes, and attorney fees in such cases, and I, therefore, suggest that if any building and loan associations have heretofore charged the amount expended by them as attorney fees in foreclosure cases to the "reserve fund" and such charge has been made in good faith and under the belief that it was properly so charged that no exceptions be taken to the same at this time, but that all companies be now advised that henceforth attorney fees incurred in foreclosure proceedings cannot be charged to the "reserve fund," but must be paid out of the earnings.

Very truly yours

TIMOTHY S. HOGAN,
Attorney General.

(To the State Liability Board of Awards)

42.

STATE LIABILITY BOARD OF AWARDS—DATE OF ACT A DIRECTORY PROVISION—STATUTORY CONSTRUCTION.

The time, Jan. 1, 1912, in Section 20-2 of the Employer's Liability Act (102 O. L. 524) is a directory not a mandatory provision, and under the circumstances existing by reason of delay caused the board by the litigation involving the constitutionality of the act, a departure from the terms in this connection, may be permitted.

COLUMBUS, OHIO, January 8, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I have your inquiry of December 23, 1911, which is as follows:

"We most respectfully request your opinion as to the proper construction of Section 20-2 of the act entitled, 'An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards,' (102 O. L. 524), as to whether the time therein mentioned, to-wit: January 1, 1912, is mandatory or directory only.

"In requesting your opinion on this matter a word of explanation is perhaps necessary. As you know, an action was brought in the supreme court on November 16th last, the effect of which was to raise the question as to the constitutionality of the act. Since the beginning of this action, no funds have been available for any of the purposes for which appropriations were made by the general assembly for the use of our board, as a consequence of which, our efforts in preparing to put the law into full operation on January 1, 1912, have been seriously handicapped. The action above referred to is still pending in the supreme court undecided, and it is our opinion that until a decision is rendered, employers and employees will not desire to adopt the plan outlined in the act in question.

"We would therefore like to have your opinion at as early a date as possible, as to whether the date mentioned in said section is mandatory, or whether, if this board defers the determination and publication of the 'premiums of liability risk in the classes of employment' required by said section until after that date, employers will nevertheless be deprived of the defenses mentioned in Section 21-1 on and after January 1, 1912."

Section 20-2 of said act is as follows:

"For the purpose of creating such state insurance fund, each employer who employes five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employes in this state, having elected to accept the provisions of this act, shall pay on or before January 1, 1912, semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the state liability board of awards. The said employers for themselves and their employes shall make such payments to the state treasurer of Ohio, who shall receive and place the

same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employes in the following proportions, to-wit: Ninety per cent. of the premium shall be paid by the employer and ten per cent. by the employes. Each employer is authorized to deduct from the pay roll of his employes ten per cent. of the said premiums for any premium period in proportion to the pay roll of such employes; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employe showing the amount which has been deducted and paid into the state insurance fund."

Section 21-1 of said act is as follows:

"All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common law defenses:

"The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence."

In answer to your first question my opinion is that the provision in Section 20-2 as to time, under the circumstances, must be considered as directory. The general rule is, as given in Lewis' Sutherland on Statutory Construction, Section 612:

"Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform, an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer. * * *"

See also cases cited under this section.

In addition to this, the rule is further, that in deciding whether a statutory provision is directory or mandatory in each case, it is necessary to consider the particular subject matter of the legislation and the importance of the provision, and the relation of the provision to the general object to be attained by the act.

In this particluar instance it has been impossible for your board to put this law into full operation by the date named in the statute, and it seems to me that the conclusion must be that the law is to become operative on January 1, 1912, or as soon thereafter as your board is able to take all the preliminary steps necessary to the proper installment of the law.

Answering your second question, it seems clear that employers will not be deprived of their defense as provided in Section 21-1 of the act until they have

been given a chance to comply with the provision of the act, this, of course, the employers cannot do until your board has made all the necessary preliminary arrangements. The employers are in no manner at fault and of course under the act itself cannot be deprived of their defenses unless they have been given an opportunity to accept the provisions of this act. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

60.

STATE LIABILITY BOARD OF AWARDS—CLASSIFICATION OF EMPLOYMENTS—PREMIUMS—NO POWER TO DISCRIMINATE AMONG MEMBERS OF A CLASS.

It is the duty of the state liability board of awards to classify employment according to the risk, the total pay roll and the number of men employed, and to fix the premiums of each class accordingly.

The board has no authority to classify in such a way as to afford different rates to different establishments of a determined class.

COLUMBUS, OHIO, January 11, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of December 28, 1911, in which you request my opinion as follows:

> "We desire your opinion as to the extent of the powers and duties of the state liability board of awards as defined by Section 17 of the act entitled, 'An Act to Create a State Insurance Fund for the Benefit of Injured, and the Dependents of Killed Employes, and to Provide for the Administration of Such Fund by a State Liability Board of Awards,' in the following particulars, viz:
>
> "Under said Section 17 are the powers of the board limited to designating each specific employment as belonging to a class, and fixing a specific definite rate of premium which will apply equally to each and every employer employing workmen or operatives in that particular class of employment? Or, does the board have the further power, after having adopted a classification of employments, to take into consideration the varying conditions under which employers employing workmen or operatives in the same class of employment conduct their business, and vary the rate of premium to be charged accordingly?"

For the purpose of answering your inquiries, I herewith qoute the following sections of the act establishing the state liability board of awards, as found in 102 O. L., 524:

> "Section 17. The state liability of awards shall classify employments with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total pay roll and number of employes in each of said classes of employment, sufficiently large to provide an adequate fund for the compensation provided for in this act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year.
>
> "Section 18. The state liability board of awards shall establish a

state insurance fund from premiums paid thereto by employers and employes as herein provided, according to the rates of risk in the classes established by it, as herein provided, for the benefit of employes of em-employers that have paid the premiums applicable to the classes to which they belong and for the benefit of the dependents of such employes, and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of said fund.

"Section 20-2. For the purpose of creating such state insurance fund, each employer who employes five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employes in this state, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the state liability board of awards. The said employers for themselves and their employes shall make such payments to the state treasurer of Ohio, who shall receive and place the same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employes in the following proportions, to-wit: Ninety per cent. of the premium shall be paid by the employer and ten per cent. by the employes. Each employer is authorized to deduct from the pay roll of his employes ten per cent. of the said premiums for any premium period in proportion to the pay roll of such employes; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employe showing the amount which has been deducted and paid into the state insurance fund.

"Section 21. The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, that have been injured in the course of their employment, wheresoever such injury has occured, and which have not been purposely self inflicted, or to their dependents in case death has ensued."

In construing Section 17 in connection with the other sections quoted, it seems clear that it is the duty of your board to make a classification of the employments and then to determine the particular class to which a certain employment belongs, and to place it in that class. The rate of premium of each employment in a given class would, necessarily, be the same. If it were held that after your board had made a classification of *employments,* it had the further right, or it was its duty, to reclassify the different *establishments* in each class, then it would become necessary for your board to make an independent investigation of the manner in which each employer conducts his business; it is difficult to conceive how accurate information on a subject of this kind could be ascertained; you would either have to depend on hearsay, or to await the outcome of a period of observation. Neither method would be satisfactory or proper. On the other hand, the establishment of a classification of the various employments, by means of statistical information now in existence, can be made with a great degree of accuracy.

My opinion, therefore, is that after you have fixed a definite rate of premium for a definite class that that rate will apply to each and every employer in such class, and that your board has no authority to take into consideration the different conditions under which employers conduct their business, nor to vary the rate in a given class on account of any such consideration.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

70.

STATE LIABILITY BOARD OF AWARDS—PAYMENT OF INSURANCE FUNDS—STATUTORY PROVISIONS NOT IN CONFLICT WITH SECTION 301 GENERAL CODE—DISBURSEMENT OF STATE TREASURY FUNDS—VOUCHERS SIGNED BY MEMBERS OF BOARD.

Section 19 of the act creating the state liability board of awards providing that disbursements from the insurance fund shall be made upon vouchers signed by members of the board of awards is not in conflict with but is an exception to Section 301 General Code which provides that no money shall be paid out of the state treasury except upon the warrant of the auditor of state.

COLUMBUS, OHIO, January 8, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I have your inquiry of January 2nd which is as follows:

> "Section 19 of the liability law, which is as follows:
>
> "'The treasurer of state shall be the custodian of the state insurance fund, and all disbursements shall be paid by him, but upon vouchers signed by any two members of the state liability board of awards,' seems to be somewhat in conflict with Section 301 and the relating sections of the General Code of Ohio. Said section 301 is as follows:
>
> "'No money shall be paid out of the state treasury, or transferred from it to a county treasury or elsewhere, except on the warrant of the auditor of state. No money in the treasury to the credit of the sinking fund shall be paid out except on such warrant and the requisition of the sinking fund commissioners.'
>
> "It is desired by this department that you reconcile what seems to be a conflict in the laws.
>
> "This department has assumed that under Section 19 of the liability law disbursement from the state insurance fund may be made upon a warrant or check drawn by the state liability board of awards directly against said fund, and forms and systems have been devised according to this assumption; but, in conference with the state treasurer the question was raised and upon his suggestion this inquiry is addressed to you."

You state that it is desired by your department that I reconcile what seems to be a conflict in the laws. You have quoted the two laws above but to better answer your inquiry I will now quote them again:

> Section 301 of the General Code is as follows:
>
> "No money shall be paid out of the state treasury or transferred from it to a county treasury or elsewhere, except on the warrant of the auditor of state. No money in the treasury to the credit of the sinking fund shall be paid out except on such warrant and the requisition of the sinking fund commissioners."

Section 19 of the act creating the state liability board of awards 102 O. L., 528 is as follows:

> "The treasurer of state shall be the custodian of the state insurance

fund, and all disbursements therefrom shall be paid by him, but upon vouchers signed by any two members of the state liability board of awards."

In my opinion there is no conflict whatever in these laws. The first quoted is the general provision, and in the absence of special provisions controls the payment of all moneys out of the state treasury by the treasurer of state. There is no constitutional provision governing this matter, and therefore it is properly regulated by the legislature. The second law above quoted is not in conflict with the first but is simply a special regulation as to a special fund, and as to that fund controls.

In the case of Cincinnati vs. Connor, 55 O. S. 82, the court per Williams, C. J., used the following language (page 88):

"We recognize it to be a well settled rule of statutory interpretation that: 'Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered an exception to the general one,' and hence 'if there are two acts, or two provisions in the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also; and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision.' Endlich on Inter. Stat., Section 216; Sedwick on Stat. and Const. Law, Section 652. Maxwell on Inter. of Stat. p. 202, Second Ed."

In State vs. McGregor, 44 O. S. 628-631 this court held, per Marshall J., that:

"The courts presume an intention in the legislature to be consistent in the making of laws; and also to have had a purpose in each enactment and all its provisions. Special circumstances often create a necessity for appropriate special provisions different from the general rule upon the same subject; and so, where such provisions are found in a statute, different from the general provisions that would apply to the case, the courts must assume that the special provisions were made for adequate reasons, and give them effect by construing them as exceptions to the general rule in the general provisions of the statute."

See also the case of Gas Company vs. Tiffin, 59 O. S. 420-441 in which Judge Williams uses the following language:

"It is a settled rule of construction, that special statutory provisions for particular cases operate as exceptions to general provisions which may otherwise include the particular cases, and such cases are covered by the special provisions."

These citations, it seems, definitely settle this question, and it may further be said that this fund is different from any other fund in the hands of the treasurer of state. In its proper sense it is not the money of the state at all, but belongs to the employers and employes contributing to said fund, and the state simply acts as trustees for the same, and there are many reasons which may, and probably did, actuate the legislature in providing for a less cumbersome and more prompt method of making payments out of the same.

My opinion, therefore, is that this fund is to be dispensed by the treasurer of state upon voucher signed by two members of the state liability board of awards.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

98.

EMPLOYERS' LIABILITY LAW—"AVERAGE WEEKLY WAGE"—"IMPAIRED EARNING CAPACITY"—DISCRETION OF BOARD

The "average weekly wage" as a basis for payments to injured or killed employes, within the meaning of the employers' liability law is the amount earned weekly by such employes, except in those cases specifically provided for wherein an injured employe is of such age and experience that under natural conditions, his wages might be expected to increase. In this instance the discretion of the board must be allowed to rule upon special circumstances of each case. The same discretion must be exercised in determining the "impaired earning capacity."

COLUMBUS, OHIO, January 11, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I am in receipt of the following letter from you, dated December 28, 1911:

> "We desire the opinion of your department as to the proper construction of Sections 26, 27, 28 and 31 of the act entitled, 'An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards,' in the following particulars, viz.:
>
> "1st. Section 26 provides that 'in case of temporary or partial disability' an injured employe shall receive 'sixty-six and two thirds per cent. of the impairment of his earning capacity,' etc.
>
> "What elemtnts are to be considered by us in determining the 'earning capacity?'
>
> "2nd. Section 27 provides that 'in case of permanent total disability the award shall be sixty-six and two thirds per cent. of the average weekly wage,' etc. Section 28 also makes the 'average weekly wage' the basis of payments made to dependents of killed employes, Section 31 provides: 'the average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.'
>
> "The many questions that the language of the foregoing sections suggest are obvious, and inasmuch as this board is required by Section 17 of the act to base the rates of premium to be charged upon the total payroll (which we understand to mean the annual payroll) and the number of employes (which we understand to mean the average number for the payroll period) it is apparent that the method of ascertaining the 'average weekly wage' which forms the basis of payments from the fund, will be an important factor in determining the rates of premium to be charged, to create the fund.
>
> "We are now engaged in the classification of employments and the

fixing of rates, and before proceeding further respectfully request your construction of the sections of the act hereinbefore enumerated."

The sections to which you refer, as they appear in 102 O. L. 524, (at page 530 et seq.) are as follows:

"Section 26. In case of temporary or partial disability, the employe shall receive sixty-six and two-thirds per cent. of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employe's wages were less than five dollars per week, then he shall receive his full wages; but not to continue for more than six years from the date of the injury, nor to exceed three thousand four hundred dollars in amount from that injury.'

"Section 27. In case of permanent total disability the award shall be sixty-six and two-thirds per cent. of the average weekly wage, and shall continue until the death of such person so totally disabled, but not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employe's wages were less than five dollars per week, then he shall receive his full wages.

"Section 28. In case the injury causes death within the period of two years the benefits shall be in the amounts and to the persons following:

"1. If there be no dependents, the disbursements from the insurance fund shall be limited to the expense provided for in Sections 23 and 24.

"2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wage and to continue for the remainder of the period between the date of the death and six years after the date of the injury, and not to amount to more than a maximum of thirty-four hundred dollars, nor less than a minimum of one thousand five hundred dollars.

"3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wage and to continue for all of such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-four hundred dollars.

"Section 31. The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits."

I also call your attention to Section 32 of this act, which section provides as follows:

"If it is established that the injured employe was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the face may be considered in arriving at his average weekly wage."

My opinion is that Section 31 is a general section providing the basis upon which to compute the benefits payable on account of any injury to an employe, whether death results from such injury or not, and that by "earning capacity" is meant the "average weekly wage," except in such cases as are provided for by Section 32 of the act, where the injured employe was of such age and experience that

under natural conditions his wages would be expected to increase. When this condition exists, then, and then only, is it important for your board to ascertain what the earning capacity of such employe is.

The only way by which you can arrive at the "average weekly wage" referred to in Section 32, would be to ascertain what the weekly wages of the employe were at the time of the injury, his physical condition, the nature of the work in which he was employed, his intelligence, his age, and, as there is no definite rule laid down in any of the authorities as to a case of this kind, any other particular fact that in the given instance would assist you in arriving at your conclusion as to the extent to which his wages would reasonably be expected to be increased.

In all other cases, it seems to me, by the statutes themselves, the average weekly wage of the employe is to be the basis of your computations. The earning capacity of a workman, or employe, must necessarily be the amount of his average weekly wage.

After a great deal of investigation and careful search, of the authorities, I find that it is impossible to specify a particular method by which your board can ascertain the average weekly wage. My opinion is, that this matter is left entirely to your own proper discretion, that on account of the many essential differences in the various employments, and the fact that in the multitude of employes in this country, practically no two are alike in all respects, it would be utterly impossible to lay down any hard and fast rule that would apply with equality and fairness to all employments. It seems to me that in each instance where it is necessary for your board to determine as to the average weekly wage, the application of common sense to the facts in the particular case before you will be found more satisfactory and just than the application of any fixed rule of law, that is you will have to take into consideration in each given case the facts which will enable you to arrive at a fair and just conclusion as to what the average weekly wage of the employe under consideration may be. One of the elements you must consider is that, of course, of time, i. e. the time you should take in arriving at an average, and it would be impossible to fix any definite period which would apply to all cases; in some cases the period to consider may only be a day, in other cases it may require that you consider the time for one or two or more years; what is essential is that the period taken be one which, for the purposes of ascertaining the average weekly wage, will be in all respects normal. As I have stated, it is impossible to lay down any hard and fast rule in this regard, and therefore it is unnecessary to even mention the other elements you must consider, as these will in each instance depend upon the case being considered; facts which control in one case may have no application whatever in another. I, therefore, repeat that this is a matter for your own discretion.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

187.

EMPLOYERS' LIABILITY ACT—"REGULARLY" DOES NOT MEAN "CONTINUOUSLY"

The word "regularly" as employed in the employers' liability act referring to employers of five or more workmen regularly does not mean "continuously."

COLUMBUS, OHIO, March 9, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter February 5th enclosing a letter to you from the secretary of a certain Builders' Exchange, baking inquiry as to the construction placed by your board upon the word "regularly" as used in a certain section of the act creating your board, (102 O. L. 524); you also enclose the reply of Mr. Yaple of your board to the said letter, and you request my opinion as to whether the word "regularly" as used in Sections 20-1, 20-2 and 21-1 of the act creating your board should be construed to mean "continuously" or not.

The act providing for the state liability board of awards, passed May 31, 1911 (102 O. L., 524) is now incorporated in the General Code as Sections 1465-37 to 1465-81, inclusive. The word "regularly," to which you refer, is used in the following sections, and I shall quote only so much of same as is sufficient to indicate the question to be considered:

Section 1465-57 (Section 20-1):

> "Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages.* * *"

Section 1465-58 (Section 20-2):

> "For the purpose of creating such insurance fund, each employer who employs five or more workmen or operatives *regularly* in the same business, or in or about the same establishment, and his employes in this state, having elected to accept the provisions of this act, shall pay * * *"

Section 1465-60 (Section 21-1):

> "All employers who employ five or more workmen or operatives *regularly* in the same business, or in or about the same establishment, who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employe for damages * * *"

I have carefully read the reply of your board through Mr. Yaple, above referred to, and it seems to me that the view he takes of this question is absolutely correct, and I herewith incorporate in this opinion the following extract from his letter, which is directly in point:

> "I do not think that the word 'regularly,' as used in said section, should be construed as meaning continuously, because that would not be a common sense construction. An employe may be regularly employed by his employer and yet not be actually engaged at his employment more than

half of the calendar year; such, for instance, is the case in the coal mining industry of the state, where the number of days which the average miner is employed is about 160 days in each year. The same is true to a certain extent in the building trades, where many contractors regularly employ certain men throughout the year when weather conditions are not unfavorable to the prosecution of their work, but in certain seasons may entirely suspend operations because of unfavorable weather conditions. Personally, I would say that if the employer regularly employs five or more employes during each portion of the year as the nature of his business permits him to operate, he would come within the provisions of this law."

As said in the above extract, to hold that the word "regularly" as used in the above sections, meant "continuously," would be opposed to common sense. It would also be opposed to the real meaning of the word "regularly." The word "regularly," I take it, is derived from the word "regula" meaning a rule, and therefore the following definitions as given by Webster should be held as expressing the proper meaning of the word as used in this act. The definition is:

"Governed by rule or rules; steady or uniform in course, practice or occurrence; not subject to unexplained or irrational variation; returning or recurring at stated or fixed times or uniform intervals; steadily pursued; usually or generally received, used, etc.; orderly; methodical; * * *"

The proper synonyms of "regular" are *normal, typical;* regular being the opposite of irregular; normal being the opposite of abnormal.

The word "continuous," as defined by Webster, means:

"Having contiguity of parts; without break, cessation, or interruption; without intervening space or time; uninterrupted; unbroken; constant; continued."

It is obvious, considering the above definitions, that in no sense can the word "regularly," as used in the above sections, be so construed as to mean "continuously." In fact, the word "continuously," if used in said sections and strictly construed, would make the law not applicable to the vast majority of establishments in this state, and, therefore, as the word "continuous" is not a synonym of the word "regular," in the sense as used in this act, and as there is nothing in the act which indicates, even by inference, that it was the intention of the legislature that the word "regularly" should be construed as meaning "continuously," and as common sense and the facts as they exist both required that the word be given its plain and ordinary meaning, I have no hesitancy whatever in holding that this word should not be construed to mean "continuously."

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

190.

PUBLICATION OF PREMIUMS OF LIABILITY RISK—METHOD REQUIRED TO BE ADOPTED BY BOARD.

As there is no specific statutory direction as to the particular method of publication of the established premiums of liability risk, any means which satisfies the proper definition of the word "publication" will suffice. A form of classification and rate book or information pamphlet is recommended.

COLUMBUS, OHIO, March 6, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—In your letter of February 14, 1912, you request my opinoin upon the following questions:

Section 20-2 of 102 O. L. 524, provides, among other things, as follows:

> "For the purpose of creating such state insurance fund, each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establisment, and his employes in this state, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be *determined and published* by the state liability board of awards.
>
> "We will, in a day or two, determine 'the premiums of liability risk in the classes of employment,' and we desire your opinion as to the method we should adopt in publishing the same; that is, is publication in a newspaper as legal publications are required to be made, contemplated, or will we have complied with the statute by making known through the press, or by communications mailed to the various employers of the state, or by the printing and issuing of a classification and rate book, the various classifications and rates applicable to each?"

Inasmuch as there is no general provision of the General Code as to how notices or other matters required to be published shall be published, and as the act establishing your board is entirely silent as to the method by which you shall publish the premiums of liability risk, in the classes of employment, as may be determined by you, it seems to me that any procedure on your part which would fulfil the definition of the word "published" would, in law, be sufficient. The word "publish" is defined by Webster as follows:

> "1 To make public; to make known to mankind or to people in general; to divulge, as a private transaction; to promulgate or proclaim, as a law or edict.
>
> "2. To make known by posting, or by reading in a church.
>
> "3. To send forth, as a book or other literary work; to issue; to emit.
>
> "4. To utter or put into circulation; as to publish counterfeit paper."

The definition given in the Standard Dictionary is practically the same as that given by Webster.

In Cyc., Volume 32, page 1258, under the head "publish," appears the following:

"To make known; to issue; to make known what before was private; to put into circulation; to proclaim; to make known generally; to send forth, as a book, newspaper, magazine, musical piece or other printed work, either for sale or for general distribution."

In the case of Plimpton vs. Malcolmson, 3 Ch. D. 531, it was held that:

"The word 'publish' means, made known to the public. In this sense the enrollment in the English Patent Office of a specification, is a publication of its contents."

It is my opinion, from the above definitions, that in the absence of statutory direction for you to make publication of the premiums of liability risk in the classes of employment as determined by you, in a newspaper, in the method usually prescribed for legal publications, it is not necessary for you to make such publication in a newspaper, and that if you make known through the press that you have established the premiums of liability risk in the classes of employment, and that the same may be had by application to your board; and also print a classification and rate book and send the same to the various employers of the state or notify the said employers by separate communications of the classifications and rates, that you would have fully complied with this law. In fact, it would seem that if you simply make known through the public press that you have determined the premiums of liability risk in the classes of employment, and that the same will be furnished to any employer requesting the same, you would have complied with the law; but as this is an entirely new department it would seem best, if there are no serious objections thereto, that you issue a classification and rate book, or some book or pamphlet that will give all the necessary information as to the premiums of liability risk in the classes of employment as determined by you, and mail the same to every employer in the state, so far as you are able to do so.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

229.

EMPLOYES WHO WORK IN OWN SHOPS AND UNDER NO CONTROL OF EMPLOYER NOT WITHIN EMPLOYERS' LIABILITY ACT.

Employes who work for an employer in their own shops over which the latter exercises no control, do not come under the terms of the Employers' Liability Act.

These piece workers themselves, if they employ more than five men regularly in or about the same establishment, are subject to the liability act.

COLUMBUS, OHIO, March 8, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of February 9, 1912, enclosing a letter to you from a certain employer, which letter is as follows:

"Some of our employes work in shops which they provide for themselves and over which we exercise no control further than with reference to the sanitary condition of the shop and the quality of workmanship produced. These employes visit premises controlled by us only when

calling for work or pay or when delivering work to us. All their work is paid for by the piece and they employ and pay for their own assistants as they see fit. We do not know if we should or should not list these people as employes under the new law.

"Will you please advise us as soon as possible because we desire to apply for insurance and it is obvious that we cannot figure the number of employes according to law nor can we estimate pay rolls intelligently until we hear from you.

"If these people are to be considered employes, will you please state whether we are to list their assistants as employes."

You ask my opinion upon the question submitted.

Although there are several sections of the act establishing the state liability board of awards, and providing for its duties, which apply in a way to the question asked, as you are familiar with all these sections, I shall quote only the following section, which is suffiicent for the purposes of this opinion:

"Section 1465-58, General Code (Section 20-2 of the act found in 102 O. L. 524 et seq.) For the purpose of creating such state insurance fund, each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employes in this state, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the state liability board of awards. The said employers for themselves and their employes shall make such payments to the state treasurer of Ohio, who shall receive and place the same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employes in the following proportions, to-wit: Ninety per cent. of the premium shall be paid by the employer and ten per cent. by the employes. Each employer is authorized to deduct from the pay roll of his employes ten per cent. of the said premiums for any premium period in proportion to the pay roll of such employes; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employe showing the amount which has been deducted and paid into the state insurance fund."

The question to be determined is the meaning of the words "each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employes in this state." I take it that the obvious meaning of this language is that it designates an establishment where five or more workmen or operatives are regularly working for an employer, or a business in which five or more workmen or operatives are regularly working for an employer; and that employes working in shops or rooms which they provide for themselves, or at their homes, and not under the supervision or control, in any way, of the employer, would not come under the terms of the act or within the class specified by the language of Section 1465-58, above quoted.

While the object of the act is to provide an effective and certain method of compensating injured employes, its primary object really is to lessen the number of accidents to employes; that is, so far as possible, to make the hazard of industrialism as slight as possible; and it is obvious that the act can only apply, and the results contemplated by it be attained, when there is some direct relation between the employer and the employe as to providing the place in which the employe is to

work, or the number and character of the other employes with whom the employe is to work, or the manner or kind of work which the employe is to perform under the supervision of the employer, either directly or by his agent, foreman or manager.

Except that the finished product shall be up to a certain standard, the employer, in the case referred to in your inquiry, has no control whatever over the employe; he does not provide the place where the work shall be done; he does not select the other employes with whom the employe is to work; nor does he exercise any supervision over the employe while performing the work. It is, therefore, my opinion that employes of this character cannot be considered as embraced within the provisions of this act, and cannot be considered by an employer in calculating and estimating his pay roll.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM

These "piece workers" themselves, if they employ more than five men regularly in their business, or in or about the same establishment, are subject to the liability act and to take out insurance.

T. S. H.

250.

EMPLOYER'S LIABILITY ACT—"WILFUL ACT" NOT SYNONYMOUS WITH "WILFUL NEGLIGENCE"—SCOPE OF LIABILITY OF EMPLOYER AND OF COMMON LAW AND STATUTORY RIGHTS TO COMPENSATION OF EMPLOYE—RIGHT OF LIABILITY INSURANCE COMPANIES—PUBLIC POLICY.

The term "wilful act" as used in Section 21-1 of the Employers' Liability Act providing that suit for damages at common law may be had for injuries or death resulting from "wilful acts" of employers, is not synonymous with the term "wilful negligence," as the construction of the act shows an intended distinction between "neglect" or something wrongfully omitted, and "act" or something wrongfully done.

Section 20-1 of the act aforesaid expressly relieves employers who take advantage of the act, from any liability whatever at common law or by statute, for death or injury to employers except such injuries as are specifically excepted by Section 21-2, namely: injuries wilfully inflicted, or caused by failure to comply with statute or ordinance. The employe is likewise limited to compensate under the act for all injuries except those excepted under Section 21-2 aforesaid, in which cases, he is entitled to elect either the compensation of the act or the common law remedy.

A liability insurance company being authorized in Ohio to insure only against "accidents" to employes, cannot insure against the excepted injuries resulting from the "wilful act" of employers. Furthermore, it would be clearly violative of public policy and against the manifest spirit of the statutes to permit such insurance companies to insure against injuries resulting from failure of the employe to comply with command of statutes, ordinances or lawful orders.

COLUMBUS, OHIO, April 4, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your inquiry of March 12, 1912, which is as follows:

"We would respectfully request your opinion on the following questions concerning the construction of certain parts of an act entitled, "An act to create a state insurance fund for the benefit of injured and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards," commonly known as the workmen's compensation Law, (102 O. L., 524), and certain questions of law arising in the course of the administration thereof, viz.:

"1. Section 20-1 provides that 'any employer who employes five or more workmen or operatives regularly in the same business, or in or about the same establishment, who shall pay into the state insurance fund the premiums provided by this act, *shall not be liable to respond in damages at common law or by statute, save as hereinafter provided,* for injuries or death of any such employe, wherever occurring, during the period covered by such premiums,' etc., and it is 'otherwise provided' in Section 21-2 as follows:

"But where a personal injury is suffered by an employe, or when death results to an employe from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, and in case such injury has arisen from the *wilful act* of such employer, or any of such employer's officers or agents, or from the *failure* of such employer, or any of such employer's officers or agents, *to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employes,* then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employe, or his legal representative in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, *and such employer shall not be liable for any injury to any employe, or to his legal representative in case death results, except as provided in this act.*

"Every employe, or legal representative in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court. Every employe or his legal representative in case death results, who exercises his option to institute proceedings in court as provided in Section 21-2, waives his right to any award, except as provided in Section 36 of this act."

"Is the expression 'wilful act,' as used in Section 21-2 of said act, synonymous with the term 'wilful negligence,' or do the words 'wilful act,' as used in said section, contemplate an overt act on the part of the employer, his officer or agent, knowingly, purposely and maliciously done with intent to injure the employe?

"2. Do the words 'and such employer shall not be liable for any injury to any employe, or his legal representative in case death results, except as provided in this act,' at the end of the first paragraph of said Section 21-2, have the effect of repealing by implication any law in existence at the passage of said act, affecting in any way the right of an employe to recover damages from his employer for injuries occasioned to him in the course of his employment, or does such language, taken in connection with the language used in Section 20-1, have the effect of absolutely denying the employe the right to maintain an action, except in the specific class of injuries defined in Section 21-2?

"3. Under the provisions of said act, and especially the provisions

contained in Sections 20-1, 20-2, 21 and 21-2, the scheme of state insurance provided for in the act would seem to be substituted for the civil action based upon negligence in all cases except those designated in Section 21-2, and all cases of injury except such injuries occurring as designated in Section 21-2, must be compensated out of the state insurance fund, the employe having no right of action at all and no election or choice of remedies, but must rely for compensation solely upon the state insurance fund. As to the exceptional class of cases mentioned in Section 21-2, it also appears to us that the state insurance fund covers all such injuries, unless the injured employe elects to sue his employer for damages, in which event, he waives any right to participate in the state insurance fund, no matter what the result of his suit for damages may be. At least, that is the construction we put upon the language of Section 21-2.

"Assuming we are correct in our conclusions as to the meaning of Section 21-2, we would like to inquire whether any insurance company now authorized to do business in the state of Ohio is empowered to make contracts of insurance with employers, by which contracts, or policies, they agree to indemnify such employers from loss or damage resulting from accidents to their employes received in the course of their employment, which more fully or completely indemnify the employer against loss, than does the provisions of this act and especially Section 21-2 thereof under the plan of state insurance? In other words, may an insurance company lawfully contract to indemnify and save an employer harmness from the result of his wilful act, or his failure to observe the laws of the state of Ohio for the protection of the life or safety of employes?"

Replying to your first question, in my opinion, the expression "wilful act," as used in Section 21-1, is not synonymous with the expression "wilful neglect." "Wilful neglect" is a term well known to the law, and, as stated in Cyc., Volume 29, page 424, the term properly applies only to actions for loss of life involving punitive damages. It has been held, also, to signify a higher degree of neglect than gross neglect. The term "neglect" is so well known and so well understood that I take it there can be no doubt but that the legislature, in the language used in Section 21-2 and 21-1 of the act under consideration, used the exact language to express its intention. Had it meant, by Section 21-2, to deprive an employer of the benefits of the act when an employe was injured by his wilful neglect, I take it that it would have said so. The word "act" is the opposite from the word "negligence" or "neglect;" as defined in the Century Dictionary, it means, "the doing of a thing; a thing done," and, therefore, the term "wilful act" must necessarily mean something intentionally done, not something omitted. This is made plainer by consideration of Section 21-1, in which it is expressly provided that,

> "All employers * * * who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment *caused by the wrongful act, neglect or default of the employer, or any of the employers' officers, agents or employes,* * * * and in such action the defendant shall not avail himself or itself of the following common law defenses: * * *"

and it will be found that the words used in said Section 21-1, namely: wrongful act, neglect or default, cover *all* of the various degrees of neglect, slight, ordinary and gross, for which an action will lie; and that the legislature having said, expressly,

that an employer who does not take advantage of the act shall be liable for injuries resulting from such neglect, has, as clearly as can be possible, said that an employer who does take advantage of the act shall not be liable in *any* action for neglect and, as provided in Section 21-2, shall only be liable when the injury has been caused by his wilful act, "act" being used in contradistinction to "neglect;" or when the injury has occurred from the failure of the employer to comply with an ordinance, lawful order or statute, as provided in Section 21-2.

Answering your second question, in my opinion, the provision at the end of the first paragraph of Section 21-2, namely:

> "such employer shall not be liable for any injury to an employe, or to his legal representative in case death results, except as provided in this act."

taken in connection with Section 20-1, absolutely and expressly relieves an employer, who has taken advantage of the act, from any liability whatever, at common law or by statute, for injuries or death of any employe in the employment of such employer, caused by the wrongful act, neglect or default of the employer; in other words, from any and all actions brought by an employe for negligence, no matter how slight or how gross; and covers every possible injury upon which an action for damages might be based, except injuries specifically excepted by Section 21-2, namely: injuries wilfully inflicted by the employer, or caused by the employer's failure to comply with an ordinance, lawful order or statute, as provided in said Section 21-2.

Answering your third question, you are correct in your assumption that under the provisions of this act all cases of injury, occurring to *employes of employers who have taken advantage of the act, except the specific injuries provided for in Section* 21-2, *must be compensated out of the state insurance fund provided for by this act. The employe has no right of action at all, and no election or choice of remedies, but he must rely solely and entirely for compensation from the state insurance fund.*

As to the exceptional case mentioned in Section 21-2, namely: when the injury has been caused by the wilful act of the employer, or from the failure of the employer to comply with a municipal ordinance or lawful order of any duly authorized officer, or any other statute for the protection of the life or safety of employes, the act provides expressly that even this class of injuries is also taken care of. Thus, an employe of an employer who has taken advantage of the act, and who has been injured by the wilful act of the employer or by his failure to comply with an ordinance, order or statute, as above stated, has his option to either take the compensation provided by the act or to sue at law. In case he chooses to accept the compensation provided by the act, then, by the provisions of Section 21-2, he absolutely waives the right to institute an action in court against the employer; and, conversely, every employe who exercises his option to institute proceedings in court waives his right to participate in the state insurance fund, no matter what the result of his suit for damages may be.

The last part of the third question is of great importance, and, as the question seems to be absolutely a new one, upon which there is no express authority, upon consideration of the statutes of our state, and of the existent facts which made necessary the enactment of the act under consideration, I have no difficulty whatever in reaching the conclusion that an insurance company cannot lawfully contract, in this state, to indemnify an employer from the result of injuries occasioned by his wilful act or from his failure to observe the laws of the state of Ohio for the protection of the life or safety of employes.

What is known as employers' liability insurance has been transacted in this

state for several years; it is authorized by Section 9510 of the General Code, which, in part, is as follows:

> "A company may be organized or admitted under this chapter to * * * make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes * * *"

I wish to call special attention to the fact that authority is given to companies to "make insurance to indemnify employers against * * * accidents to employes."

The first part of your question, therefore, would be whether an injury caused by the *wilful act* of an employer can be classed as an *accident.* "Accident" is defined (Century Dictionary) as:

> "The operation of chance; an undesigned contingency; a happening without intentional causation; chance fortune."

As above stated, in Section 21-2, in my opinion, the legislature used the term "wilful act" to express exactly what it meant; and "wilful act" is certainly the opposite, in every sense, from "accident." I take it that it is unnecessary to quote from the dictionary to express the meaning of the word "wilful," and it should be enough to state that one of the attributes of an accident is that it is unintentional; therefore, an act that is wilful could not possibly be held to be unintentional. Nor, in fact, is there any possible view of the term "wilful act" which can be taken so as to construe it as a term covering an accident.

Therefore, I am clearly of the opinion that there is no authority in the statutes of Ohio to issue an insurance indemnifying an employer or any one else against the consequences arising from an injury occasioned by his wilful act. If that were possible a person or an employer could insure himself against the consequences arising from his commission of a crime, and an act attempting to authorize such insurance would be void as against public policy.

As to the second subdivision of this portion of your question, as to the right of a company, authorized to do business in this state, to make contracts of insurance with employers, by which they agree to indemnify such employers from loss or damage resulting from accidents caused by the failure of the employer to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of life or safety of employes, my opinion is that any insurance contract or policy, purporting to indemnify an employer for loss or damage resulting from the violation of penal statutes, is in contravention of public policy; and that the legislature, in enacting said Section 21-2, clearly recognized that principle of law.

It has been held, frequently, that a master cannot, by agreement with his servant, exempt himself from liability for injuries to the servant caused by his neglect; but it has also been held that one may, by contract, with a third person, insure himself against the consequences of his neglect to his servant. There are many cases upon this subject but I do not deem it necessary to cite them nor to try to explain the method of reasoning by which the courts arrived at the conclusion that while one could not directly, by contract, relieve himself from liability for injuries caused by his negligence, on account of public policy, yet, he could do this very thing indirectly. I take it that in consideratoin of the laws now in force in this state there can be no question but that it is against the public policy of this state to allow an employer to insure himself against the consequences of his failure to comply with the commands of the state.

> "It is not easy to give a precise definition of 'public policy.' It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law."
>
> Cyc. Volume 9, p. 481.

It is the policy of this state, as well as of all civilized states and governments, at the present time, to reduce as far as possible the hazards of industrialism, that is, primarily, to reduce the number of accidents to employes. As the means to this end many laws have been passed by the state, aptly described in Section 21-2 of the act under consideration as statutes for the protection of the life or safety of employes. It is unnecessary to specify these laws; many of them can be readily found in the provisions of the General Code relating to the chief inspector of workshops and factories and chief inspector of mines. These laws compel employers to take certain precautions in regard to dangerous machinery, as to places in which the employe shall work, and, in fact, so far as is possible with present knowledge, compel the employer to safeguard the employe so far as possible. These laws are criminal in their nature and penalties are provided for persons who refuse or fail or neglect to comply with the same.

Would it be reasonable, therefore, for the state, having commanded a thing to be done and imposed a penalty in case it is not done, to, at the same time, authorize a person who chooses to violate those express statutory provisions to insure himself against the consequences arising from such statutory violation? It seems to me that, considering the purpose of these laws, anything that would induce a person to violate them instead of to obey them must necessarily be contrary to public policy.

Again, the present act creating the state liability board of awards was passed in response to a great public demand; in fact the situation compelled the enactment of this law. Accidents to workmen engaged in the different industries are all but inevitable; no matter how carefully laws for the prevention of accidents may be framed, or how rigidly they may be enforced, accidents cannot be eliminated. The system in force prior to the enactment of this law, by which it was supposed that all injured employes having a right of action would be compensated, has been found to be entirely unsatisfactory. As said by the court in Borgnis, et al vs. Falk Company, supreme court of Wisconsin,

> "To speak of the common law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty."

To this might be added the further fact, which called loudly for the establishment of a system of compensation by the state, the system which has been so highly developed by the so-called employers' liability companies—a system by which a corporation, whose prosperity and very existence depends upon defeating the claim for compensation of an injured employe, is substituted for the employer, who is at fault for the injury, as defendant in the case brought by the injured employe, for compensation.

I do not deem it necessary to go into this subject further; the necessity for, and the validity of, the law have been passed upon by our supreme court; and the

facts and arguments showing the unsoundness, if not viciousness, of the old system, of which the liability insurance companies compose such a large part, are fully set out in the briefs filed in the case of State ex rel. Yaple vs. Creamer, treasurer of state, 85 O. S. .

It was the intention of the legislature to substitute for the compensation, which could only be obtained by a civil action based upon neglect, a scheme of state insurance for the benefit of both the employer and the employe, under which, in all cases except these designated in Section 21-2, compensation would be surely and quickly made in every case of injury without resort to courts. This, the act plainly does, and we must assume that the legislature acted intelligently; that it meant to provide compensation to the employe in every case of injury resulting from accident, the risk of which could lawfully be assumed by an employers' liability company. But for the employer who wilfully injures an employe, or who fails to observe the laws enacted for the protection of the life or safety of employes, there is only a contingent protection offered by this law. There is absolute compensation to the innocent party, the injured employe; he may take his compensation under the act if he chooses, or he may sue his employer in a civil action; that is optional. It must be held that the legislature, having, by other laws compelled an employer to do certain things for the protection of the life and sefety of his employes by leaving an employer who failed to comply with those laws but of the benefits of the act, therefore, sought to impose an additional penalty to enforce compliance with the act; and it would surely be contrary to the policy of this state, as plainly expressed by its statutes, to say that notwithstanding this double prohibition and penalization, still, a corporation could lawfully invite the branch of the laws of the state by agreeing to indemnify a violator of the same against the consequences of his act.

The fact that the legislature intended the scheme of insurance as provided by this act to cover all cases of accidents that may be lawfully insured against is also made plain from the provisions of Section 21-1, by which it is provided that an employer who does not take advantage of the act shall be liable to his employe for damages suffered by reason of personal injuries caused by the wrongful act, neglect or default of the employer; and that he shall not avail himself of the defenses of the fellow-servant rule, the assumption of risk, or contributory negligence. This provision, of course, was made to induce employers to accept the terms of the act. It would be entirely valueless, therefore, if the pharses "wilful act" and "failure * * * to comply with any * * * ordinance * * order * * * or statute as used in Section 21-2 meant the same or could be held to be included in the terms "wrongful act, neglect or default," used in Section 21-1. It is conclusive that they do not. Clearly, the exceptions mentioned in Section 21-2 are meant to be such acts or neglects that to insure against would be entirely contrary to the settled policy of the state.

This opinion is long; and for that reason, and for the reason that it is an opinion and not a brief, I have not burdened you with citations as to public policy, or as to decisions of courts which touch upon the questions you ask in certain ways, but none of which are directly upon the point raised; the statutes themselves speak plainly upon all of your questions, and upon these statutes I reply and base my opinion.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

282.

EMPLOYERS' LIABILITY ACT—EMPLOYER HIRING INDEPENDENT CONTRACTOR AND FURNISHING SHOP TOOLS AND APPLIANCES.

When an employer arranges with an independent contractor for the doing of work in connection with the employer's business, which said contractor hires his own workmen but works in a shop and with tools and appliances furnished by said employer, the latter maintains a sufficient relation to the employes of the contractor to come within the provisions of the employers' liability act.

COLUMBUS, OHIO, April 12, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of April 1, 1912, which is as follows:

> "We are in receipt of your opinion given to this board under date of March 8, 1912, with reference to the statute of employes doing piece work in their own homes or shops, and away from the plant or shop of the employer, and we are pleased to note that it is in accord with our construction of the law.
>
> "There is a further question, however, growing out of the relation of independent contractor, upon which we would like your opinion. We find that in many instances the employer will make a contract with an independent contractor with reference to some portion of the work to be done in producing the finished product in the manufacture of which the employer is engaged, and the person with whom the employer thus contracts in turn employes and pays workmen assisting him on this particular work, the employer all the time furnishing the place in which to work and the tools, machinery, appliances with which to work. Under such a state of facts, would the rule not be different from that outlined in your opinion of March 8, 1912, above referred to? And in such case, would the employer or proprietor of the factory or plant where the work is carried on include not only those who are directly employed by him, but also such workmen as are employed by independent contractors under circumstances similar to those outlined above?"

My opinion to you dated March 8, 1912, was to the effect that there must be some relation between the employer and the employe, either as to providing the place in which the employe is to work or the number and character of the other employes with whom the employe is to work, or the manner or kind of work which the employe is to perform under the supervision of the employer, either directly or by his agent, foreman or manager, and of course was meant to include cases where the employer provided the tools or machines with which or at which the employe is to work; and that in the absence of all of these conditions, and in cases where the employer exercised no control whatever over the employe in any of the above respects, then that the employe could not be regarded as embraced within the provisions of this act.

In the case to which you refer in your inquiry above quoted, where the employer furnishes a place in which the employe is to work, or furnishes the tools, machinery or appliances with which the employe is to work, or in fact exercises a control over the employe in any respect, as detailed in my opinion of March 8th,

then it is my opinion that such an employe must be classed as an employe of the proprietor or manufacturer who owns or controls the main business or factory which gives rise to the employment, whether the employe works, or is employed by an independent contractor or sub-contractor or agent of the proprietor or manager owning or controlling the plant.

This conclusion, I think, is supported by the case of Jacobs vs. Fuller, etc., Co., 67 O. S. page 70. The first paragraph of the syllabus in this case is as follows:

> "Where the defendant employed a third party to manufacture furniture for it, furnishing all the materials, tools and machinery for that purpose, in which was a machine which was safe to operate under proper instructions, and dangerous to operate without instructions as to the manner of operating it, and when it is claimed that the plaintiff was injured by reason of neglect to notify him of the dangerous character of the machine and neglect to give him instructions as to operate it, the defense that the plaintiff was an employe of an independent contractor will not avail the defendant, because it is a case in which, under the circumstances of the employment, a resulting injury might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care should be omitted in the course of its employment. Railroad Co. vs. Morey, 47 Ohio St., 207 and Covington & Cincinnati Bridge Co., vs. Steinbrock, 61 Ohio St. 215, approved and followed."

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

542.

EMPLOYERS' LIABILITY ACT—"WORKMEN AND OPERATIVES" INCLUDE ALL EMPLOYES, EXCEPT TRAVELING SALESMEN—OFFICE HELP.

The term "workmen or operatives" as employed in the Workmen's Compensation Law is intended to include all "employes" as stated in the title. Such term includes all who are employed in the business or in or about the establishment to whom compensation is paid, excepting officers of the corporation, unless they are themselves employed and except also, by virtue of judicial construction, traveling salesmen. Office help are therefore governed by the act.

COLUMBUS, OHIO, July 18, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—In your letter of April 15, 1912, you make the following request for my opinion:

> "The state liability board of awards has construed the term "workmen or operatives" as used in Section 20-1 of the workmen's compensation law, to include all employes to whom compensation of any nature is paid, excepting only the officers of a corporation, as such and persons wholly engaged as traveling salesmen.

"We are frequently asked the question as to whether the law compels such construction placed upon these words used in the act, as to require the pay roll of office help, such as bookkeepers, stenographers, etc., to be included in the total pay roll upon which premiums for the state insurance fund are calculated.

"Will you kindly advise us as to your opinion on this question at an early date, and oblige."

Section 20-1 of the Ohio workmen's compensation act is as follows:

"Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employes, wherever occurring, during the period covered by such premiums, provided the injured employe has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employe of his right of action as aforesaid.

"Each employer paying the premiums provided by this act into the state insurance fund shall post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employes of the fact that he has made such payment: and of any subsequent payments he may make after such notices have been posted."

You have submitted to me with your request a very able brief prepared by Mr. James I. Boulger, of Chillicothe, upon this question, and this brief has been of great assistance to me in the consideration of this question.

The Ohio workmen's compensation act is to be most liberally construed as to the classes of persons who are entitled to the benefits of the act. The title of the act, perhaps, expresses its purpose in the best possible manner. This title is "to create a state insurance fund for the benefit of injured, and the dependants of killed employes, and to provide for the administration of such fund by state liability board of awards."

Under the rules of statutory construction, the title of an act is a legitimate aid in ascertaining its meaning, and the title of this act shows that it was the intention of the legislature to create a state insurance fund for the benefit of *"employes."* This term, I think, is used in its broad sense, and if qualified at all, can only be qualified to the extent made necessary by the decisions of our courts. The word "employe" includes any person who is employed to perform any service, whether manual or not, in or about any business or establishment, to whom compensation of any nature is paid. I take it that it clearly would not include the officers of a corporation, as such, unless such officer is also employed as a workman or operative in some capacity in the business.

It seems to me that the words "workmen or operatives," as used in Section 20-1, are used designedly, so as to cover all employes. I would take it that such words often included traveling salesmen, were it not for the decision of our supreme court in the matter of the assignment of William M. Sloan, 60 O. S. page 472. The syllabus of this case is as follows:

"' Operative' not a traveling agent to obtain subscription, etc.—Section 6355 Revised Statutes—Insolvent debtors and preferred claims.

"One who is employed by the publisher of a 'legal directory,' as traveling agent in obtaining subscriptions and in selling the 'directory' to attorneys and other and collecting accounts, is not an 'operative' within the meaning of Section 6355 Revised Statutes."

This case appears to be direct construction of the word "operative" to the extent that such word does not include a traveling salesman, and, of course, the traveling salesman could not be classed as a "workman;" therefore, as this decision stands, I feel bound by it in the construction of this term, that is, that it does not include traveling salesmen.

My opinion, therefore, is that the words "workmen or operatives," as used in Section 20-1 of the act, include all employes employed in the same business, or in or about the same establishment, to whom compensation of any nature is paid, excepting officers of the corporation, as such, and persons wholly engaged as traveling salesmen. All others are included.

Adopting the admirable language of Mr. Boulger in this respect, "in my judgment, all of the office help, as well as those persons who are actually engaged in the dangerous work of operating machinery; those who keep books, as well as those who clerk in a department store, those who run trains, as well as those who drive mules in the mines; those who bottle the liquors in the brewery as well as those who hitch the wagons, or drive the automobiles are within the terms of the act."

Very truly yours

TIMOTHY S. HOGAN,

Attorney General.

560.

EMPLOYERS' LIABILITY—STATE LIABILITY BOARD OF AWARDS MAY NOT ADOPT PLANS BY WHICH EMPLOYERS MIGHT DEPOSIT GUARANTY FUNDS TO ENABLE THEM TO REIMBURSE BOARD FOR ACTUAL PAYMENTS.

It is not within the legal powers of the state liability board of awards to adopt a plan by which instead of paying premiums to the board, employers might deposit guaranty funds and thereupon be permitted to reimburse the state treasury for payment of losses from the liability insurance fund, for the reasons, First: such power is not conferred upon the board. Second: the state treasurer is not authorized to handle such guaranty funds.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—On June 10, 1912, you submitted to me a resolution, proposed to be adopted by your board, providing for an optional plan which may be accepted and followed by employes who elect to accept the provisions of the Ohio workmen's compensation act, instead of paying their entire premium into the state insurance fund at the time they elect to accept the provisions of the act; and you wish to know whether, in my opinion, your board has power to adopt said resolution and put the plan proposed thereby into operation. The resolution is somewhat lengthy and I shall, therefore, quote only the following portions of the same, upon which I base my opinion:

"Be it resolved, by the state liability board of awards, that:

"Each employer employing five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employes in this state, who elect to accept the provisions of an act entitled, 'An act to create a state insurance fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a state liability board of awards,' (102 O. L. 524), may, instead of paying their entire premium into the state insurance fund at the time of such election, elect to operate under and subject to all the conditions and provisions of the following optional plan:

"6. That each such employer shall deposit with the treasurer of state, at the time of paying his initial payment of _____cents on each $100.00 of his pay roll, as herein provided, a guaranty fund, the amount of which shall be determined as follows, viz.: $3,600.00 for the first $100,000.00, or fraction thereof, of his estimate pay roll for the ensuing six months, and $_____ for each additional $100,000.00, or fraction thereof, of such pay roll. Such deposit may be either in cash or in United States, state, county, township or municipal bonds of political subdivisions of the state of Ohio; and in the event of such bonds being deposited, the income therefrom shall belong to the employer, except as hereinafter provided.

"Such special deposit shall be held by the treasurer of state as security for the payment of the awards made by said state liability board of awards, and the same shall be returned to such employer upon his ceasing to be a subscriber and contributor to the state insurance fund, and upon all awards for injuries to his said employes having been fully discharged and paid in the manner hereinafter provided.

"7. That all claims of injured employes of any such employer which are filed with the state liability board of awards, claiming compensation from the state insurance fund, shall be heard in the same manner and in accordance with the same rules of procedure as the claims of employes of employers not operating under such optional plan; and payments from the state insurance fund shall be made in the same manner.

"8. That on or about the 10th and 24th day of each month the state liability board of awards shall certify to such employer the total amount of the awards made by it during the preceding two weeks, giving the name of each employe, the number of his claim, the amount awarded, and the amount payable on such awards from the state insurance fund, on the date of the next regular payment day (it being understood that payments are to be made from the state insurance fund on the 1st and 15th of each month), and shall at the same time issue to such employer a pay-in-order on the treasurer of state for the full amount of such payments so to be made, and it will be the duty of such employer to thereupon pay to the treasurer of state, for credit to the state insurance fund, the total amount covered by such pay-in-order, on or before the following day, as above indicated. This provision shall apply to all claims for the payment of medical, nurse and hospital services and medicines, funeral expenses and claims for compensation for temporary or partial disability.

"9. In all cases where awards are made in favor of dependents of killed employes, a certificate similar to the certificate mentioned in the next preceding paragraph shall be forwarded to such employer, showing the award made and the persons to whom made, and the bi-monthly

accounts payable to each such person, and a statement showing the total amounts to be expended from the state insurance fund on account of such award during the remainder of the six-months period, and shall at the same time forward to such employer a pay-in-order directed to the treasurer of state for the entire amount of such payments for the remainder of said six-months period, and it shall then be the duty of such employer to pay to the treasurer of state, for credit to the state insurance fund, the amount called for by said pay-in-order, within five days from the issuance of same.

"10. That the state liability board of awards shall have the right and it shall be its duty, at any time that the deposit with the treasurer of state provided for in paragraph 6 hereof, is exceeded in amount by the aggregate of the deferred payments to be paid out of the state insurance fund on account of awards made by the board, to require a further deposit to be made with the state treasurer by such employer, so that such guaranty fund may at all times be equal to the aggregate of such deferred payments; and upon such order being made by the board, such employer shall make such deposit within five days after receiving notice of the issuance of such order.

"11. The guaranty fund required to be deposited in paragraph 6 hereof, together with such additional amounts as may be deposited in accordance with the provisions of the next preceding paragraph, shall be held by the treasurer of state intact and separate from the state insurance fund and all other funds, and shall not be paid out to such employer or to any other person, except upon the order of the state liability board of awards; and upon the failure of the employer to punctually pay into the state insurance fund such amounts as may be required from time to time by the state liability board of awards, as herein provided, the board shall have the right and it shall be its duty to require the treasurer of state to convert all or any portion of the securities composing such guaranty fund into cash at the market value of such securities, and the proceeds thereof placed to the credit of the state insurance fund; but no greater amount or part of such securities shall be so converted into money and paid into the state insurance fund than is necessary to cover all outstanding claims against such fund on account of injuries to the employes of such employer.

"13. The object of the optional plan herein outlined is to enable such employers as may adopt its provisions to pay, through the agency of the state liability board of awards and the state insurance fund, all claims arising out of injuries to their employes, which may be filed, heard and awards made thereon by the state liability board of awards. The initial payment of ------ cents on each $100.00 of pay roll, which is required to be paid at the beginning of each six-months period, by employers electing to operate under the optional plan, shall become and remain a part of the state insurance fund, and it is not intended that such initial payment, or any portion thereof, be applied to or used in the liquidation of any claim or claims, or any award made by the state liability board of awards in favor of the employes of such employers, or their dependents in case of death."

I have considered the advisability or the practicability of the plan above proposed, and have simply considered the same from the legal standpoint. In the first place, after a most careful consideration of the act, I can find no authority conferred upon your board to provide for a plan such as the one proposed, nor is such power implied. Section 17 of the act is as follows:

"The state liability board of awards shall classify employments with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total pay roll and number of employes in each of said classes of employment sufficiently large to provide an adequate fund for the compensation provided for in this act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year."

Section 18 provides as follows:

"The state liability board of awards shall establish a state insurance fund from premiums paid thereto by employers and employes as herein provided, according to the rates of risk in the classes established by it, as herein provided, for the benefit of employes of employers that have paid the premium applicable to the classes to which they belong and for the benefit of the dependents of such employes, and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of said fund."

Section 20 provides as follows:

"The treasurer of state shall give a separate and additional bond, in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the state insurance fund herein provided for."

It is unnecessary to quote further sections of the act but it will be seen from these that the act contemplates the establishment of a "state insurance fund" from the premiums piad to it by employers of employes. Only one fund is contemplated, of which the treasurer of state shall be custodian. The plan proposed by you, as stated in Section 13 of your resolution, is one by which the particular employer pays to his employes, in case of injuries, the awards made by your board. This payment is made through the agency of your board, and out of the state insurance fund; but, nevertheless, it amounts to a payment directly by the employer to his employe, for the amount paid to the employe, out of the state insurance fund, must be paid into said fund by the employer.

Under this plan the initial payment or premium paid by the employer into the state insurance fund would, necessarily, be different from the payment or premium of an employer in the same class who is not operating under the plan; and in case all employers elected to adopt this plan, instead of having a state insurance fund, as contemplating by the act, created from the premiums paid by employers and employes according to the rates of risk in classes established by your board, you would have, what amounted in substance to, an immense guarantee fund deposited with the treasurer of state, guaranteeing that employers would pay their injured employes the amounts awarded by your board. Such an arrangement as this is certainly not contemplated by the act and cannot, as it stands, be inferred. If such a plan is advisable, and it may be that it is, it should be provided for by legislation.

In addition to the above, an insurmountable objection, as the law now stands, is that there is no authority in law for the treasurer of state to become custodian of this guarantee fund. He is, by law, Section 19 of the act, made custodian of the state insurance fund proper, and by Section 20 is required to give a separate and additional bond as such custodian. His duties are all prescribed by law and he is only empowered to act as custodian as provided by law, and, therefore, there would be no authority for him to assume control of this fund; nor would there be any

authority in law for him to convert all or any portion of the securities composing such guarantee fund into cash, as provided in Section 11 of your resolution.

I deem it unnecessary at this time to go farther into this matter, for the objections detailed above seem to me such as can only be met by legislation; and I, therefore, am of opinion that your board has not authority to adopt and put into operation the plan proposed by this resolution.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

577.

TRAVELING EXPENSE—AUDITOR OF LIABILITY BOARD OF AWARDS —PAYMENT TO HOTEL FOR HOLDING OF ROOM DURING ABSENCE NOT ALLOWED.

An amount of $1.00 *a day paid by a traveling auditor of the state liability board of awards to a hotel in Cincinnati while absent therefrom for the purpose of holding a room cannot be allowed as an actual and necessary traveling expense under Section 7 of the act establishing said board.*

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of July 16, 1912, in which you make the following request for my opinion:

> "One of our traveling auditors has an arrangement with a certain hotel at Cincinnati to pay $2.50 per day for room and meals while he is there and $1.00 per day for the days he is absent.
>
> "His chief duties are at Cincinnati but sometimes we send him out to Hamilton or Middletown for several days at a time, and in order to keep his room and get the terms named, he had to make an arrangement as above mentioned.
>
> "Question. Is it lawful for him to include in his expense account the $1.00 per day charged for the days he is absent from the said hotel?"

Section 7 of the act establishing the state liability board of awards is as follows:

> "The board may employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, and fix their compensation. Such employments and compensation shall be first approved by the governor, and shall he paid out of the state treasury. The members of the board, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants that may be employed shall be entitled to receive from the state treasury their actual and necessary expenses while traveling in the business of the board. Such expenses shall be itemized and sworn to by the person who incurred the expense, and allowed by the board."

It will be noted from this section that your assistants are entitled to receive their actual and necessary expenses while traveling in the business of the board.

The question in the particular case submitted by you is one of fact. That is,

whether the payment to a hotel in Cincinnati of $1.00 per day, while he is not in the city of Cnicinnati but is at some other other points in the state, can be considered an actual and necessary expense. I take it for granted that the expenses of your auditor while at Hamilton, Middletown or any other point to which the business of your board may call him, are paid; and therefore, his expense account would show that he incurred a certain amount of expense at one place and also an expense at the same time of a $1.00 per day at Cincinnati, though he is not in the city of Cincinnati at this time, and it seems to me that this payment of $1.00 per day to the hotel while he is not in the city of Cincinnati cannot be considered as an actual and necessary expense and should not be included in the expense account of your auditor.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

680.

DAMAGES FOR WRONGFUL DEATH NOT LIMITED AFTER JANUARY 1, 1913—EMPLOYERS' LIABILITY ACT— WHEN EMPLOYE EXERCISES RIGHT TO ELECT TO SUE AT LAW, AMOUNT RECOVERABLE UNLIMITED.

By provision of proposal 5 of the constitutional amendments which will become effective January 1, 1913, as Article 1, Section 19-a, the limitation of the amount of damage recoverable for wrongful death in an action at law, by Section 10772 General Code, will no longer be effective. In case of injury by wilful act, therefore, or from failure to comply with statute ordinance or official order where the injured employe elects to sue at law, the damages recoverable will not be subject to statutory limitation.

COLUMBUS, OHIO, October 14, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—In your letter of September 27, 1912, you state that you have received from various sources inquiries relative to the operation and probable effect of Amendment No. 5 to the Constitution of Ohio (which was adopted by the vote of the electors of Ohio on September 3rd) on the employers of Ohio, and you ask my opinion as to this.

Proposal No. 5 by its adoption at the election becomes Section 19-*a* of Article I of the Constitution, and is as follows:

> "The amount of damages receivable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law."

Before the adoption of this amendment the amount of damages recoverable in a civil action in the courts of this state for death caused by the wrongful act, neglect or default of another could be limited by the legislature. The legislature had exercised this right, and by Section 10772 of the General Code (R. S. 6135) the amount of damages which might be recovered in such an action was limited to $10,000.00 in all cases except where it appeared that the action was for the benefit of a widow and one or more minor children when the limit was placed at $12,000.00.

By the adoption of the amendment above quoted the authority of the legislature to place any limit on the amount of damages which may be recovered in an action of this character is taken away, and the limitation as to the amount of such damages prescribed by Section 10772 become of no effect.

The answer to this inquiry, therefore, is that after the first day of January, 1913, when the constitutional amendment above quoted goes into effect, there will be no limit upon the amount of damages recoverable in an action in the courts of this state for damages caused by the wrongful act, neglect or default of another and this, of course, will apply to all actions brought against employers who have not availed themselves of the privileges offered by the Ohio Workmen's Compensation Act. As to employers who have availed themselves of the opportunity offered by this act and who have paid into the state insurance fund the premiums provided by law—they shall not be liable for any injury to any employe or to his legal representatives in case of death unless such injury has arisen from the wilful act of such employer, or of any such employer's officers or agents, or from the failure of such employer or of such employer's agents or officers to comply with any municipal ordinance or lawful order of any duly authorized officer or any statute of Ohio for the protection of the life and safety of employes. Briefly stated, after January 1, 1912, employers who do not avail themselves of the privileges offered by the Ohio Workmen's Compensation Act will not be liable in an action in the courts of this state for the death of an employe caused by the wrongful act neglect or default of such employer or of his officers or agents, and in such action there will be absolutely no limit upon the amount which may be awarded as damages against such employer, but the employer who avails himself of the privileges of the act will be fully protected in accordance with its terms and cannot be used for the death of an employe unless such death be caused by the wilful act of such employer or any of such employer's officers or agents or from the failure of such employer or any of such employer's officers or agents to comply with any municipal ordinance or lawful order of any duly authorized officers or any statute for the protection of the life and safety of employes. And even in the event of the death of an employe resulting from an act or omission of the employer which would give the employe's representative a right to bring an action in the courts, still such personal representatives have the same right to claim compensation or award from the state insurance fund as if the injury were caused in any other manner, and in case the option to claim an award from the state insurance fund is exercised, then no action in the court can be maintained.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

683.

EMPLOYERS' LIABILITY—BALANCE OF PREMIUM PAID MAY NOT BE REFUNDED WHEN FIRM GOES OUT OF BUSINESS.

The workmen's compensation act provides in Section 21 that moneys collected for the state insurance fund shall be disbursed to such employes that have been injured in the course of their employment and there is no authority for disbursement in any other manner.

When a firm, therefore, pays a premium to cover an ensuing period and goes out of business before the expiration of such period, the board cannot refund the balance of the premium for the time ensuing to the end of the period for which insurance is paid.

COLUMBUS, OHIO, October 16, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of October 14, 1912, in which you make the following request for my opinion:

> "On August 9, 1912, a certain company paid a premium of $54.82 into the state insurance fund provided for in the workmen's compensation law. The premium paid for the protection and benefits of the workmen's compensation law for a period of six months beginning August 9, 1912, and ending January 9, 1913.
>
> "On or about October 1, 1912, the said company quit business and they had no need for the protection of the workmen's compensation law, no longer having workmen in their employ, and they made a request of this department to refund to them two-thirds of the amount which they had paid into the state insurance fund on August 9. They maintain that since the law required them to pay premiums in advance, they are justly entitled to a proportionate refund under the circumstances.
>
> "Will you kindly give us your opinion as to the right of this department to issue vouchers authorizing payment of a refund from the state insurance fund in such cases as this?"

In considering this question I wish to call your attention to the following sections of the act establishing your board, (102 O. L., 524):

> "Section 18. The state liability board of awards shall establish a state insurance fund from premiums paid thereto by employers and employes as herein provided, according to the rates of risk in the classes established by it, as herein provided, for the benefit of employes of employers that have paid the premium applicable to the classes to which they belong and for the benefit of the dependents of such employes, and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of said fund.
>
> "Section 19. The treasurer of state shall be the custodian of the state insurance fund, and all disbursements therefrom shall be paid by him, but upon vouchers signed by any two members of the state liability board of awards.
>
> "Section 21. The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong,

> that have been injured in the course of their employment, wheresoever such injury has occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued."

It would appear from the last sentence of Section 18, namely that your board

> "shall adopt rules and regulations with respect to the collection, maintenance and disbursement of said fund"

that possibly you might by rules and regulations provide for the return of a portion of the premium paid in by an employer when he goes out of business and the insurance ceases prior to the expiration of the period covered by the said premium; but Section 21 provides explicitly that your board

> "shall disburse the state insurance fund to such employes * * * that have been injured in the course of their employment * * *"

and taking this as well as the other provisions of the act, and the entire scheme of the act, I find no authority whatever for a return to the employer of any part of the premium paid.

I take it, therefore, that as the law now stands you have no authority to make a refunder of this character. It seems to me, however, that this matter is one that should be provided for by subsequent legislation as it is only just that employers should only be required to pay for the insurance they actually receive, and when the reason for the insurance ceases, a method should be provided for making a proper proportionate refunder.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

685.

EMPLOYERS' LIABILITY ACT—OCCUPATIONAL DISEASES NOT INCLUDED.

From the title of the workmen's compensation act and the general provisions thereof, occupational diseases are not within the provisions of the act.

COLUMBUS, OHIO, October 22, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—In your letter of October 1, 1912, you make the following request for my opinion:

> "A certain employer, under Claim No. 392, has applied for compensation and award out of the state insurance fund. His injury consists of acute poisoning, and in answer to the question requiring a description of the injury he states that it is a case of lead poisoning, and in the first notice of injury adds the words, 'occupational disease.'
>
> "Is this an injury under the statute such as entitles the applicant to compensation and award out of the state insurance fund?"

What is known as "the workmen's compensation act" passed March 28, 1911 (102 O. L., 524) was Senate Bill 127, entitled: "an act to provide a state insurance fund for the benefit of injured, and the dependents of killed, employes and to provide for the administration of such fund by a state liability board of awards." It is well settled that the title of an act can be considered in construing it, especially to arrive at the intention of the legislature. Taking the title of this act, the general scheme of the act itself, and the various sections composing it, it seems beyond all doubt that the title fully expresses the intention of the legislature, that is, it was to provide a state insurance fund for the benefit of *injured,* and the dependents of killed, employes, and to provide for the administration of such fund. I find nowhere in the act any intention express or implied to make its benefits extend so as to cover employes who incur a disease on account of their occupation, in other words, occupational diseases, which may be defined as diseases pertaining to or caused by certain occupations. These diseases are well-known and many of them have distinctive names. The act does not cover diseases of any kind, but refers to and provides for personal injuries, or accidents, suffered by employes in the course of their employment. This is made plain throughout the act.

Section 8 of the act is as follows:

> "The board shall adopt reasonable and proper rules to govern its procedure, regulate and provide for the kind and character of notices, and the services thereof, in cases of *accident and injury* to employes, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to benefits of compensation from the state insurance fund, hereinafter provided for, the forms of application of those claiming to be entitled to benefits or compensation therefrom, the method of making investigations, physical examinations and inspections, and prescribe the time within which adjudications and awards shall be made."

And Section 21 of the act explicitly provides that the state insurance fund shall be paid out

> "To such employes * * as have been *injured* in the course of their employment, wheresoever such injury has occurred, and which have not been purposely self-inflicted * *"

Not only is it clear from the act itself that it does not, and it was not intended to cover occupational diseases, but the same legislature which passed this act (the 79th General Assembly of Ohio) on May 17th, 1911, passed a joint resolution known as "Senate Joint Resolution No. 19" (102 O. L., 749) authorizing and directing the state board of health to make an investigation of occupational diseases. By this resolution it was resolved:

> "That the state board of health is hereby authorized and directed to make a thorough investigation of the effect of occupations upon the health of those engaged therein with special reference to dust and dangerous chemicals and gases, to insufficient ventilation and lighting, and to such other unhygienic conditions as in the opinion of said board may be specially injurious to health, and to report to the next General Assembly the results of such investigation, with such recommendations for legislative or other remedial measures as it may deem proper and advisable, provided that the cost of such investigation shall not exceed the sum of five thousand dollars."

My opinion, therefore, is that the specific case to which you refer is not an "injury" which entitles the applicant to compensation and award out of the state insurance fund, and that the act does not cover occupational diseases.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

694.

STATE LIABILITY BOARD OF AWARDS MAY ENGAGE PERMANENT ROOMS IN CITIES OTHER THAN COLUMBUS FOR HOLDING SESSIONS THEREIN AND FOR OTHER BUSINESS.

Under Section 6 of the act establishing the liability board of awards, the board is authorized to hold sessions at any place within the state and if it is necessary for the board to hold a room continuously for such purposes in cities other than Columbus, the board has authority to so do and may pay the expense of the same by authority of Section 37 of the act. If advisable to further expediency and to save expense, the board may use said room for its general business purposes.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—In your letter of October 14, 1912, you make the following request for my opinion:

> "We would like your opinion as to the right of this department to maintain local offices in such cities of the state as the convenience of the patrons of the department and the convenience of the board and its employes would seem to suggest.
>
> "You will note that by Section 6 of the act under which we are operating, we are required to maintain an office in the city of Columbus and are authorized to hold sessions at any place within the state.
>
> "Our experience so far has been such that we are convinced that the opening of local offices in Cincinnati and Cleveland would enable us to conduct the business of the department in those cities much more satisfactorily, and, we believe, with less expense."

Section 6 of the act establishing the state liability board of awards, 102 O. L., 524, is as follows:

> "The board shall keep and maintain its office in the city of Columbus, and shall provide a suitable room or rooms, necessary office furniture, supplies, books, periodicals and maps. All necessary expense shall be audited and paid out of the state treasury. The board may hold sessions at any place within the state."

Section 37 of said act is as follows:

> "The board may make necessary expenditures to obtain statistical and other information to establish the classes provided for in Section 17. The salaries and compensation of the secretary, and all actuaries, accounts, inspectors, examiners, experts, clerks and other assistants, *and all other expenses of the board herein authorized* including the premium

to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers, signed by two of the members of such board, presented to the auditor of state, who shall issue his warrant therefor as in other cases."

Taking Section 6 in connection with Section 37, you undoubtedly have the right to provide a room, or office, at any place within the state, where you deem it necessary to hold sessions of your board. If it is necessary to have such a room or office continuously in any cities of the state, then, under said sections you have the authority so to do. If such room or offices are maintained continuously, it seems to me it would not only be right, but it would be proper, for you to use the same for all possible business of your board, as well as for holding sessions, if by so doing you can make your work more efficient or save expense to the state.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the State Fire Marshal)

252.

TRAVELING EXPENSES IN HOME CITIES—DEPUTY ASSISTANTS AND INSPECTORS IN FIRE MARSHAL'S OFFICE.

The fire marshal is given a wide discretion in allowing necessary expenses for the performance of the duties of his office.

What traveling expenses are, is a question of fact governed by common sense principles, and under proper circumstances may be allowed to deputy assistants or inspectors while working in their home cities.

COLUMBUS, OHIO, April 10, 1912.

HON. JOHN W. ZUBER, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 4, 1912, in which you inquire whether or not you are justified, under the law, in allowing a deputy assistant or inspector for his lunch or meals, when he is called upon to investigate a fire or inspect properties in remote portions of the city of his domicile, due to the fact that he should keep in close touch with the case and that it is impossible for him to leave his work at lunch or meal times and travel across the city for the purpose of securing his lunch or meal at his usual eating or boarding place. In reply thereto I desire to state:

Section 821 of the General Code provides as follows:

> "The state fire marshal shall appoint a first deputy fire marshal, a second deputy fire marshal, and a chief assistant, each of whom he may remove for cause. He may employ such clerks and assistants, and incur such other expenses as are necessary in the performance of the duties of his office."

Considering the imperative and strenuous duties imposed upon the state fire marshal and his office force by the laws of Ohio, he is vested with the right to determine what constitutes "such other expenses as are necessary in the performance of the duties of his office;" and when acting in good faith, with the full facts in each case before him, he is sole judge of what expenses "are necessary." This must be so, from the very nature of the services required of his deputies and assistants, in which they are required to perform all their duties with promptness, secrecy and efficiency. The whole matter is one to be viewed from a sensible and practical standpoint. As shown by the facts in each particular case it is a question of fact rather than of technical law. Under the facts as stated by you, the deputy, inspector or assistant should be allowed his expenses for meals; and you have the right to prescribe rules for the government of subordinates along this line.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Canal Land Department)

253.

CANAL LANDS—FEE SIMPLE TITLE OF STATE BY VIRTUE OF OCCUPANCY—GRAND RESERVOIR IN MERCER AND AUGLAIZE COUNTIES—CUTTING OF TIMBER BY LAND CLAIMANT.

The fee simple title of all land with and upon which the embankment was constructed by the state at the east end of the Mercer county reservoir, is in the state for the reason that the state's actual occupancy of the same for canal purposes, ipso facto, vests said fee simple in the state.

The canal superintendent is justified in refusing to permit a party, claiming title to the northwest quarter of the southeast quarter of section No. 17, to cut and remove timber that stands near the border of the reservoir below the waste weir line, but within the artificial embankment constructed by the state.

COLUMBUS, OHIO, April 3, 1912.

HON. E. E. BOOTON, *Engineer Canal Land Department, Columbus, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your letter of February 27, 1912, wherein you inquire as follows:

> "Between the years 1837 and 1841, the state of Ohio constructed, as a part of its canal system, what is now known as Grand Reservoir, but formerly known as the Mercer county or St. Mary's Reservoir in Mercer and Auglaize counties.
>
> "The reservoir was formed by constructing immense embankments across the east and west ends of a low swampy valley, about eight miles apart.
>
> "But little attention was paid as to who were the owners of the different tracts embraced within the reservoir, as it was expected that applications for damages would be made by the parties interested. Many years after the reservoir was built, certain parties made applications to the general land office to purchase lands within the limits of the reservoir without disclosing that portion of the same, and in some instances all, of such tracts that had been appropriated by the state for reservior purposes.
>
> "Among the tracts thus acquired adversely to the state's interest was the forty acres shown by red boundaries on the enclosed plat of the reservoir. The tract books in the Auditor of State's office show that John W. Stoker purchased from the United States the northwest quarter of the southwest quarter of section 17, town 6 south, range 4 east, Auglaize county, Ohio, September 4, 1851. The plat books also show that Stoker acquired the southwest quarter of the northeast quarter; also the northwest quarter of the northeast quarter of said section 17.
>
> "I merely call attention to the last two entries for the reason that litigation involving them throws some light as to the title to the land under consideration.
>
> "In 1896, Mr. Stoker caused a bill to be introduced in the Senate, which was later enacted into a law, by which he was paid $1,400.00 for an easement to overflow the two tracts last described above, but for some reason no mention was made of the land in the northwest quarter of the southeast quarter of said section, which he either owned at this time

or had transferred to someone else. At any rate, no settlement was made for the tract now in controversy.

"After the settlement made under the act passed April 27, 1896, for the lands within the reservoir, Stoker set up a claim that he was the owner of the land included in the banks and borrow pits outside of the reservoir and proceeded to lease building sites on the outer slope of said embankment.

" At the request of the Canal Commission, the attorney general brought suit in the common pleas court of Auglaize county to recover in the name of the state of Ohio the land in dispute from the possession of Stoker. The decision in both the common pleas and circuit courts were adverse to the claim of the state.

"However, the decision of the circuit court was reversed by the supreme court, but unfortunately no report of the case was made. Evidently the court took the view that the state had already acquired title by appropriation.

"In order to purchase these lands it was necessary for Stoker in his application to state that no one was in possession of the property applied for, and the government patent, no doubt as is customary in such cases, was granted 'subject to any adverse interests.'

"Under the act of 1825 authorizing the construction of the canals, the canal commissioners, their engineer and agents could enter upon, take possession of and use any lands, streams or materials necessary for the improvements intended by the act.

"The owners could make a claim for damages providing the same was filed within one year, but whether damages were allowed or not, the fee simple title to the lands thus appropriated vested in the state (See O. L., 23, pp. 56-57) (See also decision of Ohio supreme court in the case of Ohio ex rel. vs. P. C. C. C. & St. L. Railway Company).

"I submit herewith a copy of the canal commission laws which contain portions of the original act, also extracts from court decisions that you will find useful for ready reference.

"The reason for requesting an opinion at this time is that Mr. Charles H. Nauts, canal superintendent for the northern division of the Ohio canal, is threatened with a suit for damages for refusing to permit parties claiming title to the northwest quarter of the southeast quarter of said section 17, to cut and remove some timber that stands near the border of the reservoir but below the waste-wier line thereof and within the artificial embankment constructed by the state.

"As the party is threatened to remove the timber regardless of the notice of the canal superintendent forbidding such removal, it may be necessary to invoke the strong arm of the law to prevent the removal of same, but before taking any drastic measures, we desire your opinion as to the state's right in the matter and will govern our actions in accordance therewith."

In reply to your inquiry I desire to say that the act of February 4, 1825 provides for the building of canals within the state, and further provides that the canal commission or any agent or engineer employed by them could enter upon and take possession of any land or material necessary for making such improvements; and also provides that necessary land for such improvements might be appropriated by the canal commissioners and that the fee simple title of the premises so appropriated should vest in the state. Said act provides that any application for compensation for any land, waters, streams or materials so appropriated should be made within

one year after taking possession of the same by the said commissioners for said canal purposes.

On May 25, 1828, the Congress of the United States passed an act entitled "To aid the state of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said state to aid in the construction of the canals authorized by law." Section 1 of this act provides as follows:

> "Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that there be, and is hereby, granted to the state of Ohio, for the purpose of aiding said state in extending the Miami canal from Dayton to Lake Erie, by the Maumee route, a quantity of land equal to one-half of five sections in width, on each side of said canal between Dayton and the Maumee river, at the mouth of the Auglaize, so far as the same shall be located through the public land, and reserving each alternate section of the land unsold to the United States, to be selected by the commissioner of the general land office, under the direction of the president of the United States; and which land, so reserved to the United States, shall not be sold for less than two dollars and fifty cents per acre. The said land hereby granted to the state of Ohio to be subject to the disposal of the legislature of said state for the purpose aforesaid, and no other; Provided, That said canal, when completed, shall be and forever remain a public highway, for the use of the government of the United States, free from any toll or other charge whatever, for any property of the United States, or persons in their service passing through the same: And Provided Also, That the extension of the said Miami canal shall be commenced within five years and completed within twenty years, or the state shall be bound to pay to the United States the amount of any lands previously sold; and that the title to purchasers under the state shall be valid."

Section 3 of the act provides as follows:

> "And Be It Further Enacted, That the state of Ohio under the authority of the legislature thereof, after the selection shall have been so made as aforesaid, shall have powers to sell and convey the whole or any part of said land, and give a title in fee simple therefor to the purchaser thereof."

Section 5 of the act provides as follows:

> "And Be It Further Enacted, That there be, and hereby is, granted to the state of Ohio five hundred thousand acres of the lands owned by the United States with the said state, to be selected as hereinafter directed, for the purpose of aiding the state of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, contracted by said state in the construction of the canals within the same, undertaken by the authority of the laws of said state now in force, or that may hereafter be enacted, for the extension of canals now making; which land, when selected, shall be disposed of by the legislature of Ohio for that purpose and no other. Provided, That said canals, when completed or used, shall be, and forever remain, public highways, for the use of the government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same. And Provided Further,

That the said canals, already commenced, shall be completed in seven years from the approval of this act; otherwise the state of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her within that time may have brought; but the validity of the titles derived from the state by such sales shall not be affected by that failure."

Section 7 of the act provides as follows:

"And Be It Further Enacted, That this act shall take effect, provided the legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the state to the several provisions and conditions thereof; and unless such expression of assent be made this act shall be wholly inoperative, except so far as to authorize the governor of Ohio to proceed in causing selections of said land to be made previous to the said next session of the legislature. Approved 24th May, 1828."

On December 22, 1828 the general assembly of the state of Ohio passed an act declaring the assent of the state of Ohio to the provisions and conditions of the aforesaid act of Congress, as follows:

"Be It Enacted By The General Assembly of The State of Ohio, That the assent of the state of Ohio be, and the same is hereby expressed and declared to be given to the several provisions and conditions of an act of the congress of the United States approved twenty-fourth May, eighteen hundred and twenty-eight, and entitled, "An act to aid the state of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said state, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas Territory."

In accordance with the grant of land so made to the state of Ohio by the national government, the state built and constructed the Miami canal from Dayton to the Maumee river at the mouth of the Auglaize river, and in connection with the said canal the state built and constructed the Mercer county reservoir in the manner as stated in your inquiry. On numerous occasions, our state supreme court has held that the title acquired by the state by the appropriation of lands for canal purposes under section 8 of the act of February 4, 1825, was an absolute estate in fee simple.

"Under the constitution of 1803, the legislature, in the exercise of the right of eminent domain, possessed the power to appropriate to public use the fee simple title to lands, where, in its judgment, the public necessities required it; and the title acquired by the state by the appropriation of lands for canal purposes, under the eighth section of the act of February 4, 1825 (2 Chase, 1472), was an absolute estate in fee."

(Malone vs. City of Toledo, 34 O. S., 541, syllabus.

"Lands of which the state in any manner acquired possession under the acts of February 4, 1825 (2 Chase, 1472), and February 7, 1826 (24 O. L., 58), and used in the construction of its canals, became the property of the state in fee. (State ex rel. vs. The P. C. C. & St. L. Ry. Co., 34 W. L., 15.)

(State of Ohio vs. Snook et al., 53 O. S., 521.)

"By force of the provision of Section 8 of the act to provide for 'the internal improvement of the state of Ohio by navigable canals,' 23

O. L., 57 whenever the state actually occupied a parcel of land for canal purposes, a fee simple title thereto at once and by virtue, alone, of such occupancy, vested in the state."

(Ohio ex rel. vs. Railway Company, 53 O. S., 189.)

At pages 243, 244, 245 and 246 of the opinion in the last cited case, the court says:

"'Statutes of limitation do not run against the state unless the intention that they should so run is obvious.'

"That the title of the state to its canal lands is one in fee simple, is a question of law. The only fact to be ascertained is whether the lands were, in fact, a portion of the canal system. How the acquisition was made is not material. The mere seizure and appropriation of a parcel of land for canal purposes, by force of the statute under which our canals were constructed, was alone sufficient to vest in the state a fee simple title to them. Nor could any other title than one in fee simple be received by the state for lands to be devoted to a canal. A mere occupation of lands by the state for canal purposes was a seizure and appropriation of it to that purpose, and to be devoted to that purpose was to give to the state a fee simple title thereto. No conveyance was necessary; the seizure and occupation transferred to the state the entire estate in the lands so seized and occupied, leaving to the former owner simply a claim for compensation. 23 O. L., 56 (Section 8); Malone vs. Toledo 28 O. S., 643; Malone vs. Toledo, 34 O. S., 541.

"The lands, the occupation of which is the subject of controversy in this action, were a part of the canal lands of the state, to which, as before stated, the state had a fee simple title. The statute of 1863, 60 O. L., 44, did not authorize a conveyance in fee to the city of Cincinnati of a parcel of land in controversy, nor did the deed of the governor, made pursuant thereto, purport to convey such title. The statute, as well as the deed, expressly prescribes the interest conveyed. It was an 'authority and permission to the city of Cincinnati to enter upon, improve and occupy forever as a public highway and for sewerage purposes' the land in controversy. No other estate, right or interest was granted or intended to be granted than that just recited. Grants made by the state are not to be extended by construction. The grant was of a right to occupy and improve this strip of land for two specific purposes—for sewerage and for public highways—the fee remaining in the state. No power of sale passed to the city nor any power to barter this strip of land for another strip or parcel lying elsewhere, although the latter should be used for street or sewerage purposes. The limits of the rights of the city under the conveyance was to improve and use the land conveyed for sewerage and street purposes; it could use or apply it to no other purpose itself, nor could it grant to another any right whatever in these lands. The city by the ordinance of December 1, 1871, vacated Eggleston Avenue from the north line of Front street to the south line of Pearl street. That was a direct abandonment of the right which had been conveyed to this city by the state to improve and use for a street the portion thus vacated; and by the use to which it permitted the defendant to appropriate that portion of the strip which is situated south of Pearl street, it may be fairly inferred that the city has abandoned that also. The city having abandoned this right, it reverts to the state, from which the right emanated.

"The state was the absolute owner in fee of the whole estate and interest in this strip of land; it conveyed to the city a right to use it for two specified purposes only; upon the abandonment by the city of either purpose, the interest to that extent returned to the grantor. By the express terms of the deed made to the city, as well as by the terms of the statute authorizing it, the city was authorized to enter upon, improve and occupy all or any part of the strip of land which is subject of controversy, so that the fact that the city has abandoned a part of the land for street purposes does not work an abandonment of the whole. Nor is it the use to which the city has permitted the defendant to devote that part of the land which lies between Broadway and Pearl streets inconsistent which its continued use by the city for street purposes, and therefore, such use by the defendant does not work abandonment of the city's rights. But as the right granted to the city only authorized a use by the city itself, of the premises granted, the city could grant no right to the defendant to lay track thereon, and, therefore, such use of the premises by the defendant is without authority of law."

In the case of Ohio vs. Stoker et al., to which you refer in your letter and which was decided by the supreme court of Ohio, but not reported, the plaintiff in error (the state of Ohio) began an action in the court of common pleas of Auglaize county against the defendant, (Stoker et al.) to quiet the title to the land of the plaintiff described in the petition as being a portion of the east embankment of the Mercer county reservoir. The petition is in usual form. The defendants in their answer deny the title and possession of the land in question to be in the state of Ohio, and by way of cross petition allege they are seized of an estate in and are in possession of said land and that plaintiff's assertion of title therein is without right and constitutes a cloud on the title, and they pray that the title may be quieted as against the plaintiff. The allegations of the defendant's answer are denied in plaintiff's reply. In the common pleas and circuit courts decrees were entered in favor of the defendants. Motion for new trial was filed by the plaintiff, which motion was overruled and exceptions were accordingly taken by the plaintiff in error, the state. A bill of exceptions was taken embracing all the evidence and duly signed and filed and a petition in error was filed in the supreme court to reserve the judgment of the court below. The supreme court held, in substance, that fee simple title in and to said land was in the state and held the estate or interest as claimed by the defendants to be null and void, thereby reversing the judgment of the common pleas and circuit courts.

The situation about which you inquire in your letter is in all respects similar to the situation of the case of State vs. Stoker, supra, and the land in the case about which you inquire is on or within the east slope of the east bank of the Mercer county reservoir, as was also the land claimed by Stoker et al. I desire here to quote from the decision of the department of interior in the case of the application of Longnecker to which you refer in your letter, and which said case is also similar in most respects to the situation as described in your inquiry. In his opinion, the honorable secretary of the interior says:

"On August 25, 1898, one J. M. Longnecker, made application to the commissioner of the general land office to have set apart to him as a homestead entry, the south half of the southwest quarter of section three (3), township six (6) south, range three (3) east, first principal meridian, in Mercer county, state of Ohio.

"In such application, and proofs accompanying the same, it is shown that the attempted entry of Longnecker was made as the assignee of

one Matilda Parker, widow of Ira Parker, deceased, a private soldier who had died April 1, 1896, and which application was based on the provision of Section 2306 and 2307 of the Revised Statutes of the United States.

"On December 8, 1899, the honorable commissioner of the general land office, rendered a decision denying the application of Longnecker, and from this decision an appeal was taken pursuant to the practice which obtains in the department, to the honorable the secretary of the interior, and on July 19, 1900, an opinion was rendered by the department affirming the decision of the commissioner.

"The cause was then heard before the honorable secretary of the interior on motion for review and revocation of the foregoing decision of affirmance.

"Briefs were filed by counsel representing Longnecker and by the department of the attorney general of Ohio, representing the interests of the state of Ohio in said premises, and the decision of the interior department was rendered May 29, 1901.

"Upon the consideration of the question thus submitted the secretary of the interior refused to revoke, or set aside the opinion rendered by the department affirming the decision of the land commissioner. * * *"

At page 4:

"The last cited authorities (Spaulding vs. Chandler, 160 U. S., 394; and Wilcox vs. Jackson, 13 Pet. 498) show that there must be an authority of law for an appropriation of lands either to an individual or a public purpose, and without such authority no appropriation can be made. That authority existed for the land department to reserve these lands to the uses of the canal admits of no serious question. The power to make such a reservation or appropriation arises by necessary implication from the grant itself. It is a general proposition that with a grant, or franchise, go, by implication, all such powers as are necessary to the exercise of the grant. * * *"

At page 5:

"There can be no question of the power. It was incidental to the general purpose. A reservoir and works for storing and serving water to the canal are as essential to its maintenance and operation as are water stations and machine shops to the operation of a railroad.

"Where such reservoir and works should be located, their special character and extent, and what lands should be taken in the very nature of the case are questions that must necessarily be determined by the authority constructing the canal, into the determination of which the topography of the country, its hydrographic and other features, must enter and to some extent control. The state has that authority. Subject to approval of such appropriation by the United States, where public lands are affected, these powers were granted to the state and its officers by necessary implication as incidental to the general purposes. The fact that the reservoir was built, that it is maintained, that these lands are beneath its waters, are conclusive proof of the exercise of the power, and are notice of that fact to all the world. * * *"

At page 7:

"* * * In 1890 application was made by one M. D. Shaw to have section 7, township 6 south, range 4 east, advertised and sold as an isolated tract. That land is in the same situation and is now covered by similar applications of Mr. Longnecker as the land in question. The order for such sale was made by the then commissioner of the general land office, and, on the protest of the state, was December 31, 1890, revoked."

At page 9:

"It is most strenuously insisted by counsel, however, that the department is wrong in assuming that the state of Ohio has any equities to be protected. This canal was built many years ago when close business methods were not followed, when the public lands were of small value. The board of public works may have been mistaken as to their powers, or as to the fact that title to these lands had not been acquired and remained in the United States. With acquiescence of the government the status of these lands has remained unchanged for a period of sixty years."

At page 10:

"The state having been in peaceable possession of these lands for this term of years, exercising control over them and having placed an improvement on them at great cost, the department cannot but say there is equity in favor of the state as against Longnecker. 'The motion is therefore denied. The departmental decision is adhered to.'"

Therefore, I am of the undoubted opinion that the fee simple title of all the land within and upon which the artificial embankment was constructed by the state at the east end of Mercer county reservoir is in the state for the reason as held by the supreme court in the case of state of Ohio vs. Railway Company, supra,

"* * * whenever the state actually occupied a parcel of land for canal purposes, a fee simple title thereto at once and by virtue, alone, of such occupancy, vested in the state."

I am of the further opinion that the canal superintendent is properly and legally safeguarding the rights and interests of the state in refusing a permit to the party to cut and remove timber that stands near the border of the reservoir below the waste-weir line thereof but within the artificial embankment constructed by the state, even though said party claims title to the northwest quarter of the southeast quarter of said section No. 17.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

647.

POLICE OFFICERS APPOINTED BY BOARD OF PUBLIC WORKS AND CHIEF ENGINEER—JURISDICTION SAME AS CONSTABLES—BUCKEYE LAKE—BOAT LICENSES—ARREST WITH AND WITHOUT WARRANT.

Under 475 *General Code, police patrolmen, appointed by the board of public works and the chief engineer for service upon Buckeye Lake, have the same power and authority as constables in the discharge of their official duties.*

When, therefore, boat owners operate their boats without having complied with the license provisions of Sections 479 *and* 481 *General Code, said police officers in accordance with Section* 13492 *General Code, may arrest without warrant and detain until a warrant can be obtained, such persons as are found by themselves to be violating said provisions. If the violation is not committed in the presence of the officer, however, a warrant must be obtained.*

Such officer is not empowered by the act to confiscate boats, but if it is necessary in making an arrest, he may, by the provisions of Section 482 *General Code, take possession of and hold the same, and, when pursuing an offender, caught in the violation by himself, may go so far as to knock off the lock of a boat house to obtain the boat.*

License fees may be recovered by civil suit or by the criminal prosecution aforesaid, as set out in 481 *General Code.*

Such police officers, like constables, may pursue defendants and arrest them in any county of the state, with or without warrant, under the conditions prescribed.

In accordance with 13496, *when arrest is made or affidavit filed by such police officer, security for costs cannot be required.*

COLUMBUS, OHIO, September 12, 1912.

HON. E. E. BOOTON, *Engineer Canal Land Department, Columbus, Ohio.*

DEAR SIR:—I herewith desire to acknowledge receipt of your letter of August 1, 1912, wherein you inquire as follows:

> "The police patrolmen at Buckeye Lake are having some trouble in collecting the boat license fees under the provisions of Section 8 of an act entitled 'An act for the control and management of lakes and reservoirs and state lands dedicated to the use of the public for parks and pleasure resort purposes, as amended May 9, 1908. See O. L. pages 347 and 348, Vol. 99.
>
> "The question which we wish to submit grows out of the physical condition at Buckeye Lake. In the west half of section 12, town 17, range 18, Licking county, Ohio, the large artificial embankment terminates a short distance east of the dance pavilion at Buckeye Lake park. After this embankment was constructed, a large pond containing about five acres was left outside of the reservoir proper, but no connection was arranged for at that time. After the improvements were commenced at Buckeye Lake park the predecessors of the Ohio Electric Railway Company obtained permission to build a flume connecting the reservoir with what is known as Crane pond, and have enlarged and deepened the pond and have leased a large number of sites for boat houses. A number of the owners of motor boats house their boats in boat houses upon this pond, keeping the doors locked most of the time. Many of these owners live at a distance, and come to the lake and spend a day,

generally coming Saturday afternoon, and leaving Sunday afternoon, and apparently take special pains to keep out of sight of the state police patrolman, Mr. Benner. He has written these parties several times, notifying them that they must take out the permits required by law, and a number of them have refused to make any reply. It has been ascertained that attorneys have advised these parties that the police patrolman does not dare pry off the locks in order to get possession of the launches. The question therefore arises as to the method of procedure in order to collect the boat license, and we will be greatly obliged if you will advise us as to the action to be taken in these cases. There is another cause for complaint, when the police patrolman observes someone violating the law upon the reservoir, but is unable to arrest the parties before they escape to the shore and beyond the limits of the state's property. In such cases the justice of the peace refuses to issue a warrant for the arrest of the party. We believe that the justices are in error as to their duty in the matter and we will greatly appreciate it if you will render an opinion advising these officials as to their duties in regard to issuing warrants under such conditions. A prompt opinion on these matters will be greatly appreciated by the park board."

In reply to your inquiry I desire to say that Section 7 of an act entitled, "An act for the control and management of lakes and reservoirs and state lands dedicated to the use of the public for parks and pleasure resort purposes" (Sections 479 and 480 General Code) provides for the fees to be charged for licenses to maintain and operate boats on state reservoirs as follows:

Section 479 General Code:

"On the first day of May each year through such officers as the board and engineer designate, the following fees shall be collected upon all boats and watercraft maintained and operated, canal traffic boats excepted, in or upon any of the waters of any state reservoir dedicated or set apart for the use of the public for park or pleasure resort purposes; rowboats carrying not more than five persons, one dollar; rowboats carrying more than five persons, fifty cents additional for each person in excess of five; electric, naphtha and steam launches, steam boats and watercraft used for similar purposes, one dollar for each person of one hundred and seventy pounds that may be carried thereon with safety."

Section 480 General Code.

"All moneys derived from such fees shall be credited to the funds for maintaining and policing, and upon the payment of such fees, such board and engineer shall issue a written permit, to be signed by the president of the state board of public works, authorizing such person, persons, or corporation to maintain and operate the boats, for which such fees have been paid, upon the waters of such public park or pleasure resorts, in the manner prescribed in such permit. Such permit shall be revoked by such board and engineer on proof that such boat or boats are used for illegal purposes."

Section 481 of the General Code provides that metal plates shall be issued for each boat so licensed as follows:

> "In carrying out the provisions of the preceding two sections, the board of public works and engineer thereof shall procure suitable metal plates, numbered consecutively, to be issued annually to persons using boats on the waters of such public parks, for which the fees provided for therein shall be charged. No person shall maintain or operate a boat on the waters of any such public park or pleasure resort, without first obtaining the permit provided for by such section and without displaying, at all times such metal plate, in a conspicuous manner, upon the side or end of his boat, unobscured by paint or other covering. Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than fifty dollars, and stand committed until such fine and costs are paid. Justices of the peace shall have jurisdiction within their respective counties in all cases of violation of this section, and neither party shall be entitled to a trial by jury."

Section 475 of the General Code provides for the appointment of police patrolmen as follows:

> "Such board and engineer may appoint police potrolmen to preserve order and protect the public at any such reservoir and adjacent state land, and such police patrolmen shall have the same power and authority as constables in the discharge of their official duties, and their jurisdiction shall be co-extensive with the counties touching or including any portion of such public park or pleasure resort."

Section 482 General Code specifies the powers of such police patrolmen as follows:

> "Every police patrolman appointed by the board of public works and chief engineer of public works to preserve order and protect the public, in accordance with these provisions, may arrest on view or warrant and bring to justice a person violating any such provision, and, if in making an arrest, it is necessary for such patrolman to take possession of and hold a boat or boats or other property, he shall not be held liable for the loss of or any damage done to such boat or boats or other property taken and held by the reason of the failure of the owner or owners thereof to comply with the provisions hereof, providing ordinary care is exercised in the handling thereof, and no person shall take possession of a boat or other property which has been taken in charge by a police patrolman or other officer as herein provided, until such patrolman or officer has released it, and any person doing so shall be fined in any sum not less than five dollars nor exceeding twenty-five dollars, and shall stand committed until such fine and costs are paid."

Under Section 481, as above quoted, any violation of any of the provisions contained in said act constitutes a misdemeanor, and said section provides for a fine of not less than ten dollars nor more than fifty dollars for such violation.

It will be noted by the provision of Section 475, above quoted, that such police patrolmen have the same power and authority as constables in the discharge of their official duties.

Section 13492 General Code enumerates the officers that may make arrests as follows:

> "A sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained."

In other words, if a misdemeanor is committed in the presence of the officer, then such officer can legally make the arrest without a warrant, and if not committed in the presence of the officer he must first procure a warrant before making the arrest. (Reinhard vs. City, 49 O. S., 257 and State vs. Lewis 50 O. S., 179.)

Applying the above rule to the situation as described in your inquiry, if the patrolman finds any person maintaining or operating a motor boat or launch upon the waters of Buckeye Lake without a metal plate on such motor boat or launch, as required by Section 481 General Code, indicating that no license fee has been paid, then said patrolman may arrest such person without a warrant and detain him until a legal warrant can be obtained. Said act does not contain any provision specifically providing for the confiscation of any boats, motor boat or launch upon which no license fee has been paid. Said Section 482 merely provides that,

> "if in making an arrest, it is necessary for such patrolman to take possession of and hold a boat or boats or other property, he shall not be held liable for the loss of or any damage done to such boat or boats or other property taken, etc."

It follows that such patrolman is without legal authority to pry off the locks on any of the boathouses mentioned in your inquiry even if he had knowledge that there were boats therein which were, or had been operated contrary to law unless he were in pursuit of an operator of such boat and had arrested such operator just after he had placed such boat in one of the boat houses and had locked said boat house, then the patrolman in so arresting said operator would have the right to take possession of such boat as provided in Section 482 General Code, above quoted, even to the extent of breaking the lock on the boat house.

This disposes of the question as to whether or not, and under what circumstances, a patrolman has the right to pry off the locks on the boat houses under the circumstances stated in your inquiry.

Following this brief preface which I have gone into for the purpose of leading up to your principal question as to the method of procedure to be followed in order to collect license fees upon boats, for the operation of which no licenses have been procured and paid for, and answering the same, I am of the opinion that either of two remedies may be pursued as follows:

First. By a civil suit against any person or persons maintaining or operating such motor boats or launches upon the waters of Buckeye Lake. The state has the legal right to maintain a civil suit for the purpose of recovering license fees due it although the proper evidence to sustain such suit should be carefully procured before bringing the same. (City of Cincinnati vs. Beuhansen, 10 Dec. Reprint 652; 22 Bul. 421.)

Second. By a criminal prosecution as provided in Section 481 of the General Code and placing such person or persons under arrest by procuring a state warrant if the offense was not committed in the presence of the patrolman, for, as above stated, it would not be necessary to procure a warrant if such offense was committed in the presence of the patrolman. However, before starting such prosecution if the offense was not committed in the presence of the patrolman it would be necessary

to have the name of the person or persons maintaining and operating such motor boat or launch in contravention of said act hereinbefore referred to, as well as sufficient evidence of the fact that such person or persons had so operated said boat.

As above stated, and reiterated now, there is no provision contained in said act giving patrolman authority to confiscate motor boats or launches or holding the same for the purpose of enforcing payment of the license fees provided by Section 479 of the General Code above quoted.

Coming now to your third question as to whether or not the police patrolman who observes a party violating the law upon the reservoir can arrest such person after escaping to the shore and beyond the limits of the state property, I would say, as above stated, such police patrolman has the same power and authority as constables in the discharge of their official duties by reason of Section 475 of the General Code. For reasons heretofore given, such patrolman has the legal right to arrest any person found violating the law in his presence and furthermore has the right to pursue and arrest the offender even beyond the limits of the state's property. In other words, the police patrolman can arrest such offender on sight wherever he happens to find the offender without first procuring a state warrant under the above circumstances. This is in accordance with Section 13492 General Code above quoted which expressly makes it the duty of every sheriff, deputy sheriff, constable, marshal or deputy marshal or police officer to arrest and detain any person found violating any law of this state or any legal ordinance of any city or incorporated village until a legal warrant can be obtained. If, however, under the circumstances just stated, the patrolman desires a warrant or in case it is necessary to procure a warrant because the offense was not committed in the presence of the officer—he can procure such warrant by filing an affidavit for the same with a justice of the peace of the county wherein the offense was committed in accordance with Section 13496 of the General Code, which provides as follows:

> "When an affidavit charging a person with the commission of an offense is filed with a justice of the peace, mayor or police judge, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused."

It is to be carefully noted, however, that I only mention justices of the peace for the reason that such police patrolman cannot legally file his affidavit with a mayor or police judge because Section 481 of the General Code only gives justices of the peace jurisdiction in cases of violation of any of the provisions contained in said act.

Section 13499 General Code provides when security for costs of prosecution are required and when not required as follows:

> "When the offense is a misdemeanor the magistrate, before issuing the warrant, may require the complainant, or, if he considers the complainant, irresponsible, may require that he procure a person to become liable for the costs if the complainant be dismissed, and the complainant or other person shall acknowledge himself so liable and such magistrate shall enter such acknowledgment on his docket. Such bonds shall not be required of a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer when in the discharge of his official duty."

Such police patrolman having the same power and authority as a constable in the discharge of his official duties is not required to give security for costs, and it is thereupon, by filing an affidavit in accordance with Section 13496 General Code,

above quoted, incumbent upon the justice of the peace to issue a state warrant. If, however, there be no reasonable grounds to believe that the offense has been committed, the justice of the peace, notwithstanding the affidavit of the complainant, may decline to issue the warrant.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Commissioner of Labor Statistics)

209.

EMPLOYMENT AGENCY—CHARITY ORGANIZATIONS—NECESSITY TO PRODUCE A LICENSE.

Charity organizations, like the Young Men's Christian Association and the Goodrich House of Cleveland, which charge a fee for registration or as a commission upon the salary of the party for whom employment is procured, are obliged, by Section 886 General Code, to procure a license.

COLUMBUS, OHIO, March 15, 1912.

HON. FRED LANGE, *Commissioner of Labor Statistics, Columbus, Ohio.*

DEAR SIR:—I have received your request for an opinion upon what constitutes a private employment agency within the meaning of the provisions of the General Code providing for the payment of a license; based upon the specific inquiries of the Young Men's Christian Association of Springfield and The Goodrich House of Cleveland as to whether or not their respective employment departments come within the purview of the statute.

The letter of the Young Men's Christian Association discloses the fact that it is there the intention to charge a fee or commission, based upon the first month's salary of the party assisted; while from the communication of the Goodrich House I gather that the intention is to charge a small registration fee; but for the purposes of your inquiry this constitutes no essential difference.

The question, then, is whether charitable organizations maintaining an employment department and charging a small fee, either by way of registration fee or commission, is obligated under Section 886 of the General Code to obtain a license.

Section 893 of the General Code declares what shall be deemed a private employment agency, as follows:

> "Except an employment agency of a charitable organization, a person, firm or corporation furnishing or agreeing to furnish employment or help, or displaying a sign or bulletin, or offering to furnish employment or help through the medium of a circular, card, or pamphlet, shall be deemed a private employment agency, and subject to the laws governing such agencies."

This section specifically exempts charitable organizations insofar as the agreeing to furnish employment and the displaying of a sign or bulletin would constitute them private employment agencies, and if there were no further provision would be decisive. But let us examine, however, Section 886 of the General Code. This section provides:

> "No person, firm or corporation shall open, operate or maintain a private employment agency for hire, or in which a fee is charged an applicant for employment or an applicant for help, without obtaining a license from the commissioner of labor statistics, and paying to him a fee according to the population of the municipality as shown by the last preceding federal census, viz.:
>
> | | |
> |---|---|
> | In cities of 50,000 and upward | $100.00 |
> | In cities of 16,000 to 50,000 | 75.00 |
> | In cities of less than 16,000 | 50.00 |
> | In villages | 25.00 |

> "The commissioner may refuse to issue or renew a license to an applicant if, in his judgment, such applicant has violated the law relating to private employment agencies, or is not of good moral character."

The above section unequivocally, to my mind, places charitable organizations in which a fee is charged an applicant in the category of private employment agencies requiring license.

Section 893 and 886, General Code, would then, at first blush, seem contradictory, but a little examination will disclose that they are not so in fact. Section 893 simply provides that insofar as the agreeing to furnish employment and the displaying of a sign or bulletin constitute the indicia of a private employment agency, these indicia shall be disregarded when a charitable organization is under consideration; while Section 886 is broader in its scope and covers any person, firm or corporation which operates or maintains a private employment agency for hire.

In other words, *any person,* firm or corporation agreeing to furnish employment and displaying an advertisement to that effect, save and except a charitable organization, is presumed by statute to be a private employment agency and subject to the license statute; and *every person,* firm or corporation, including a charitable organization, actually charging a fee to the applicant for employment is subject to the provisions of Section 886 and obligated to secure a license.

My conclusion, therefore, is that charitable organizations maintaining an employment department and charging a fee, either by way of registration fee or by way of a commission upon the salary of the party assisted, is a private employment agency within the meaning of the statute and is obligated to secure a license.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

266.

MATTRESSES—LABELS—SALE OF NEW AND SECOND HAND.

The label required by 102 *O. L.,* 519 *containing a statement of materials used in the manufacture of a mattress, must be placed upon the new mattress by the manufacturer and such label may not be attached by one selling a second hand mattress.*

No mattress may be possessed, sold or delivered which is not properly branded or labeled.

COLUMBUS, OHIO, April 6, 1912.

HON. FRED LANGE, *Commissioner of Labor Statistics, Columbus, Ohio.*

DEAR SIR:—You call our attention to certain language used in an opinion heretofore rendered by this department to you under date of October 19, 1911, relative to our interpretation of an act passed by the last legislature which act is found in the 102 Ohio Laws 519, which act is entitled "An act to provide for the branding and labeling of mattresses, and to provide against the use of insanitary or unhealthy materials in the manufacture of mattresses and to provide against the sale of mattresses containing such insanitary or unhealthy materials.

The language to which you call our attention is as follows:

> "As the law requires that the label must contain a statement of the materials used in the *manufacture* of mattresses, it is clear that such

label is intended to be used wholly upon new mattresses as manufactured, and not upon mattresses which are sold as second hand mattresses and not as new mattresses."

You state that such language has been interpreted to mean that a second hand mattress provided it is sold as a second hand mattress need not bear any label at all, and that, therefore, second hand mattresses are not within the purview of the act in question. The interpretation so placed upon such language is quite the opposite of that intended by the use thereof.

The language so used was intended to mean that the label must be placed on the mattress when manufactured, and must state what is required by Section two of said act, and that it was not permitted for dealers in second hand mattresses to attempt themselves to place a label on such mattress in order to bring such mattress within the provisions of the law.

Section two of the act clearly shows that it is intended that the label should be placed upon the mattress when manufactured as it says that the label shall contain a statement of the materials used in the manufacture of such mattress.

Section one of said act provides:

"Whoever manufactures for sale, offers for sale, sells, delivers or has in his possession with intent to sell or deliver *any* mattress which is not properly branded or labeled as hereinafter provided, or which is falsely branded or labeled, * * * or whoever dealing in mattresses has a mattress in his possession for the purpose of sale or offers it for sale without a brand or label as herein required * * shall be fined * *."

There can be no doubt that after said act went into effect it was unlawful for any person to manufacture for sale, to offer for sale, to sell, to deliver or to have in his possession with intent to sell or deliver *any* mattress which is not properly branded or labeled as required by Section two of said act whether the same be a new mattress or one that is sold as a second hand mattress.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Veterinary Examiners)

267.

VETERINARY SURGERY—EXAMINATIONS—PERSONS WHO PRACTICED PRIOR TO MAY 21, 1894—CONSTITUTIONALITY—IGNORANCE OF LAW DOES NOT EXCUSE.

Section 1174-1 *of the General Code, providing that veterinary surgeons, who had not within six months after the passage of the act, submitted satisfactory evidence to the state board of veterinary examiners that they had practiced prior to May* 21, 1894, *would not be entitled to a certificate without examination, is constitutional.*

Ignorance of said law will not excuse said veterinary surgeons from compliance with its provisions.

COLUMBUS, OHIO, April 10, 1912.

DR. LOUIS P. COOK, *Secretary, Ohio State Board of Veterinary Examiners,* 3116 *Spring Grove Avenue, Cincinnati, Ohio.*

DEAR SIR:—The sub-joined opinion was rendered me by one of special counsel in my department under date of August 10, 1911. After an examination of the statement of facts and brief prepared by Messrs. Bolin & Bolin, attorneys at law, in reference to the right of certain persons to practice veterinary medicine and surgery in the state of Ohio, the said persons having been engaged in the practice of veterinary medicine and surgery prior to May 21, 1894, but having failed within six months after the passage of the act known as Section 1174-1 passed May 10, 1910, and approved May 23, 1910, to submit satisfactory evidence to your board that he was so engaged in the practice of veterinary medicine and surgery in this state prior to said May 21, 1894. At the time of receiving the said opinion I was not clearly satisfied that the conclusions therein were correct. However, after careful examination thereof and of the statute cited therein I have come to the conclusion that the said opinion is correct and that in order for the parties coming within Section 1174-1 to be entitled to a certificate for the practice of veterinary medicine and surgery it was necessary that such party submit the evidence satisfactory to the board within the six months prescribed in said act, and further that the concluding clause of said section that "no person shall after six months following the passage of this act practice veterinary medicine and surgery in this state without a certificate" simply suspended the operation of criminal prosecution until the termination of said six months period.

While this may work a hardship upon the parties now applying for a certificate claiming to come under Section 1174-1 General Code, yet I am clear that the board has no authority at this time to grant any certificate, the party not having submitted satisfactory evidence to the board within six months after the passage of the act that he was engaged in the practice of veterinary medicine and surgery in this state prior to May 21, 1894, and that the remedy must be with the legislature.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(Copy)

COLUMBUS, OHIO, August 10, 1911.

HON. T. S. HOGAN, *Attorney General, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and report the statement of facts and brief of Messrs. Bolin & Bolin in reference to the right of certain persons to practice veterinary medicine and surgery in the state of Ohio.

It appears from the statement of facts that the parties in question were all practicing as veterinary surgeons at least three years prior to the passage of the act of May 21, 1894, being "an act to regulate the practice of veterinary medicine and surgery." 91 Ohio Laws 391.

Section one of said act provides:

> "That all persons who now, or shall hereafter, practice veterinary medicine and surgery in the state of Ohio, and have not been engaged in such practice for at least three years prior to the passage of this act, in the state of Ohio, shall be examined as to their qualifications by a state board of veterinary examiners, to be appointed as hereinafter provided."

This act required all persons who had not been engaged in the practice of veterinary medicine and surgery in the state for at least three years *prior* to the passage of act should have to stand examination as to their qualifications. Subsequently, in the adoption of the General Code said provision was carried into Section 1174 of such Code in the following language:

> "Before entering upon the practice of veterinary medicine and surgery in this state, each person shall pass an examination as to his qualifications and fitness to engage in such practice, before the state board of veterinary examiners."

Said Section 1174 was amended and supplemented 101 O. L. 355.

Section 1174 as amended and supplemented provides in part:

> "Before entering upon the practice of veterinary medicine and surgery in this state each person except such as qualify as hereinafter provided, shall pass an examination as to his qualifications and fitness to engage in such practice."

Section 1174-1 of the General Code provides as follows:

> "Any person who within six months after the passage of this act, submits satisfactory evidence to the state board of veterinary examiners that he was engaged in the practice of veterinary medicine and surgery in this state prior to May 21, 1894, and who pays a fee of $2.50 to said board, shall be entitled to practice veterinary medicine and surgery in this state and shall receive a certificate from the said board signed by the members thereof, which certificate shall state that the person to whom it is given is legally entitled to practice veterinary medicine and surgery in this state; and no person shall, after six months following the passage of this act, practice veterinary medicine and surgery in this state without first having obtained from the state board of veterinary examiners a certificate entitling him to engage in such practice."

Messrs. Bolin and Bolin in their brief reply upon the proposition that the practice of veterinary medicine and surgery in Ohio prior to May 21, 1894, was a *vested right,* and that a subsequently enacted statute will not effect to deny such practitioners their right to practice.

This contention on the part of Messrs. Bolin and Bolin, as I read their brief, is the sole contention that they make for permitting their clients to practice in this state. They do not maintain that the state in the exercise of its police power has not the authority to regulate the practice of veterinary medicine and surgery of those persons who were not in active practice at the time of the passage of the act of May 21, 1894, but they do maintain that as to those who were so in the active practice on May 21, 1894, such persons had obtained a vested right to practice their profession without being required to obtain a certificate from the state as provided in Section 1174-1. They further maintain that as a matter of fact their clients have no knowledge of the passage of the section now known as Section 1174-1 prior to the expiration of the six months therein provided within which to make application for a certificate without examination. They further maintain that the rule that ignorance of the law excuses no one is now becoming abrogated, excepting in violations involving moral turpitude or infringements of well known and plain public policies, and they cite us to an unreported case, that of state of Ohio vs. Cochran. Said case was a criminal prosecution under the provisions of the statutes and was therefore totally different from the matter under investigation. To hold that because these practitioners were unaware of the passage of Section 1174-1 and its provision they were entitled to a certificate would be to hold that they could obtain a legal right in derogation of the plain provisions of the statute. I am of the opinion that although in some cases it may be held that ignorance of the law would excuse a person from the penalties thereof, as was done in the case of State vs. Cochran mentioned above, such rule could in no case be appealed to for the purpose of acquiring a legal right.

The doctrine that a person who has been practicing medicine prior to the passage of an act regulating such practice by virtue of the police power vested in the state, vests a legal right in such person is against the great weight of authority as is shown by the following cases:

"Dent vs. West Virginia, 129 U. S. 114.
"Hawker vs. New York, 170 U. S. 189.
"State, ex rel. vs. State Board of Health, 103, Mo. 27.
"State, ex rel. vs State Medical Examining Board, 32 Minn. 324.
"People, ex rel. vs. McCoy, 125 Ill. 289."

The syllabi in the case of Dent vs. West Virginia supra are as follows:

"1. A statute of a state, which requires every practitioner of medicine in it to obtain a certificate from the state board of health that he is a graduate of a reputable medical college, and which makes the practice of medicine by any person without such certificate a misdemeanor, punishable by fine or imprisonment, is not unconstitutional and void under the fourteenth amendment, which declares that no state shall deprive any person of life, liberty or property without due process of law.

"2. Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable by usual modes adapted to the nature of the case."

Justice Field in delivering the opinion of the court in the above case makes the distinction between the right of the state in the exercise of its police power to prescribe conditions for the practice of medicine that are reasonable and can be readily met, and conditions which cannot be met at all; which are not a means of ascertaining whether the person was qualified to pursue his profession and which would absolutely debar such person from being able to qualify under the statute. This case is cited with approval in the case of Gravett vs. State 65 O. S. 289, at page 309.

The second syllabus of which latter case is as follows:

> "One who has an established practice in the healing of diseases may be required to conform to such reasonable standard respecting qualification therefor as the general assembly may prescribe, having in view the public health and welfare."

I am, therefore, of the opinion that in view of the authorities above cited, the position of Messrs. Bolin and Bolin that there is a vested right in his client to practice veterinary medicine and surgery in this state is untenable, and that, therefore, in order to practice within this state, they having failed to comply with the provisions of Section 1174-1 General Code they must present themselves for examination.

Attached to the brief of Messrs Bolin and Bolin is a certain letter dated April 16, 1900 from the Ohio State Board of Veterinary Examiners, addressed to Dr. G. W. Wendelken, of Athens, Ohio, the contents of which is as follows:

> "At the meeting of the state board of veterinary examiners, held on Tuesday last, your case was considered. In view of the many certificates presented from citizens of your county stating that you had been in continuance veterinary practice since before May 21, 1894, in the state of Ohio, the board decided not to molest you. You may therefore, continue to practice in peace."

Prior to the enactment of Section 1174-1 of the General Code and prior to the enactment of Section 1174 on the adoption of the General Code there was no certificate of qualification required of a person who had practiced medicine three years prior to the passage of the act of May 21, 1894. Consequently, prior to the adoption of the Code Dr. Wendelken was permitted to practice in this state without a certificate as the facts show that he was a practicing veterinary three years prior to May 21, 1894, and the letter above set out simply states that the board is satisfied that the proofs offered by Dr. Wendelken were sufficient as to his length of practice. The above letter can under no circumstances be considered as a certificate, and on the adoption of Section 1174 no one was permitted to practice in this state unless he shall have first passed an examination as to his qualification and fitness. Consequently, it is my opinion that on the adoption of the Code and the passage of said Section 1174 Dr. Wendelken, as well as the other clients of Messrs. Bolin and Bolin, could not legally practice in this state without having passed an examination. On the adoption of Section 1174-1 Dr. Wendelken, as well as the others, were permitted with six months after the passage of said section, upon submitting satisfactory evidence, that he was engaged in such practice prior to May 21, 1894, and the payment of the regular fee to practice veterinary medicine and surgery in this state, to receive a certificate from the board signed by the members thereof.

No distinction can be made between the right to establish a practice and the right to pursue a practice within this state under the ruling of Gravett vs. State, supra, wherein the court says on page 308:

> "This objection is founded on the inhibition of the fourteenth amendment to the constitution of the United States: 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;' and the provision of our own bill of rights which gives inviolability to the rights of 'enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking to obtain happiness and safety.' In urging this objection it is correctly assumed that there is a property interest in a vocation or means of livelihood, but the distinction between the right to establish a practice, and the right to pursue a practice, already established seems to be inadmissible. By what process of reasoning could it be esteemed more sacred that the right to make contracts by which property might be acquired. The provision quoted from the bill of rights includes the right to acquire, and the right to possess within the same protection."

Summing up, therefore, I beg to submit that it is my opinion:

First. That the doctrine that ignorance of the law excuses no one is fully applicable to the matter under examination, and the fact that the clients of Messrs. Bolin and Bolin were not aware of the passage of Section 1174-1 will not give them the legal right at this time to demand a certificate from the board.

Second. That Section 1174-1 of the act regulating the practice of veterinary medicine and surgery is constitutional, and that the requirements imposed by said act must be met in order to entitle the person to a certificate.

Third. That the case of Dr. Wendelken stands in no better position than does the case of other clients of said Messrs. Bolin and Bolin.

It will be necessary, therefore, that the clients of Messrs. Bolin and Bolin present themselves for such examination as is required by the Ohio State Board of Veterinary Examiners.

Respectfully submitted,

Special Counsel.

(To the State Highway Commissioner)

71.

STATE AID ROAD WORK ENGINEER—EXPENSES—AUTOMOBILE HIRE PAYABLE TO WIFE CANNOT BE ALLOWED—PUBLIC POLICY—DEALINGS OF PUBLIC OFFICIALS WITH PERSONALLY INTERESTED PARTIES.

A bill presented as an expense account of an engineer purporting to be for automobile hire and payable to the wife of such engineer, when the state records show an automobile listed in the name of the engineer and none listed in the name of the wife, is clearly apparent on its fact to be a subterfuge. Furthermore, the policy of the law forbids a public official to deal in such capacity with his wife or any other personally interested party. Such bill cannot be allowed.

COLUMBUS, OHIO, January 13, 1912.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your communication of December 1, wherein you inquire as follows:

> "Mr. H. M. Sharp is employed as resident engineer on state aid road work. As a resident engineer he is entitled to actual and necessary expenses. In this expense account, he includes an item of $38.00 for automobile hire covered by a receipt signed by Mrs. H. M. Sharp.
>
> "The records of the automobile department show an automobile registered in the name of H. M. Sharp but none in the name of Mrs. H. M. Sharp. Can this bill for automobile hire be legally paid from state aid money?"

In reply to your inquiry, Section 1215, General Code, as amended in 102 O. L., 345, being Section 42, provides for the appointment, salary and expenses of resident engineers under the state highway department. Said section reads as follows:

> "The state highway commissioner shall use a competent engineer and assistants to make the necessary surveys and plans for a proposed highway improvement. Such engineer may also be employed to superintend the work of construction of such improvement, shall be compensated for each day employed in such service, not to exceed six dollars per day, and actual expenses. All assistants shall receive not to exceed three dollars per day and actual expenses."

From the statement you make, to the effect that the records of the automobile department show an automobile registered in the name of F. M. Sharp, but none in the name of Mrs. F. M. Sharp, it is perfectly apparent that the receipt from Mrs. F. M. Sharp is a mere subterfuge; and whether a subterfuge or not it is not the policy of the law that a man may contract with his wife concerning matters that are subjects of expense in his own office.

It is the policy of the law so well understood as to need only mention, that an officer in incurring expenses should deal with those with whom he may deal at full arm's length. We have even penal statutes forbidding certain public officials from contracting with certain interested persons. These statutes disclose the public policy. Before an officer is entitled to reimbursements for claimed expenses,

it must appear that such officer has actually paid out the money to a third person, that the expenditure is for a proper purpose, and that the contract is made with one not coming with the legal inhibition either by express statute or well known and well understood public policy.

The bill to which you refer cannot legally be paid from state aid money.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

171.

STATE AID FOR ROADS—PERSONAL INVESTIGATION OF COUNTY'S QUALIFICATIONS FOR AID BY HIGHWAY COMMISSIONER—LIMITATIONS OF AID TO AMOUNT RAISED BY LEVY BY COUNTY COMMISSIONERS.

The act providing an appropriation for state aid in road building, limits the benefits of the appropriation to counties having less than two hundred miles of macadam, gravel or brick road, and for the purpose of determining whether or not a county comes within such limitations, the state highway commissioner is not concluded by the statement of facts set out in an application for state aid but may use such means as are reasonably necessary to determine such fact.

Under Section 1218, *a county applying for state aid is limited to an amount equal to that which it has raised by tax levy.*

COLUMBUS, OHIO, February 26, 1912.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—The recent legislature in appropriating money for "state aid in road building" attached thereto the following proviso:

> "State aid in road building----------$440,000.00. Provided, that this appropriation shall not be paid out by said state highway department or used in any other manner than in new construction in counties having less than two hundred miles of macadam, gravel or brick road, and no part of such appropriation shall be paid to any county for repairs on dirt or unimproved road; but in counties having more than two hundred miles of macadam, gravel or brick road, it may be used for new construction or improvement of said roads as the county commissioners may decide."

Since it is provided in said appropriation that the same shall not be paid out by the state highway department in any other manner than in construction in counties having less than two hundred miles of macadam, gravel or brick road, you desire to know whether or not you are concluded, as to whether or not a county has two hundred miles of macadam, gravel or brick road, by the statement to that effect contained in the application for state aid for repairs.

It is my opinion that you are not concluded thereby but that you may use such means as is reasonably necessary in order to determine whether or not a county has two hundred miles of such road; providing you have reason to believe that such statement is not in accordance with the facts. The law requires that the appropriation shall not be paid out by your department for repairs in counties having

less than two hundred miles of macadam, gravel or brick road, and it is your duty to see that the county has said two hundred miles in order to be entitled to state aid for repairs.

You further state that in a certain application for state aid for repairs filed with your department December 7, 1910, the commissioners in their application stated that they had levied on the tax duplicate of said county three-tenths of a mill for the repairs of improved roads in said county amounting to $7,000.00, and that they make application to your department for the amount of state aid apportioned to their county for the year 1911. You state that the amount apportioned to their county is somewhat in excess of $7,000.00, and you desire to know whether such county would be entitled to anything in excess of $7,000.00, being the sum which they have raised by taxation for repair of improved roads.

Section 1218 General Code, being the highway act prior to the new highway act passed by the last legislature provides:

> " * * * The amount so apportioned shall be paid to the county treasurer, if the county commissioners of such county have levied or will levy a tax on the duplicate of the county sufficient to equal the amount so appropriated."

The county commissioners in their application for state aid have certified to your department that they have levied three-tenths of a mill, amounting to $7,000.00.

I am of the opinion that they are entitled only to an amount equal thereto, to wit, the sum of $7,000.00 of the amount apportioned to their respective county, and that in order to receive the balance of said sum it would have been necessary for them to have made a further application therefor prior to the enactment of the new highway law as found in 102 Ohio Laws 333.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

242.

STATE HIGHWAY COMMISSIONER—CERTIFIED CHECK RECEIVED AS GUARANTEE WITH BID ON CONTRACT—DISPOSITION OF, WHEN CONTRACTOR FAILS TO PERFORM.

When, in accordance with a requirement of the state highway commissioner, a contractor submits with his bid, a certified check as a guarantee for the performance of the contract, and later said contractor fails to enter into a contract, the commissioner may out of the proceeds of said check, reimburse both the state and county for the loss resulting from such non-performance and must return the balance to the contractor.

COLUMBUS, OHIO, February 10, 1912.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Under date of November 27th you submitted to this department for opinion the following:

> "In preparing the letting of state aid roads, we require that the contractor submit a draft or certified check in the sum of three hundred dollars ($300.00) payable at sight to the state highway commissioner,

as a guarantee that if the bid is accepted a contract will be entered into and performance thereof properly secured within five days of notice of acceptance of bid.

"In case of failure or refusal on the part of the proposer to enter into contract within the set period, what disposition shall be made of the amount deposited?"

Section 1202 General Code provides in reference to receiving bids for the construction of an improved road under the state highway act that

"The bids received for a contract shall be filed and opened at the time stated in the notice, and be protected by such other regulation as the state highway commissioner directs."

The state highway law as amended 102 Ohio Laws 333 et seq., on page 341 (Section 1202 General Code) provides that:

"The bids received for an improvement shall be filed and opened at the time stated in the notice and shall conform to such other regulations as the state highway commissioner may direct."

By virtue of the provisions above set forth I am of the opinion that the state highway commissioner has full authority to make the requirements set forth in your letter.

The question arises to what disposition in case of failure or refusal on the part of the successful bidder to enter into the contract within the specified time shall be made of the amount deposited.

The money forfeited by failure of the successful bidder to enter into the contract as provided may or may not be an amount sufficient to cover the expenses and the additional costs, including the increase in the cost of the road on a reletting thereof, incurred by reason of such failure and the necessity of a re-advertisement and a reletting of such contract.

The question arises as to whether this money so forfeited shall be considered in the nature of liquidated damages. It would appear to me that the same should be considered in the nature of a reimbursement for the expenses and additional costs incurred by reason of such failure. As the money expended in the letting of the contract comes out of the state aid money appropriated to the particular county and out of the county as well, I am of the opinion that the state highway commissioner should ascertain the expenses and additional costs incurred by the failure of the contractor to enter into the contract and apportion the same between the county and the state in proportion to the amount of money appropriated by the state and county respectively for the particular road, and pay the said sum or so much thereof as is necessary to reimburse the county and state for all losses by reason of the failure to enter into the contract into the state treasury and county treasury respectively to be credited to the general fund of each. If there is any balance after reimbursing the state and county for loss on account of failure of the contractor to enter into the contract, the balance thereof should be returned to the contractor.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

392.

ROADS AND HIGHWAYS—SHARE OF EXPENSE OF MAINTENANCE AND REPAIR OF STATE AID ROADS BY COUNTY, TOWNSHIP AND HIGHWAY COMMISSION—"IMPROVEMENT" AND "MAINTENANCE" AND "REPAIR."

Under Section 1225 *General Code, the expense of maintaining and repairing roads improved by state aid, shall be payable* 25 *per cent. by the state;* 50 *per cent. by the county and* 25 *per cent. by the township, unless both the commissioners and and the trustees have failed to make application for their share of the funds, in which case the state highway commissioner could pay all of the cost.*

Section 1207 *General Code provides only for road improvement and cannot therefore, be applied to the maintenance or repair of roads.*

COLUMBUS, OHIO, May 9, 1912.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of April 20th, wherein you state:

> "A road that has been built under state aid is badly in need of repair. The county commissioners have passed a resolution in which they state that they have no funds to apply to the repair of this road, and request the state highway commissioner to repair the same, taking the entire cost out of the state aid money apportioned to their county.
>
> "In your opinion what is the limit to the per cent. of the total cost of repair work that the highway commissioner may expend on state aid roads? Also, in your opinion, can maintenance and repair work on state aid roads be done under Section 1207, General Code?"

In reply to your first question I direct your attention to Section 1225, General Code, the first paragraph of which reads as follows:

> "Highways improved or constructed under the provision of any act providing for aid by the state shall be kept in repair and maintained by the state highway commissioner. The expense of such repair and maintenance shall be divided and payable twenty-five per cent. thereof by the state, fifty per cent, thereof by the county and twenty-five per cent. thereof by the township or townships. The state's share being payable from moneys appropriated by the general assembly for the purpose; the county and township shares from their respective road or road repair funds."

The statement in your letter that the road in question is one built under state aid brings said road clearly within the provisions of Section 1225. The requirement of said section that twenty-five per cent. of the expense of the repair of such road shall be paid by the state, fifty per cent. by the county, and twenty-five per cent. by the township or townships, is, in my opinion, mandatory and cannot be disregarded without doing violence to the plain intent and meaning of the express words of the statute. The only instance in which you would be legally justified in repairing a road and paying all the cost out of the state's apportionment to the county would be under Section 1185, when neither the county commissioners nor the township trustees had made use of the apportionment of the state aid money to said county.

It is therefore my opinion that unless the commissioners or trustees have failed to make application for the county's share of the state highway fund, you are not authorized to pay more than twenty-five per cent. of the cost of the repair of this road out of the funds allotted to said county under the state highway law.

Your second inquiry involves a construction of Section 1207 of the General Code, which is as follows:

> "Whenever there are one or more improvements to be made in any county and the cost and expense thereof is equal to or is less than twice the amount apportioned by the state to a county, then the state shall pay fifty per cent. of such cost and expense.
>
> "Whenever there are one or more such improvements to be made in any county and the cost and expense thereof exceeds twice the amount apportioned by the state to a county, then the state shall pay the amount of the apportionment for said improvement or improvements apportioned as may be agreed upon by the state highway commissioner and the county commissioners.
>
> "Except as otherwise provided in this chapter, the county shall pay twenty-five per cent. of all cost and expense of improvement."

The question to be determined is whether, under said section, the state highway department can do maintenance and repair work on state aid roads. No express authority seems to be granted therein by said section for doing maintenance or repair work, and if such authority exists it must be by implication.

In this connection it becomes important to determine whether the word "improvement" includes "maintenance" and "repair." To maintain is defined by Webster's Dictionary as "to hold or keep in any particular state or condition, to support, sustain or uphold; not to suffer to fail or decline." The words "improve" and "repair," as applied to roads, are defined and distinguished in Elliott on Roads and Streets, Third Edition, Section 576, in which the following language appears:

> "An improvement may ordinarily include repair but not, as is generally true in such cases, when the two terms are used in contra-distinction. To repair seems, primarily, to mean to mend or restore to a sound or good state after decay, injury or partial destruction, while to improve seems to convey more of the idea of making better, generally by addition or change of material, nature or character."

The words "improvement," "maintenance" and "repair," being used in contra-distinction, each possesses a different meaning, separate and distinct from the others. In numerous instances the words "construction," "improvement," and "repair" occur in the same sections of the General Code in reference to the state highway law, but in Section 1207 the word "improvement" is used to the exclusion of the others, thus negativing the idea that "repair" or "maintenance" was intended.

I am, therefore, of the opinion that maintenance and repair work on state aid roads cannot be done under Section 1207, General Code.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

457.

STATE AID FOR ROADS—DISPOSITION OF FUNDS FOR "IMPROVEMENTS" AND FOR "REPAIRS."

State aid funds for "improvements" are paid under Section 1206, *General Code. State aid funds for "repairs," however, are paid under Section* 1218, *General Code, to the county treasurer, to be placed in a common fund together with the proceeds of levy made by the county commissioners, which fund is to be disbursed by said county commissioners acting as a board of turnpike directors.*

Opinion to J. R. Marker, State Highway Commissioner Columbus, Ohio.

COLUMBUS, OHIO, June 3, 1912.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter, wherein you state:

> "Enclosed in the 'application for state aid for repair' submitted by the board of commissioners of Defiance county.
>
> "This application was filed in the office of the state highway commissioner, November 22, 1910.
>
> "How and by whom should the state's apportionment be disbursed?"

The sections of the General Code which have any bearing upon your inquiry are Sections 1206 and 1218, which read as follows:

> "Section 1206. One-half of the cost and expenses of the construction of the improvement shall be paid by the treasurer of state upon the warrant of the auditor of state issued upon the requisition of the state highway commissioner, from a specific appropriation made to carry out the provisions of this chapter.
>
> "Section 1218. If permanent roads of not less than standard width have been constructed prior to the establishment of the state highway department and the materials thereof are gravel, brick, telford, macadam or material of like quality, the county commissioners may make application to the state highway commissioner on or before January first of each year, for the amount of state funds apportioned to such county. Thereupon the amount so apportioned shall be paid to the county treasurer, if the county commissioners of such county have levied or will levy a tax on the duplicate of the county sufficient to equal the amount so appropriated. Such appropriation and levy shall become a part of the pike repair fund of the townships, and be apportioned to the townships or road districts of not less than one township each in proportion to the amount of the fund collected by such levy in each such township or road district. Township trustees or other authorities having charge thereof shall apply such fund to the repair of improved roads in the same manner as other pike repair funds are applied, but the material used therefor shall be equal to the material used in the original construction of such road."

At first glance, I inclined to the view that state aid money for repair should be disbursed as provided by Section 1206, since the word "improvement," therein used, seemed to be sufficiently broad to include "repair." The context of Section 1218, however, lends a different aspect to the case. That section deals exclusively

with the disbursement of state aid money for the *repair* of highways, whereas Section 1206 refers to new construction.

When the preliminary steps required by Section 1218 have been taken by the county commissioners it becomes the duty of the state highway commissioner to cause to be forwarded to the treasurer of such county such portion of the county's fund set apart by the state for the repair of highways; whereupon his jurisdiction over the said fund ceases. The said state aid money allotted to said county, in addition to the proceeds of the levy made, or authorized by the county commissioners, must be placed in a common fund to be disbursed by the county commissioners acting as a board of turnpike directors, as held by me in an opinion to Hon. W. J. Schwenck, prosecuting attorney of Crawford county, Ohio, a copy of which opinion is herewith enclosed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

604.

ROADS AND HIGHWAYS—DAMAGE TO ROAD THROUGH FAILURE TO COMPLETE WITHIN TIME LIMIT FIXED BY CONTRACT—LIABILITY OF CONTRACTOR, STATE HIGHWAY COMMISSIONER AND COUNTY COMMISSIONERS.

When, under the terms of a contract granted by the state highway commissioner, a time limit was set for completion, and when, through failure to complete in such time (neither the state highway department nor the county commissioners being responsible for the delay), damage occurred to said road by reason of its use by order of county commissioners before completion, but after date set for the same, the contractor is not excused from rebuilding said road according to plans and specifications without increase over the contract price.

COLUMBUS, OHIO, August 6, 1912.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 11th as follows:

"I respectfully request your opinion upon the following:

"In the matter of the Children's Home road in Darke county, Ohio.

"The contract for the construction of said road was awarded to Baker & Kniseley on the 30th day of September, 1910, said road to be completed July 30, 1911. The commissioners then in office failed and neglected to construct sewers and culverts for said road until after the 18th day of September, 1911. A portion of said road was constructed in the fall of 1911, immediately after the new board of commissioners assumed the duties of their office. The road could not be completed on account of cold weather. The portion of said road constructed was ordered thrown open by the state highway department; the contractor, in writing, protested to the commissioners of the county, and also to the state highway commissioner, against the opening of said road, and insisted that a by-way, provided for by statute, be provided for travel along said highway.

"The road so thrown open during the winter of 1911 was con-

siderably damaged. Said road has never been accepted by the state highway department.

"Query: What right have the county commissioners, if any, to assist in repairing or reconstructing the road in question?

"Query: What right, if any, has the state highway department to assist in repairing or reconstructing the road in question?"

I am also in receipt of a letter of the same date from Mr. Ezra Baker, one of the members of the firm to whom was awarded the contract for the construction of said road which letter is as follows:

"With reference to the Children's Home road in Darke county, Ohio, I wish to state that, as contractor for said road, that prior to September 18, 1911, I requested the commissioners of Darke county, Ohio, on different occasions to construct culverts and sewers, as provided by specifications and statute, along said road.

"The commissioners failed and neglected to construct the same, thus making it impossible for me to complete the road during the time provided for by the contract.

"As soon as the new board of commissioners assumed the duties of their office, they proceeded to construct the culverts and sewers along said way, and the greater portion of said road was constructed during the fall of 1911. On account of cold weather, it was impossible to complete the road during said fall.

"The state highway department ordered said road so completed, thrown open to public travel. I protested in writing to the commissioners of the county, and also to the state highway department against the opening of said road, and requested that a by-way be built, as provided by statute, for public travel.

"During the winter of 1911, that portion of the road so constructed and thrown open to public travel was considerably damaged.

"The remainder of the road has been constructed, and, as I claimed, strictly in accordance with the plans and specifications as furnished by the highway department, and under the direction and supervision of an inspector appointed by said highway department; also to the satisfaction of the resident engineer.

"I am willing to do what is right in helping to repair this road, but do think that I should not be compelled to pay one cent, as I did my duty in the matter as near as it was possible for me so to do.

"I am willing, by way of compromise, to assist in the repair of the road, and the commissioners are willing provided the statute permits them to do their portion of the construction or repair of the road and this is the query that is submitted to you by James R. Marker, state highway commissioner.

"Trusting that we may hear from you at your earliest convenience."

The claim of the contractor for an additional allowance over and above the stipulated contract price to assist him in the reconstruction or repair of said road is based upon the alleged negligence of the county commissioners of Darke county in not constructing sewers and culverts in time to enable him to complete the road by the date specified in the contract.

The contract was awarded by your predecessor in office, Hon. James C. Wonders, to Baker & Kniseley on September 30, 1910, and was duly approved by the commissioners of Darke county. It was provided among other things that

the work was to be commenced within twenty days from the date of the awarding of the contract and completed to the satisfaction of the state highway commissioner on or before ten months from the date of the contract, that is, on or before July 30, 1911, and that if, for any reason, except for the written consent of the state highway commissioner, the completion of said work should be delayed beyond the date fixed in the contract, the contractor should forfeit and pay the sum of five dollars ($5.00) for each and every day during which said work should be delayed. It was also provided that the state highway commissioner may, in his discretion, extend the period allowed for construction in which event damages for delay should not become operative until such extension expired. It does not appear that such extension was granted by you.

In addition to the facts submitted in your letter and that of Mr. Baker, I am in receipt of additional information to the effect that no effort was made by the contractor to commence work on this contract until sometime in August, 1911, after the time limited for completion had expired. The correspondence on file in your office relating to this matter shows that on July 20, 1911, you wrote to Baker and Kniseley calling their attention to the fact that construction on said road had not been commenced, and requested information as to the reason for the delay. On July 26th, Mr. Ezra Baker answered your communication and gave as the reason for the failure to complete said road, inability to procure material promptly. Nothing was mentioned at that time of the failure of the county commissioners to construct sewers and culverts, and it seems to me if the commissioners were at fault in that regard, Mr. Baker would have said so then instead of waiting nearly a year to advance the claims of alleged negligence on the part of the county commissioners as an excuse for the failure to complete the work according to contract.

There were but two sewers and culverts on that particular road and if the contractor had not waited for almost a year, before doing anything the county commissioners could have constructed said sewers and culverts in time to enable the contractor to complete his contract by July 30, 1911.

Upon consideration of the foregoing facts and the terms of the contract, I am of the opinion that neither the board of county commissioners nor the state highway commissioner is legally authorized at this time to assist in the repair or reconstruction of said Children's Home road, and it is the duty of the contractor to complete the work according to the plans and specifications for the original contract price.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

724.

ROADS AND HIGHWAYS—STATE AID FUNDS MAY BE EXPENDED ONLY AS DESIGNATED IN APPLICATION—BALANCE LEFT TO CREDIT OF COUNTY MUST BE REAPPLIED FOR.

Inasmuch as application for state aid funds must be made prior to May 1st, and as such application must designate specifically the roads to be improved, the county commissioners may not use a balance of such funds left over after the improvement of the designated roads, for the purpose of improving roads not designated in the improvement.

Such balance, however, remains to the credit of the county and may be expended in accordance with a proper application for state aid made prior to May 1st following.

COLUMBUS, OHIO, November 13, 1912.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—You have submitted an oral request for an official opinion upon the following:

> "The commissioners of a certain county made application in December, 1911, for the 1912 fund for the improvement of one mile of a certain highway therein. The application was regular in form and was approved by you. In April, 1912, the county commissioners passed a final resolution agreeing to appropriate the county's share of the cost of the improvement which resolution was duly approved by this department as required by law.
>
> "The contract was let and work of construction is nearing completion. The cost of construction will be considerably less than the estimate, and in consequence, there will be a balance in the state aid fund allotted to that county, which, added to an equal amount that the county commissioners say they are willing to appropriate, would be sufficient to construct another mile of said road."

Upon the foregoing facts, you desire an opinion as to whether there is any way by which said money can be legally used this year in the construction of another mile of said road.

It is provided by Section 1185 of the General Code, in part as follows:

> "The commissioners of a county may make application to the state highway commissioner for aid from an appropriation by the state for the construction, improvement, maintenance or repair of highways. Such application shall be filed prior to May first of the year in which such appropriation may be made or become available. If the county commissioners have not made use of the apportionment to such county, in the year in which it is available, then the township trustees may make application prior to the first day of April of the succeeding year * * *."

Section 1186, General Code, provides in part as follows:

> "Each application for state aid in the construction, improvement, maintenance or repair of highways shall be accompanied by a proper certified resolution of the county commissioners or township trustees having jurisdiction of the road to be constructed, improved, maintained or

repaired, stating that the public interest demands the improvement of the highway therein described; * * *. Each application for state aid shall also contain an agreement on the part of the county commissioners or township trustees, having jurisdiction over the road, to pay one-half of the cost and expenses of surveys and other expenses preliminary to the construction, improvement, maintenance or repair of said road."

County commissioners are required by Section 1185, to file application for state aid money prior to May 1st of the year in which the appropriation becomes available. Section 1186 requires the application for such money to designate specifically the road or roads to be improved. This is necessary so that the state highway commissioner may make plans and specifications and estimate the cost of construction of such road, and to enable him to determine the amount of money that a county would be required to appropriate to pay its share of the cost of such construction and whether the amount of state aid money allotted to the county would be sufficient to pay the state's share of such cost.

There is no provision in the highway law which would preclude county commissioners from filing two or more applications prior to May 1st of the year in which the appropriation by the state becomes available. Inasmuch as the commissioners of the county in question failed to apply for all of the money allotted to their county for the year 1912, before May 1, 1912, I am of the opinion that they are without power to apply for the unexpended portion thereof, at this time.

You are not authorized to expend state money in the construction of roads unless an application such as that described above, has been filed by the county commissioners. As this cannot now be legally done, I am of the opinion that no part of said balance remaining to the credit of said county can be used for a new construction work this year. However, it remains to the credit of the county and at the end of this year will be subject to application by township trustees as provided by Section 1185, supra.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

766.

ROADS AND HIGHWAYS—STATE AID—WHEN APPLICATION MADE PRIOR TO JANUARY 1, 1911, MISTAKES AND OMISSIONS IN APPLICATION MAY SUBSEQUENTLY BE RECTIFIED.

When applications for state aid, under Section 1218 *General Code, are defective in that they fail to contain a statement of the total taxable property of the county and the number of mills levied thereon and the number of miles of improved road in such county, or by reason of a failure to state that any levy has been made or will be made to raise funds equal to the amount applied for or by reason of clerical errors:*

Held:

If the application has been made prior to January 1*st, such omissions may yet be supplied and such errors be corrected so as to permit the counties to take advantage of the state aid provision.*

COLUMBUS, OHIO, November 13, 1912.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter wherein you state:

"Find enclosed applications for state aid for repair for the following counties; Warren, Van Wert, Crawford and Champaign.

"Each of these several applications are more or less irregular in some respects, and I therefore most respectfully request your opinion as to what course this department shall pursue in each case."

Section 1218 of the General Code provides a method of using the state aid money allotted to a county for the repair of improved highways therein, as follows:

"If permanent roads of not less than standard width have been constructed prior to the establishment of the state highway department and the materials thereof are gravel, brick, telford, macadam or material of like quality, the county commissioners may make application to the state highway commissioner on or before January first of each year for the amounts of state funds apportioned to such county. Thereupon the amount so apportioned shall be paid to the county treasurer, if the county commissioners of such county have levied or will levy a tax on the duplicate of the county sufficient to equal the amount so appropriated. Such appropriation and levy shall become a part of the pike repair fund of the townships, and be apportioned to the townships or road districts of not less than one township each in proportion to the amount of the fund collected by such levy in each such township or road district. Township trustees or other authorities having charge thereof shall apply such fund to the repair of improved roads in the same manner as other pike repair funds are applied, but the material used therefor shall be equal to the material used in the original construction of such road."

The applications in question were all made under the old highway law prior to January 1, 1911, and it is therefore, not necessary to consider the effect of the governor's veto of the section of the present highway law, repealing the old law on that subject.

State aid money could not be paid, under Section 1218, to any county for repairs, unless such county, prior to the establishment of the state highway department, had constructed permanent roads of not less than standard width, of "gravel, brick, telford, macadam or material of like quality." The county commissioners were required to make application for the county's share of state aid money, on or before January 1st of the year in which the appropriation by the state was made, or become available. Before said money could be paid to any county, the county commissioners were required, either to levy, or agree to levy a tax on the duplicate of the county, sufficient to equal the amount of state aid money apportioned to the county.

A clause in the form of application by county commissioners for state aid money for repair, required them to state the number of mills levied by them on the taxable property of the county, and to state the amount of the total taxable property of the county, so as to serve as a basis of computation in ascertaining whether the amount of money levied or agreed to be levied by the county commissioners, would be sufficient to equal the amount of state aid money apportioned to the county.

The 1911 Appropriation bill (102 O. L., 378), contains a clause limiting the expenditure of state aid money to new construction in counties having less than 200 miles of macadam, gravel or brick road, so that the commissioners of any county desiring to use the 1911 state aid money for repair, instead of for new construction, would have to show that the county had at least 200 miles of macadam, gravel or brick road.

All of the applications enclosed in your letter, with the exception of the application of the county commissioners of Van Wert county, are defective in that they fail to contain a statement of the total taxable property of the county, and the number of mills levied thereon, and the number of miles of improved road in such county. According to the application of the commissioners of Van Wert county, they levied six-tenths of one mill for the repair of improved roads on the property of said county, except upon the property of certain townships therein, in which the township trustees made a levy for said purpose upon the taxable property of their respective townships.

The total tax duplicate of the county "including the aforesaid townships," is given as $14,104,750.00. By deducting from this total, the total value of the taxable property of those townships enumerated as having made a levy, and multiplying the remainder by the rate levied by the county commissioners on the remainder of the property of the county, the total amount that will be produced by the levy made by the county commissioners may be readily ascertained. You may pay an equal amount to Van Wert county from the state appropriation. Inasmuch as the proceeds of the levy made by the commissioners of Van Wert county are already in the county treasury, I have not passed upon the general question of the legality of the act of the county commissioners in making a levy on only a part of the taxable property of the county.

The application of the commissioners of Crawford county is defective in that it fails to state that any levy has been made or will be made, and in that the total tax duplicate of the county is not stated. The applications of the commissioners of Warren and Champaign counties are defective in the same respect as that of the application of the commissioners of Crawford county. The two last named failed to set forth the number of miles of improved road in each of said counties, so as to enable you to determine whether said counties are entitled to any of the state aid money for repair.

Another defect is to be noted in the application of the commissioners of Champaign county, which is not common to any of the other applications, in that it is made to appear that the 1910 state aid fund was applied for when, in fact, the 1911 fund was intended. This is apparently a clerical error, and I see no objection to the commissioners correcting it by adopting a supplementary resolution declaring the date to be erroneous and that they intended to apply for the 1911 fund.

The essential feature is the *making* of the applications before January 1st, and this has been done in each case. I know of no reason why the omitted facts cannot now be supplied by the commissioners of the several counties affected.

If the commissioners have levied, or will agree to levy a tax upon the taxable property of the county equal to the amount of state aid money apportioned to the county, a supplementary resolution to that effect, including a statement of the number of miles of improved road in the county, will be sufficient to warrant you in paying the county's share of the state aid fund for 1911 to the treasurer thereof, providing such county had, at the time of making the application, at least 200 miles of improved road.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Health)

325.

STATE BOARD OF HEALTH—NO POWER TO ENJOIN PERSONS PUBLISHING MISREPRESENTATIONS AS TO APPROVAL OF PLUMBING APPLIANCES BY BOARD.

When a person is publishing misrepresentations with respect to approvals made by the board of health with reference to certain plumbing appliances, invented and sold by him, the board may not proceed by injunction against said party for the reason that there is no statutory provision for the same, and also because there is an adequate remedy at law.

COLUMBUS, OHIO, May 1, 1912.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of December 28, 1911, in which you state that:

> "On the request of Mr. H. J. Luff, of Cleveland, and others, the state board of health has adopted certain interpretations of provisions of Part 4 of the Ohio State Building Code (O. L. 102, p. 586, et seq.) and on other interpretations asked for has postponed giving an answer until tests can be made to prove the efficiency of appliances proposed as substitutes for those appliances described in the Code. Under the provisions of the Code (Section 12600-277) such substitution can only be made upon approval of the state and municipal authorities charged with the enforcement of the act.
>
> "Mr. Luff has prepared for publication a book containing the provisions of the Code above referred to and in this book has stated that certain appliances in which he is financially interested have been approved by the state board of health and also represents as approved by this board other methods of installation which have not and could not be approved as they are contrary to good practice in plumbing."

and you request my opinion upon the following:

> "What remedy has the state board of health to prevent the author and publisher from circulating the book containing these misrepresentations as the information contained therein will work to the detriment of the state board of health and also to those who install plumbing work in the belief that the statements contained in the book are true and represent the opinion of this board?"

In reply I desire to say that after a careful investigation of the law relative to the subject referred to in your letter, I have come to the conclusion that the state board of health is without any authority to prevent either the publication or the circulation of the work prepared and placed upon the market by the said author, Mr. Luff, of Cleveland, Ohio.

Your board is a statutory board and has the power to enforce certain things under the statutes, but in the case referred to in your letter, you are without statutory authority, for the reason that the act itself provides in Section 1 thereof, (Section 12600-281) as follows:

> "It shall be the duty of the state board of health or building inspector or commissioner, or health departments of municipalities having building or health departments to enforce all the provisions in this act contained, in relation and pertaining to sanitary plumbing. But nothing herein contained shall be construed to exempt any other officer or department from the obligation of enforcing all existing laws in reference to this act."

and section 2 thereof (Section 12600-274 of the General Code) provides what shall be an unlawful act thereunder, as follows:

> "It shall be unlawful for any owner or owners, officers, board, committee or other person to construct, erect, build, equip or cause to be constructed, erected, built or equipped any opera house * * * without complying with the requirements and provisions relating thereto contained in this act."

and section 3 of the act (Section 12600-275 of the General Code) provides:

> "It shall be unlawful for any architect, builder, civil engineer, plumber, carpenter, mason, contractor, sub-contractor, foreman or employe to violate or assist in violating any of the provisions contained in this act."

It is apparent from a careful consideration of the above sections of the said act that the editing and publishing of a book containing any misrepresentations is not a violation of any of the provisions of this act, and therefore your board is without any remedy to proceed criminally against the author. I am further of the opinion that your board is without authority to maintain an injunction against the author to prevent the publication and sale of the same on the ground that it contains misrepresentations which might affect some individual belonging to the class specified in sections 2 and 3 of the act above quoted. For injunction, like other equitable remedies, was intended to meet the deficiencies of the law and with the exception of cases in which the remedy is expressly allowed by statutes, the same would not lie. The same principles and maxims are applicable to injunctions as to other equitable proceedings and that remedy of injunction does not lie in favor of one who has a complete and adequate remedy at law like they would have in case any individual of the class above enumerated had relied upon the correctness of the publication referred to in your inquiry, as the publisher would be liable in damages to the person so injured by such false representations as are included in said publication.

I might suggest, however, to your board that in view of the fact that many may be mislead by this publication and made liable to a breach of the law above quoted, that you cite the author to appear before your board and after pointing out to him the evils which might result from the sale of his book on account of the misrepresentations contained therein, then if he still insists upon continuing such publication and the sale thereof, that you as a board give notice to the public of such misrepresentations contained therein by giving notice to all the architects, builders and parties amenable to the law.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

469.

STATE BUILDING CODE—CESSPOOLS ON PRIVATE LOTS NOT GOVERNED BY—POWERS OF LOCAL BOARD OF HEALTH.

The Ohio State Building Code applies only to the structures named in the act, and to the lands and lots appurtenant thereto, and private homes and lots are not included. Section 2 of said code, therefore, providing that cesspools on premises accessible to a sewer shall be abandoned and filled, does not apply to private lots.

Such lots are governed by the rules established by city and village boards of health and their owners subject to the penalties provided for the same.

COLUMBUS, OHIO, June 25, 1912.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Your letter, of which the following is a copy, is hereby replied to, with proper suggestions:

"B5 COLUMBUS, OHIO, November 9, 1911.

"HON. TIMOTHY S. HOGAN, Attorney General, Columbus, Ohio.

"DEAR SIR:—In Title 16, Section 2, Ohio State Building Code (O. L. 102, p. 725), it is required that where cesspools now exist on premises accessible to a sewer that the cesspools shall be abandoned and filled. This provision also aplies to privy vaults. Title 18, Section 2 (O. L. 102, p. 726).

"In the administrative section of the state building code (page 586), it is made the duty of the state board of health or building department or board of health to enforce that part of the code in which the sections above mentioned are found.

"In the chapter penalties, Section 1, page 587, a penalty is provided for failure "to obey any order of * * * building inspector or commissioner in cities having a building inspection department or the state board of health in relation to the matters and things in this act contained shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 and stand committed until said fine and costs be paid or secured to be paid or until otherwise discharged by due process of law."

"In a village where sanitary sewers have been made accessible to every lot within the village, it is proposed to enforce the provisions of the code above cited by requiring each lot owner having on his premises a cesspool or privy vault to abandon the same and to make connections to the sanitary sewer.

"Will you please inform me what, if any, penalty can be invoked where the order of the board of health to make such connections is not obeyed.

Yours truly,
JAMES E. BAUMAN,
Acting Secretary."

In the first place, the building code, from which you quote, by its very title and subdivisional contents, was enacted by the legislature to cover a multitude of evils existing in the conditions of buildings where the public assembled. These conditions to be remedied, related to sanitary, fire, and other deplorable situations then apparent, in which the public was generally interested. Plumbing, ventilation,

sewerage, safety, and other vital questions, are included in the progressive provisions of this lengthy act. But, like all statutes, seeking to cover a great field of improvement and advancement, this act, owing to its multifarious questions, sought to be included, is, in some instances, not free from ambiguity. Provisions not germane to the title, and really not intended to apply to other than public matters, have, possibly by inadvertence, crept into its 142 pages. I cannot see my way clearly to say that this act was ever intended to apply to the owner or occupant of a family homestead, or dwelling, or a single lot in a village, as to his sewerage, vault, or use thereof. While the sections relative thereto, cited by you, *standing alone,* might include the dwelling or a village town lot; yet, I think these sections must be construed in the light of the *whole act,* and not taken *verbatim et literatim.*

Moreover, the penalty quoted by you, of $1,000.00, could never have been intended to be inflicted upon a humble owner of a little village lot, who had failed to abandon his back yard vault, and at great expense, inaugurate a new connecting system of disposing of the excrementitious matter of self and family.

Such an enforcement, under the guise of a building code, or sanitary measure, backed by such an enormous fine, savors too much of a taking away of the rights of the poor occupant of the lot, to the enhancement of plumber's interests.

These penalties quoted have intelligent reference to a violation of the act as to the structures named in the act and lands and lots appurtenant thereto. Private homes and lots are nowhere mentioned in the act; but Part 2, p. 588, gives seven classes to which the code applies. Therefore, I am of the opinion that, answering your last proposition, the penalty of $1,000.00 does not apply to the owners of village lots as to cesspools or privy vaults, unless they include such structures as mentioned in this code.

Now, let us see what laws do apply to owners of village lots, who maintain cesspools or privy vaults which are a nuisance, and who fail to comply with the orders of the health officers.

Section 4404 of the General Code provides for appointment of board of health in villages. Council may, in lieu of board of health, appoint health officer, with all powers of board of health.

Section 4405. If a municipality fails to establish a board of health, or appoint a health officer, the state board of health may appoint such officer. He to have all the powers of a board of health in villages, etc.

Section 4413. The board of health may make such rules as it deems necessary for public health, etc.

Section 4421, G. C., provides:

> "The board of health may also regulate the location, construction and repair of yards, pens and stables, and the use, emptying and cleaning thereof, and of water-closets, privies, cesspools, sinks, plumbing, drains or other places where offensive or dangerous substances or liquids are or may accumulate. When a building, erection, excavation, premises, business, pursuit, matter or thing, or the sewerage, drainage, plumbing or ventilation thereof is, in the opinion of the board of health, in a condition dangerous to life or health, and when a building or structure is occupied or rented for living or business purposes and sanitary plumbing and sewerage are feasible and necessary, but neglected or refused, the board of health may declare it a public nuisance and order it to be removed, abated, suspended, altered, or otherwise improved or purified by the owner, agent or other person having control thereof, or responsible for such condition, and may prosecute them for the refusal or neglect to obey such order. The board may also, by its officers and employes,

remove, abate, suspend, alter or otherwise improve or purify them and certify the costs and expense thereof to the county auditor, to be assessed against the property, and thereby made a lien upon it and collected as other taxes."

This section gives the board of health full power as to cesspools and privies. Sections 4422 and 4423 G. C. The board may arrest the party offending, or do the work and charge it as taxes.

Section 4414 G. C., providing for penalty, is as follows:

"Whoever violates any provision of this chapter, or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of such order, or willfully or illegally omits to obey such order, shall be fined not to exceed one hundred dollars or imprisonment for not to exceed ninety days, or both, but no person shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted, contains the allegation that the offense is a second or repeated offense."

So it will be seen that there is ample provision under the laws *outside of the building code* to cover your questions.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

518.

STATE BUILDING CODE—NO APPLICATION TO DWELLINGS—STATE CODE GOVERNS MUNICIPAL CODES.

The Ohio State Building Code is applicable only to the specific structures enumerated therein, and private dwellings are not included.

Where the state building code governs a subject, its provisions must govern as opposed to municipal building code. The only remedy to avoid conflict rests with legislative action.

COLUMBUS, OHIO, July 12, 1912.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I hereby acknowledge receipt of yours of January 16, 1912, which is as follows:

"I submit for your consideration the following state of affairs, which I find exists throughout the state in many cities in which plumbing ordinances were in force prior to the enaction of part 4—sanitation, Ohio state building code. Thirty cities in the state have municipal plumbing codes which cover all buildings.

"In an opinion dated September 11, 1911, to the Hon. John L. Cannon, village solicitor of Cleveland Heights, Cleveland, Ohio, you have ruled that

"'Part 4. Sanitation, Ohio state building code, does not cover dwellings.'

"It was the intention of the Ohio building code commission that

Part 4, Sanitation, Ohio state building code 'should cover all buildings,' and that Section 12600-281 O. L.,

"'It shall be the duty of the state board of health or building inspector, or commissioner, or health departments of municipalities having building or health departments, to enforce all the provisions in this act contained in *relation* to and *pertaining* to sanitary plumbing.'

covered the matter, and the language used affected all buildings in which plumbing would be installed.

"The matter as it now stands requires these cities to enforce two separate codes, which are in most cases in direct conflict and at variance with each other, causing considerable confusion.

"The question is:

"'What remedy or action can be taken that would be feasible toward remedying this condition of affairs, and make the state code the minimum standard in municipal corporations referred to, as was intended?'"

I beg to answer the same as follows:

The opinion referred to, of September 11, 1911, to the Hon. John L. Cannon, solicitor of Cleveland Heights, that "part 4, sanitation, Ohio state building code, does not cover *dwellings,*" is correct, and is hereby affirmed.

You speak of the *"intention"* of the building code commission, that part 4, sanitation, should cover all buildings, and that Section 12600-281 applies to all buildings, as to enforcement of the penalties of the building code, in which plumbing would be installed. Whatever the *intention* may have been on this subject, we must look to the language of the *building code itself* for guidance as to the scope of its provisions. The very title of the act forbids the idea of its application to dwellings; and, while occasional sentences therein might seem broad enough to include "all buildings," as you suggest, yet, considering the act as a whole, it can not have such application. Section 12600-1 sets out 7 classes of buildings covered by the building code and dwellings are not included.

In the cities having plumbing codes, as you suggest, most of which were enacted before the building code, it is true that both codes exist, but, as to all things included in the state building code, its provisions govern; as to all things not provided for in the said code, the provisions of the municipal code, if properly enacted, must obtain. The two codes are equally effective as to the matters covered by each. The state code cannot be invoked to enforce anything it does not contain, and the same rule applies to municipal codes. The remedy or action to be taken will require amendments to the state code and the laws governing municipal codes on these subjects, clearly defining the scope and powers of each. By this means there will be no apparent clash. Thereby there will be no conflict between municipal codes and the state code, and uniformity will obtain. Until this is done, the law, as it now exists, gives to each of these codes—state and municipal—its own apparent right of way on all subjects included in the provisions of each.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

524.

SECRETARY OF STATE BOARD OF HEALTH—PERSONAL LIABILITY FOR NEGLECT OF QUASI-JUDICIAL DUTY TO APPROVE EXPENSE ACCOUNTS—DILIGENCE OF ORDINARILY PRUDENT MAN IN OWN BUSINESS.

The secretary of the state board of health being bound to carry out the orders of the board and having been detailed by said board to approve expense accounts of members and employes, has been legally obligated to perform such duties and as they require the exercise of a discretion of a judicial nature, they are to be considered quasi-judicial in their charter.

For failure or neglect in performance therefore, he is liable only when he has failed to exercise the care and diligence of an ordinarily prudent man in his own business.

COLUMBUS, OHIO, July 11, 1912.

HON. E. F. MCCAMPBELL, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR:—Your communication of July 6, 1912, received, in which you state as follows:

> "Each employe of the state board of health and each board member, when traveling, submits monthly daily expense sheets over his signature. These bills are all carefully audited as to amount, enumerated, and attached to a voucher. Under the rules of the state board of health the secretary approved the bill and sends the same to the chairman of the the finance committee who approves, based, presumably, on the secretary's approval. When the same are returned to the secretary's office, a bankable voucher is made out and sent to the president of the board with the expense sheets and expense account so approved, for the president's approval. Following the approval by the president of the board the same is sent to the individual presenting the account for indorsement and certification."

and requesting my opinion upon the following question:

> *"As to whether any liability may attach to the secretary of the state board of health in approving bills for personal expense accounts."*

In reply to your inquiry I desire to say that Section 1234 of the General Code, in part, as follows:

> "The state board of health shall elect a secretary who *shall perform the duties prescribed by the board and the provisions of this chapter."*

Section 1235 of the General Code provides as follows:

> "Each member of the state board of health shall receive five dollars for each employed in the discharge of his official duties, and his necessary traveling and other expenses while engaged in the business of the board. The president of the board shall certify the amount of compensation and expenses due each member, and on presentation of a certificate therefor the auditor of state shall draw his warrant on the treasurer of state for the amount certified."

It is the duty of the secretary to do any act prescribed by the state board of health and law, and, therefore, as stated by you in your letter, under the rule of the board it becomes the secretary's duty to approve all bills for necessary traveling and other expenses presented to the board by members and other appointees of the board.

The duty being enjoined upon the secretary of the board as above stated, the question then arising is, as to what kind of an act said duty is, and what, if any, liability attaches to said officer in the performance thereof.

Mechem on public officers says:

> "When the law, in word or by implication, commits to an officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial."

and the fact that you are to approve the expense accounts above specified under the rules of the state board of health, without specifically directing how you are to determine the correctness or falsity of the same, leads me to the opinion that your acts in said matters are quasi-judicial.

Your duties, in respect to approving said expense accounts, are discretionary as to the correctness thereof, and ministerial if found correct, and, therefore, under the rules of law to be found on the subject, I am of the opinion that it is your duty to use such care and diligence in approving said expense accounts as a prudent man would use in his own business.

I am, therefore, of the opinion that in performing the duties enjoined upon you, as to the expense accounts referred to in your inquiry, that if you use such care and diligence as above stated in investigating the correctness or falsity of the same, that no liability could attach to you should any mistake be made in performing said duties.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

614.

VILLAGE BOARD OF HEALTH AND HEALTH OFFICER—MANDATORY DUTY OF COUNCIL TO APPROPRIATE SUMS TO MEET SALARIES AND EXPENSES.

The statutes make it mandatory upon the council to appropriate sufficient funds to meet salaries of a board of health or of a health officer, serving in lieu thereof, and expenses created in the performance of the duties of said board or officer, including compensation of employes when properly certified as provided by law.

COLUMBUS, OHIO, August 22, 1912.

DR. E. F. MCCAMPBELL, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours of August 15th inst., in which you say:

> "This department desires your opinion relative to the authority of a municipal council to deny to a board of health, or health officer serving in lieu of a board of health, an appropriation of money to meet the necessary expenses created in the performance of its duties and to

meet the compensation of the health officer or other paid employes or too refuse to pay such necessary expenses when property certified as provided by law."

Replying thereto, it is my opinion that the establishment of a board of health is a *mandatory duty* on the part of the council, except that in lieu of such board, the council may appoint a *health officer,* whose powers and duties are the same as the board of health; and his rules, regulations and orders shall be approved by the state board of health. The salary and term of office of said officer, are to be fixed by the council. The above provisions are found in Section 4404 General Code.

Section 4405 General Code provides as follows:

"If a municipality fails or refuses to establish a board of health or appoint a health officer, the state board of health may appoint a health officer therefor and fix his salary and term of office. Such health officer shall have the same powers and duties as health officers appointed in villages in place of a board of health, and his salary as fixed by the state board of health, and all necessary expenses incurred by him in performing the duties of a board of health shall be paid by and be a valid claim against such municipality."

It is, therefore, the duty of all municipalities in Ohio, in view of the above statutes, to appoint and maintain, continuously, either a board of health or a health officer. If a board of health is appointed it must appoint a health officer. Boards of health and health officers are part of the police powers and regulations of the state. In the language of the court in the case of Board of Health vs. Columbus, 12 O. D. 553, they have "powers of a legislative, executive and quasi-judicial character; and these powers may, in some cases, be exercised in a summary manner." (Quoted in Note 5, Section 4404 G. C. Page & Adams.)

No certificate is required that the necessary funds are on hand for the salary of a health officer, or the expenses of a board of health. This is an exception to the general law governing liabilities and contracts in municipal affairs. I refer to the above matters to indicate the almost unlimited powers of health officers and boards. Wherever the word "shall" occurs in these statutes under consideration, it is not *discretionary* not inter-changeable with the word "may;" but it carries with it all the potentiality of the mandatory verb. Section 4405 General Code, as you will note, gives the state board power when the municipality fails or refuses to act, to appoint a health officer and fix his salary. It further provides that his salary as so fixed, and all necessary expenses incurred by him as such officer *"shall be paid by and be a valid claim against such municipality."* Such board, or health officer chosen in lieu thereof, may appoint a clerk, district or ward physician, sanitary police. Section 4409 General Code requires certain books and blanks to be bought and accurate records kept. Section 4412 gives the board exclusive control of its appointees, the definition of their duties and the fixing of their salaries. In the numerous sections which follow this the board is given complete control in quarantine, disinfection, destruction of infected property, funerals, closing of churches and schools and other public places, and many others—all looking to the protection of the public against the ravages of disease.

Can it be said that a board or officer vested with such power, and using the same for the protection of the whole public, can be denied the financial aid requisite to carry these wholesome measures into effect? Certainly not. Section 4451 General Code says:

> "When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, *the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified.*"

This is mandatory and the council cannot, under any pretext whatever, avoid this duty.

The circuit court of Stark county in a full opinion, in the case of State ex rel. Miller vs. Council of Massillon, says:

> "It is mandatory upon council to create a board of health, and it is mandatory upon the board of health to appoint a health officer and fix his salary, and the necessary appropriation to meet the expense must be made."

The court further says:

> "Nor does Section 2702 (Section 3806 G. C.) providing for the issuing of a certificate that the necessary funds are on hand before liability is incurred, apply to the salary of a health officer or to the expenses of a board of health *and mandamus will lie to compel an appropriation for such salary and expenses.*"

Therefore the council has no right to say "that no further appropriations would be made for the expenses of the board of health for a period of one or two years." The duty to appropriate for these expenses is *mandatory* and cannot be ignored or avoided. Council is bound to follow the provisions of the statute and can be compelled to do so by mandamus.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

648.

COMPENSATION OF MEMBERS OF STATE DENTAL BOARD—PER DIEM—"DAYS EMPLOYED" AND DAYS "ACTUALLY EMPLOYED" OF SAME MEANING.

Section 1235 *General Code, providing that members of the board of health shall receive five dollars for each day employed in the discharge of their official duties and Section* 1317 *Genereal Code, providing that members of the state dental board shall receive ten dollars for each day actually employed, in the discharge of their official duties, have the same meaning and members of neither board can receive compensation for days upon which actual official duties of the board are not performed.*

COLUMBUS, OHIO, September 28, 1912.

HON. E. F. MCCAMPBELL, *Secretary of the State Board of Health, Columbus, Ohio.*

DEAR SIR:—Under date of September 17, 1912, you inquire of this department as follows:

> "I note by the newspapers that you have recently rendered a decision to the state dental board relative to the per diem of members of that board.

"I shall be glad if you will inform me how this opinion affects the per diem of members of the state board of health."

The compensation of the members of the state board of health is fixed by Section 1235, General Code, which provides:

> "Each member of the state board of health shall *receive five dollars for each day employed in the discharge of his official duties,* and his necessary traveling and other expenses while engaged in the business of the board. The president of the board shall certify the amount of compensation and expenses due each member, and on presentation of a certificate therefor the auditor of state shall draw his warrant on the treasurer of state for the amount certified."

The opinion to which you refer was given to Hon. E. M. Fullington, auditor of state. In that opinion, a copy of which is herewith enclosed, the provisions of Section 1317, General Code, were construed. Said section reads:

> "Each member of the state dental board shall *receive ten dollars for each day actually employed in the discharge of his official duties,* and his necessary expenses incurred. The secretary shall receive an annual salary to be fixed by the board, and his necessary expense incurred in the discharge of his official duties. The compensation and expenses of the secretary and members and the expense of the board, shall be paid from moneys received under this chapter, upon the approval of the president and secretary."

The only difference in these statutes in fixing the time for which the per diem is to be paid, is that Section 1317, General Code, uses an additional word to-wit, "actually" before the word "employed."

Section 1235, General Code, provides that each member of the state board of health shall receive five dollars "for each day employed in the discharge of his official duties," and Section 1317, General Code, provides that each member of the state dental board shall receive ten dollars "for each day *actually* employed in the discharge of his official duties."

These provisions are to all intents and purposes the same. The use of the word "actually" does not change the meaning.

I am therefore of the opinion that the rule as to ascertaining the days for which the per diem is to be paid to a member of the state board of health is the same as that applied in the case of the per diem of the members of the state dental board, as set forth in the opinion referred to.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

661.

INITIATIVE AND REFERENDUM—ORDINANCE RAISING FUNDS FOR COMPLIANCE WITH ORDER OF STATE BOARD OF HEALTH NOT SUSPENDED.

Since, under 1259 *General Code, it is made mandatory upon council to take the necessary steps to carry out the orders of the state board of health for municipal improvements under* 1249-1261 *General Code, an ordinance under said Section* 1259 *General Code, providing for the raising of funds to comply with the order is not to be deemed the exercise of a power and not within the provision of the Initiative and Referendum Act, and such ordinance is, therefore, not required to lay over sixty days.*

COLUMBUS, OHIO, October 7, 1912.

HON. E. F. MCCAMPBELL, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR:—Under date of July 23rd you requested to be informed whether the act providing for the initiative and referendum, Section 4227-1-4227-6, General Code, affect the power or authority of a municipal council to raise funds for immediate use in compliance with an order of the state board of health for municipal improvements given under authority of Section 1249-1261 inclusive General Code.

Section 4227-2 General Code provides:

> "Any ordinance * * * of a municipal corporation, * * * involving the expenditure of money or exercising any other power delegated to such municipal corporation by the General Assembly, shall be submitted to the qualified electors for their approval or rejection in the manner herein provided * * *."

The second paragraph of said section provides that:

> "No resolution, ordinance or measure of any municipal corporation * * * involving the expenditure of money * * * shall become effective in less than sixty days after its passage."

Sections 1249-1261 inclusive, of the General Code, to which you refer in your inquiry are found under the chapter dealing with state board of health and in reference to public water supplies.

Section 1249 General Code provides that whenever the council or board of health of a municipality, commissioners of a county, or trustees of a township set forth in writing that a city, village, corporation or person is discharging sewage into a stream, water course, lake or pond and is thereby creating a public nuisance detrimental to health or comfort, or is polluting the course of any public water supply said board of health shall inquire into and investigate the conditions complained of.

Section 1250 General Code provides that if such state board of health finds the source of public water supply contaminated or rendered impure and detrimental to health or comfort it shall give notice of its findings and an opportunity to be heard.

Section 1251 General Code provides that after such hearing if the board determines that improvements or changes are necessary it shall report its findings to the governor and attorney general, and upon their approval notify the city, village, corporation or person to install works satisfactory to the board for pumping or

disposing of such sewage, or to change or enlarge existing works in a manner satisfactory to the board.

Section 1252 General Code provides that whenever the board of health or health officer of a municipality or ten per cent. of the electors thereof file a complaint with the board setting forth that it is believed that the public water supply is impure and dangerous to health, the state board of health shall inquire into and investigate.

Section 1253 General Code provides that if the state board finds the public water supply impure and dangerous it shall cause notice to be served and an opportunity to be heard.

Section 1254 General Code provides that after such hearing if the state board determines that improvements or changes are necessary it shall report its finding to the governor and attorney general and upon their approval the board shall serve notice to change the source of supply or install and place in operation water purification plant satisfactory to the board.

Section 1255 General Code authorizes the state board of health to issue an order in reference to any water or sewage purification works and secure an effluent as pure as might be reasonably expected from such plant and satisfactory to the board.

Section 1256 General Code provides that upon failure so to do the state board of health shall notify the governor and attorney general and upon their approval may order a competent person to be appointed and salary paid.

Section 1257 General Code provides for an appeal from the state board of health in any of the above cases to referee engineers.

Section 1258 General Code provides as to the power of such referees.

Section 1259 General Code provides as follows:

> "Each municipal council, department or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds, or otherwise, shall take all steps necessary to secure the funds for any such purpose or purposes. When so secured, or the bonds thereof have been authorized by the proper municipal authority, such funds shall be considered as in the treasury and appropriated for such particular purpose or purposes, and shall not be used for any other purpose. The bonds authorized to be issued for such purposes shall not exceed five per cent. of the total value of all property in any city or village, as listed and assessed for taxation, and may be in addition to the total bonded indebtedness otherwise permitted by law. The question of the issuance of such bonds shall not be required to be submitted to a vote."

It will be seen by what has been foregoing set forth in reference to Sections 1249-1261 General Code inclusive that it is a positive duty, set forth in Section 1259, that a municipal council take all steps necessary to secure funds for the purposes set forth in the next preceding sections, and that if bonds are necessary to be issued they are not required to be submitted to a vote. In other words, it appears to be the intent of the legislature that it shall be a positive duty upon a municipal council to pass the ordinances necessary to carry out the orders of the state board of health, and that such council shall have no discretion in the matter. While the provisions of Section 4227-2 General Code which includes any ordinance involving the expenditure of money would seem, since under an ordinance passed in pursuance of Section 1259 General Code the funds raised by such ordinances are self appropriating, to embrace the ordinances passed under the provisions of Section 1259, yet I do not believe that it was the intention of the legislature to so include such ordinances. Raising the funds under Section 1259 General Code is not a power delegated to the municipal corporation, but a positive duty enjoined upon

it. Section 4227-2 General Code provides that any ordinance involving the expenditure of money, or exercising any other power delegated to such municipal corporation shall be subject to referendum. It seems to me that the words "involving the expenditures of money" must refer to such ordinances involving the expenditure of money as are passed in pursuance of some power delegated to a municipal corporation. In this case as before stated I believe that an ordinance passed in pursuance of the order of the state board of health to raise funds to comply with such order is a *duty* devolving upon council and not a power delegated in the sense that it may or may not be used at the discretion of council. It being, therefore, a positive duty upon council and Section 1259 General Code providing further that bonds issued under said section shall not be submitted to a vote, I am of the opinion that such ordinances are not within the purview of Section 4227-2 General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

736.

OFFICES INCOMPATIBLE—SANITARY ENGINEER FOR CITY AND MEMBERS STATE BOARD OF HEALTH.

In accordance with the general rule of law that an officer may not act in a quasi-judicial capacity in a matter in which he is interested, since a member of the state board of health is obliged to approve plans made for a sanitary system of a city, such member should not serve as member of such board and at the same time be employed by a city in the preparation of such plans.

COLUMBUS, OHIO, December 3, 1912.

HON. JOHN W. HILL, *Member State Board of Health, Cincinnati, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of October 31st in which you state that you have been asked to act professionally in a sanitary matter by a certain city in this state, where it is thought that your professional experience as a sanitary engineer is desirable, and in which you request my opinion upon the following question:

> "Could I perform such service while acting as a member of the state board of health, provided that when the plans which I am asked to prepare are submitted to the board, I withdraw from the board and decline to vote in the matter, or would it be necessary in a case of this kind to resign from the board before such a commission could be accepted?"

In reply I desire to say that Section 1240 General Code provides that:

> "No city, village, public institution, corporation or person shall provide or install for public use, a water supply or sewerage system, or purification works for a water supply or sewerage, of a municipal corporation or public institution, or make a change in the water supply, water works intake, water purification works of a municipal corporation or public institution, *until the plans therefore have been submitted to and approved by the state board of health.*"

The power vested in the state board of health, by virtue of the above quoted

section of the general code, under the well established rules of law, being a power, the exercise of which is committed to the judgment or discretion of your board, is in the nature of a judicial power and is styled sometimes a "judicial power" and sometimes a "quasi-judicial power." Under Section 1235 of the General Code you, and each member of the state board of health are entitled to receive the sum of five dollars for each day you are employed in the discharge of official duties and necessary traveling expenses while engaged in the business of the board, therefore, it is my legal opinion that the board and its members hold positions of trust and confidence toward the state to such an extent that no member of said board should be interested directly or indirectly in any contract, the subject matter of which relates to the rights of the public in having that trust and confidence exercised without any suspicion upon his or the board's discharge of said duty, no matter how faithfully and conscientiously it may be done.

It is a rule of common law that judicial and discretionary officers are disqualified to act in any matter in which they are personally interested, and under a well established line of decisions in this country, and an exception to the general rule is made to the effect that,

> "Where a judicial officer has not so direct an interest in the cause or matter as that the result must necessarily affect him or his personal or pecuniary loss or gain, or where his personal or pecuniary interest is minute, and he has so exclusive jurisdiction of the cause or matter by constitution or by statute as that his refusal to act will prevent any proceeding in it, then he may act so far as there may not be a failure of remedy or as it is sometimes expressed a failure of justice."

Your acting in the capacity as member of the state board of health in a matter as important as the approving, in conjunction with the other members of the board, plans and specifications or any of the things enumerated in the statute above quoted, where you had prepared such plans, or acting as engineer for the said municipality, would be acting, in my judgment, in a matter wherein you had an interest. Not that I doubt but what you would exercise honesty and ability in so preparing any plans, etc., or representing such municipality as its engineer, but for the reason, as above stated, that the board should be free from any influence to such an extent that no cast of suspicion should rest upon it or any member thereof in the discharge of the major duty to the public.

I am, therefore, of the opinion that if you desire to accept employment such as you have described in your letter, and under the circumstances, it is far better for you to resign from the board before accepting the same and thereby keep yourself, and the board of which you are a member, free from any suspicion.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

746.

BUILDING CODE—POWER OF STATE BOARD OF HEALTH AND PROPER MUNICIPAL AUTHORITIES TO PERMIT SUBSTITUTIONS OF DEVICES, FIXTURES AND CONSTRUCTIONS.

Under Section 21600-277 General Code, the board of health, in conjunction with the state and proper municipal authorities referred to, may permit the substitution, for a device, fixture or construction specified in part four of the Ohio state building code, of some other device, fixture or construction when in their discretion, they are satisfied that the latter will answer to all intents and purposes those devices, fixtures and constructions specified in the statute.

The material, substance, manner of use, connection and general adaptability of the device, fixture or construction to be substituted must be taken into consideration.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of recent date, in which you state:

> "The state board of health desires to know,
>
> "1. To what extent, if any, the board has authority to allow the substitution, for a device, fixture or construction, specified in part four of the Ohio state building code, being Sections 12600-137 to 12600-238, of some other device, fixture or construction, that test or experience has shown to be equal in efficiency to that specified.
>
> 2. How limited or how broad are the powers of the board in the definition of what is comprised in the words 'device,' 'fixture' and 'construction?'"

In reply to your first inquiry I desire to say that Section 12600-277 provides:

> "* * * Where the use of another fixture, device or construction is desired, at variance with what is described in this statute, plans, specifications and details shall be furnished to the proper state and municipal authorities mentioned in Section 1, for examination and approval, *and if required, actual tests shall be made,* to the complete satisfaction of said state and municipal authorities that the fixture, device or construction proposed *answers,* to all intents and purposes, the fixture, device or construction, hereafter described in this statute, instead of actual tests satisfactory evidence of such tests may be presented for approval with full particulars of the results and containing the names of witnesses of said tests."

It is a rule of construction, well known to the law, that a statute must be construed with reference to the whole system of which it forms a part. It was evidently the intent of the legislature, in enacting the section above quoted, to vest a discretionary power in the officers designated in Section 1 of the building code, whose duty it is to enforce the provision of part four of said code, namely: the state board of health inspector or commissioner, or health departments of municipalities having building or health departments, when acting in conjunction, to approve some proposed device, fixture or construction, which they may find answers to all intents and purposes the fixture, device or construction, specified in said building code, under said part four. In my opinion, said Section12600-277 is directory as to the powers of said officers, heretofore enumerated, as to the ap-

proval of the proposed substitution therein specified. The statute in itself vests a certain power or jurisdiction in the state board of health and the municipal officer to approve and grant the right to the use of some other device, fixture or construction, found by them to answer, to all intent and purposes, the fixture, device or construction specified in said code.

There can be no doubt as to the right of the legislature to vest said public officers or boards with such power, and the only remaining problem in your first question is as to what extent, if any, the board can go in exercising said power. As the act makes the power discretionary, it is my opinion that so long as the respective officers acting in conjunction upon any proposed substitution, are satisfied that the same will answer, to all intents and purposes, for those devices, fixtures and constructions specified in the statute, they may grant the permission to substitute.

I am further of the opinion that the power of said board and municipal officer, specified in Section 1, to allow a substitute, extends not only to the kind or class of fixture, device or construction, but to the substance constituting the same or the method in which it is placed. In other words, the power extends to the allowance of a substitute for any of the enumerated devices, fixtures or constructions, as to material and workmanship.

As to your second question, namely:

> "How limited or how broad are the powers of the board in the definition of that is comprised in the words device, fixture and construction?"

I desire to say as to the first, namely: the device, that it would mean not only the manner in which it is devised or formed by design, but the substance of which the same was manufactured or constructed; as to the second, namely: fixture, the power would extend to the designation of the kind of fixture that should be substituted in the place of that specified in the statute, not only as to the material but as to the method of its being attached or made a permanent appendage to the whole system of plumbing which is to be used; and as to the third, to-wit: construction, it is my opinion that the meaning to be given it is the manner of putting together the parts of the sanitary plumbing system to be installed, as provided in said code, so as to give to the whole its peculiar form.

In conclusion, it is my opinion that the powers of the board, when acting in conjunction with the municipal authorities specified in said Section 1 of said building code, are broad in their nature and must be given that liberal construction which will give the greatest effect possible to the code in general as a whole. But at the same time, the power should not be exercised, even with the discretion vested by said statute, unless said substitution meets, as to all intents and purposes, the fixture, device or construction specified in the code, and particularly that part hereinbefore specified, namely: part four, relating to the construction, installation and inspection of plumbing and drainage.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

763.

STATE BOARD OF HEALTH MAY NOT AUTHORIZE MEMBER TO GO ABROAD TO INVESTIGATE METHODS OF SEWERAGE DISPOSAL.

Inasmuch as the statutes do not so authorize, the state board of health is not empowered to authorize one of its members to go abroad and inquire into the latest methods of sewerage and waste disposal for the purpose of obtaining information that would be of value to the board in directing the cities of the state in installing and operating sewerage disposal plants.

COLUMBUS, OHIO, December 4, 1912.

HONORABLE JOHN W. HILL, *Member, State Board of Health, First National Bank Building, Cincinnati, Ohio.*

DEAR SIR:—From the tenor of your letter of October 12, 1912, requesting my opinion upon the legality of a certain course of procedure under consideration by the state board of health, it is rather difficult to determine whether that communication is to be regarded as an official request from the board, or simply an invitation for an expression of my views as an ex-officio member of that body.

As my conclusion in either event would be the same, I shall simply answer the question as asked, and leave it to you to set me right if I am mistaken in addressing this reply to you personally.

The specific question is:

> "Has the state board of health the legal power to authorize one of its members having the necessary sanitary engineering experience to fit him for such an investigation, to go abroad and inquire into the latest methods of sewerage and waste disposal; the purpose of such foreign trip and investigation being to obtain information that would be of value to the board in directing the cities of the state in installing and operating sewerage disposal plants?"

You also explain, and I mention this because it tends to strengthen the arguments in favor of my answer to your inquiry, that it was in the course of a discussion of the very serious problem of sewerage purification from one of the cities of the state, that the question suggested itself.

The question, to my mind, is more one of fact than of law. More one of logic and common sense than of statutory interpretation. I would therefore pass over the discussion of what the powers of an appointive board are in general, and treat specifically of the state board under consideration; how appointed, its powers, duties, compensation, and its relations to the subordinate boards of health.

Section 1232, General Code, provides:

> "There shall be a state board of health, consisting of eight members, seven of whom shall be appointed by the governor. Each year, the governor, with the advice and consent of the senate, shall appoint a member of the board, who shall serve for a term of seven years from the thirteenth day of December. The attorney general shall be ex-officio a member of the board."

From this section it is apparent that no qualifications as to experience in sanitary engineering, medical science, or other kindred subjects are required of the member. It is to be presumed as a matter of common sense that the governor in his ap-

pointment, would make a selection of members familiar to a certain extent with the laws of sanitation, but there is nothing in the statute itself which would prohibit the appointment of laymen absolutely ignorant of all such matters.

Therefore, insofar as the right to designate a particular member of this board to make an expert investigation along any particular line, there would be no more justification for the selection of a member who happened to be an engineering expert or a medical authority, any more than there would be for the selection of any business man who happened to be, perchance, a member of the board.

In other words, the fact that a member of the board happens to be an engineering expert or medical authority cannot be considered as affecting the power of the board to authorize one of its members to make a foreign trip for the purpose of gathering information for the board.

Coming now to Section 1237, General Code, the general powers and duties of the board are thus defined:

> "The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people and have supreme authority in matters of quarantine, which it may declare and enforce, when none exists, and modify, relax or abolish, when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as it deems best to control by a general rule. It may make and enforce orders in local matters when emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

In the course of this section it will be seen that the board is given supervision, which pre-supposes an underlying or subordinate authority, it is given power to declare and enforce, etc., quarantine *where none exists.* It may make special orders for such sanitary matters as are best controlled by a *general rule* and, (this is to be especially noted) it may make and enforce orders in local matters when emergency exists, or when the local board fails to act or has not been created.

The purpose of the investigation proposed to be conducted by the member sent abroad by the state board of health, is to determine upon a method of sewerage disposal which may be enforced in the various cities of this state.

The original idea of the necessity of such an investigation arose from the predicament of one certain city of this state. Section 1237 in its last sentence specially prescribes that where an emergency arises, or where a local board has refused to act, or where no local board is in existence, and in consequence the state board is compelled to act, "the necessary expense incurred shall be paid by the city, village, or township for which the services are rendered."

If, in the special case which was the reason for this question, the local board has refused or neglected to act, thereby necessitating the interference of the state board, the local organization and not the state should be compelled to bear the expense.

If various cities throughout the state are confronted with problems of sewerage disposal, these problems should, in the first instance, be worked out by the local authorities, and in fact must of necessity be so worked out, because it is self-evident that no one and uniform plan of sewerage disposal could be applied to all

the municipalities throughout the state, the question of sewerage disposal being primarily one in which municipalities alone are interested, it would be unfair to place the burden of taxation for the hiring of an expert or the payment of one, upon the entire state.

Coming now to the question of compensation, Section 1235 provides:

> "Each member of the state board of health shall receive five dollars for each day employed in the discharge of his official duties, and his necessary traveling and other expenses while engaged in the business of the board. The president of the board shall certify the amount of compensation and expenses due each member, and on presentation of of a certificate therefor the auditor of state shall draw his warrant on the treasurer of state for the amount certified."

How then could the remuneration of the expert engineer in the case you suggest, be fixed? Certainly not by independent contract, because the board has no power to make such contract.

> "Boards of health, being as a rule, administrative bodies, without corporate capacity and without taxing powers, it follows that they cannot take measures for the promotion of the public health which involve the acquisition of valuable property, the letting of large contracts, or the incurring of heavy expenses, unless the power to do so is clearly conferred by law. 21 Cyc. 388, and cases cited."

Certainly not at the rate fixed by law for the members of the board, because the services he would be performing would not be performed as a member of the board, or as the statute words it, "official duties."

Answering your question therefore specifically, I would say that the state board of health has no more authority to hire one of its members as an expert because of his technical knowledge, than it would have to hire an expert who did not happen to be a member of the state board of health, and that the hiring of such an expert could be done only by virtue of statutory authority and that such authority does not exist.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(State Board of Library Commissioners)

480.

TRAVELING EXPENSES—LIBRARY ORGANIZER NOT ALLOWED FOR TRIP OUT OF STATE.

The library organizer is not legally entitled to traveling expenses for a trip made out of the state.

COLUMBUS, OHIO, June 25, 1912.

HON. J. H. NEWMAN. *Secretary Board of Library Commissioners, Columbus, Ohio.*

DEAR SIR:—Under date of June 13, you wrote this office as follows:

> "The board of library commissioners most respectfully request your opinion on the regularity of the expense account of Miss Mary E. Downey of the organizing department of the Ohio state library for the month of January, where she charges for a trip to and from Chicago also for hotel while in Chicago. The trip was made without direction of the board and the board is desirous, in a friendly way, of ascertaining as to whether that portion of the bill, referred to above for the month of January, is regular."

It is well settled that traveling expenses cannot be made chargeable to the state unless they are incurred in the performance of a duty legally enjoined or authorized and their payment able to be provided for by a duly authorized warrant upon the state treasury.

Section 794, General Code, is the only relevant statute. This section is as follows:

> "The state board of library commissioners may appoint a library organizer, who shall have office room in or near the state library. The library organizer shall keep informed of the condition, scope and methods of the various *public libraries of the state, visit them,* as occasion may require, furnish advice and information when requested as provided in the preceding section, and, as far as practicable, assist in promoting and establishing new public libraries. At the close of each fiscal year he shall make a report to the board of the general conditions in the state relative to public libraries."

The extent of the duties enjoined by this statute is restricted to the visiting of libraries *within this state only and* I am unable to discern any provision whatever therein contained which could be construed to either require or permit the organizer to leave the state upon any official business whatever.

I am, therefore, of the opinion that the visit to Chicago and return was unauthorized and that the expense of the trip may not be made a legal charge against the state.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(State Medical Board)

206.

OSTEOPATHIC EXAMINATIONS—RECIPROCITY PROVISIONS—POWERS OF OSTEOPATHIC COMMITTEE, MEDICAL BOARD AND LEGISLATURE—"MAY" MEANING "SHALL."

If Section 1292 providing that upon recommendations of the osteopathic committee, the state medical board "may" issue certain certificates without examination, is to be construed as giving the committee and board power to exercise an uncontrolled discretion with respect to persons to whom it shall issue certificates, said statute would confer upon these officials a legislative or judicial power and would therefore, be unconstitutional. The word "may" therefore must be construed "shall."

Inasmuch as the statutes have failed to provide for reciprocity with other states in regard to osteopathic examinations, while they do so provide with respect to medical and other examinations, the intent to omit such provisions must be presumed and furthermore it is thereby established that the action of installing such a policy is a prerogative of the legislature.

A set of resolutions by the osteopathic committee providing for the reciprocity policy in this connection, is void.

COLUMBUS, OHIO, March 15, 1912.

DR. GEORGE H. MATSON, *Secretary State Medical Board, Columbus, Ohio.*

DEAR SIR:—Some time ago you submitted to this department the following question:

> "Section 1282 of the General Code of Ohio makes certain provisions for the registration of osteopaths who have practiced in another state for five years. Quoting from this section 'the state medical board *may* issue a certificate without examination, etc.'
>
> "Acting under the provision of this section, the osteopathic examining committee of the state medical board submitting the following resolution which was, on January 5, 1909, adopted by the board:
>
> "'The osteopathic committee believe it would be justified in recommending for reciprocity those possessing the following qualifications:
>
> "'1. Those who have been in the practice not less than five years, are of good moral character and had on April 21, 1912, the qualifications that would have entitled them to certificates, had they been engaged in the practice of osteopathy in Ohio at that time.
>
> "'2. Those who have been in the practice not less than five years, are of good character, have graduated since April 21, 1902, possess the preliminary qualifications required by law and present a certificate to practice osteopathy, granted by a state which maintains qualifications equivalent to those required by Ohio and which grants equal rights to osteopaths of Ohio.'
>
> "It will be seen that the osteopathic committee of the Ohio board are in accord with the conditions by which certificates may be granted to those who have practiced in another state for five years, and it will also be seen that these conditions were based upon the requirements exacted by the law as amended April 21, 1902, and which provides that all those who were not practicing in Ohio at that time must appear before the medical board for examination.

"In an application filed with the board which may be related as follows certain questions arise:

"Mr. A. graduated in osteopathy in 1905 and has practiced in New Jersey since graduation, or for a period of six years. The New Jersey law does not provide for the registration of osteopaths and so the applicant has been practicing in that state without having been certified by the state.

"The applicant holds a certificate authorizing him to practice in New York state which was granted to him upon the basis of registration by diploma, or without examination, in 1907 (five years after the Ohio law requiring examinations was passed).

"The medical board in refusing certification to this applicant did so for the following reasons:

"First, because applicant did not present credentials from a state maintaining requirements equal to those of Ohio, and because the state was not able to accord equal privileges to those who might wish to change their location from Ohio to such state.

"Secondly, because the applicant has not met the requirements exacted by the Ohio board during the time he practiced in the state from which he comes, in that, he has not presented himself to a state board for examination, as the Ohio applicants are required to do."

Section 1292 of the General Code provides:

"Upon recommendation of the osteopathic committee and the payment by the applicant of a fee of fifty dollars, the state medical board may issue a certificate without examination to a graduate of a reputable school of osteopathy, who is of good moral character, and has been engaged in the practice of osteopathy in any other state for at least five years."

First: You inquire whether the granting of certificates under the provisions of Section 1292 *supra,* is discretionary.

Said section provides that the state medical board *may* issue a certificate without examination to a graduate of a reputable school of osteopathy if such applicant is of good moral character and has been engaged in the practice of osteopathy in any other state for at least five years. It is a well understood rule of statutory construction that the word "may" is often to be contrued "shall." This is particularly the case where the statutory clothes public officers with power to do an act which concerns the public interest and the rights of third persons. (Sutherland on Stat. Con. 1st Ed., sec. 462.)

Such is the statute under consideration now. To give the word "may" its exact meaning would be to say that the medical board may exercise uncontrolled discretion with respect to persons otherwise qualified to whom it shall issue certificates. So construed the statute would be clearly unconstitutional as a delegation of legislative power or judicial power. The legislature in prescribing the functions of executive and administrative officers must lay down a rule of action for their guidance. The constitutional requirements are satisfied if the rule is very broadly stated but it must be laid down nevertheless. This statute must be construed so as to render it constitutional. That being the case it should be paraphrased as follows:

"Graduates of reputable schools of osteopathy who are of good moral character and have been engaged in the practice of osteopathy in

any other state for at least five years shall, upon recommendation of the executive committee, based upon its determination of these facts, be granted a certificate to practice osteopathy by the state medical board."

That is to say, the legislature has either meant that which I have defined or it has attempted to delegate the law-making power to the osteopathic committee or to the medical board. Such a delegation would render the section unconstitutional.

It is my opinion that the function of determining whether an individual is a graduate of a reputable school of osteopathy and is of good moral character is vested in the osteopathic committee, so that the state medical board has nothing to do except to act upon the recommendation of that committee. The osteopathic committee is limited in its discretion to the determination of these two facts, and in their determination it must act reasonably and not capriciously or arbitrarily. Any determination or rule of the committee not germane to the ascertainment of these two facts and based upon distinctions not found in the law, will be regarded as arbitrary or capricious within the meaning of this principle and set aside by a reviewing court.

All these conclusions are rendered plainer by consideration of the fact that statutes in *parimateria* with Section 1292 General Code, viz.; Sections 1282 and 1287 thereof, which apply to the issuance of certificates to practice medicine by the state medical board specifically provide for reciprocity—i. e., the issuance of certificates to otherwise qualified practitioners of states whose requirements are equal to those of Ohio, and the refusal thereof without examination to practitioners of such states which do not have requirements equal to these of the state of Ohio—*as* a legislative policy. That is to say it is recognized in these sections that the adoption of the rule of reciprocity is a matter for the legislature—a legislative power. This leads to two observations:

First, under the rule of statutory construction, known as that of enumeration and exclusion the provision for reciprocity as to medical certificates is strong evidence that failure to specifically provide therefor as to osteopathic certificates indicates that the legislature did not intend that that policy should prevail in the field of osteopathy.

Secondly, the fact that the legislature has itself provided for reciprocity, shows that such provision is a matter of legislation, and that the power to make it is a legislative power which cannot be exercised by or even delegated to an executive board or tribunal.

I am, therefore, of the opinion that the resolution of the osteopathic committee, under date of January 5, 1909, is wholly void.

The second question submitted by you need not, therefore be answered.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

243.

ANAESTHETIC—DENTISTS MAY NOT ADMINISTER OUTSIDE OF THE PRACTICE OF DENTISTRY

Regularly qualified dentists are authorized to administer anaesthetics in the exclusive practice of dentistry, but it is not lawful for them to administer anaesthetics in surgical operations not incident to the practice of dentistry.

COLUMBUS, OHIO, April 4, 1912.

DR. GEORGE H. MATSON, *Secretary State Medical Board, Columbus, Ohio.*

DEAR SIR:—Under date of February 26th you submit for my opinion the question of whether or not regularly qualified dentists are permitted under the laws of this state to administer anaesthetics under the direction of a registered surgeon, or for surgeons at surgical operations.

I assume from the above question that you mean operations other than are incident to the practice of dentistry.

Under date of April 14, 1911, I have given it as my opinion that administering of anaesthetics unquestionably constitutes the practice of medicine and surgery, and that, therefore, it is not lawful in this state for a person who is not a registered physician to administer anaesthetics even under the supervision of a registered physician.

While it is true that under the law relating to examination for registered dentists it is necessary that such applicants for license to practice dentistry shall pass a satisfactory examination, among other subjects, on the subject of anaesthetics, yet as I view the provisions of said section it relates solely to an examination for the administering of anaesthetics in purely dental cases.

Section 1287 General Code provides:

> "This chapter (to-wit: the chapter relating to the practice of medicine and surgery or midwifery) shall not apply to * * * regularly qualified dentist when engaged *exclusively* in the practice of dentistry. * * *"

As I am clearly of the opinion that the requirement that an applicant for license to practice dentistry in this state shall be examined in the subject of anaesthetics applies solely to the administering of anaesthetics exclusively in the practice of dentistry, and as I am of the opinion that the administering of anaesthetics in surgical operations is a practice of medicine and surgery, and as Section 1287 General Code specifically exempts regularly qualified dentists when engaged exclusively in the practice of dentistry, I am of the opinion that it is not lawful for regularly qualified dentists to administer anaesthetics under the direction of a registered surgeon or for surgeons at surgical operations not incident to the practice of dentistry.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

586.

REVOCATION OF PHYSICIAN'S LICENSE FOR GROSS IMMORALITY IN ADVERTISING—FALSE AND EXTRAVAGANT STATEMENTS—OBSCENE AND INDECENT DESCRIPTIONS OF DISEASES.

The provisions of Section 1275, *providing for the revocation of a physician's license by the state medical board on the ground of "gross immorality," may be resorted to when a physician has been guilty in advertising.*

1st: Of employing any statements which are false and made to deceive or defraud the public.

2nd: Of promising to cure incurable diseases, knowing them to be incurable.

3rd: Describing obscene and indecent symptoms of diseases.

4th: Making any statements which seek to take advantage of the fears and credulity of the public.

COLUMBUS, OHIO, July 16, 1912.

The Ohio State Medical Board, Columbus, Ohio.

GENTLEMEN:—The matter of revoking the license of certain physicians indulging in certain classes of advertising has been referred to this department for opinion.

The substances of the causes for the revocation of said certificates is stated in a letter to said physicians dated February 22, 1912, and is as follows:

> "Proceedings looking toward the revocation of your certificates will be taken should you continue after this date to use extravagantly worded or untruthful advertisements, promising to cure incurable diseases, to restore lost manhood or suppressed menstruation, or otherwise take advantage of the fears or credulity of the public."

Counsel for respondents in his brief subdivides these grounds into the following classes:

(a) Extravagantly worded advertisements.
(b) Untruthful advertisements.
(c) Those promising to cure incurable diseases.
(d) To restore lost manhood.
(e) To restore suppressed menstruation.
(f) To take advantage of the fears or credulity of the public.

The authority of your board to revoke the certificate of a physician is found in Section 1275, General Code, which provides:

> "The state medical board may refuse to grant a certificate to a person guilty of fraud in passing the examination, or at any time guilty of felony or gross immorality, or addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery. Upon notice and hearing the board, by a vote of not less than five members may revoke a certificate for like cause or causes."

The legislature uses the term "guilty of felony or gross immorality." It is apparent, by the use of the alternative "or" that "gross immorality" is something different than is involved in the commission of a felony. It must of necessity mean a moral short coming of less degree than that of a felony.

The term "gross immorality" as used in the above section was defined and

applied in the case of Rose vs. Baxter, 18 Ohio Dec. 658 (7 Misi Prius N. S. 132), the third and fourth syllabi of which case reads:

> "The term 'gross immorality' for which under Rev. Stat. 4403-c the state board of medical registration may revoke a certificate to practice medicine, represents in law as adjudicated by the courts such a wilful, flagrant and shameful quality with respect to the office involved as renders the officer unfit to hold his license and authority to act, and is akin to that of 'moral turpitude;' such term, therefore, is not so vague or indefinite that the board cannot carry out the legislative act without resorting to uncertainty and caprice.
>
> "Charges against a physician in his quasi-public character as such of maintaining a physician's office under one name and another office under another name, intending to perpetrate a fraud upon the public, is sufficiently definite to revoke his certificate for gross immorality."

On page 661, Dillon, J., says:

> "Gross immorality is a term which has been used and has received adjudication at the hands of a great many courts. The word 'gross' does not mean great, or big, or excessive, necessarily, but rather such a wilful, flagrant and shameful quality with respect to the office involved as renders the officer unfit to hold his license and authority to act."

The foregoing case was affirmed without report in Rose vs. Baxter, 81 Ohio St. 522.

The term "gross immorality" is construed as meaning the same as "moral turpitude" as used in the statute for the disbarment of an attorney at law.

In the matter of Lundy, 8 Cir. Dec. 111, it is held:

> "Erasing a memorandum 'dismissed, E' by an attorney, for the purpose of deceiving the court and again submitting the case, is conduct involving moral turpitude, within the meaning of the statute."

The sixth syllabus in the matter of Bickley, 16 Ohio Dec., 569, reads:

> "A specification, which charges that an attorney who is an administrator, falsely represented to creditors of the estate, that he had been ordered by the probate court appointing him to pay but three per cent. interest on a note, when in fact no such order had ever been made, as he well knew, is unprofessional conduct involving moral turpitude, for which he will be held to answer."

These three cases apply the terms "gross immorality" and "moral turpitude" to misrepresentations in professional conduct.

One of the grounds for revoking the certificate is "untruthful advertisements."

In 30 Cyc. at page 1556 the rule as to advertisments by a physician is stated as follows:

> "Mere advertising by a physician is not such unprofessional conduct as to warrant the revocation of his license; if, however, the advertisement is false and known to be false, and is a studied effort to impose upon the credulity of the public for gain, the law is otherwise."

It may be conceded without quoting any further authorities that advertising

by a physician of his business does not constitute "gross immorality" and is not prohibited by the statutes of Ohio. No objection has been made to advertising. but the criticism is as to the manner of advertising.

In People vs. McCoy, 125 Ill., 289, the fourth syllabus reads:

> "If the holder of a certificate to practice medicine makes statements and promises with reference to the treatment and cure of the sick and afflicted which are calculated to deceive and defraud the public, that will be unprofessional and dishonorable conduct."

In State vs. Purl, 128 S. W. 196 (Mo.) it is held:

> "A dentist who by false advertisment as to the cost of a set of teeth, as to re-enameling teeth or making teeth without bridges or plates, curing pyerrhea, etc., intended to make the public believe that they would get something different and better than they actually received from him, and something different and better than they would receive from other dentists, and who by means thereof procured from patients various sums of money, was guilty of fraud, deceit, or misrepresentation in the practice of dentistry within Rev. St. 1899, Section 8528, as amended by acts 1905, page 215."

In case of State vs. State Board of Medical Examiners, 34 Minn. 391, it is held:

> "For a physician to publish an advertisement containing false statement as to his ability to cure diseases, knowing them to be false when he makes them and intending thereby to impose on and deceive the public, is 'unprofessional and dishonorable conduct' within the meaning of laws 1883-*c*, 125 Section 9."

This decision will apply to advertisements promising to cure incurable diseases.

Diseases that are incurable are known to physicians and are discussed and set forth in medical works.

In case of State Medical Board vs. McCrary, 130 S. W. 544, (Sup. Ct. of Ark.) it is held:

> "Acts of 1900, p. 637, authorizing the state board of medical examiners to revoke a license to practice medicine for publicly advertising special ability to treat or cure chronic and incurable diseases, is not invalid because of indefiniteness, for chronic and incurable diseases are specifically named and discussed in medical works, and are known to physicians possessing a sufficient knowledge of their profession to practice medicine; that word 'chronic' being the antithesis of acute, and 'chronic and incurable disease' being generally understood to be one of long standing and unyielding to treatment."

In rendering the opinion in this case the learned judge states that chronic and incurable diseases are so deep rooted and so unyielding to treatment that those afflicted with such a disease become greatly discouraged and readily grasp at promise for relief. This makes an advertisement promising to cure such disease the more objectionable. It shows the purpose of such promises in advertisments. Such promises secure patients who are very much discouraged, and who are ready to grasp at any straw that comes within their reach.

Another ground of complaint is the use of "extravagantly worded advertisements."

In support of his contention as to this class of advertisements counsel cites the case of Hewitt vs. Board of Medical Examiners 3 L. R. A. (N. S.) 896, and quotes:

> "The legislature cannot delegate to a state board the power to revoke the licensce of a physician for making 'grossly improbable statements' in an advertisement without any definition of such terms."

The court in the above case held the term "grossly improbable statements" as indefinite and the statute void for that reason. The court in discussing this term and the possibility of the advertisements says further:

> "The advertisement in connection with his medical business may be made in entirely good faith."

The statute of Ohio has been held constitutional and the term "gross immorality" has been determined to have a definite meaning. An advertisement made in good faith could not be "grossly immoral," as the court above holds might be true as to "grossly improbable statements." This case does not control "extravagantly worded" advertisements under our statutes.

The use of extravagant statements in advertisements by a physician was involved in the case of Macomber vs. State Board of Health, 28 R. I. 3. In that case, however, the state medical board failed to take any evidence to show that the advertisement was extravagant and the court was compelled for that reason to dismiss the proceedings.

The syllabus of said case reads:

> "Upon an appeal from the decision of the state board of health revoking the certificate of a physician upon the ground of 'gross unprofessional conduct' and 'conduct likely to deceive and defraud the public,' in the absence of testimony showing the falsity or extravagance of statements attributed to appellant, the court cannot take judicial notice of matters requiring expert medical knowledge."

On page 4, Parkhurst, J. says:

> "A number of advertisements from Providence papers relating to cures or alleged cures said to have been made by the use of the 'Electricure,' a device for which one David S. Frazer was agent in this state, are produced by the state board, upon a few of which appear the name of appellant as 'specialist;' or as 'physician in charge;' also certain circulars and advertisements purporting to explain the 'Electricure' and exploiting in glowing terms its powers in the cure of numerous diseases. It is evidently the intention of the state board that this court shall infer, from the language of these various advertisements that the statements therein contained are untrue, that the claims made are extravagant and therefore likely to 'deceive and defraud the public,' and that Dr. Macomber, the appellant, by allowing his name to appear upon some of them or by distributing some of them to his patients or to inquiring parties, has been guilty of conduct as above set forth.
>
> "Unfortunately, however, the state board has not seen fit to offer any testimony to show that any of the statements set forth is untrue in

fact, or even that it is extravagant or misleading, or tending to 'deceive' or 'defraud' the public."

In Webster's International Dictionary the word 'extravagant' is defined:

"Extravagant: Exceeding due bounds; wild, excessive; unrestrained."

The purpose of using extravagant statements in advertisements is usually to deceive; to hold out false promises. Extravagant statements are those beyond due bounds; they are excessive.

Objection is made to advertisements for the cure of "lost manhood" and "suppressed menstruation."

Counsel cites the case of In re Washington, Queen's Bench Division, 23 Ontario Reports, 299, as authority for the publication of the symptoms of a disease. The symptoms published in that case was of the disease of catarrh.

The diseases which are advertised in the present cases are diseases relating to the sexual organs. There is a vast difference between publishing the symptoms of catarrh, and the publishing of symptoms of diseases of the sexual organs.

Courts and attorneys are compelled to hear the harrowing details of crime, but this does not authorize their publication in the daily papers.

In case of Czarra vs. Board of Medical Supervisors, 25 App. D. C. 443, it is held:

"The conviction of a physician of distributing obscene and indecent printed matter in this district is a sufficient ground for the revocation of his license by the board of medical supervisors, under the authority granted that board by the act of congress of June 3, 1896, 29 Stat. at L. 198, Chap. 313, regulating the practice of medicine and surgery in this district."

The court holds that the term "unprofessional or dishonorable conduct" is void for uncertainty as used in the statute. In discussing this point the court says at page 453:

"Doubtless all intelligent and fair minded persons would agree in the opinion of the board of medical supervisors that the act charged against the appellant in the case at bar amounted to conduct both unprofessional and dishonorable."

The nature of the charge is set forth in the statement of the case on page 447:

"The appellant was first brought before the board of medical supervisors in January, 1904, and his license ordered revoked upon a complaint made of unprofessional and dishonorable conduct in the distribution of obscene literature. The obscene literature consisted of a pamphlet purporting to relate to the cause, prevention and cure among other things, of venereal and secret diseases, and of certain filthy and indecent habits and practices. Upon appeal to this court the order was reversed because of the insufficiency of the complaint.

"On January 11, 1905, another complaint was made, against said Czarra, charging him with unprofessional and dishonorable conduct in that he 'did distribute, deposit, or place, or cause to be distributed, deposited or placed, in the vestibules and on the door steps of various

residences in the city of Washington, and in the District of Columbia, aforesaid, a certain circular, book or pamphlet containing certain obscene lewd, and lascivious words, language, statements, and matter, copy of which it hereto attached as part hereof, etc. The attached pamphlet is identical with that referred to in the former complaint."

The obscene literature distributed in the above case pertained to disease and its cure. The report does not show whether the statements were true or false. It is apparent that all symptoms and descriptions of disease cannot be published and distributed. There are many things discussed in medical books which would be improper and indecent for the reading of an immature youth. These discussions are essential for the medical student and the physician, who understand their purpose.

The principles of the foregoing authorities will now be applied to the various objections which have been made to the advertisements.

a. Extravagantly worded statements in advertisements by a physician which are untrue and false are made to deceive or to defraud the public would constitute gross immorality and would be cause for revoking the certificate of the physician.

b. Untruthful and false advertisements by a physician for the purpose of deceiving and defrauding would constitute gross immorality and would be ground for revoking his certificate as physician.

c. Promises to cure incurable diseases made by a physician in advertisements, knowing them to be incurable, would constitute gross immorality. There are different schools of medicines, and probably one school will consider a disease incurable that another school will hold as curable. If such case exists the physician must be bound by the recognized doctrine of the school of which he is a member.

d and e. A statement in an advertisement by a physician as to disease and the symptoms thereof which are obscene or indecent would constitute gross immorality and would be cause for revoking the certificate of said physician.

f. Any advertisement by a physician which seeks to take advantage of the fears or the credulity of the public would constitute gross immorality and would constitute cause for the revocation of his certificate.

Whether or not a particular advertisement comes within either of the above classes must be determined by the facts of each particular case.

While advertising by a physician is permissible, it must be made in good faith; it must be truthful; it must not be made for the purpose of deceiving or defrauding the public; it must comply with the laws of decency.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

(State Dental Board)

519.

DENTISTRY—RECIPROCITY—KENTUCKY DENTISTS MAY NOT BE ADMITTED TO PRACTICE IN OHIO WITHOUT COMPLIANCE WITH OHIO LAWS—COMITY.

Inasmuch as the laws of Kentucky do not accord to dentists from other states desiring to practice therein, rights which are equal to those accorded by the state of Ohio, to dentists from other states who desire to practice herein, dentists from Kentucky will not be permitted by provision of Section 1324 of the General Code to practice dentistry in Ohio without complete fulfillment of the requirements of Ohio's laws.

COLUMBUS, OHIO, July 12, 1912.

DR. H. BARTILSON, *Secretary, Ohio State Dental Board, Columbus, Ohio.*

DEAR SIR:—Under date of June 25th, you enclosed a copy of the law regulating the practice of dentistry in Kentucky enacted March, 1912, and desire to know whether such law conforms with the provisions of Section 12 of the Ohio state dental law, and if it does conform is a man who holds a license issued prior to this act entitled to an exchange under the laws of Ohio, the requirements previous to this act not being equal to those of Ohio.

Upon an examination of the provisions of the act enacted by the commonwealth of Kentucky, March, 1912, it will be seen that Section 3 thereof requires all persons, whether they have prior to such act practiced dentistry or not in said state, to first obtain a license for such purpose from the Kentucky state board of dental examiners and register such license, except such persons as have been licensed and registered prior to the passage of such act. The applicant for such license is required to be of good moral character, at least twenty-one years of age at the time of making the application and a graduate of and the holder of a diploma from a reputable dental college: and, furthermore, the said applicant must stand an examination, which examination must be both written and clinical, and "of such a character as to thoroughly test the qualifications of the applicant to practice dentistry."

Section 15 of said act provides as follows:

> "Said board may in its discretion issue a license to practice dentistry without examination other than clinical to a legal and ethical practitioner of dentistry who removes to Kentucky from another state or territory of the United States, whose standard of requirement is equal to that of Kentucky, and in which he or she conducted a legal and ethical practice of dentistry for at least five years immediately preceding his or her removal, provided such applicant shall present a certificate from the dental board or a like board of the state or territory from which he or she removes, certifying that he or she is a legal, competent and ethical dentist, and of good moral character; and provided further, that such certificate is presented to the Kentucky state board of dental examiners within six months from the date of its issue, and that the board of such other state or territory shall permit in like manner by law the recognition of licenses issued by the Kentucky state board of dental examiners when presented to such other board by legal practitioners of dentistry from this state who may wish to remove to or practice in such other state or territory."

Coming now to the Ohio law:
Section 1321 General Code provides as follows:

> "Each person who desires to practice dentistry within this state shall file with the secretary of the state dental board a written application for a license and furnish satisfactory proof that he is at least twenty-one years of age, of good moral character, and present evidence satisfactory to the board that he is a graduate of a reputable dental college, as defined by the board. Such application must be upon the form prescribed by the board and verified by oath."

Section 1322 General Code provides as follows:

> "An applicant for a license to practice dentistry shall appear before the state dental board at its first meeting after the filing of his application, and pass a satisfactory examination, consisting of practical demonstrations and written or oral tests, or both, in the following subjects: anatomy, physiology, chemistry, materia medica, therapeutics, metallurgy, histology, pathology, bacteriology, prosthetics, operative dentistry, oral surgery, anesthetics, orthodonia and oral hygiene."

Section 1324 General Code, which is the codified number of Section 12 referred to in your inquiry, provides as follows:

> "The state dental board may issue a license without examination to an applicant who furnishes satisfactory proof that he is a graduate from a reputable dental college of a state, territory, or district of the United States, and holds a license from a similar dental board, under requirements equal to those of this state, or who, for five consecutive years next prior to filing his application, has been in the legal and reputable practice of dentistry in a state, territory or district of the United States and holds a license from a similar dental board thereof, if in either case the laws of such state, territory or district accord equal rights to a dentist of Ohio holding a license from the state dental board, who removes to, resides and desires to practice his profession in, such state, territory or district. No license shall be issued under this section unless authorized by an affirmative vote of all the members of the board present at such meeting."

The requirements that an applicant to practice dentistry must be at least twenty-one years of age, of good moral character and a graduate of a reputable dental college are similar in both laws, as will be noted from an examination of Section 3 of the Kentucky law and Section 1321 General Code of Ohio. Section 1322 General Code sets forth the subjects upon which the applicant must pass a satisfactory examination consisting of practical demonstrations and written or oral tests, or both. Section 3 of the Kentucky law requires the examination to be both written and clinical, and "of such a character as to thoroughly test the qualifications of the applicant to practice dentistry." I take it that if the state dental board of Ohio should find that the examinations given by the Kentucky state board of Dental Examiners are equal to those required by this state, the fact that the subjects upon which the applicants are examined are not identical, would not stand in the way of reciprocity between Kentucky and Ohio.

Upon an examination of Section 1324 General Code it will be noted that there are two classes of persons practicing dentistry in other states who can be admitted

to Ohio without examination, *provided* the laws of the other state accord equal rights to a dentist of Ohio holding a license from the state dental board. These two classes are as follow:

1. A graduate from a reputable dental college who holds a license from a similar dental board under requirements equal to those of this state.

2. One who for five years prior to filing his application has been in the legal and reputable practice of dentistry in such other state and holds a license from a similar dental board thereof.

From an examination of Section 15 of the Kentucky law, above set out in full, it is to be noted that the Kentucky board is not authorized to admit a person coming from another state to the practice of dentistry in Kentucky without any examination whatever, but requires in each and every instance a clinical examination.

Second, It further requires that the person coming from another state desiring to practice dentistry in Kentucky must have continued the practice of dentistry for at least five years immediately preceding the removal into Kentucky. The Ohio law does not require that of a graduate of a reputable dental college, who holds a diploma from a dental board similar to the one in Ohio under requirements equal to those in this state. Equal rights, therefore, are not accorded to a dentist of Ohio going into Kentucky in this to-wit:

First: As to the first class set forth in Section 1324 General Code, to-wit: A graduate from a dental college who holds a license from a similar dental board under requirements equal to those of this state:

A person coming within such class may enter Ohio from another state without any examination and irrespective of the time he has practiced in such other state.

An Ohio dentist cannot enter Kentucky without passing a clinical examination and not before he has practiced in Ohio for five years next preceding his removal.

Second: As to the second class set forth in Section 1324 General Code, to-wit: An application who for five years next prior to filing his application has practiced dentistry in another state.

A person coming within such class may enter Ohio from another state without any examination whatever.

An Ohio dentist, although he has practiced for at least five years immediately preceding his removal into Kentucky, cannot enter Kentucky without passing a clinical examination.

I am, therefore, of the opinion that the law as enacted by the state of Kentucky regulating the practice of dentistry therein, enacted March, 1912, does not conform to the provisions of Section 12 of the Ohio state dental law, Section 1324 General Code. Such being the case, it is not necessary to answer your question in reference to a man who holds a license issued by the state dental board of examiners of Kentucky prior to the passage of the act of March, 1912.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

739.

STATE DENTAL BOARD MAJORITY REQUIRED TO REVOKE LICENSE —POWER TO REOPEN HEARING UPON DISCOVERY OF NEW EVIDENCE AFTER TWO VOTES CAST FOR REVOCATION.

Inasmuch as the revocation of a license by the dental board is a serious undertaking of at least a quasi-judicial character, and inasmuch as the statutes relating to the medical board require a vote of five out of seven to revoke a license, Section 1326 General Code, giving power to the state dental board to revoke a license should be construed to require at least a majority vote to accomplish such a result.

When a hearing in a certain case was had, therefore, whereat only four of the five members of the dental board were present, only two of whom voted for revocation of a license, such hearing may still be considered pending, and newly discovered evidence may be introduced and a second vote taken on the question of revocation of licenses.

COLUMBUS, OHIO, December 6, 1912.

DR. H. C. MATLACK, *President, Ohio State Dental Board, Cincinnati, Ohio.*

DEAR SIR:—Under date of November 16th you wrote us as follows:

> "In view of the fact that there were only four members present at the last meeting of the board when we considered the M. case, and two members only voted for conviction (the president not having a vote) and in view of the fact that new and more convincing evidence has been secured by the defendant, has the president the power to order a special meeting of the board for a re-hearing of the case? The case in question is that of Dr. V. H. M. Can the case be opened at any time in the future, not having been appealed to the governor and the attorney general?"

The statutes regulating the state dental board are found in Sections 1314 to 1334 inclusive of the General Code. From an examination of said sections it appears that the state dental board consists of five persons (Section 1314 G. C.); that a majority of the members shall constitute a quorum, and that the board shall make such reasonable rules and regulations as it deems necessary (Section 1315 G. C.) Section 1325 General Code provides that *the state dental board* may revoke a license if the person named therein is guilty of immoral conduct. Section 1326 General Code provides for the hearing and further provides that "if upon such hearing the board finds the charges are true, it may revoke the license. Such revocation shall take from the person named in a license all rights and privileges acquired thereby."

Upon an examination of the minutes of October 30, 1912, being the meeting to which you refer in your letter, appears the following:

> "Upon motion of H. Bartilson, seconded by J. R. Owens in view of the fact that V. H. M. stated while on the stand and under oath that he had committed an immoral act in his office and with his patient Miss L. B. S. of F. that the license of the said V. H. M. be revoked and the secretary notify him of the same. Motion carried."

The action taken by such state dental board revoking a license is administrative in character and not judicial. France vs. State 57 O. S. I.

While it is true that the action of such board in revoking the license is only ministerial in character nevertheless it is in the nature quasi-judicial as I view it, and such an action as would deprive the person holding the license from continuing his life work, and is, therefore, a most severe proceeding.

Upon an examination of the statutes in relation to the powers of the state medical board it will be found that said board cannot revoke a license except by a vote of not less than five of its seven members.

In the matter in question it appears that there were but four members present at the meeting of the board at which the attempted revocation of the license of Dr. M. was acted upon, and that only two of the members present at such meeting voted in favor thereof. While it is true that as to ordinary actions of the board, a majority being present, a majority thereof could pass such act, yet in view of the seriousness of the revocation of a license, and the fact that the statute simply says that the state dental board may revoke a license, I am of the opinion that it takes the affirmative action of at least a majority of the entire membership of the board so to revoke a license.

In the present case a majority of the members having neither acted for nor against the revocation of the license and feeling as I do that it must take the action of at least a majority on such a question, I am of the opinion that the matter is still pending before your board for proper action. I would further say that I deem it eminently proper should it be called to the attention of the board that there was further evidence which should be presented, to hear such evidence before finally passing upon the case.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(State Board of Pharmacy)

302.

INTOXICATING LIQUORS—PURCHASE OF, FOR MEDICINAL PURPOSES IN DRY TERRITORY—VETERINARY SURGEON NOT AUTHORIZED TO PURCHASE.

Inasmuch as Section 6104 General Code, providing for the sale of liquor in dry territory for medicinal purposes, prescribes that the prescription of the physician ordering the same shall contain the name of the person for whom the liquor is prescribed, the section must be restricted in its application to physician prescribing for human ills only. Therefore, a veterinary surgeon is not authorized to to purchase intoxicating liquors in such territory.

COLUMBUS, OHIO, April 22, 1912.

HON. F. H. KING, *Secretary Pro tem, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under date of March 11, 1912, you requested me to render you an opinion on the following:

> "Whether or not a pharmacist may accept a whiskey prescription signed by a local veterinary surgeon in a municipality which has been voted 'dry' under the Beal law."

Section 6103 General Code provides:

> "No provision of this chapter or the penal laws relating thereto, shall prevent the sale of intoxicating liquor at retail by a regular druggist for exclusively known medicinal, mechanical, pharmaceutical, scientific or sacramental purposes; nor in addition thereto, shall it prevent such sale for exclusively known art purposes by a regular druggist in the limits of a township without the limits of a municipal corporation, as provided in sub-division V of this chapter."

Section 6104 General Code provides:

> "When intoxicating liquor is so sold for medicinal purposes, it shall be done only in good faith upon a written prescription issued, signed, dated in good faith by a reputable physician in active practice and in conformity with the provisions of this chapter. Such prescription shall be used but once and must contain the name and quantity of liquor prescribed, the name of the person for whom prescribed, the date on which the prescription is written and directions for the use of the liquor therein so prescribed."

Section 6105 General Code provides:

> "In each county, township, municipal corporation or residence district in which the sale of intoxicating liquor as a beverage is prohibited, a book shall be kept by each retail druggist and pharmacist in which shall be entered, at the time of each sale of intoxicating liquor, the date thereof, the name of the purchaser, who shall sign his name in such book as part of such entry, the kind, quantity and price of such liquor, the purpose

for which it was sold and the residence by street and number, if there be such, of such purchaser. When such sale is for medicinal purposes, such book shall also contain the name of the physician issuing the prescription. Such prescription shall be cancelled by writing on it the word 'cancelled' and the date on which it was presented and filed. Such book shall be in form substantially as follows: Date_____
Name of Purchaser _____Residence _____
Kind and Quantity _____Purpose of Use _____
Price _____Name of Physician _____
Signature of Purchaser."

It will be noticed that Section 6104 General Code provides that when intoxicating liquors are sold for medicinal purposes it shall be done only in good faith upon a written prescription of a physician in active practice.

"Physician" is defined by Century Dictionary as "one who practices the art of healing diseases and of preserving health; a prescriber of remedies for sickness and disease."

It might well be said that a veterinarian is within the description of "physician" as defined by the dictionary. However, that is the broad meaning of the term and a narrow meaning thereof is one who prescribed for human sickness and disease. The question therefore, arises as to whether the term "physician" as used in Section 6104 is so used in its broad or restricted sense. A further examination of said section will show that the prescription issued, signed and dated by said physician must contain, among other things, the name of the *person* for whom prescribed. Hence, as it is necessary that the prescription shall contain the name of the *person* for whom prescribed it is my conclusion that the term "physician" as used in said section is so used in its restricted sense.

Such being the fact, I am of the opinion that pharmacist may not accept a whiskey prescription signed by a veterinarian in a municipality which has been voted "dry" under the Beal law, and concur with an opinion of my predecessor to the Hon. J. J. Brown, city solicitor, Alliance, Ohio, under date of May 13, 1909, as the law stood prior to the adoption of the General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

368.

MORPHINE—CONTRACT FOR SALE OF MORPHINE ACCEPTED IN ST. LOUIS, NOT WITHIN OHIO STATUTE.

A contract is made where completed and when an acceptance to an offer from Ohio to buy morphine is mailed at St. Louis, the contract is completed and therefore, made in St. Louis.

A contract for the sale of morphine, so made therefore, is not made in Ohio and therefore not within Section 12674 *General Code prohibiting the sale of morphine except upon the written order from a prescribing physician.*

COLUMBUS, OHIO, October 5, 1912.

HON. F. H. KING, *Secretary Pro tem, State Board of Pharmacy, Delphos, Ohio.*

DEAR SIR:—Under date of February 24th you enclosed a letter from Mr. Charles W. Antony, secretary of Canton Retail Druggists' Association, asking as to the right of a St. Louis firm to sell morphine or morphine tablets to a consumer living in Ohio.

From subsequent conversation with you I learned that the question submitted is in reference to the right of the concern situated in St. Louis to sell such morphine to a consumer in Ohio, the same having been ordered by the consumer in Ohio from St. Louis firm by mail.

Section 12674 General Code provides in part as follows:

> "Whoever dispenses, sells or delivers * * * morphine or its salts, * * * * except upon the written prescription of a legally qualified physician or dentist, or refills such prescription except upon the written order of the person prescribing it, shall be fined not less than ten dollars nor more than fifty dollars for each offense."

The above law makes it unlawful to dispense, sell or deliver morphine except on written prescription.

As the criminal laws of the state of Ohio have no extra territorial application the question arises in your inquiry as to where said contract of sale is made.

It is a well established rule of law that where a person uses the mail to make an offer the postoffice becomes his agent to carry the offer, and that when so made the contract is complete when the acceptance of said offer is mailed.

9 Cyc. 294 et seq.

In the question under consideration, therefore, when the Ohio consumer writes to a firm in St. Louis for certain morphine tablets and the said firm in St. Louis accepts the order and mails the said tablets back to Ohio the contract is completed at St. Louis, in the state of Missouri, and, therefore, the Ohio law making it unlawful to dispense, sell or deliver morphine except on written prescription is not applicable. It is only applicable where said morphine is dispensed, sold or delivered in the state of Ohio, and in many instances it would be a question as to where the sale takes place, which question must always be answered upon the particular facts of the case. Whether or not there is a law in the state of Missouri covering the matter I do not undertake to decide.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

502.

DISPOSITION OF FINES COLLECTED IN PROSECUTIONS BY BOARD OF PHARMACY—FINES ASSESSED BY JUSTICE OF PEACE UNDER SECTION 12666 OF THE GENERAL CODE.

Section 12666 of the General Code is a general statute and has not any particular relation to the practice of pharmacy so as to bring it within Section 1313 of the General Code providing for the payment of fines collected under prosecutions by the board of pharmacy into the state treasury, to the credit of the pharmacy fund.

Fines assessed under Section 12666 of the General Code by a justice of the peace, therefore should be paid into the county treasury in accordance with Section 13429 of the General Code.

COLUMBUS, OHIO, June 22, 1912.

HON. N. M. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under date of May 6th, Mr. F. H. King, secretary pro tem. of your board, submitted to this department a letter from Mr. Flandermeyer, of

Cleveland, a member of your board, requesting to be advised as to whether or not your board is entitled to receive a fine assessed in a case brought before a justice of the peace under Section 12666 General Code.

Sction 1313 General Code provides in part as follows:

> "The secretary of the state board of pharmacy shall enforce the laws relating to the practice of pharmacy. * * * Fines assessed and collected under prosecutions commenced or caused to be commenced by the state board of pharmacy shall be paid to the treasurer thereof, and by him paid into the state treasury each month to the credit of the fund for the use of the board."

Sections 12705-12710 General Code are the sections relating to the practice of pharmacy.

Section 12666 General Code provides in part as follows:

> "Whoever, knowingly sells or delivers to any person otherwise than in the manner prescribed by law, or sells or delivers in the manner prescribed by law but without the written order of an adult, to a minor under sixteen years of age, any of the following described substances or any poisonous compounds, combinations or preparations thereof to-wit: * * * (various things set forth) * * * shall be fined not less than ten dollars nor more than fifty dollars for each offense."

Section 12667 General Code provides the manner in which said substances may be sold.

Section 12668 General Code provides certain exceptions thereto.

In none of these Sections, 12666-12668 General Code, are there any words limiting the operation thereof to a pharmacy exclusively, and, therefore, is not one of the sections relating to the practice of pharmacy. Furthermore, there is no provision of law requiring the state board of pharmacy to enforce the provisions of said Section 12666 General Code, or any provision that the fines collected shall be paid to such board as there is in relation to Section 12672 General Code regulating the sale of cocaine. Section 12666 General Code is found contained within what is known as "offenses against public health" under the sub-head "poison."

Section 13429 General Code provides as follows:

> "Fines collected by a justice of the peace shall be paid into the general fund of the county where the offense was committed within thirty days after collection unless otherwise provided by law."

The provisions of Section 1313 General Code, above set forth in relation to the fine assessed and collected under prosecutions commenced by the state board of pharmacy refer, as I view it, solely to violations of law relating to the practice of pharmacy.

As the provisions of Section 12666 General Code are general in their application and as there is no provision that the fines assessed and collected under Section 12666 General Code shall be paid to the treasurer of the state board of Pharmacy, I am of the opinion that said state board of pharmacy is not entitled to receive such fines, but that the same should be paid into the county treasury as provided in Section 13429.

Very truly,
TIMOTHY S. HOGAN,
Attorney General.

641.

STATE BOARD OF PHARMACY—PAYMENT OF GENERAL OFFICE AND OTHER EXPENSES AND OF OFFICE AND OTHER EXPENSES INCURRED IN INVESTIGATION AND PROSECUTION OF ILLEGAL SALE OF COCAINE—APPROPRIATIONS.

Payment for such office help and other expenses as are required for investigating and prosecuting the illegal sale of cocaine and other narcotics, may be made from the fund of $3,500.00 *appropriated for the purpose of such prosecutions and investigations.*

Other offices and expenses must be paid from the fund provided for in Section 1312 *General Code, which is accumulated from fees collected by the board.*

COLUMBUS, OHIO, September 27, 1912.

HON. M. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of August 27th wherein you advise me that your board has an appropriation of $3,500.00 for investigating and prosecuting the illegal sale of cocaine and other narcotics. You desire to know whether any of this appropriation can be legally used for office help and expenses while conducting such investigation.

The language of the appropriation act is as follows:

> "Investigating and prosecuting the illegal sale of cocaine and other narcotics----------$3,500.00."

Section 1312 General Code provides as follows:

> "All fees required by the previous section shall be paid in advance to the treasurer of the state board of pharmacy, and by him paid into the state treasury each month, to the credit of a fund for the use of the board. The compensation and expenses of members and officers of the board and all its necessary expenses shall be paid from this fund upon a requisition signed by the president and secretary of the board, and the warrant of the auditor of state."

By reference to Section 1312 foregoing set forth it is to be noted that the compensation and expenses of members and officers of the board and all the necessary expenses of the board are to be paid from the moneys paid by the treasurer into the state treasury. It is to be noted, therefore, that it is the intention of the legislature that the ordinary office help and ordinary expenses of the board are to be met as provided in Section 1312 General Code.

The amount appropriated for investigation and prosecuting of illegal sales of cocaine and other narcotics is a fund appropriated for the specific purpose of investigating and prosecuting, and was so appropriated to take care of such expenses as were incurred in so investigating and prosecuting other than the ordinary salaries and ordinary office help necessary for the ordinary operation of the board. Any extraordinary expense which may be incurred in such investigating and prosecuting may be paid from the said $3,500.00 so appropriated, but it is only those expenses which would not have been incurred save for such investigating and prosecuting that can be so paid from said fund. Your letter does not specifically state whether the office help and expenses referred to in your inquiry means the

ordinary office help and expenses or whether it means extraordinary office help and expenses attributable solely to the conducting of investigation of illegal sales of cocaine and other narcotics. If your inquiry means the ordinary help and expenses which accrued while conducting such investigation but which would have accrued whether such investigation was undertaken or not, I am of the opinion that the $3,500 so appropriated cannot be used, but that if additional help and additional expense attributable solely to the investigation of the illegal sale of cocaine are necessary the amount incurred for such office help and expenses may be paid from such fund.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

644.

PHARMACY—CARBOLIC ACID NOT A "HOUSEHOLD REMEDY"—ILLEGAL SALE BY GROCER.

Carbolic acid is a poison within the meaning of 12706 *General Code. The words and "other similar preparations" as employed in Section* 12707 *General Code, which enumerates a number of exceptions to* 12706 *General Code, are construed to mean "other household remedies." As carbolic acid is of a more dangerous character than the articles so enumerated and as it cannot properly be classed as a "household remedy," it is not included within the exceptions, and a grocer selling the same contrary to Section* 12666 *or* 12706 *General Code, is liable for the penalties therein provided.*

COLUMBUS, OHIO, September 27, 1912.

HON. M. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under date of August 31st you advised me that you have in possession a four ounce bottle of solution carbolic acid that you purchased from a grocery store, the dispenser thereof not being a registered pharmacist, and you wish to know whether the sale of such solution of carbolic acid is a legal one. Enclosed in your inquiry is a copy of a label on the bottle containing said solution as purchased. Said label shows that it is clearly set forth that the contents of the bottle is a solution of carbolic acid and that it is poison; also directions for the use of the same is given and it appears that it is put up by a wholesale druggist, the name of such wholesale druggist being given together with the address of such wholesale druggist. The statutes which should be considered in reference to this matter are Sections 12666, 12667, 12669, 12706 and 12707 General Code.

Section 12666 General Code provides in part as follows:

> "Whoever, knowingly sells or delivers to any person otherwise than in the manner prescribed by law, or sells or delivers in the manner prescribed by law but without the written order of an adult, to a minor under sixteen years of age, any of the following described substances or any poisonous compounds, combinations or preparations thereof, to-wit: * * * carbolic acid * * * or any of the poisonous alkaloids or alkaloidal salts or other poisonous principles derived from the foregoing, or other poisonous alkaloids or their salts or other *virulent* poison, * * *."

It is to be noted that among the substances mentioned in Section 12666 General Code regulating the sale of poison is carbolic acid, and the method by which the same is to be sold is set forth in Sections 12667 and 12669 General Code.

Section 12666 General Code applies generally to anybody who sells or delivers carbolic acid whether the same be sold by a registered pharmacist or not, and standing alone would not prohibit the sale of carbolic acid by a person other than a registered pharmacist. Carbolic acid, however, is a poison, and

Section 12706 General Code provides as follows:

> "Whoever, not being a legally registered pharmacist, or a legally registered assistant pharmacist employed in a pharmacy or drug store under the management or control of a legally registered pharmacist, compounds, dispenses or sells a drug, chemical, *poison* or pharmaceutical preparation, shall be fined not less than twenty dollars nor more than one hundred dollars. Each day's violation of this section shall constitute a separate offense."

Certain exception to Section 12706 is found in Section 12707, General Code, which provides as follows:

> "The next two preceding sections shall not apply to a physician or prevent him from supplying his patients with such medicines as to him seem proper, the making or vending of patent or proprietary medicines by a retail dealer, the selling of copperas, borax, blue vitriol, saltpeter, sulphur, brimstone, licorice, sage, juniper berries, senna leaves, castor oil, sweet oil, spirits of turpentine, glycerine, glauber's salt, cream of tartar, bicarbonate of sodium, quinine, rochelle salts, epsom salts, alum, camphor gum, oil of cinnamon, oil of lemon, or prohibit a person from selling in the original packages, paregoric, essence of peppermint, essence of cinnamon, essence of ginger, hive syrup, syrup of ipecac, tincture of arnica, syrup of tolu, syrup of squills, spirits of camphor, number six, sweet spirits of nitre, compound cathartic pills, quinine pills and other similar preparations when compounded by a legally registered pharmacist and put up in bottles or boxes bearing the label of such pharmacist or a wholesale druggist, with the name of the article and directions for its use on each bottle or box."

It is to be noted that Section 12706 General Code requires that drugs, chemicals, preparations and pharmaceutical preparations must be sold by a legally registered pharmacist or a legally registered assistant pharmacist employed in a pharmacy or drug store under the management or control of a legally registered pharmacist. Carbolic acid is a poison, and, therefore, unless there is some exceptoin to be found in Section 12707 General Code, foregoing set forth, such carbolic acid must be sold as provided in Section 12707 General Code.

An examination of Section 12707 General Code discloses certain exceptions to Section 12707 General Code, to-wit: a physician supplying his patient with certain medicines as to him seems proper, the making and vending of patent and proprietary medicines, the selling of certain drugs and chemicals and also does not prohibit a person from selling in the original package drugs, chemicals, poisons and pharmaceutical preparations specifically set forth, and "other similar preparations" when compounded by a legally registered pharmacist and put up in boxes or bottles bearing the label of such pharmicist or wholesale druggist, the name of the article and directions for its use on each bottle or box.

The question arises, therefore, as to whether or not carbolic acid can be considered and included within the term "other similar preparations" as used in said Section 12707 General Code. I am informed that none of the preparations specifically set forth in said section have any similarity one to another, and I have

heretofore construed the words "other similar preparations" to mean what is generally known as "household remedies" for the reason that the preparations as set forth are what are generally known as such household remedies. However, none of such preparations are in themselves dangerous, nor would they be necessarily fatal if taken contrary to the usual directions for the use thereof. It is well known that carbolic acid is an exceptionally dangerous poison and that it is often used with suicidal intent, being in fact one of the most usual poisons taken to accomplish self-destruction. It is also very doubtful that the same could under any circumstances be considered as a household remedy as said term is usually understood, and I am unwilling to consider it as such unless it is clearly proven so to be, or clearly shown to be within the exception contained in Section 12707 General Code.

I hold, therefore, that it is not included within the term "and other similar preparations" as used in such section, and that, consequently, a sale thereof by one who is not legally registered or legally registered assistant pharmacist employed in a pharmacy under the management and control of a legally registered pharmacist is illegal, and furthermore, even if sold by a legally registered pharmacist or assistant pharmacist as provided by said Section 12707 General Code, the provisions of Section 12667 et seq. General Code must be complied with.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(State Board of Veterinary Examiners)

114.

"VETERINARY"—LICENSE TO PRACTICE—VACCINATION OF SWINE.

As the act of vaccinating swine for the purpose of curing or preventing disease is a surgical or medical treatment of domestic animals and comes within the purview of the term "veterinary," such practice can be engaged in by only licensed veterinaries.

COLUMBUS, OHIO, January 30, 1912.

LOUIS P. COOK, D. V. S., *Member Ohio State Board Veterinary Examiners,* 3116 *Spring Grove Ave., Cincinnati, Ohio.*

DEAR SIR:—I herewith acknowledge the receipt of your letter of the 5th inst., wherein you inquire as follows:

> "The state board of veterinary examiners has received a number of letters recently asking whether any person not legally qualified to practice veterinary medicine in this state can legally engage in the work of vaccinating swine that have been exposed to the disease hog cholera, or that are already affected with such disease.
>
> "The reply of the secretary of the board was to the effect that only persons legally qualified to practice veterinary medicine in this state could, under the law engage in such work."

In reply thereto I beg to say Section 13382 of the General Code provides as follows:

> "Whoever engages in the practice of veterinary medicine or surgery in violation of any provision of law, shall be fined not less than ten dollars nor more than twenty-five dollars, and for each subsequent offense shall be fined not less than fifty dollars nor more than one hundred dollars or imprisoned in jail not more than sixty days, or both. This section shall not prohibit veterinary advice or service in cases of emergency, if rendered by a person not entitled to practice or apply to animal castration and dehorning cattle."

It is apparent from the foregoing section that only those persons can practice veterinary medicine and surgery who have received certificates to practice in accordance with the law. The question to be determined then is whether or not the vaccination of swine that are exposed to or already have hog cholera constitutes the practicing of veterinary medicine.

Webster defines "veterinary" as follows:

> "Of or pertaining to the art of healing or treating the diseases of domestic animals, as oxen, horses, sheep and the like."

The Century Dictionary defines "veterinary" as follows:

> "Pertaining to the surgical or medical treatment of domestic animals."

The vaccination of swine which already have the disease of hog cholera is, of course, for the purpose of curing the swine of the disease; and the vaccination of swine which have been exposed to the disease of hog cholera, and have not yet acquired such disease, is, of course, for the purpose of preventing and avoiding the disease. In either case such vaccination pertains to the "art of healing or treating of diseases of domestic animals," and constitutes a part of the practice of veterinary medicine.

Therefore, it is my opinion that none save licensed veterinary doctors can lawfully vaccinate swine for the purpose of either curing hog cholera or preventing the disease from developing. Any person who does so vaccinate swine is practicing veterinary medicine in violation of Section 13382 General Code, above quoted.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

Addendum:

The foregoing conclusion is, of course, subject to the cases of emergency mentioned in said Section 13382.

(Board of State Charities)

412.

PERSONS VOLUNTARILY COMMITTED AND INSANE PRISONERS OF PENITENTIARY NOT LIABLE TO "PAY PATIENT" PROVISIONS WHILE CONFINED IN STATE HOSPITAL FOR INSANE.

Inasmuch as only such patients are amenable to Sections 1815-1815-10, *General Code, known as the "pay patient" provisions as are committed to the state hospital for the insane, by the proper legal procedure in the county of their legal residence, and for the further reason that persons sentenced to the penitentiary are wards of the state, such persons must be supported by the state during the time of their confinement in the state hospital.*

An applicant for admission to any state institution, under voluntary commitment, by provision of Section 1972-3 *and* 1972-4 *of the General Code, is not amenable to the "pay patient" provisions, but as the power to receive such applicant is discretionary with the superintendent of the institutions, the applicant might be required to pay a reasonable compensation for his maintenance while in the institution.*

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Your communication dated February 8, 1912, received, in which you say:

> "There recently were transferred from the Ohio penitentiary to the Columbus State Hospital a number of insane prisoners."

and requesting my opinion as to whether the provisions of the pay-patient law, Sections 1815 to 1815-10 of the General Code, would apply to persons committed to the hospital under such circumstances; and also requesting my opinion as to the application of this law to persons admitted to state hospitals under what is known as voluntary commitment act, Sections 1972 to 1974 of the General Code.

In answer to your first inquiry I desire to say that Section 2222 of the General Code provides as follows:

> "When a convict in the penitentiary or the reformatory becomes insane, the warden of the penitentiary or the superintendent of the reformatory shall give notice to the physician thereof, who shall forthwith examine the convict. If upon examination, he is of opinion that the convict is insane, the physician shall so certify to the warden, or superintendent. If the Lima state hospital is not then open to receive such convict, the warden shall forthwith confine the convict in the insane department of the penitentiary. The superintendent shall present to the board of managers of the reformatory the certificate of such physician. In such case the board of managers may order the superintendent to remove the convict to the Columbus state hospital, and the superintendent of such hospital shall set apart a portion of the hospital wherein such convict shall be confined."

and Section 2223 G. C. provides as follows:

> "Should it be necessary after a convict is so confined in the insane department of the penitentiary, evidenced by the certificate of the superintendent of the Columbus state hospital and the physician of the pene-

tentiary, the board of managers of the penitentiary may order the warden to remove such insane convict to the Columbus state hospital and the superintendent shall set apart a portion of the hospital wherein such insane shall be confined."

Under the provisions of the two above quoted sections the convicts of which you speak are properly confined or have become inmates of the Columbus state hospital for treatment as other inmates, subject, however, to be returned to the Ohio penitentiary upon being restored to their proper minds, as provided in Section 2224 of the General Code, which is as follows:

"When the physician of the penitentiary certifies to the warden thereof, that an insane convict confined in the insane department of the penitentiary, or when the superintendent of the Columbus state hospital certifies to the warden of the penitentiary or to the superintendent of the reformatory, that a convict from such institution so confined in such hospital, is so far restored to his proper mind that it is safe to put him at labor under his sentence, the warden or superintendent of the reformatory as the case may be shall remove such convict from the hospital and return him to the prison and put him at labor under his sentence."

Section 13720 of the General Code provides as follows:

"A person sentenced to the penitentiary, or Ohio state reformatory, unless the execution thereof is suspended, shall be conveyed to the penitentiary or Ohio state reformatory by the sheriff of the county in which the conviction was had, within five days after such sentence, and delivered into the custody of the warden of the penitentiary, or superintendent of the Ohio state reformatory, with a copy of such sentence there to be kept until the term of his imprisonment expires, or he is pardoned. If the execution of such sentence is suspended, and the judgment be afterward affirmed, he shall be conveyed to the penitentiary or state reformatory within five days after the court directs the execution of sentence; provided, however, that the trial judge, or any judge of said court in said subdivision may, in his discretion, and for good cause shown, extend the time of such conveyance."

And under this last above quoted section, and the transfer of said insane convicts to said state hospital, the status of each is that of imprisonment and an inmate of the hospital for temporary treatment only, for it becomes the duty of the superintendent of said hospital to set apart a portion of the same wherein such insane convicts shall be confined and upon being restored to reason shall be returned to the peniteniary as provided in Section 2224 of the General Code above quoted.

It is apparent, from the working of Sections 1815-1815-10 of the General Code, that only such inmates of the state hospital for insane as have been committed to the same by the proper legal procedure for the commitment of insane persons from the county which is their legal residence, come under the provisions thereof.

Again, a convict is supported during imprisonment by the state, and any convict becoming insane is the ward of the state, and, although transferred to the state hospital for temporary treatment, is constructively imprisoned in the penitentiary during such temporary absence therefrom, and the state must support him while in said hospital.

For the reason above stated I am of the legal opinion that said Sections 1815 to 1815-10 of the General Code do not apply to insane convicts transferred to the hospital from the Ohio penitentiary.

As to your second inquiry, viz.:

> "As to the application of pay-patient law, Sections 1815 to 1815-10, to persons admitted to state hospitals under what is known as voluntary commitment act, Sections 1972 to 1974 of the General Code."

I desire to say that Section 1815-1 provides:

> "When any person is *'committed'* to a state hospital for the insane, * * * to the 'Ohio hospital of epileptics' or to the institution for feebleminded, the judge making such *'commitment'* shall, at the same time, certify to the superintendent of such institution, and the superintendent shall thereupon enter upon his records the name and address of the guardian, if any appointed, and of the relative or relatives liable for such person's support under Section 1815-9."

Section 1815-9 of the General Code provides:

> "It is the intent of this act that a husband may be held liable for the support of a wife while an inmate of any of said institutions; a wife for a husband, a father or mother for a son or daughter, or both for a father or mother."

Under the provisions of the act above referred to only such inmates as are committed to such institutions are subject to the same, and unless the patients are committed thereto I am of the opinion that they would not have to pay as provided herein.

The word "committed," as used in said sections, means: "The act of committing or putting in charge of said institution under legal writ."

Under Section 1972, General Code,

> "Only such persons as are in an incipient stage of mental derangement, or epilepsy, may apply for admission to and treatment in a state hospital for insane or the Ohio hospital for epileptics, and likely to be benefited by such treatment."

This application is voluntary, and when the applicant is admitted, cannot be kept at such institution beyond such time as the patient may desire to remain and, therefore, they are not in any sense committed as other insane patients under the law, and under the provisions of Section 1972 the longest time that any such voluntary patient may be allowed to remain in such institution is sixty (60) days, thus there must of necessity be a plain distinction between committed and voluntary patients.

The law does not provide for any charge being made for any such patients so admitted to either of the state institutions under the voluntary Sections 1972-1974, and certainly a person, a charge on some one other than himself, could not create an obligation in favor of the state by availing himself of the provisions of said last above quoted sections.

I am, therefore, of the legal opinion that any patients admitted to any of the

state institutions under the provisions of 1972-3 and 4 of the General Code are not amenable to the provisions of Sections 1815 to 1815-10 inclusive, but in view of the fact that the power to receive such applicant is a discretionary one vested in the superintendent of each such institution I see no reason why any such applicant, who is able to pay, should not contribute to his maintenance while in such institutions and might be required to pay a reasonable compensation for his maintenance while in the said institution.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(State Board of Agriculture)

312.

SALARY—INCREASE AND DECREASE OF SALARY DURING TERM OF OFFICE—PUBLICITY AGENT OF BOARD OF AGRICULTURE FOR COLUMBUS CENTENNIAL.

Inasmuch as the publicity agent employed by the board of agriculture in connection with the Columbus Centennial does not act in an independent capacity, but merely as an employe of the board, he is not a public officer, and therefore, not within the constitutional prohibition against increase or decrease of salary during term of office.

COLUMBUS, OHIO, April 9, 1912.

HON. A. P. SANDLES, *Secretary, State Department of Agriculture, Columbus, Ohio.*

MY DEAR MR. SANDLES:—Answering your verbal inquiry as to whether or not the state board of Agriculture, having heretofore elected Clark C. Doughty as publicity agent of the Columbus Centennial, agreeable to Senate Bill 107, enacted into law last year, at a salary fixed at twelve hundred dollars, to be paid in nine monthly installments from the amount appropriated, and in the manner as provided, in said bill, can increase said salary for the remaining time, he having served a few months as said publicity agent.

The first question that arises is whether or not the publicity agent provided for is an officer, for, if he is, then, there could be no question but that his salary could not be increased during his term. As stated by the supreme court in state vs. Halliday, 61 O. S. 171:

> "The distinguishing characteristic of a public officer is that the incumbent is in an independent capacity and is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public, as required by law."

The court had previously held, in State vs. Jennings, 57 O. S. 415, that employes, subject to the control and direction of some one else would not be officers.

In State vs. Massilon, 14 O. C. D. 249, it was held:

> "One whose duties are not prescribed by statute, but who is a servant of the board appointing him, under their absolute control and direction, they fixing his salary and having power to remove him, would not seem to be an officer."

In view of the foregoing, and since, as I take it, the publicity agent was merely employed for a definite and particular purpose, I have no hesitation in arriving at the conclusion that he is not an officer as contemplated by law.

So, being a mere employe, if he is removable at the pleasure of the board and has no contract fixing the time during which he is to be employed; and if the so-called salary, is only the entire amount to be paid for the nine months, from which might be calculated the amount he was to receive for the time he actually remained in the service of the board, I am of the opinion that the board, if it so sees fit, may either discharge him at pleasure, reduce the amount that it would pay him per month, or increase said amount.

But if, on the contrary, the relation existing is contracted (and there was no contract, either express or implied, that he was to serve nine months for $1,200.00) then, it would be my opinion that the contract fixes the rights of the parties; and so long as it exists they could not vary from its terms.

It must always be kept in mind that since the compensation of the publicity agent is payable from the amount appropriated in said act, when the amount of said appropriation is exhausted the board's power to pay said agent would cease.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(Ohio Agricultural Experimental Station)

27.

OHIO AGRICULTURAL EXPERIMENT STATION—BIDS FOR ERECTION OF POWER HOUSE—CONFORMANCE WITH ESTIMATE—ALTERATION OF BID BY REASON OF MISTAKE IN ESTIMATE—CONTRACTORS.

A contractor's bid for the erection of a power house for Ohio agricultural experiment station, cannot be accepted if its amount exceeds the estimate on file with the auditor of state.

When bids have been received by the board of control and the same have been opened, the board cannot permit an alteration of the bid on account of error unless the mistake and the requisite data for correcting the same are apparent on the face of the bid.

COLUMBUS, OHIO, November 22, 1911

HON. CHARLES E. THORNE, *Director, Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your communication of October 31st, wherein you inquire as follows:

> "On October 27th, the day set by advertisement for opening bids for the erection of an addition to the power house of this station, the following bids were received:
>
> "Wm. L Long, Wooster, for power house.....$3,664.00
> "Wm. L. Long, Wooster, for chimney..... 1,195.00
> "C. O. Langell, of Wooster, power house..... 3,960.00
> "C. O. Langell, of Wooster, chimney..... 1,400.00
> "W. H. Levers, Wooster, power house..... 4,173.25
> "General Concrete Construction Co., of Chicago, for reinforced chimney..... 1,050.00
> "Alphons Custodis Chimney Construction Co., of Chicago, concrete block chimney..... 1,130.00
>
> "Our estimate of the total cost of this building, as filed in the office of the auditor of state, is $3,132.00 for the power house and $1,130.00 for chimney, total cost of $4,262.00. Of this amount four items were not included in the bids above mentioned, namely:
>
> "Excavation, $210; concrete floor, $225; heating $120; and tunnel to main building, $250; total, $805.00; these items being reserved to be constructed by employes of the station. Deducting $805 from $3,132.00 the balance, $2,327.00 is below any of the bids received.
>
> "This difference is partly due to the fact that some items were overlooked in making up the estimate and partly to failure to take into account the commission to the contractor.

"We have therefore gone over the estimates with the lowest bidder, Wm. L. Long, and he has revised his bid as follows:

"Brick work complete	$1,189.50
"Cut stone work and cement steps	52.00
"Carpentry	1,092.00
"Roofing and slating	365.00
"Two ventilators	40.00
"Steel floor beams and bearing plates	398.00
"Plastering	364.00
"Painting	55.00
"Total	$3,555.50

"Of these items the cut stone and steps, the ventilators and $115 of the plastering were not included in our estimates.

"Mr. Long agrees to erect the chimney for the amount of our estimate $1,130, provided it is included with the contract for the remainder of the building.

"Mr Long is ready to begin this work at once and it is of very great importance that it should be done this fall.

"I therefore request your advice as to whether a contract may be entered into on the basis above described. If so, the contract will be properly executed and submitted to you for your approval."

From your statement of the facts, I deduce that the total amount of Mr. Long's bid is $4,859.00 for building both the addition to the power house and the chimney. His bid for building the addition to the power house alone is $3,664.00 and does not include the following items:

Excavation	$210.00
Concrete floor	225.00
Heating	120.00
Tunnel to the main building	250.00
Total	$805.00

The estimate of the total cost as filed in the office of the secretary of state is $3,132.00 for the power house, and $1,130.00 for the chimney. Deducting from the $3,132.00 (the estimate for building the addition to the power house) the above mentioned $805.00, which is not included in the bid, leaves a balance of $2,327.00 as the estimate for building the addition to the power house, which is less than the bid submitted by Mr. Long, and it was less than the bid as revised by Mr. Long after the opening of the said bids.

Mr. Long's bid, as revised, amounts to $3,555.50 for building the addition to the power house, which is $1,228.50 more than the estimate when figuring the estimate at $2,327.00.

Section 2323 of the General Code provides:

"No contract shall be made for labor or materials at a price in excess of the entire estimate thereof. The entire contract or contracts, including estimates of expenses for architects or otherwise, shall not exceed in the aggregate the amount authorized by law for such institution, building or improvement, addition thereto or alteration thereof."

In the case of Beaver and Butt vs. The Trustees, 19 O. S., 97, the supreme court held that:

> "Where, under the act of April 3, 1868, 'prescribing the duties of directors, trustees, etc., to whom is confided the duty of devising and superintending the erection, etc., of any state institution,' etc. (S & S 637), the trustees of the institution for the blind proceed regularly in all respects in accordance with law to advertise for sealed proposals, to be filed within a day named, for the furnishing of specified labor and materials toward the erection of a state institution for the blind, it is their duty to award the contract for the furnishing of such labor and materials to such person or persons who shall so offer the same at the lowest price and give the requisite security, provided such price is not in excess of the preliminary estimate required by said act."

You state further that some of the items were overlooked in making up the estimate, to-wit:

Cut stone work and cement steps	$52.00
Two ventilators	40.00
Plastering	115.00
Total	$207.00

and that for this reason Mr. Long has revised and changed his bid.

In this connection I desire to say that after the bids have been received by the board of control and the same have been opened, the board has no authority or right to permit an amendment or alteration of the bid on account of error or mistake therein unless the facts of such mistake and the requisite data for correcting the same are apparent on the face of the proposal.

(Beaver and Butt vs. Trustees, 19 O. S. 97.)

Under the circumstances you state, it does not appear that the facts of such mistakes and the requisite data for correcting the same appear on the face of the proposal of Mr. Long.

Therefore, I am of the opinion that a contract cannot be entered into under the circumstances you state for the reason that the bid exceeds the estimate on file with the auditor of state, and for the further reason that the board of trustees is without the right or authority to permit a change or alteration in the bid after the same has been received and opened by the board of control.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

380.

OHIO AGRICULTURAL EXPERIMENT STATION—BOARD OF CONTROL CANNOT LEASE LANDS TO OIL COMPANY.

The board of control of the Ohio agricultural experiment station is not authorized to enter into a lease of the lands owned by the station to an oil company for the purpose of drilling for oil on said grounds.

COLUMBUS, OHIO, May 17, 1912.

HON. CHARLES E. THORNE, *Director Ohio Agricultural Experiment Station Wooster, Ohio.*

DEAR SIR:—Under date of May 4, 1912, you submitted for my consideration a certain proposed lease, between the board of control of the Ohio agricultural experiment station and the Ohio Oil Company, whereby the latter, for a con-

sideration expressed in said proposed lease, is to obtain the privilege of locating wells and drilling for oil and gas on the lands owned by said station at Wooster. As suggested in your letter, I would not, in any event, give my approval to this lease until the same is fully executed. The reason for asking my advice at this time is to facilitate the execution of the proposed lease if my opinion should be to the effect that such lease would be legal.

The law governing the management and operation of the Ohio agricultural experiment station consists of Sections 1156 to 1170, inclusive, of the General Code.

Section 1156 provides:

> "There shall be a state agricultural experiment station for the benefit of practical and scientific agriculture and the development of the agricultural resources of the state. It shall be known as the 'Ohio Agricultural Experiment Station.'"

Section 1157 provides:

> "The state agricultural experiment station shall be under the supervision and control of a board of control which shall consist of five members, who shall be appointed by the governor with the advice and consent of the senate. One member of the board shall be appointed each year who shall hold his office for a term of five years. Not more than three members shall belong to the same political party. (R. S. Section 409-2.)"

Section 1160 provides:

> "The board of control of the Ohio agricultural experiment station shall be a body corporate with power to sue and be sued, to contract and be contracted with, to make and use a seal and to alter it at its pleasure. It may receive and hold in trust for the use and benefit of the station a grant or devise of land, or a donation or bequest of money or other personal property to be applied to the general or special use of the station as directed by the donor. (R. S. Section 409-4.)"

The foregoing seem to be the only statutory provisions necessary to be considered in arriving at the solution of your question. Under Section 1156, the state agricultural experiment station is established "for the benefit of practical and scientific agriculture, and the development of the agricultural resources of the state," and Section 1157 provides for a board of control consisting of five members to manage said station. The board of control, under Section 1160, is constituted "a body corporate, with power to sue and be sued, to contract and be contracted with," etc.

The right to bind the state by contract is reserved to the legislature, and only when such power is expressly delegated by the legislature, can the same be exercised by any state officer or board. The lands of the agricultural experiment station are held in trust for the state of Ohio by the board of control for the uses and purposes set forth in Section 1156 supra. I am of the opinion that although said board of control is vested with the power of making contracts, such contracts must have for their object the "benefit of practical and scientific agriculture and the development of the agricultural resources of the state." The leasing of this land, for drilling oil and gas wells, does not come within the objects for which the experiment station was established, and accordingly the board of control may not legally enter into said lease.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(Chief Examiner of Steam Engineers)

45.

DEPARTMENT OF EXAMINERS OF STEAM ENGINEERS—DISPOSITION OF MONEYS RECEIVED—WITNESS FEES TO INSPECTORS—EXAMINERS—STATE TREASURY.

All moneys and fees including fines, received by the department of examiners of steam engineers are to be paid in accordance with Section 1058, *General Code, into the state treasury to the credit of the general revenue fund.*

An inspector of such department is entitled to witness fees as provided for witnesses in general.

The duties of this department are confined to the conduct of prosecutions and do not extend to the collection or disposition of fines.

COLUMBUS, OHIO, January 13, 1912.

HON. C. H. WIRMEL, *Chief Examiner Department of Examiners of Steam Engineers, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your inquiry of the 4th inst. wherein you inquire as follows:

> "Kindly advise the undersigned as to the rights of the state in the collection of fines that are assessed against offenders of the law.
>
> "Has this department any claim to all or a part of such fines when a conviction is made?"

In reply to your inquiry I desire to say that Section 1058 of the General Code, provides as follows:

> "The chief examiner of steam engineers shall pay all moneys and fees received by him from the district examiners into the revenue fund. On or before the tenth day of such month he shall file a report with the governor of the business of his office and the amount of money received by him and paid into the state treasury."

By virtue of the last cited section I am of the undoubted opinion that all moneys and fees, including fines received by your department, are to be paid into the state treasury to the credit of the general revenue fund, and I am of the further opinion that your department has no claim either to all or any part of the fines which are covered in prosecutions brought by your department.

Since the date upon which your department submitted the above inquiry you have verbally requested an opinion from this department as to whether or not an inspector in your departmnt is entitled to witness fees after having testified as a witness in prosecutions brought by your department.

In answer to the last inquiry I desire to say that Section 3014 of the General Code provides that in criminal cases.

> "Each witness attending under recognizance or subpoena, issued by order of the prosecuting attorney or defendant, before the court of common pleas, or grand jury, or other court of record, * * *, shall be allowed the following fees: For each day's attandance one dollar, and five cents for each mile, the same as in civil causes, to be taxed in

only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court. * * *."

Section 3012 provides that each witness shall receive fifty cents for each day and such mileage for attending a trial before a justice of the peace or mayor of a municipal corporation.

Section 3011 of the General Code provides as follows:

"In all cases not specified in this chapter, each person summoned as a witness shall be allowed fifty cents for each day's attendance, and the mileage herein specified. When not summoned, each person called upon to testify in a cause shall receive twenty-five cents."

Answering your question directly I am of the opinion that an inspector is entitled to witness fees whenever he testifies as a witness, and the amount of his fees as such witness is determined by the above cited sections. That is to say, if he testifies in a trial before a justice of the peace or mayor of a municipal corporation he then receives a witness fee of fifty cents per day, together with mileage. If he testifies in a court of record as a witness attending under recognizance or subpoena he then receives the sum of one dollar as such witness, together with mileage. If such inspector testifies in a trial before a justice of the peace or mayor of a municipal corporation and is not summoned he shall receive the sum of twenty-five cents as such witness, and likewise if he testifies in a court of record as a witness not under subpoena, such inspector then receives twenty-five cents, as provided in Section 3011 cited above.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

Addendum:

"I may further add that the department of examiners of steam engineers has no concern with the collection or disposition of fines collected under prosecutions for a violation of the regulations of your department. It is their sole province to conduct the prosecution."

(Chief Inspector of Steam Boilers)

146.

BOILER INSPECTORS—EXAMINATION OF MEMBER OF BOARD OF BOILER RULES—FEES FOR INSPECTION AND FOR CERTIFICATES PAYABLE TO CHIEF INSPECTOR OF BOILERS—EACH BOILER TO BE INSPECTED.

Members of the board of boiler rules, may take the examination provided for boiler inspectors in Section 1058-16 *of the act relating thereto, if when so taking the examination, they come before the board as any other applicant without having taken any part in the preparation of the examination and without knowledge of the questions submitted.*

Fees provided under Section 1058-25 *for inspection of boilers shall not be paid to an insurance inspector by express provision of Section* 1058-13 *and also the fee of fifty cents for certificates of inspection shall, by Section* 1058-21 *be paid only to the chief inspector of boilers.*

The department of boiler inspectors may not forward the certificate until the fee has been paid.

Under Section 1058-21, *the fee for inspecting shall be collected only from the owner or user of the boiler direct and cannot be exacted from an insurance company which has accepted the risk.*

A separate certificate under Section 1059-21 *shall be issued for each and every boiler operated, with all required statements.*

COLUMBUS, OHIO, February 23, 1912.

HON. C. H. WIRMEL, *Chief Inspector of Steam Boilers, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 15, 1911, in which you inquire, first, as follows:

> "Are members of the board of boiler rules eligible to the examination for certificate of competency as provided for in Section 1058-16 (Section 11)?"

In reply thereto I would say that Section 1058-16 (Section 11 of the act providing for the inspection of steam boilers) provides for the examination of applicants for certificates of steam boiler inspectors, as follows:

> "Applications for examination as an inspector of steam boilers shall be in writing, accompanied by a fee of ten dollars, upon a blank to be furnished by the chief inspector of steam boilers, stating the school education of the applicant, a list of his employers, his period of employment and the position held with each. He shall also submit a letter from one or more of his previous employers certifying to his character and experience. Applications shall be rejected which contain any wilful falsification, or untruthful statements. Such applicant, if the board of boiler rules deem his history and experience sufficient, shall be examined by the board at its next regular meeting, by written examination dealing with the construction, installation, operation, maintenance and repair of steam boilers and their appurtenances, and the applicant shall be accepted or rejected on the merits of his application and examination. A rejected applicant shall be entitled, after the expiration of ninety days, and

upon payment of an examination fee of ten dollars, to another examination.

"Upon a favorable report by the board of boiler rules, of the result of an examination, to the chief inspector of steam boilers, he shall immediately issue to the successful applicant a certificate to that effect."

After careful consideration of your question I have reached the conclusion that there is no statutory provision which renders a member or the members of the board of boiler rules ineligible to take the examination as provided for in said Section 1058-16, above quoted. However, I desire to qualify this conclusion by saying that, as a matter of law, such member, when so taking the examination, must come before the board and take the examination the same as any other applicant, without having taken any part in the preparation of the examination to be submitted, and without any knowledge as to the questions to be submitted at such examination.

Heretofore, it has been the rule when a member of the board of school examiners desires to take the examination for a teacher's certificate, before the board of which he was a member, that he could do so, providing he took no part in the preparation, and had no knowledge of the questions to be submitted at such examination.

Therefore, as a direct answer to your specific question, I am of the opinion that members of the board of boiler rules are eligible to the examination for a certificate of competency, as provided for in Section 1058-16.

Your second inquiry is as follows:

"Can the fee for certificate issued by an insurance inspector be collected by the latter, or must owner be notified by the department?"

Section 1058-17 (Section 12 of said act) is as follows:

"The chief inspector of steam boilers may, with the consent of the governor, appoint from the holders of certificates provided for in Section 11, not to exceed ten general inspectors.

"Any company authorized to insure boilers against explosion in this state may designate from holders of such certificates persons to inspect the boilers covered by such company's policies, and the chief inspector of steam boilers shall issue to such persons commissions authorizing them to act as special inspectors. Such special inspectors shall be compensated by the company designating them, and the fee provided for in Section 20 shall not be collected by such special inspectors.

"The chief inspector of steam boilers shall issue to each of such appointees, a commission to the effect that the holder thereof is authorized to inspect steam boilers for the state of Ohio.

"No person shall be authorized to act for the state, either as a general inspector or a special inspector, unless he holds a certificate of having passed the examination as herein provided, and also that he holds a commission from the chief inspector of steam boilers to represent the state in that capacity."

Section 1058-25 (Section 20 of said act) provides as follows:

"The owner or user of a boiler herein required to be inspected shall pay to the inspector upon inspection five dollars for each boiler internally and externally inspected, and two dollars for each boiler in-

spected while in operation. The inspectors shall give receipts for the same, and when the fee is collected by a general inspector the same shall be forwarded, with his report of the inspection, to the chief inspector of steam boilers. Provided, however, that no more than eight dollars shall be collected in any one year on each such boiler, unless additional inspections are requested by the owner or user of same, or unless the boiler has been inspected and a certificate has been refused, or unless an additional inspection is required because of the change of location of a stationary boiler."

Section 1058-21 (Section 16 of said act) provides that a fee of fifty cents shall be charged and paid to the chief inspector of steam boilers, as follows, to-wit:

"The certificate of inspection shall state the name of the owner or user, the location, size and number of each boiler, the date of inspection, and the maximum pressure at which the boiler may be operated, the name of the person that made the inspection, and of the chief inspector of steam boilers, and shall also contain such quotations from the statutes as shall be deemed necessary by the board of boiler rules, and shall be so placed as to be easily read in the engine room or boiler room of the plant where the boiler is located, except that the certificate of inspection for a portable boiler shall be kept on the premises and shall be accessible at all times.

"The owner or user of a boiler herein required to be inspected shall pay to the chief inspector of steam boilers the sum of fifty cents for each certificate issued."

Said Section 1058-17, above quoted, clearly states that the fees provided for by Section 1058-25, General Code, shall not be paid to an insurance inspector, and Section 1058-21 clearly provides that the fee of fifty cents on each certificate issued shall be paid to the chief inspector of boilers, and I am of the oipnion that the fee for certificates issued by insurance inspectors cannot be collected by such insurance inspectors, but should be paid to the chief inspector of boilers direct.

Your third question is as follows:

"Has the department the right to forward certificates before fee has been forwarded?"

Inasmuch as there is no statutory provision for insuring and forwarding certificates before the fee has been received by the chief inspector of boilers. I am of the opinion that this department has no legal right to issue certificates before the fee has been received for the same. In other words, I think it is the clear intent of the act providing for the inspection of steam boilers that the certificate of inspection shall not be issued until the fee for the same has been received by the chief inspector.

Your fourth inquiry is as follows:

"Can the department exact the fee from an insurance company accepting the risk?"

In answer thereto, Section 1058-21, General Code, provides that the fee for the inspection shall be paid by the owner or user of the boiler inspected, and, therefore, I am of the opinion that such fee cannot be exacted from an insurance company which has accepted the risk of insuring such boiler against explosion.

Such fee must be exacted by your department from the owner or owners of such boilers as are required to be inspected.

Your fifth inquiry is as follows:

> "Must a separate certificate be issued for each and every boiler, or is it permissible where two or more boilers are operated and where all conditions of construction and operation are equal, to issue a single certificate covering all the boilers?"

In reply thereto, Section 1059-21, above quoted, provides in substance that a certificate of inspection shall state the name of the owner or user, the location, size and number of *each* boiler, and further provides that said certificate shall be so placed as to be easily read in the engine or boiler room of the plant where the boiler is located. It is my opinion that the language employed in the last cited section means that a separate certificate of inspection shall be issued for each boiler, and that said certificate shall state the name of the owner or user, the location, number and size of the respective boiler covered by said certificate.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(State Board of Boiler Rules)

559.

INSPECTION OF BOILERS—BOILERS OF CLOTHES PRESSING DEVICES GENERATING LESS THAN FIFTEEN POUNDS PRESSURE EXEMPT.

Under the terms of Section 1058 *of the General Code boilers which are used for clothes pressing purposes in tailoring establishments which generate steam at a pressure of fifteen pounds or more are subject to inspection.*

Boilers of this class which do not carry a pressure equal to fifteen pounds and which are equipped with the safety devices ordered by the board of boiler rules are by the same statute exempt from inspection.. No fee may therefore be charged for the initial inspection of such.

HON. C. H. WIRMEL, *Chairman, Ohio Board of Boiler Rules, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 13th, wherein you state:

> "The undersigned has been directed by the state board of boiler rules to ascertain your opinion in reference to the following:
>
> "The board has been asked to exempt from the provisions of the law small steam tanks which are used for clothes pressing purposes in tailoring establishments, and are usually operated in conspicuous places for the observation of the general public. While in operation such boilers contain about four-fifths of a cubic foot of water and are heated by a gas or oil burner and generate steam at a pressure of 60 pounds per square inch.
>
> "Can these boilers be exempted from the law as heating boilers if provided with the safety appliances prescribed by the board of boiler rules?"
>
> "Can inspectors charge a fee on exempted heating boilers for the initial examination and approval of safety devices prescribed by the board of boiler rules?"
>
> "An early response to the above query will be gratefully appreciated."

In answer to your first question I direct your attention to Section 2 of the Boiler inspection law, Section 1058-7, General Code, which is as follows:

> "On and after January 1, 1912, all steam boilers and their appurtenances, except boilers of railroad locomotives, portable boilers used in pumping, heating, steaming and drilling, in the open field, for water gas, and oil, and portable boilers used for agricultural purposes, and in construction of and repairs to public roads, railroad and bridges, boilers on automobiles, boilers of steam fire engines brought into the state for temporary use in times of emergency for the purpose of checking conflagrations, boilers carrying pressures of less than fifteen pounds per square inch, which are equipped with safety devices approved by the board of boiler rules, and boilers under the jurisdiction of the United States, shall be thoroughly inspected, internally and externally, and under operating conditions at intervals of not more than one year, and shall not be operated at pressures in excess of the safe working pressure stated in the certificate of inspection hereinafter mentioned. And shall be equipped with such appliances to insure safety of operation as shall be prescribed by the board of boiler rules."

You will observe that said section provides for the inspection of all steam boilers and their appurtenances on and after January 1, 1912, excepting certain classes of boilers therein enumerated; and unless it clearly appears that a particular kind of boiler comes within the exceptions of the statute it is not exempt from inspection. It is evident from a reading of the statute that boilers used in clothes pressing and tailoring establishments are not exempted by name, and the fact that they generate steam at a pressure of sixty pounds per square inch takes them out of the other excepted class, to-wit: "boilers carrying a pressure of less than fifteen pounds per square inch, which are equipped with safety devices approved by the board of boiler rules." It is, therefore my opinion that such boilers, regardless of whether or not they are equipped with safety devices approved by the board of boiler rules, are subject to the law.

In answer to your second question, permit me to point out that by the express provisions of the section above quoted "all boilers carrying a pressure of less than fifteen pounds per square inch, which are equipped with safety devices approved by the board of boiler rules" are exempt from inspection. It seems to me that an inspection, to come within the purview of this law, is more than a mere determination of the steam pressure and the existence of safety devices approved by the board of boiler rules. If, therefore, a boiler carries a pressure of less than fifteen pounds per square inch, and is equipped with safety devices, etc., it is, by the positive provisions of Section 1058-1, exempt from inspection; and, accordingly, it is my opinion that no fee can legally be charged for the initial examination and approval of safety devices prescribed by your board.

All boilers carrying a pressure of less than fifteen pounds per square inch should be inspected until they are equipped with the safety devices prescribed by your board, for which inspection the regular fee should be charged, as provided elsewhere in the law.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(Chief Inspector of Mines)

120.

MINING SHAFTS—NECESSITY FOR HOISTING EMPLOYES—"VERTICAL DISTANCE"—EFFECTS OF SLOPE AT TOP AND BOTTOM OF SHAFT.

Section 929 of the General Code provides that in a mine where a perpendicular shaft is of a depth of one hundred feet, the employes shall be hoisted in and out of the mine.

When a mining company makes a change in a shaft 114 feet deep, by slopes at the first six feet of the top and the last fourteen feet of the bottom, the "vertical distance" within the meaning of the Code is still beyond one hundred feet and the statute still applies.

COLUMBUS, OHIO, January 29, 1912.

HON. GEORGE HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—Your letter of January 15th received. You state:

> "The enclosed blue print represents what is known as the manway or travelingway for the employes to descend to, and descend from their work in the Imperial mine, owned by the O'Gara Coal Co., of Chicago, Ill., and located at Derwent, Guernsey county, Ohio. This opening was originally 114 feet deep from the surface to the coal, the main hoisting shaft being about the same depth.
>
> "The blue print also represents recent changes made at the entrance and the bottom of this opening, used for the purpose of ingress and egress by the employes of the mine. Previous to June 11, 1910, there was no specific law that regulated the depth or distance which the employes of a mine were required to travel down or up a stairway or ladder provided for that purpose in any shaft mine.
>
> "Section 929 of the present Code makes the provision that in a perpendicular shaft of 100 feet, or over, in depth, that the owner, lessee or agent is required to lower into, and hoist out of a mine the employes. When the vertical shaft is less than 100 feet in depth, and a stairway approved by the district inspector of mines is not provided, the owner lessee or agent shall be required to lower or hoist persons as above prescribed; but when such stairway is provided and approved, the hoisting of persons shall not be required.
>
> "As also shown by the blue print, the change made has reduced the perpendicular distance to less than 100 feet, and increased the distance of travel at the top of the shaft 30 feet, with a down grade of 13-13 per cent. and also increased the distance of travel at the bottom 60 feet, with a down grade of 15 per cent. in order to reach the level of the coal.
>
> "Being unable to decide as to the legality of this change, and the management and miners at this mine insisting on a legal opinion, we respectfully desire that you will advise us at your earliest opportunity, giving us a clearer definition of Section 929, covering the question at issue and enabling us to apply the law judiciously and impartially."

and you inquire whether, under Section 929 of the General Code, the O'Gary Coal Company can be compelled to lower their employes into the mine and hoist them out, as provided in said section.

From your statement of facts I gather that the shaft which was sunk by the O'Gara Coal Company, and which was used by the men as a means of ingress and egress, was originally 114 feet deep; that certain changes were made at the entrance to the shaft, making a 13-13 per cent. slope, and at the bottom of the shaft by shooting down at the top and filling the bottom with rock and constructing a new travelway, making a slope of 15 per cent.; that by reason of these changes the "vertical distance" from the "new bottom" to the foot of the slope at the top of the shaft is now 99 feet; and you inquire as to the duty of the O'Gara Coal Company in regard to the lowering and hoisting of their men.

It is contended on the part of the O'Gara Coal Company that Section 929 of the General Code does not apply to the situation presented at their mine for the reason that the vertical part of the travel into and from their mine is less than 100 feet; to be exact 99 feet and 6 inches. It is claimed that the remaining fourteen feet of the vertical distance is eliminated by slopes of such reasonable grade that the burden of descending and ascending into and from this mine is no greater than if the shaft was originally less than 100 feet deep.

Prior to the enactment of Section 929 General Code there was no law compelling mine owners to lower and hoist men into and from shafts. There are shafts in Ohio ranging from sixty to four hundred feet, and the distance in the deeper shafts is so great as to be a hardship on the men if they are compelled to walk into these mines and up therefrom by means of steps, hence the change in the statutes. The mining commission composed of the chief inspector of mines and a representative of employers and employes agreed that in all mines where the only means of ingress and egress was by vertical shafts, if the depth exceeded 100 feet, the mine owner should be compelled to designate one or more persons whose duty it should be to attend to the lowering and hoisting of the men into and out of such mines as provided by Section 929 General Code.

I cannot agree with the contention of the O'Gara Coal Company that Section 929 of the General Code does not apply to the situation presented at the O'Gara mines. The "vertical distance" from the surface to the coal is still beyond 100 feet. If the men travel through this vertical shaft 100 feet, if going down, they are still within eight feet of the bottom, and if going up they are six feet from the top.

I am, therefore, of the opinion that Section 929 General Code does apply, and that the means employed by this company to eliminate the excess in the "vertical distance" beyond 100 feet by constructing slopes is an evasion of the statutes; that the reasonableness of the grade adds no argument in its favor. It should hold that companies could construct slopes of 13-13 per cent. and 15 per cent. at the top and bottom of vertical shafts as was done in the case before me, other companies in order to evade lowering and hoisting men would be authorized to construct slopes of 40 and 50 per cent. grade and compel men to travel slopes of longer distances than those constructed by the O'Gara Coal Company and thereby defeat the object of Section 929 General Code.

I therefore, hold, as a matter of law, that the O'Gara Coal Company is compelled to designate one or more persons whose duty it shall be to attend to the lowering and hoisting of persons into and out of the mine as provided by said Section 929 General Code.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

Addendum:

In my judgment, all the facts contained in your communication, together with the blue print, discloses that beyond question the shaft, within contemplation

of law, is a vertical shaft. The change made at the top no more takes away from this shaft the true characteristics of a vertical shaft on the whole than the facts bring the case out of the one hundred foot requirement of Section 929.

133.

MINES—DOUBLE PASSAGE WAYS—NON-SUFFICIENCY OF SINGLE PASSAGE SEPARATED BY A CONCRETE WALL.

The statutes provide for double entries from the surface to the working part of a mine separated by natural strata and a mining company does not comply with such requirement by building a single passage way and separating the same by means of a concrete wall.

Such artificial construction is, in contemplation of the statute, but a single passage way. The company may not proceed to construct the legal double passage way beyond the limits of said concrete wall until a new passage way has been constructed leading from the surface.

COLUMBUS, OHIO, February 16, 1912.

HON. GEORGE HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—You state in your letter of February 6, 1912 that:

> "Section 931 of the mining code provides, that: 'The owner, lessee or agent of a mine shall provide and maintain, in safe condition for the purpose provided, two separate and distinct traveling ways from the interior workings of the mine, each of which shall be available to not less than one opening to the surface."
>
> "We have in Ohio an operation, to-wit, the Golden Red Mine, situated in Noble county, owned by the Guernsey Coal & Mining Company, of Newark, Ohio, where the management of the mine, who, after driving the main entries several hundred feet, double entry, came in contact with faulty coal of irregular thickness and of somewhat inferior quality, and without consulting this department, or notifying us, as required by Section 939, ceased to drive one of these entries, widening out the other one and continuing it as a single entry, using ordinary canvas cloth for dividing the space lengthwise, and as a means of conducting the air, contrary to the provisions of Section 926, which states that breakthroughs between entries shall not exceed sixty feet apart, they drove this single entry in this way over six hundred feet, without the writer ever having been notified of the fact.
>
> "They commenced building a concrete partition, dividing the entry into two spaces lengthwise and designating it, 'two separate and distinct traveling ways, as required by Section 931.' They have started a new development at the inner end of the single entry, with the artificial partition, and from that point have driven double entries, and working quite a number of miners and employes.
>
> "We desire that you advise this department, at your earliest opportunity:
>
> "First. Does this artificial partition in the single entry constitute two separate and distinct traveling ways, as provided for in Section 931, with breakthroughs in the natural strata between two places, as required by Section 926?

"Second. If this proceeding is contrary to the provisions of Section 931, are they justified in making this new development beyond the single entry without first providing a second and lawful traveling way?

"Enclosed find copy of the investigation of this matter by three of our district inspectors: Robert S. Wheatly, inspector 12th district, L. D. Devore, inspector 10th district and John L. McDonald, inspector 3rd district, who reported on this matter September 26, 1911, but thinking this company would provide a means of escapement we have not yet taken any definite action."

Accompanying your letter of inquiry is a copy of a report on the mine referred to in your letter made by inspectors McDonald, Wheatly and Devore, a copy of which report is as follows:

"Guernsey Coal & Mining Co., Newark, Ohio.

"Copy of report of Golden Rod Mine, made by inspectors McDonald, Wheatley and Devore, September 26, 1911.

"MR. GEO. HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

"Pursuant to your suggestion, we have today, in company with inspector Ellwood, of the 5th district, examined the concrete walls used to divide the single entry in the Golden Rod Mine, in Noble county, into two compartments, and in connection therewith wish to report as follows:

"Beginning at a point approximately 200 feet east of the bottom of the shaft the entry was driven for a distance of approximately 1,014 feet in a general easterly direction. Six hundred and forty-three feet of this entry was driven single and since being driven it has been separated lengthwise into two compartments by a concrete wall. This wall is reported by the mine management to be 21 inches thick at the bottom and from 9 to 10 inches thick at the top, its height varying with the height of the entry. The south compartment was found to be as small as 4 feet 10 inches wide and 5 feet high in one place, while on the north or haulage roadside, one measurement shows a height of entry 4 feet 10 inches and a width of 7 feet. This entry was driven in violation of Section 926 of the General Code in that breakthroughs were not made at the prescribed distances.

"This wall is a poor and unsatisfactory substitute for natural strata and is the only means, which, under present conditions, provides two traveling ways from the interior of the mine to the surface. In our opinion such traveling ways are inadequate as a safe and ready means of escape in a probable emergency. The wall could be readily destroyed resulting in the entombment of those employed in the mine.

"In view of this condition and in order that the safety of those employed in the mine may be properly safeguarded, we would suggest that an order be given the Guernsey Coal & Mining Co., to provide an additional traveling way from the interior of the mine to the surface.

"Respectfully yours,

"ROBERT WHEATLEY, Inspector 12th District,

"L. D. DEVORE, Inspector 10th District,

"JOHN L. MCDONALD, Inspector 3rd District."

You inquire first:

"Does this artificial partition in the single entry constitute two separate and distinct traveling ways, as provided for in Section 931,

with breakthroughs in the natural strata between two places, as required by Section 926?"

Section 931 of the General Code provides in part as follows:

"The owner, lessee or agent of a mine shall provide and maintain, in safe condition for the purpose provided, two separate and distinct traveling ways from the interior workings of the mine, each of which shall be available to not less than one opening to the surface. One of such traveling ways may be designated by such owner, lessee or agent as the principal traveling way. One of such traveling ways may be designated as the escapement way. The provision of this section shall not prohibit such owner, lessee or agent from designating more than one principal traveling way, or more than one escapement way, so long as the provisions thereof are complied with."

Section 926 of the General Code provides in part as follows:

"* * * From a point where the seam is reached in the opening of a mine, to a point not exceeding a distance of four hundred feet therefrom, *breakthroughs* shall be made between main entries, where there are no rooms worked, not more than 100 feet apart, provided such entries are not advanced beyond the point where the breakthrough will be made until the breakthrough is complete. Breakthroughs between entries, except as hereinbefore provided, shall be made not exceeding sixty feet apart. * * *"

It appears from the statement of facts contained in your letter and from the report made by your inspectors that the coal company mentioned drove its main entries several hundred feet, double entry system, came in contact with faulty coal of irregular thickness and inferior quality, and without consulting your department ceased to drive one of these entries, widening out the other one to about twelve feet and drove it as a single entry through this fault using ordinary canvas cloth for dividing the space lengthwise as a means of conducting the air during the driving of the entry, and after it was driven six hundred feet built a concrete partition twenty-one inches thick at the bottom and nine or ten inches thick at the top, the height varying with the height of the entry. The coal company claim that they have by erecting this concrete wall in a single entry complied with Section 931 of the General Code as to providing two separate and distinct traveling ways for their employes. It further appears from your statement of facts that after they had driven through this fault and constructed the cement partition that they are continuing the doubly entry system.

Answering your first inquiry, it is my opinion, in contemplation of law, that there is from the point where the double entry ceases and where they begin at the end of the six hundred feet, which is divided into two ways by an artificial wall, but only one traveling way. The law contemplates two traveling ways separated by natural pillars and walls. Section 926, quoted above, provides that breakthroughs shall be made every sixty feet in the entry not artificial openings in an artificial wall but breakthroughs made through coal slate, etc.

It was the intention of the legislature in the enactment of the mining code to safeguard the lives of the men employed in the mines; that adequate means of escape be provided in cases of emergency. All laws passed to protect the lives of men employed in mines should be strictly construed and rigidly enforced. The dangers incident to mining coal are great enough without adding thereto by lax enforcement of the mining laws on the part of those charged with the enforcement

thereof, and by a too liberal construction of the laws on the part of those whose duty it is to construe the laws in order that they may be enforced as construed.

The law contemplates two separate and distinct traveling ways for the ingress and egress of men in mines it contemplates two traveling ways separated by natural walls instead of artificial walls; walls that cannot be destroyed by the explosion of powder or other accidents common in mines, walls that in case of emergency requiring the escape of men, when one of the traveling ways is obstructed will leave the other free for the safe conduct of the men to the outside. From the report of your inspectors the cement wall constructed in this mine, even if it were permissible, is insufficient and unlawful. Your inspectors say:

> "This wall is a poor and unsatisfactory substitute for natural strata and is the only means, which under present conditions provides two traveling ways from the interior of the mine to the surface. In our opinion, such traveling ways are inadequate as a safe and ready means of escape in a probable emergency. The wall could be readily destroyed resulting in the entombment of those employed in the mine."

The artificial means adopted by this company in order to technically comply with Section 931 General Code is a justification for my position that laws enacted for the protection of the lives of men employed in mines should be strictly construed and rigidly enforced. In case of a probable emergency the wall erected by this company could be readily destroyed resulting in the entombment of those employed in the mine.

I, therefore, advise you that the artificial partition in the single entry in this mine erected to provide two separate and distinct traveling ways does not comply with Section 931 of the General Code. That in contemplation of law there is but one traveling way in that part of the entry way where the artificial wall is located.

Your second inquiry is as follows:

> "If this proceeding is contrary to the provisions of Section 931, are they justified in making this new development beyond the single entry without first providing a second and lawful traveling way?"

The answer to your first inquiry practically answers the second. Section 931 of the General Code requires two separate and distinct traveling ways from the interior workings of the mine, each of which shall be available to not less than one opening to the surface. If the only means of ingress and egress to that part of the mine beyond this single entry divided by the cement wall is through the single entry, then I hold, as a matter of law, that this company is not justified in making new developments beyond the single entry without first providing a second safe and lawful traveling way as provided by Section 931 of the General Code.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

Addendum:

In my judgment your department is not called upon to pass upon the sufficiency of artificial walls between entries however substantial when the statute contemplates natural support and natural division of entries.

431.

OIL AND GAS WELLS—NOTICE TO CHIEF INSPECTOR OF MINES WHEN DRILLED IN COAL PRODUCING COUNTIES.

Section 973, General Code, requires persons drilling any well for oil of gas or elevator well, or test well, only in counties wherein any quantity of minable coal is produced, to give notice in writing of such drilling to the chief inspector of mines.

COLUMBUS, OHIO, May 13, 1912.

HON. GEORGE HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—Your letter of May 8th received. You ask my construction of the following portion of Section 973 General Code:

> "Any person, firm or corporation causing to be drilled any well for oil or gas or elevator well or any test well within the limits of any coal producing county of this state, must give notice, in writing, of such fact to the chief inspector of mines, stating the location of the land upon which such well is to be drilled."

You inquire further whether the smallness of the production of the coal in any county would justify annulling the law.

Section 973 prior to the last amendment provided as follows:

> "Any person, firm or corporation intending to drill an oil or gas well where same is likely to penetrate a workable seam of coal, shall give notice in writing, of such intention to the chief inspector of mines, stating the location of the land upon which such well is to be drilled, and procure from him before proceeding to drill, permission in writing.
>
> "Written notice from the owner, lessee or agent of the seam of coal, setting up the facts that the oil or gas well to be drilled, will, or that the well already drilled has penetrated a workable seam of coal, shall be sufficient notice to the person, firm or corporation intending to drill or having drilled such well, that such well will or has penetrated a workable seam."

Section 973 as amended 102 O. L. now provides:

> "Any person, firm or corporation causing to be drilled any well for oil or gas or elevator well or any test well within the limits of any *coal producing county* of this state, must give notice, in writing, of such fact to the chief inspector of mines, stating the location of the land upon which such well is to be drilled."

The law prior to the last amendment required notice in writing only when an oil or gas well was liable to penetrate a workable seam of coal. This law gave rise to many disputes and evasions of the law. Drillers were either purposely silent as to their penetrating a seam of coal or reported "no coal." This was so even in counties and in sections where coal was located; the result was that the law soon became a dead letter.

In 1911 the law was changed so as to make it the duty of all persons, firms or corporations drilling for oil or gas in *any coal producing county,* to give notice

in writing to the chief inspector of mines stating the location of land upon which the well was to be drilled. The law as it now reads is plain. There is no room for doubt. It makes no discrimination as to the amount of coal produced necessary to bring oil and gas drillers under its provisions.

If a county produces *any quantity* of minable coal, all persons, firms or corporations drilling for oil or gas, elevator well or any test well, must give notice in writing of such fact to the chief inspector of mines, stating the location of the land upon which such well is to be drilled.

Whether the land to be drilled for oil or gas produces coal or whether it does not, if the land is located in a coal producing county, the statute applies.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(State Inspector of Oils)

322.

OIL INSPECTOR—POWER TO INSPECT AND LABEL, "DANGEROUS"—SUBSTANCES NOT GASOLINE NOR PETROLEUM AND USED FOR MECHANICAL PURPOSES.

Applying to the rule of "euisdum genaris" to Section 865 General Code, the state inspector of oils or his deputies, by authority thereof, may lawfully stamp or stencil as "dangerous," a package containing any substance, which is "similar to gasoline" or petroleum, by reason of its being a volatile fluid by-product of petroleum or mineral oil, having a degree of explosiveness ascertained by the use of the flash test for illuminating oil.

By applying the rule of enumeration and exclusion, the fact that the omission of the words, "for illuminating purposes" in Sections 865 and 866 General Code which words are included in all other relative statutes, justifies the conclusion that, the above powers of inspection and labeling are extended to substances fulfilling the above definition whether they be intended to be used for illuminating purposes or not.

COLUMBUS, OHIO, March 23, 1912.

HON. W. L. FINLEY, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 15th requesting my opinion upon the following questions presented by a letter from Mr. Rober C. Paw, vice president of the Sun Oil Company, to you:

> "May the state inspector of oils or his deputies lawfully stamp or stencil as "dangerous" a package containing a substance which is neither gasoline nor petroleum-ether and which is not used for illuminating purposes but solely for mechanical purposes?
>
> "May the department of oil inspection lawfully inspect such substance and collect fees therefor?"

Section 865 of the General Code provides as follows:

> "Gasoline, petroleum-ether or similar or like substances, under whatever name called, whether manufactured within this state or not, having a lower flash test than provided in this chapter for illuminating oils, shall be inspected by the state inspector of oils or his deputies. Upon inspection, the state inspector or a deputy shall affix by stamp or stencil to the package containing such substance a printed inscription containing its commerical name, the word 'dangerous,' date of inspection and the name and official designation of the officer making the inspection. For such inspection, the state inspector or his deputy shall receive the same fees as for the inspection of oil, which shall be paid into the state treasury as herein provided for other fees. Such fees shall be a lien on the gasoline, petroleum-ether or similar substance so inspected. For such inspections, deputy inspectors shall receive the same fees and shall make monthly report of such inspections, as provided herein for the inspection of oils. Whoever sells or offers for sale any gasoline, petroleum-ether or similar or like substance not stamped as provided in this chapter shall be fined not more than one thousand dollars or imprisoned in the county jail not exceeding twenty days, or both."

This section was a part of Section 13 of the act of May 9, 1908, 99 O. L. 518. The remainder of said Section 13 is incorporated in Section 866 General Code which is as follows:

> "So far as practicable, the provisions of this chapter relating to the inspection of oil shipped to distributing stations in tank cars, shall govern similar shipments of gasoline, petroleum-ether or similar or like substances."

In the original section the latter portion of the section was as follows:

> "The provisions of this chapter relating to the inspection of oil *intended to be sold or offered for sale for illuminating purposes in this state* which is shipped to distributing stations in tank cars shall be construed by the inspector of oils as governing, so far as practical, similar shipments of gasoline, petroleum-ether or similar or like substances."

Whatever may be the meaning of these two sections and of the original Section 13 it is clear that all the remainder of the chapter relates solely to illuminants. Without quoting, I refer to Sections 854, 856, 857, 858, 859, 860, 862, 863 and 864 without mentioning other sections, as clearly disclosing that the purposes of all tests and inspections made by the state inspector of oils other than those provided for in Section 865 relate to the safety and utility of derivatives and by-products of mineral and petroleum oils for illuminating purposes.

Section 861, which I have omitted from the catalogue of sections above set forth is of peculiar interest. It provides as follows:

> "If upon inspection oil in tank cars is rejected, the certificate, in addition to the word 'rejected,' shall set forth the car initials and number, the date of inspection and the official signature of the officer making such inspection, and shall be delivered to the owner of the oil or his agent. Whoever transfers the contents of such car to a storage or receiving tank from which illuminating oil is distributed to consumers or dealers within this state shall be fined not less than one thousand dollars or imprisoned in the county jail not exceeding twenty days or both."

This is the section referred to in Section 866. Coming now to the precise questions raised by Mr. Paw's letter, I beg to state that upon a reading of Section 865 it appears reasonably clear to me that both of these questions must necessarily be answered in the same way. Whatever substances the state inspector of oils has the power to inspect he has the power to brand as "dangerous" under this section. Both powers and duties—those of inspection and those of stamping, relate to the same things, viz., "gasoline, petroleum-ether or similar or like substances * * * having a lower flash test than provided in this chapter for illuminating oils."

I observe that the claim is made by Mr. Paw that the substance concerning which he particularly inquires, which is already described in the question as I have stated it as not being gasoline or petroleum-ether, is not similar to or like either one of these substances. This is a question of fact, of course. I have no means of knowing what substances are like gasoline or petroleum-ether. I beg to advise you, however, that in my opinion, the respect in which its likeness is to be determined is explosiveness. I do not think it necessary that a substance in gasoline or petroleum-ether should be chemically or mechanically similar to or like either one of these substances in any respect other than this one.

The general assembly in enacting this law did not use the words "similar" or

"like" in any scientific or technical sense and must be regarded as having in mind as the basis of the comparison suggested by them, the fundamental idea which runs through the whole section.

It is, therefore, my opinion that a substance in order to be "similar to" or "like" gasoline or petroleum-ether must at most have the attributes of fluidity, volatility and explosiveness which characterize both of these substances, and all of which are elements which enter into the other considerations of Section 865. That is to say, it is not every fluid that is "similar to" or "like" gasoline or petroleum-ether or both of them nor every volatile substance, nor every explosive substance, but a substance which is at once fluid, volatile and explosive is like gasoline and petroleum-ether and similar thereto.

I have just advised you as a matter of law as to the scope of the words "similar to" and "like" as used in Section 865. The application of the principle which I have tried to define to a specific case is, of course, a question of fact. If the substance which Mr. Paw refers to is not volatile like gasoline and petroleum-ether and is not similarly explosive, which, of course, would be ascertained by the use of the flash test referred to in the section, then, of course, there is no question that the inspector of oils or his deputy may not lawfully inspect or label as "dangerous" any packages containing such substance.

If, however, the substance is fluid, volatile and possessed of the degree of explosiveness described in Section 865, then the further question. which I take it is the one in Mr. Paw's mind and in yours, is raised, viz.: Is Section 865 intended to apply to substances not used or intended to be used for illuminating purposes? I have already pointed out that the entire chapter exclusive of Sections 865 and 866 relates to illuminating fluids. In practically every section of the act excepting these now under consideration the words "for illuminating purposes" occur and limit the meaning of general language otherwise of broader significance. It is also true that the chapter is otherwise limited to the inspection, handling and sale of mineral oils and by-products of petroleum. This, however, is equally true of Section 865 and this fact itself furnishes another possible element for your guidance in determining what constitutes a substance "similar to" or "like" gasoline or petroleum. That is to say, a substance is not "similar to" or "like" gasoline or petroleum-ether unless it is a by-product of petroleum, I should have stated this qualification in formulating the definition above set forth, and for the sake of clearness I repeat that definition as further limited by this qualification:

A substance is "similar to" or "like" gasoline or petroleum-ether, within the meaning of Section 865 General Code which is a volatile fluid by-product of petroleum of mineral oil having a degree of explosiveness ascertained by the use of the flash test for illuminating oil.

Returning again to a discussion of the question as to whether or not Section 865 is limited in its application to illuminants, I beg to state that in my opinion it is not so limited. The related statutes here afford an exceptionally apt illustration of the application of the rule of statutory construction known as that of enumeration and exclusion. All of the sections of the chapter having been enacted at the same time and the qualifying phrase "for illuminating purposes" being found in all of the other sections of the act the omission of that phrase from Sections 865 and 866 is of itself clear evidence that the legislature did not intend the application of this section to be limited to illuminating substances. It is a matter of common knowledge that the uses of gasoline are by no means limited to illuminating purposes for indeed this substance is ever used for such purpose. So also with petroleum-ether. It seems to me that every consideration of fact and every rule of statutory construction point to the conclusion that Section 865 is intended to apply to all substances similar to or like gasoline and petroleum-ether as above defined whether they are intended to be used for illuminating purposes or not.

For all of the above reasons then I am of the opinion that a substance which is within the foregoing definition like or similar to gasoline or petroleum-ether must be inspected by the inspector of oils or his deputy, and upon inspection the label "dangerous" must be affixed to each package thereof, if found to be of lower flash test than prescribed by statute.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(Chief Inspector of Workshops and Factories)

327.

BUILDING CODE—CHANGE OF BUILDING FROM STOREROOM TO THEATER BUILDING BY TENANT AGAINST WILL OF LANDLORD,

A building was leased for a term of years for theater purposes and at the expiration of the lease, converted by the tenant, contrary to the will of the landlord, into a place for business purposes. A new lease was granted by landlord at the expiration of the first lease, with the intention that the building should be continued to be used as a theater, and said building was reconverted by the new tenants into a theater.

Held:

That the temporary change in construction did not change the character of the building as a theater for the purposes of the building code.

COLUMBUS, OHIO, May 3, 1912.

HON. THOMAS P. KEARNS, *Chief Inspector Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 20th wherein you state:

"A short time ago plans and specifications were submitted to this department for a picture show to be installed in a room owned by D. and W. H., at ----------, Ohio, which we refused to approve for the reason that the room contemplated being used did not meet the requirements of the new state building code.

"Section 2 of the administrative section of the new building code provides that all buildings erected, built or equipped for theatrical purposes or to which any alterations or repairs are made, except for maintenance without affecting the construction, sanitation, safety or other vital features must comply with the requirements and provisions relating thereto contained in the new state building code.

"Therefore the department felt that since this room had been abandoned for picture show purposes and converted into a business room that it was no longer a theater, and if the same was to be equipped for theater purposes it would have to comply with all the requirements of the state building code.

"The owners contend, however, that since the building has been used for seven years for picture show purposes and is again under lease for a term of five years to be used for such purposes, that the provisions of the new code do not apply to this building and set forth their reasons in the following statement of facts.

"That the building had been leased for seven years for the purpose of operating a moving picture show which had been operated there until the last week in March, 1912, when the lease expired. On January 8, 1912, the property was again leased to D. for the continuation of and the operation of a moving picture show business. That one of the terms or provisions of the lease of the former occupant was that the building at the expiration of the lease should be put back into its original condition which the lessee did notwithstanding that he was requested not to do so by the owners of the building as it was desired to use it again for picture show business. This, they allege, was done for the purpose of stifling com-

petition, obtaining a monopoly of the business and to prevent the new lessee from operating a picture show therein, and for these reasons believe that they should not be made to comply with the requirements of the new building code.

"If this building had been left in the same condition it was in when being used as a picture show, of coure there could have been no objection to the parties continuing its use for that purpose, but since it has been changed back to a business room as per the terms of the lease the question arises—Could this room again be equipped and used for picture show purposes without complying with all of the provisions of the new building code, or shall it be regarded as a theater notwithstanding that it has been converted into a business room and required to comply only with such provisions of the law as would be applicable to other picture shows now in operation?

"I would be pleased to have you render an opinion in this matter and the department will be governed accordingly."

The question presented is not entirely free from difficulty, yet, in the light of the facts submitted and agreed upon, I have no hesitancy in readily reaching a conclusion. You know, of course, that I have no desire to infringe upon your domain. When it comes to the facts involved in that particular case, your department has exclusive jurisdiction, I can only give you the law as I see it and such advise in the matter as you may request.

From your inquiry I gather that for seven years the room in question has been equipped and used exclusively as a theater, and that prior to the expiration of the lease about April 1, 1912, in fact, on the 8th day of January, last, the landlord had again leased the premises for five years longer to another party for theater purposes to commence at the termination of the then lessee's term. It further appears that the landlord waived any right to have the room restored to the condition in which it was when first rented, which, under the usual provisions of a lease, he might have required. And, further, it appears that the first lessee, for some reason of his own and against the expressed request of the owner, restored the room by replacing the front, leveling the floors, and, so as to make it in form again a store room as when he first took possession of it.

You desire to know, did such restoration change the room from its character as a theater to a store room so as to bring the restored room under the regulations of the new state building code? It is conceded that if the room remained a theater it would not be affected by the new building code as the provisions thereof had no retrospective application.

The law is well settled that a landlord may waive the performance of the covenants entered into by his lessee and that any positive act of prevention by the covenantee will relieve the covenantor from performance. (Taylor's Landlord and Tenant, Section 269).

The act of the landlord in seeking to purchase the chattels of the tenant and his demand that the building be left in the same condition as it was constituted sufficient notice to the tenant that the said landlord did not want the physicial restoration of the premises to the condition in which they were before the room was changed into a theater. The further fact that the landlord three months before the expiration of the said lease leased the premises for the same business, to-wit, a moving picture show, manifests an intention of continuing the character of the room. Nor can I conclude that the mere caprice or wilful act of the tenant in changing the room back to its first and former physical conditions would militate against the express desire and intention of the landlord.

It is my opinion, therefore, under the conceded facts that the room was con-

tinuously a theater; that the act of the tenant was ineffective to change its character in the manner attempted; that being a theater room continuously from and after the time of the going into effect of the state building code it was without its provision and that the state building code commission should so regard and treat said room.

Of course you understand that the theater would be subject to and have to comply with such regulations as are applicable to similar picture shows and theaters under the existing law.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

459.

SCHOOLING CERTIFICATES FOR CHILDREN BETWEEN FOURTEEN AND SIXTEEN, NOT REQUIRED DURING SCHOOL VACATION PERIODS.

The history of the statute and its process of codification make clear that the words "as provided by law" in Section 12994, General Code, providing a penalty for employing children between fourteen and sixteen years of age without schooling certificate "provided by law," refer to Section 7765 and Section 7766, General Code, which require the certificate only for employment during the school term.

Such a construction harmonizes the statutes and is in keeping with the undoubted legislative intent to prevent child labor only in so far as it interferes with schooling.

COLUMBUS, OHIO, June 14, 1912.

HON. T. P. KEARNS, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—Your favor of June 13, 1912, is received in which you inquire as follows:

> "I am in receipt of a number of letters relative to the issuing of schooling certificates for minors between the ages of fourteen and sixteen years during the vacation periods, or when school is not in session.
>
> "The child labor laws, Section 12994, and Section 7765 of the compulsory educational laws conflict in this respect.
>
> "Section 7765 of the compulsory educational laws provides that children shall not be employed during the school term without the proper age and schooling certificate, while Section 12994 of the child labor laws does not make any exception as to the time of employment, and provides that they shall procure an age and schooling certificate provided by law before they can be given employment.
>
> "I would be pleased to have you render an opinion as to whether or not this department can compel the filing of schooling certificates with the employer during the vacation months, or the time that the schools are not in session."

Section 7765, General Code, provides:

> "No child under sixteen years of age shall be employed or be in the employment of any person, company or corporation during the school term and while the public schools are in session, unless such child pre-

sents to such person, company or corporation an age and schooling certificate herein provided for as a condition of employment, who shall keep the same on file for inspection by the truant officer or officers of the department of workshops and factories."

The schooling certificate to be furnished is set forth in Section 7766, General Code, which provides in part:

"An age and schooling certificate shall be approved only by the superintendent of schools, or by a person authorized by him, in city or other districts having such superintendent, or by the clerk of the board of education in village, special and township districts not having such a superintendent, upon satisfactory proof that such child is over fourteen years of age, and that such child has been examined and passed a satisfactory fifth grade test in the studies enumerated in Section seventy-seven hundred and sixty-two; provided, that residents of other states who work in Ohio must qualify as aforesaid with the proper school authority in the school district in which the establishment is located, as a condition of employment or service, and that the employment contemplated by the child is not prohibited by any law regulating the employment of children under sixteen years of age. Every such age and schooling certificate must be signed in the presence of the officer issuing the same, by the child in whose name it is issued."

Section 12994, General Code, provides:

"Whoever, having charge or management of such establishment as provided in the next preceding section, employs or permits a child between fourteen and sixteen years of age to work in or in connection with such establishment, or in the distribution or transmission of merchandise or messages, without first procuring from the proper authority the age and schooling certificate provided by law, shall be fined not less than twenty-five dollars nor more than fifty dollars."

It will be observed that Section 7765, General Code, prohibits the employment of a child under the age of sixteen, during the school term and while the public schools are in session, unless such child presents an age and schooling certificate.

Section 12994, General Code, does not mention the school term or session, but specifies that a child between the ages of fourteen and sixteen must procure the age and schooling certificate "provided by law." Your question is whether this age and schooling certificate must be procured in order that a child between the ages of fourteen and sixteen, can be employed during the vacation period, or when the schools are not in session.

Sections 7765 and 7766, General Code, were originally parts of Section 4022-2, Revised Statutes. Said Section 4022-2 also contained the penalty for a violation of the provisions of said section. The penalty is now found in Section 12975, General Code, and not in Section 7765, et seq., of the General Code. Said Section 12975, General Code, provides:

"Whoever employs a minor under sixteen years of age before exacting from such minor the age and schooling certificate provided by law, or fails to keep such certificate on file, or who fails to return to the superintendent of schools or the person authorized by him such certicate within two days from such minor's withdrawal or dismissal from

his services as provided in Section seventy-seven hundred and sixty or to permit a truant officer, upon request thereafter, to examine such certificate, shall be fined not less than twenty-five dollars nor more than fifty dollars."

The penalty as set forth in Section 4022-2, Revised Statutes is as follows:

"Any person, company or corporation, employing any minor contrary to the provisions of this section shall be fined not less than twenty-five nor more than fifty dollars."

The provisions of Section 12975, General Code, as to procuring the schooling certificate, are similar to those found in Section 12994, General Code, while in the original act the penalty was as to the provisions of Section 4022-2, Rev. Stat., which excepted the periods of vacation and when the public schools were not in session.

The provisions of Section 12994, General Code, were originally found in Section 6986-7, Revised Statutes. The latest amendment of this section prior to the adoption of the General Code, was in 99 Ohio Laws, page 30. Section one of said act contained the following provision:

"* * * nor shall a child between fourteen and sixteen years of age be employed, permitted or suffered to work in or in connection with any of the aforesaid establishments, nor in the distribution or transmission of merchandise or messages, without first procuring from the proper authority the age and schooling certificate *prescribed* in Section 4022-2 of the Revised Statutes."

It was this provision which was codified and carried into the General Code in Section 12994, now under consideration. This provision states that the child must procure the age and schooling certificate "prescribed" by Section 4022-2, Revised Statutes. Said Section 4022-2 contained the provisions now found in Sections 7765 and 7766, as to when such certificate should be procured and the requirements of the certificate. Did the provisions of section one of the act of 99 Ohio Laws, page 30, that such child should procure a certificate as prescribed by Section 4022-2, Revised Statutes, refer only to the age and schooling certificate as therein provided, or did it also refer to the provision that no employment should be made during the school term, or when the public schools were in session, without securing such certificate If said provision referred to both then the two sections can be harmonized.

The statutes do not absolutely prohibit the employment of children between the ages of fourteen and sixteen years. But it does prohibit such employment unless certain conditions are and requirements are complied with. The statutes prohibit the employment of children under the age of fourteen years.

Section 12993, General Code, provides:

"Whoever, having charge or management of a factory, workshop, business office, telephone or telegraph office, restaurant, bakery, hotel, apartment house, mercantile or other establishment, employs or permits a child under the age of fourteen years to work in or in connection with such establishment, or in the distribution or transmission of merchandise or messages shall be fined not less than twenty-five dollars nor more than fifty dollars."

The purpose of the provisions of the statutes as to children between the ages

of fourteen and sixteen years is not to prohibit absolutely their employment, but to require that they shall meet certain educational tests before they shall be employed. If they have not secured the required amount of education they are required to attend school. This is shown by Section 7767, General Code, which provides:

> "All minors over the age of fourteen and under the age of sixteen years, who have not passed a satisfactory fifth grade test in the studies enumerated in Section seventy-seven hundred and sixty-two, shall attend school as provided in Section seventy-seven hundred and sixty-three, and all provisions thereof shall apply to such minors.
>
> "In case the board of education of any school district establishes part time day schools for the instruction of youths over fourteen years of age who are engaged in regular employment, such board of education is authorized to require all youth who have not satisfactorily completed the eighth grade of the elementary schools, to continue their schooling until they are sixteen years of age; provided, however, that such youth if they have been granted age and schooling certificates and are regularly employed, shall be required to attend school not to exceed eight hours a week between the hours of 8 a. m. and 5 p. m. during the school term. All youth between fourteen and sixteen years of age, who are not employed, shall be required to attend school the full time."

The primary intent of the statutes and of the provisions under consideration is to require compulsory education to a certain grade and age. During vacation period there is no school and if an age and school certificate was required during that time, from all children from fourteen to sixteen years of age, before they could be employed, many of these children could not meet the requirements of the law to secure a certificate. They could not be employed, neither could they attend school. The compulsory education law is inoperative during the period of vacation, for the reason that there are no sessions of the school to attend.

The codification commission changed the word "prescribed" in Section 6986-7, Revised Statutes, to the word "provided" in Section 12994, General Code. These words, as therein used, are similar in meaning.

In case of United States vs. Dimmick, 112 Fed. 350, District Judge De Haven, says at page 351:

> "The words 'prescribe,' 'direct' and 'order' are all synonyms of the word 'require.'"

In Webster's International Dictionary the following definitions are given:

> "Provide. To establish as a previous condition; to stipulate.
>
> "Provided. It being provided; on condition; with the stipulation.
>
> "Prescribe. To lay down authoritatively as a guide; direction; or rule of action; to impose as a peremptory order; to dictate; appoint; direct; ordain."

The synonyms of "require" are given as, exact, enjoin, direct, order, demand, need.

If we substitute for provide in Section 12994, General Code, the word "stipulate" it will read "without first procuring from the proper authority the age and schooling certificate stipulated by law." In this sense this provision will refer to both Sections 7765 and 7766, General Code.

If we use the word "prescribed" for "provided" and place therein "direct" as

given in the definition of prescribe, said section will read as "directed by law." In this sense said provision will also refer to both Sections 7765 and 7766.

Reading the word "prescribed" as meaning "required" as in the opinion of De Haven, supra, said section will read as "required by law." In this sense also this provision will refer to both of said sections. The word "direct" is given as a synonym of "require" and also as one of the meanings of "prescribe" in Webster's dictionary.

The provisions of the statutes under consideration are upon the same subject matter and should be construed if possible so as to permit each provision to stand. If it is held that the provisions of Section 12994, General Code, apply to all periods of the year, it would in effect nullify the provisions of Section 7765, General Code, which require the certificate only during the school term or when the public school is in session. If, on the other hand, the term "provided by law" as used in Section 12994, General Code, is construed as meaning "required by law" or "stipulated by law," it would refer to the provisions of Section 7765, General Code, and would make both sections harmonious. That in my opinion is the proper construction of Sections 12994 and of 12975 of the General Code. Such a construction does not do violence to the language used in said sections and is in harmony with the purpose of the legislature in regulating the employment of children and of requiring compulsory education.

It is my opinion that an age and schooling certificate cannot be required as a condition of employment of a child between the ages of fourteen and sixteen years, during the period of time not covered by the school term, that is during vacation, nor during the time when the public schools are not in session.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

(Inspector of Building and Loan Associations)

103.

CORPORATIONS—BUILDING AND LOAN ASSOCIATIONS—JUDGMENT IN QUO WARRANTO FOR NON-USER FOR FIVE YEARS.

The state under Section 12323, *General Code, is entitled to a judgment in quo warranto against a building and loan association for non-user only after such corporation has failed to use its corporate rights, privileges, and franchises for a period of five years.*

COLUMBUS, OHIO, January 30, 1912.

HON. E. H. MOORE, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 11, 1912, wherein you state:

> "A certain deposit and loan company was incorporated July 19, 1910. Pu to the present time this company has transacted no business, having advanced only so far as the consideration and adoption of constitution and by-laws.
>
> "Will you kindly advise whether this company can continue to hold its charter for an indefinite period without carrying on the business for which it was incorporated?"

By an action in quo warranto a corporation may be ousted and excluded from its corporate rights, privileges, and franchises, for the reason that it has not used the same, but it would seem, from Section 12323 of the General Code, which I shall hereafter quote, that such non-user must exist for a period of five years.

Section 12303 of the General Code provides for an action in quo warranto against a person, officer, or an association of persons who act as a corporation without being legally incorporated; and Section 12304 provides that a like action may be brought against a corporation for different offenses, the second ground upon which such an action against a corporation may be based, is as follows:

> "When it has forfeited its privileges and franchises by non-user."

Section 12323, provides for the judgment that shall be entered in an action brought against a corporation for non-user of its rights, privileges and franchises. This section is as follows:

> "When, in such action, it is found and adjudged that by an act done or omitted, a corporation has surrendered or forfeited its corporate rights, privileges, and franchises, or has not used them during a term of five years, judgment shall be entered that it be ousted and excluded therefrom, and that it be dissolved."

It will be seen from this last quoted section that in order for the state to be entitled to a judgment of ouster and dissolution, it must appear that the corporate rights, privileges and franchises have not been used during a term of five years; and my opinion, therefore, is that an action would be of no avail in the case to which you refer, at the present time, but that if said corporation fails for a period

of five years to exercise its rights, privileges and franchises, then it should be proceeded in quo warranto.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

52.

BUILDING AND LOAN LAW—WORDS AND PHRASES—"SUBSCRIBED" —NO STOCK REQUIRED TO BE PAID IN.

In the clause of the building and loan law which states that five per cent. of the stock must be subscribed before beginning business, the word "subscribed" does not intend that that amount shall be actually paid in.

COLUMBUS, OHIO, December 14, 1911.

HON. E. H. MOORE, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—Under favor of November 10, 1911, you inquire as follows:

> "I am enclosing a letter from A. S. Mann, attorney-at-law, Cleveland, in order that we may receive from your department a formal opinion upon the question raised by Mr. Mann.
> "Please return the letter with your opinion, and oblige."

The letter of Mr. A. S. Mann, enclosed, states as follows:

> "I wish to enquire as to the meaning of the word subscribe in the clause of the building and loan law which states that five per cent. of the stock must be subscribed before beginning business.
> "Some attorneys seem to hold that this means that five per cent. must be subscribed and actually paid in before beginning business, and others hold that it means only that said five per cent. must be subscribed.
> "Wish you would kindly give me your interpretation of this clause as early as possible, and thanking you in advance for same, I remain."

Section 9645, General Code, provides the amount of stock to be subscribed before business shall be commenced by a building and loan association, in these terms:

> "The capital stock named in the articles of incorporation shall be deemed to refer to the authorized capital. *The organization may be completed and business commenced when five per cent. thereof is subscribed, and* the names and addresses of its officers and not less than two copies of its constitution and by-laws have been filed with the inspector of building and loan associations."

There is no provision of statute that any amount of said stock subscriptions shall be paid in.

Then general laws in reference to corporations provide that ten per cent. of the capital stock shall be subscribed and that ten per cent. of each share shall be payable at the time of making a subscription to such stock.

The last sentence in Section 9643, General Code, exempts building and loan associations from these provisions, as follows:

"* * * Associations may be organized and conducted under the general laws of Ohio relating to corporations, except as otherwise provided in this chapter."

Building and loan associations are organized under the provisions of a special act, which act prescribes that before commencing business five per cent. of the capital stock shall be subscribed.

A subscription for capital stock is merely a promise to take stock and to pay for it. The subscription is the contract; the payment for the stock is the execution of the contract.

Henley, J., on page 190, in case of Heller vs. Elwood board of trade, 18 Ind. App. 188, says:

"A subscription is a written contract by which one engages to contribute a sum of money for a designated purpose.

"To subscribe is to agree in writing to furnish a sum of money or its equivalent for a designated purpose. Anderson Law Dict. 985."

In case of Holman vs. State, 105 Ind., 569, the syllabus reads:

"Under the statutes providing for the formation of railroad corporations and requiring stock to the amount of at least fifty thousand dollars to be first subscribed, the subscriptions must be made in good faith, by persons who have a reasonable expectation of ability to pay."

On page 573, Mitchell, J., says:

"It is abundantly established by the evidence that most of the subscribers to the stock had not only neither the ability, actual or apparent, at the time they subscribed, to pay any calls, but it appears further that they had no purpose or expectation that they would be called upon to pay, or that they could pay anything if called upon."

In this case payment had not been made and no question was raised on that account. Evidently it was taken for granted that the provision that a certain amount of stock should be subscribed did not mean that such amount should be paid in.

The expression in Section 9645, General Code, that five per cent. of the capital stock shall be subscribed before business shall be commenced, excludes conditions which are not expressed.

It is my conclusion that the provision of said Section 9645, General Code, as to the subscription of stock of building and loan associations does not require that any part thereof shall be paid into the treasury of the company or association, before such association shall commence business.

Such subscriptions, however, should be made in good faith, and by persons who have the ability to pay therefor, or who have a reasonable expectation of paying therefor.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

285.

BUILDING AND LOAN ASSOCIATIONS—USURY—INTEREST, FINES. DUES AND PREMIUMS—LOANS.

In accordance with Section 8303 General Code, building and loan associations may not charge more than eight per cent. as interest on loans. It is permissible, however, for such associations, by virtue of Section 9650 General Code, to charge for premiums, fines, dues and interest, an aggregate which amounts to more than the legal rate.

COLUMBUS, OHIO, April 12, 1912.

HON. E. H. MOORE, *Bureau of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your inquiry of March 25th which is as follows:

> "We enclose herewith a copy of the constitution and by-laws of a certain building and loan association, of _____, and request your opinion as to the right of the association to provide, in Section 31 of the by-laws, for the making of temporary loans at 'such rate of interest, *not exceeding ten per cent. per annum.*' Does not the general statute, limiting the interest rate to eight per cent. apply to such loans, or, in fact, to all loans made by such associations?"

The section of the by-laws of this association to which my attention is called is as follows:

> "Should there at any time be money in the treasury, not called for by borrowing or withdrawing members, the board of directors may make temporary loans to members or any person, on such security as the board shall agree upon, such terms, and such rate of interest, *not exceeeding ten per cent. per annum. Such temporary loans shall not run more than ninety days.*"

Section 8303 of the General Code is as follows:

> "The parties to a bond, bill, promissory note, or other instrument of writing for the forbearance of payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent. per annum, payable annually."

In the provisions of the General Code relating to the organization and powers of building and loan associations are incorporated the following sections:

> "Section 9657. To make loans to members and others on such terms, conditions and securities as may be provided by the association.
>
> "Section 9650. To assess and collect from members and others, such dues, fines, interest and premium on loans made or other assessments, as may be provided for in the constitution and by-laws. Such dues, fines, premiums or other assessments shall not be deemed usury, although in excess of the legal rate of interest."

It will be seen from the above that Section 9650 of the General Code makes an exception as to building and loan associations from the general statute regulating

the rate of interest, namely Section 8303, quoted above, and this statute has been held by our supreme court to be a valid enactment; (See Cramer vs. The Southern Ohio Loan and Trust Company, 72 O. S., 395). But I think that the proper construction of the statute is that when dues, fines or premiums added to the rate of interest specified in the contract, bring the total amount above the legal rate which may be stipulated for, that the same is not to be regarded as usury. This, in fact, was the holding in the case of Cramer vs. The Southern Ohio Loan and Trust Company, above referred to, where the rate of interest as fixed at five per cent. and the premium is fixed at five per cent., which bring the total, of course, above the legal rate; but it is further my opinion that a stipulation to charge more than eight per cent. as *interest* only, would come within the prohibition of Section 8303, that is, if in specifying the rate of interest in its contract, the association cannot exceed eight per cent., but that it can, if so provided in its by-laws also charge premiums, dues, fines, etc., which would bring the total amount really charged as interest above the prohibited rate, and that this can be done by virtue of Section 9650.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(State Supervisor of Public Printing)

134.

CONSTITUTIONAL CONVENTION—PROCEDURE AND PAYMENT OF EXPENSES OF PRINTING OF PROCEEDINGS.

The printing of the constitutional convention proceedings, debates, reports, etc., is not within the classes of printing under Section 754, General Code, which are to be provided for by the supervisor of public printing, nor is it such as under Section 786 General Code, is provided by law or resolution to be cared for through the department of public printing.

Therefore under the only other possible provision therefore, namely, the act providing for the constitutional convention 102 O. L. 298, by Sections 4 and 18, thereof, the convention is given entire control of the matter.

The expenses of such printing shall be paid from the General appropriation fund allowed the convention under the aforesaid act.

These proceedings are substantially similar to those followed by the last constitutional convention.

COLUMBUS, OHIO, February 16, 1912.

HON. E. A. CRAWFDRD, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 8th, which is as follows:

> "At the beginning of the constitutional convention in a conference with the secretary of state representing the printing commission and the supervisor of public printing, the printing for the convention was directed through the office of the supervisor. The expense of this printing to this time is in the neighborhood of two thousand ($2,000.00) dollars; there does not seem to be any specific provision of law as to how the printing expenses of this convention should be paid. It is important, therefore, that we have your opinion as to how this expense should be met, and, further expenses of printing for the convention."

Section 754 of the General Code provides as follows:

> "The printing for the state shall be divided into seven classes and shall be let in separate contracts as follows:
>
> "First class: Bills for the two houses of the general assembly, resolutions and other matters ordered by such houses or either of them to be printed in bill form.
>
> "Second class: The journals of the senate and house of representatives, and reports, communications and other documents which form a part of the journals.
>
> "Third class: Reports, communications and other documents ordered by the general assembly or either house thereof or by the executive departments, to be printed in pamphlet form, not including the bulletins of the agricultural experiment station.
>
> "Fourth class: General and local laws and joint resolutions.
>
> "Fifth class: Blanks, circulars and other work for the use of the executive departments, not including those to be printed in pamphlet form.

"Sixth class: The bulletins of the agricultural experiment station.

"Seventh class: The report of the secretary of state, auditor of state, commissioner of common schools, superintendent of insurance, railroad commission, commissioner of labor statistics, state board of agriculture, and other reports of executive officers required by law to be bound in either cloth, or half law binding, not including the laws, joint resolutions and journals of the house and senate.

"Printing for each of the classes, except the seventh class, shall be let in one contract; the printing for the seventh class may be let in one or more contracts as the commissioners of public printing in their discretion may require."

It is evident from a consideration of the above section that the printing for the constitutional convention does not come within any of the classes enumerated therein. Therefore, if the expense of this printing is to be paid through your department, we must look elsewhere in the law for a provision authorized such payment. The only other section which can possibly be considered in this respect is Section 786 of the General Code, which is as follows:

"All printing and binding for the state not authorized by the provisions of this chapter shall be subject to the provisions thereof so far as practicable, and, whether provided for by any law or resolution, the commissioners of public printing may advertise for proposals and let contracts therefor as herein provided."

It will be seen by considering this section that any printing or binding for the state not provided for by chapter IV, division II, title III, must be provided for by law or resolution in order to be paid for by your department. Now, going carefully over the statutes I fail to find any provision by law, that is by an act of the legislature or by a resolution of the general assembly to provide that this printing shall be paid for through your department; in fact, the only provisions of law in any manner bearing upon this question are found in the act providing for the constitutional convention, 102 O. L., 298. The following two sections of the said act, therefore, are sections which must govern this matter, taken in connection with the provisions of the General Code above referred to:

"Section 4. Said convention shall have authority to determine its own rules of proceeding, and to punish its members for disorderly conduct, to elect such officers as it may deem necessary for the proper and convenient transaction of the business of the convention, and to prescribe their duties to make provisions for the publication of its proceedings, or any part thereof, during its session; to provide for the publication of the debates and proceedings of the convention, in durable form, and for the securing of a copyright thereof for the state; and to fix and prescribe the time and form and manner of submitting any proposed revision, alterations or amendments of the constitution to the electors of the state; also the notice to be given of such submission.

"Section 18. The journal and proceedings of said convention shall be filed and kept in the office of secretary of state. Said secretary of state shall furnish said convention with all stationery, and shall do such other things relative to the distribution and publication of matter pertaining to the convention as it may require. He shall forthwith cause such number of copies of this act to be published and transmitted to the electors several boards in the state as will be sufficient to supply a copy

thereof to each board of judges of election in their respective counties, and such election boards shall distribute the same to such boards of judges of election."

Now, considering Section 786 of the General Code, above quoted, in connection with Section 4 and Section 18, the question to be determined, it seems to me, is whether this printing for the constitutional convention is printing for the state, and whether it is authorized by law. It seems to me that as the legislature has given the convention power by Section 4 "*to make provisions* for the publication of its proceedings or any part thereof, during its session; to provide for the publication of the debates and proceedings of the convention in durable form, and for the securing of a copyright thereof for the state;" and providing that the "secretary of state shall furnish said convention with all needed stationery and shall do such other things relative to the distribution and publication of matter pertaining to the convention as it may require;" this printing must be considered as printing for the state; but that it may be done through your department it must be authorized by law or resolution. That is, there must be an act or resolution of the legislature specifying that the printing for the constitutional convention is to be done through your department. There is no such law or resolution. Section 18, copied above, cannot be construed as authorizing the printing to be supervised by you as other state printing, and to be paid for out of your appropriation. Clearly the meaning of this section is that the legislature has given the constitutional convention full authority to provide for its necessary printing in such manner as it may deem best and to do so entirely independent of your department.

Note the language—"*Said convention shall have authority * * * to make provisions for the publication of its proceedings,* or any part thereof, during its session; *to provide for the publication of the debates and proceedings* of the convention, in durable form, and for the securing of a copyright thereof for the state." (Section 4.)

In the absence of limitation, this gives the constitutional convention complete control over this printing, and there is no limitation upon this language, express or implied.

I do not consider that the language found in Section 18, namely, "said secretary (of state) shall furnish said convention with all needed stationery and shall do such other things *relative to the distribution and publication of matters* pertaining to the convention as it may require" has any bearing on your question; as, in the view I take of this provision, it does not relate at all to the *printing* for the convention, but rather to the distribution and making public of such matters as it may decide to make public. The secretary of state is not the supervisor of public printing and would have no authority to order the printing for the convention to be done by you. And, in my judgment, this provision is meant to apply to such matters as naturally come under the supervision and direction of the secretary of state.

My opinion that there is no authority for this printing to be done through your department necessarily carries with it the further holding that it cannot be paid out of the appropriation made to your department. This appropriation is only available to pay for state printing ordered in accordance with the provisions of chapter 4, division 2, title 3 of the General Code, Sections 754 and 786 of this chapter are quoted above and it is unnecessary to quote other sections. It seems to me that there can be no doubt that it must be *paid* for out of the appropriation for the constitutional convention and that the legislature so intended. This appropriation (102 O. L., 195) is as follows:

"CONSTITUTIONAL CONVENTION OF OHIO."

"Salaries and mileage of members, expenses, uses and purposes of the convention, in accordance with the provisions of S. B. 15, 79th General Assembly ----------$200,000.00."

This language is extremely broad, and as Section 24 (102 O. L. 298) is one of the provisions of Senate Bill No. 15, 79th General Assembly, referred to in the appropriation, "the expenses, uses and purposes of the convention" surely include the publication of its proceedings, etc., specified in said section.

Though I am perfectly clear in my opinion as to these questions, it may not be amiss to consider briefly the provisions of the act for the constitutional convention in 1873, and the course taken in regard to the printing for it. This act is found in Vol. 70, Ohio Laws, at pages 6 and 8. Section 4 is as follows:

"Said convention shall have authority to determine its own rules of proceedings, and to punish its members for disorderly conduct, to elect such officers as it may deem necessary for the proper and convenient transaction of the business of the convention, and to prescribe their duties; to make provisions for the publication of its *own* proceedings, or any part thereof, during its session; to provide for the publication of the debates and proceedings of the convention, in durable form, and for the securing of a copyright thereof for the state; and to fix and prescribe the time and form and manner of submitting any proposed revision, alterations or amendments of the constitution to the electors of the state; also the notice to be given of such submission."

Section 7 of the act provides as follows:

The journal and proceedings of said convention shall be filed and kept in the office of secretary of state. Said secretary of state shall furnish said convention with all needed stationery, and shall do such other things relative to the distribution and publication of matter pertaining to the convention as it may require. He shall forthwith cause such number of copies of this act to be published and transmitted to the several clerks of the courts of common pleas in the state as will be sufficient to supply a copy thereof to each board of judges of election in their respective counties, and such clerks shall distribute the same to such boards."

It will be seen that Sections four (4) and seven (7) of this act are, as far as concerns your inquiry, identical respectively with Sections four (4) and eighteen (18) of the act providing for the present constitutional convention, quoted in the first part of this opinion. The appropriation for the Constitutional Convention of 1873, found in 70 O. L., 266, is as follows:

"CONSTITUTIONAL CONVENTION."

"For the mileage and per diem of members and per diem of officers and messengers of the constitutional convention, to be paid on the certificate of the presiding officer of the convention, sixty-five thousand dollars.

"For contingent expenses of constitutional convention, five hundred dollars, to be allowed and paid on the presentation of proper vouchers

certified to be correct by the presiding officer of the convention.

"For the printing of the constitutional convention, to be contracted for by the convention with the lowest and most responsible bidder or bidders, six thousand dollars. All bills for printing herein provided for, shall be audited and paid as similar bills for state printing are audited and paid.

"The necessary binding for the convention shall be executed under the direction of the supervisor of the public printing and binding, at the state bindery."

It is thus seen that the Constitutional Convention of 1873 was allowed only $500 for contingent expenses, was given a specific appropriation to cover its printing and was also directed as to the manner of contracting for this printing and as to how payments for the same should be made. It was also provided that the binding should be done by the state.

In the act providing for the present constitutional convention, as above pointed out, the appropriation is general for the "expenses, uses and purposes of the convention, in accordance with the provisions of S. B. 15, 79th General Assembly," there is no specific appropriation for printing or anything else, and hence the conclusion is that the legislature appropriated this lump sum with which the convention was to pay for all the things it was authorized by the act to do, including its printing. The records show that the printing for the Contsitutional Convention of 1873 was contracted for by the convention. There was no authority for directing any printing for the present constitutional convention through your department, unless the constitutional convention itself so requested; and, as pointed out in this opinion, no part of this printing can be paid for out of your appropriation, it must be paid for out of the appropriation for the constitutional cenvention. The constitutional convention has exclusive authority to provide for *all* of its printing and the same must be paid for out of the appropriation made for said convention.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

135.

CONSTITUTIONAL CONVENTION—PUBLICATION OF RESULTS FOR ELECTORS—CONTROL OF CONVENTION—PRINTING.

Under Sections 4 and 18 of the act providing for a constitutional convention, the convention may take such means as it deems fit to publish the result of its proceedings for the purpose of enabling the electors to form an opinion thereon.

COLUMBUS, OHIO, February 19, 1912.

HON. E. A. CRAWFORD, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your inquiry of January 23rd, which is as follows:

"Numerous inquiries have reached this department relative to the matter of the publication of the result of the present constitutional convention should it adopt a new constitution.

"I have been unable to learn, either, by precedent or law, what publication is given to the production of such a constitutional body. Will you be kind enough to give me your opinion as to what publication will be necessary in this regard?"

I take it that your inquiry refers to the publication necessary to bring the draft of a new constitution, or the amendments, adopted by the constitutional convention, before the electors of this state, for ratification or rejection. As to the proceedings of the convention itself, the printing of its debates, journals, etc., I have already held that this is to be provided for by the constitutional convention and to be paid for out of its appropriation.

Section 4 of the act providing for the present constitutional convention, 102 O. L. 298, is as follows:

> "Said convention shall have authority to determine its own rules of proceeding, and to punish its members for disorderly conduct, to elect such officers as it may deem necessary for the proper and convenient transaction of the business of the convention, and to prescribe their duties; to make provisions for the publication of its proceedings, or any part thereof, during its session; to provide for the publication of the debates and proceedings of the convention, in durable form, and for the securing of a copyright thereof for the state; and to fix and prescribe the time and form and manner of submitting any proposed revision, alterations or amendments of the constitution to the electors of the state; also the notice to be given of such submission."

and I take it that the last sentence of this section, taken in connection with the underlined portion of Section 18, which is as follows:

> "The journal and proceedings of said convention shall be filed and kept in the office of secretary of state. *Said secretary of state shall furnish said convention with all needed stationery, and shall do such other things relative to the distribution and publication of matter pertaining to the convention as it may require.* He shall forthwith cause such number of copies of this act to be published and transmitted to the electors several boards in the state as will be sufficient to supply a copy thereof to each board of judges of election in their respective counties, and such election boards shall distribute the same to such boards of judges of election."

really answers your inquiry, as for, under these provisions, the constitutional convention is to fix and prescribe the time and form and manner of submitting any proposed revision, alterations or amendments of the constitution to the electors; and, also, is to provide for the notice to be given of such submission; and all of this can properly be done through the secretary of state.

The necessity of submitting the matter to the electors of the state is governed by Section 3 of Article XVI of the present constitution, which is as follows:

> "At the general election, to be held in the year one thousand eight hundred and seventy-one, and in each twentieth year thereafter, the question: 'Shall there be a convention to revise, alter or amend the constitution,' shall be submitted to the electors of the state; and, in case a majority of all the electors, voting at such election, shall decide in favor of a convention, the general assembly, at its next session, shall provide by law for the election of delegates, and the assembling of such convention, as is provided in the preceding section; but no amendment of this constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect, until the same shall have been submitted to the electors of the state, and adopted by a majority of those voting thereon."

In my opinion to you, dated February 16, 1912, I called attention to the fact that Section 4 of the act providing for the constitutional convention of 1873, 70 O. L. pp. 6 and 8, is practically identical with Section 4 of the act providing for the present constitutional convention, 102 O. L. 298, above quoted; and the convention of 1873, in the schedule of the constitution, adopted by said convention (which was rejected upon its submission to the electors of the state) provided as follows:

> "Section 10. This constitution shall be submitted to the electors of the state on Tuesday, the 18th day of August, one thousand eight hundred and seventy-four; and at the same time there shall be separately submitted to said electors the following propositions * * *:
>
> Section 11. At said election the ballots shall be in the following form * * *:
>
> "Section 12. The secretary of state * * * on or before the 1st day of July next, shall cause this constitution to be printed in one English and one German weekly newspaper of each political party, printed in each county * * *.
>
> "Section 13. Said election shall be held and conducted in the places, by the officers and in the manner now by law provided for the election of members of the house of representatives, as far as practicable; * * *"

It will be seen from the above that the convention of 1873 provided, entirely, for the submission of the constitution to the electors of the state; and also directed the publication necessary to bring the matter properly before the electors, through the secretary of state. In my opinion, this is the plain meaning of Sections 4 and 18 of the present act; and this matter is left entirely with the constitutional convention and will be provided for by it.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

211.

SUPERVISOR OF PUBLIC PRINTING—POWER TO CONTROL STATE BOOK BINDING ESTABLISHMENT AND DUTY TO CARRY OUT ORDERS OF STATE INSPECTOR OF WORKSHOPS AND FACTORIES—ALLOWANCE BY STATE EMERGENCY BOARD.

The supervision, control and management of the book binding establishment is lodged, by virtue of Section 750 General Code, in the supervisor of public printing and when the building used as a state bindery has been condemned by the state inspector of workshops and factories, it is the duty of the said supervisor of public printing to reconstruct, repair and fit out said building in accordance with the order of the said inspector.

If the funds appropriated for the purposes are insufficient, the situation presents an amply grounded "emergency" to justify the required allowance by the emergency board of the state.

COLUMBUS, OHIO, March 21, 1912.

HON. E. A. CRAWFORD, *State Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—Your communication of February 12, 1912, is received in which you enclose an attached copy of a finding of the state inspector of workshops and factories and an order issued to you by him, being order No. 3484 relating to the

building now used by your department for the state bindery located on the grounds of the state school for the deaf, which finding is to the effect that the said building now being used for the state bindery is in such a condition as to become dangerous to employes therein employed, and said finding also being to the effect that on account of the crowded conditions the machines therein are so close together that the operation thereof becomes dangerous to employes, and also that the sanitary conditions of the whole building are such as to be injurious to the health of the employes and that you were ordered to abandon the same at once, and requesting of me an opinion as to what action should be taken by you, and how it should be taken relative to said order, and whether the emergency board should be called upon to supply the necessary funds for rental and removal of the machinery for this institution, or whether other means should be adopted to secure the same.

In reply I desire to say that under the provisions of Section 996 to 1,000 of the General Code, defining the powers and duties of the chief inspector of workshops and factories, upon investigation if the chief inspector or any deputy finds the conditions such as the report of the inspector of the state bindery shows, it is his duty to make an order such as he has in the above one referred to, and as the report of the chief inspector shows such a dangerous and unhealthy condition of the construction and the location of the machinery therein and the sanitary condition, and makes an order recommending that the same be abandoned for its present use, I am, therefore of the legal opinion that it is your legal duty, and the duty of the state, to immediately abandon the use of the present building for a state bindery, and at once proceed, through you, to obtain proper quarters in a suitable building or buildings necessary to carry on the work and duties of that department of the state department of public printing.

Section 750 of the General Code provides as follows:

> "The supervisor of public printing shall have charge of the bookbinding establishment at the state school for the deaf, he shall provide the necessary materials, implements, machinery and fixtures therefor, he shall have *supervision and control thereof* and exclusive management of its practical operation."

Under the above quoted section you are given ample power to perform all the things necessary to carry into effect the order of the state inspector of workshops and factories which should be done for the safety of the employes of the state bindery, and there remains but one question for me to answer, viz:, shall the emergency board of the state be called upon to supply the necessary funds for rental and removal of the machinery of this institution or whether other means should be adopted to secure the same?

As to that question I desire to say that if the appropriations for your department available for the year 1912 are insufficient to meet the carrying into effect of the order above referred to, I am clearly of the opinion that the said things necessary to be performed constitute an emergency "requiring the expenditure of a greater sum than the amount appropriated by the general assembly for that department of the state," and under Section 2313 of the General Code the emergency board of the state is and would be warranted in authorizing the expenditure of the amount necessary to meet said emergency, and therefore, in conclusion I advise you to at once proceed to carry out the order issued to you aforesaid and secure information as to the amount necessary to enable you to so do that you may present the same to the state emergency board without further delay.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

270.

PRINTING—LEGISLATIVE MANUAL—PAYMENT FROM APPROPRIATION FOR PUBLIC PRINTING.

Under Section 786 General Code, the legislative manual provided for by resolution, may be printed and the cost thereof paid from the appropriation for public printing.

COLUMBUS, OHIO, April 11, 1912.

HON. E. A. CRAWFORD, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—You will recall that on August 31, 1911, this department rendered an opinion holding that the cost of printing the legislative manual provided for by senate joint resolution No. 24, 102 O. L. 753 could not legally be paid from your appropriation for state printing.

Since the promulgation of said opinion additional facts have been furnished which were not before me at that time, whereby I am prompted to re-consider the legal questions involved.

The subject of public printing is covered by chapter 4, of division 2 of the General Code of Ohio, being Sections 745 to 787 inclusive. The following sections thereof are pertinent:

Section 754.

"The printing for the state shall be divided into seven classes and shall be let in separate contracts as follows:

"First class: Bills for the two houses of the general assembly, resolutions and other matters ordered by such houses or either of them to be printed in bill form.

"Second class: The journals of the senate and house of representatives, and reports, communications and other documents which form a part of the journals.

"Third class: Reports, communications and other documents ordered by the general assembly or either house thereof or by the executive departments, to be printed in pamphlet form, not including the bulletins of the agricultural experiment station.

"Fourth class: General and local laws and joint resolutions.

"Fifth class: Blanks, circulars and other work for the use of the executive departments, not including those to be printed in pamphlet form.

"Sixth class: The bulletin of the agricultural experiment station.

"Seventh class: The report of the secretary of state, auditor of state, commissioner of common schools, superintendent of insurance, railroad commissioner, commissioner of labor statistics, state board of agriculture, and other reports of executive officers required by law to be bound in either cloth or half law binding, not including the laws, joint resolutions and journals of the house and senate.

"The printing for each of the classes except the seventh class shall be let in one contract; the printing for the seventh class may be let in one or more contracts as the commissioners of public printing in their discretion may require."

"All printing and binding for the state not authorized by the provisions of this chapter shall be subject to the provisions thereof so far as practicable, and, whether provided for by law or resolution, the commissioners of public printing may advertise for proposals and let contracts therefor as herein provided."

Section 754 defines specifically the classes of printing for the state, the first four sub-divisions whereof govern the printing for the legislative department. The resolution providing for the printing of this manual reads as follows:

"Be is resolved by the General Assembly of the state of Ohio:

"That the assistant clerk of the senate and the assistant clerk of the house of representatives be and they are hereby authorized and directed to prepare and have printed in book form, bound in cloth, five thousand copies of a legislative manual, fifteen hundred copies for the use of the senate and thirty-five hundred copies for the use of the house of representatives. To defray the expense connected with the preparation and revision of such manual the assistant clerk of the senate and the assistant clerk of the house of representatives shall receive five hundred dollars each, payable from the contingent funds of the senate and house upon vouchers signed by the speaker of the house and the president of the senate, and such officers are hereby authorized and directed to sign vouchers for said amounts upon completion of such manual. The manual shall contain the joint rules of the 79th general assembly, the rules of the senate and the house of representatives, together with a list of the members and the standing committees of each house; section of statutes, state and federal relating in any way to the powers and duties of the general assembly, and such other matter as those charged with the preparation of this book may deem appropriate."

It is apparent from a comparison of the language of the resolution with that of Section 754 that said manual cannot be printed by virtue of any authority granted by said section for the palpable reason that no provision is made therein for the printing for the legislative department of the state government of any document in *"book form, bound in cloth"* as the resolution prescribed.

In my judgment it was the legislative intent, in the enactment of Section 786 to provide for printing not expressly authorized by Section 754 to the end that no state department may be unduly hampered by the limited provisions of Section 754.

The provisions of Section 786 recognized as legal, printing ordered pursuant to resolution, as well as that ordered pursuant to law, considered in connection with the fact that a resolution was duly passed by the general assembly calling for the printing of the aforesaid manual, clothe you with ample authority to cause the cost thereof to be paid from appropriation for public printing.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(State Board of Administration)

96.

LONGVIEW HOSPITAL—APPROPRIATION FOR FORMER ALLOWANCE—LEGISLATIVE INTENT SHOWN BY CHAIRMAN OF GENERAL ASSEMBLY FINANCE COMMITTEES—APPROPRIATION FROM "MAINTENANCE" FUND.

It being clearly shown by the statements of the chairman of the finance committees of both the senate and the house, that the legislature intends to allow the same amount to Longview hospital as has been heretofore appropriated for that institution, the board of administration may apportion such amount to that institution but only from the general appropriation fund classed under the head of "maintenance."

COLUMBUS, OHIO, February 2, 1912.

State Board of Administration, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication, dated January 9, 1912, in which you state as follows:

> "This board is in receipt of your opinion under date of December 12, 1911, in reply to our communication dated November 20, 1911, in which we asked you to advise us as to the relationship existing between the Ohio board of administration and Longview hospital.
>
> "Certain facts have presented themselves since this opinion has been rendered: among them, that it was evidently the intention of the finance committees of the senate and the house of representatives that Longview hospital should be entitled to the same proportion of the total amount appropriated for the year beginning February 16, 1912, both for maintenance and ordinary repairs and improvements, as it had received in prior years.
>
> "This board begs to submit a supplementary request, which is accompanied by a statement from the chairman, respectively, of the senate finance committee and the finance committee of the house of representatives of the state of Ohio, and ask that you render a supplemental opinion, taking into consideration the facts as set forth in the statement enclosed herewith."

In the opinion rendered your board, December 12th, in which I endeavored to define the relations existing between your board and the Longview hospital, I cited Section 33 of said act, which provides as follows:

> "The state shall continue to provide for the the maintenance of Longview hospital, and the board in making estimates for the maintenance of the institutions under their control shall include a suitable amount therefor. Out of the moneys appropriated for the *maintenance* of state institutions, the board shall apportion a proper allowance for said hospital * * *."

In the same opinion I cited your board to Section 2033, General Code of Ohio, which provides how the apportionment out of the proper allowance or appropriation made by the legislature for the state institutions is to be made, or how your board would be guided in making the same, as provided therein.

In my opinion to your board under date of August 31, 1911, relative to the merging of the appropriations made by the last general assembly for the use of the state institutions under your charge. I fully defined what I thought should be the three classes of appropriations under Section 31 of the act creating your board; and the legislature, in making the appropriations for the year beginning February 16, 1912, followed, strictly, the provisions of said Section 31, in classifying said appropriations, as provided in said section.

But, according to your letter requesting this supplemental opinion, and as shown by the letter accompanying the same, which is signed by the chairman of the senate finance committee and the chairman of the finance committee of the house of representatives, it was evidently the intent and understanding of the general assembly in passing said appropriation bill, that Longview hospital should participate in the total amounts appropriated for "maintenance" and "ordinary repairs and improvements," the same as it had in prior years; the same being evidenced by the fact that the memorandum of the records of estimates guiding the respective committees in arriving at said total amounts, so appropriated under the two headings of "maintenance" and "ordinary repairs and improvements," now on file with the chairman of said committees, is plain; and were it not for the fact that Section 33 of the act creating your board, 102 O. L. 221, provides that "out of the moneys appropriated for the *maintenance* of state institutions the board shall apportion a proper allowance for said hospital (meaning Longview hospital)," I would advise your board, in apportioning the proper amounts out of the respective totals appropriated for the state institutions for the year beginning February 16, 1912, to allow Longview hospital the proper apportionment from both the "maintenance" and "ordinary repairs and improvements" appropriations; but said Section 33 provides that out of the moneys appropriated for the maintenance of state institutions, your board shall apportion a proper allowance for said hospital, and does not refer to the class known as "ordinary repairs and improvements."

It is a rule of construction well known to the law that the intent of the legislature should be taken into consideration in construing one of its acts, if possible so to do. In view of the fact that it was evidently the intent of the legislature that the said Longview hospital should participate in and be apportioned certain amounts, according to former appropriations, I am of the opinion that that construction should be given to the statute, insofar as possible, as will give that effect to the act. In view of the further fact, that the legislature itself, by said Section 33 of said act, limited the participation of the Longview hospital in the appropriations to that class known as "maintenance;" and in view also of the fact that by Section 31 of said act, all appropriations for state institutions should be of three classes, namely: maintenance, ordinary repairs and improvements, and specific purposes, I am compelled to advise your board that said Longview hospital cannot be allowed or apportioned any of the appropriation made for state institutions for "ordinary repairs and improvements," for the year beginning February 16, 1912.

Under the appropriation of $3,339,330 for state institutions, under the head of "maintenance for the year beginning February 16, 1912," 102 O. L. 407, believing that it was clearly the intent of the legislature in making said total appropriation, as shown by the estimate above referred to, that said institution should be apportioned such amount as had theretofore been apportioned to it; and from the further fact that Section 1 of the act creating your board provided that the intent and purpose of the act is "to provide humane and scientific treatment and care and the highest attainable degree of individual development for the dependent wards of the state, etc.," I am of the opinon that your board may apportion, out of said general appropriation for maintenance, that proportion thereof as the legislature intended that said institutions should have for that purpose.

In conclusion I might say that the latter part of Section 41 of said act provides that all parts of sections of the code, inconsistent with the provisions of this act shall be repealed insofar as such inconsistencies exist; thereby repealing so much of Section 2033, General Code, as is inconsistent with said sections of the act creating your board, above referred to.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

122.

MURDER IN SECOND DEGREE—POWER OF BOARD TO PAROLE—EFFECT OF COMMUTATION OF SENTENCE.

When a prisoner sentenced for murder in the second degree has his sentence commuted to twenty years, such commutation merely affects a change in the penalty and does not, have any effect upon Section 2169, General Code, which makes it impossible for the board of administration to parole murderers in the first or second degree before a fulfillment of twenty-five years of their sentence.

COLUMBUS, OHIO, February 15, 1912.

State Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of February 5, 1912, in which you state that there is now confined in the Ohio penitentiary, a prisoner who was sentenced to life imprisonment for murder in the second degree, whose sentence was commuted to twenty years; and that said prisoner has made application to your board for a parole from said institution; and request my opinion as to the eligibilty of said prisoner for a parole, or the power of your board to grant said prisoner a parole.

In reply I desire to say that Section 2169, General Code, is the authority for your board to grant paroles, and reads as follows:

> "The board of managers shall establish rules and regulations by which a prisoner under sentence other than for murder in the first or second degree, having served the minimum term provided by law for the crime of which he was convicted and not previously convicted of felony or not having served a term in a penal institution, or a prisoner under sentence for murder in the first or second degree having served under such sentence twenty-five full years, may be allowed to go upon parole outside the buildings and enclosures of the penitentiary. Full power to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner."

It will be observed that there is a restriction placed upon your board, in the statute, as to what prisoners may be paroled by it, where it provides:

> "The board of managers (now the board of administration) shall establish rules and regulations by which *a prisoner under sentence other than for murder in the first or second degree, etc.*"

It was, evidently, the plain intention of the law-making power (the legislature), in granting the power to your board to parole prisoners, under said above

quoted section, to prevent the granting of a parole to any prisoner sentenced to imprisonment for murder in the first or second degree, except such prisoner shall have first served twenty-five full years under his sentence for murder.

Your inquiry could be easily solved and answered under the statement of facts, were it not for the fact that *"after the prisoner had been sentenced to life imprisonment for murder in the second degree"* his sentence was commuted to the term of twenty years, and, therefore, the serious question for consideration and determination by me is:

> "Does the fact of a commutation of a sentence from life imprisonment to a term of twenty years change the prisoner's legal status in relation to the parole statute, above quoted?"

In order to fully advise your board upon the question asked in your inquiry it is necessary to define what a commutation is and to what it relates.

In the case of Rice vs. Chamberlain, 107 Michigan, 381-383, the supreme court of that state defined a commutation as a:

> "Substitution of a less for a greater penalty or punishment."

Bouvier's Law Dictionary defines a commutation as:

> "The change of a punishment to which a person has been condemned into a less severe one."

The International Dictionary defines a commutation as:

> "A passing from one state to another; alteration; change."

In the case of "in the matter of Sarah M. Victor," 31 O. S. 206, Welch, Chief Justice speaking for the supreme court of Ohio defined a commutation as follows:

> "In its legal acceptation, it is a change of punishment from a higher to a lower degree, in the scale of crimes and penalties fixed by law."

Under the decisions and definitions, above quoted, I have no difficulty whatever in concluding that a commutation of sentence is simply the substitution of a less for a greater penalty for the crime for which a prisoner is sentenced.

The statutes empowering your board to parole certain prisoners restricts your power by denying the right thereto to parole any prisoner *under sentence for murder in the first or second degree unless* such prisoner has served under such sentence, twenty-five full years; and as the restriction relates to any prisoner under sentence for the crime of murder in the first or second degree, except as provided, it seems to me, clear that the crime for which the prisoner seeking parole was sentenced must be the guiding matter, by which your board is governed in determining the eligibility of said applicant to be paroled.

The fact that executive clemency is extended to a prisoner by commuting his sentence from life imprisonment to that of twenty years does not, in any legal sense, change the crime for which the prisoner was sentenced, but simply substitutes the lesser for the greater penalty for the same crime, and the prisoner is still confined in the penitentiary for the crime of murder in the second degree.

To make the matter plainer, suppose the sentence of the prisoner applying to your board had been commuted to the term of twenty-five years, it could not in

any manner place the prisoner in the class eligible to parole, for it cannot be sucessfully claimed that the governor, in commuting the sentence, could not have fixed the period of imprisonment at twenty-five years; because the statute places no restrictions upon his power under Section 99 of the General Code, as to time.

For the foregoing reasons, and under the circumstances set forth in your communication, your board is without legal authority to grant a parole to the prisoner making application therefor, or to any other prisoner who may, in the future, apply for a parole, under sentence for murder in the first or second degree, unless such prisoner shall have first served twenty-five full years under such sentence.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

174.

PAROLE—POWERS OF BOARD OF ADMINISTRATION—"MINIMUM SENTENCE"—PRISONER CONVICTED OF RAPE ON DAUGHTER NOT ELIGIBLE—EFFECT OF COMMUTATION OF SENTENCE.

Inasmuch as Section 2169 General Code restricts regulations of the board of administration with reference to applications for parole to such prisoners as have served the "minimum sentence" prescribed by law for the crime for which they were convicted, and as the minimum sentence provided for rape upon a daughter is life imprisonment, a prisoner sentenced for such crime cannot become eligible for parole.

The fact that such prisoner's sentence has been commuted does not change the nature of the crime and therefore in no wise affects his eligibility for parole.

COLUMBUS, OHIO, February 26, 1912.

State Board of Administration, Columbus, Ohio.

GENTLEMEN:—Your communication dated February 13, 1912 was duly received. You state therein as follows:

> "A prisoner in the Ohio penitentiary has made application for parole, who was convicted of rape upon his daughter and sentenced to life imprisonment, and the board of pardons later recommended that the prisoner's sentence be commuted to twenty years, which was done. Is said prisoner eligible to parole?

In reply I desire to say that in my opinion to your board dated February 15th, relative to a prisoner who was serving a life sentence for murder in the first or second degree, and whose sentence had been commuted, I held that a commutation of a sentence did not in any legal sense change the crime for which the prisoner was sentenced, but simply substitutes the lesser for the greater penalty, for the same crime; and I so hold as to the prisoner referred to in your communication; the crime for which he is still serving (although sentence was commuted) is rape upon his daughter.

Section 12413 of the General Code provides:

> "Whoever has carnal knowledge of his daughter * * * forcibly and against her will, shall be imprisoned in the penitentiary during life."

The section just quoted provides but one penalty, viz.: life imprisonment; and does not provide for any minimum term to be served for the crime of which he was convicted.

The General Code, Section 2169, delegating to your "board" the power to parole prisoners, provides in part as follows:

> "The board of managers (board of administration) shall establish rules and regulations by which a prisoner under sentence for other than murder in the first and second degree, *having served the minimum term provided by law for the crime of which he was convicted,* etc."

It seems to me that it was clearly, the spirit of the parole law, to limit the granting of a parole to any prisoner who had been convicted of such heinous crimes as murder in the first and second degree, unless the prisoner had served at least twenty-five (25) full years under said sentence; and it is just as clear that the legislature, in providing in the said Section 2169, that no prisoner should be *paroled until be had served the minimum term provided by law for the crime he had committed,* intended that said parole power should not be extended to any prisoner serving a sentence for a crime for which there is no minimum penalty prescribed, such as rape upon his daughter.

The legislature, in prescribing the penalty for the commission of the crime of rape upon a daughter, placed any prisoner, sentenced for such crime, ineligible to parole by not providing a minimum penalty for such crime.

The prisoner referred to in your communication is; for the reasons above stated, ineligible to parole, under the laws of Ohio.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

226.

PAROLE OFFICERS OF BOYS' INDUSTRIAL HOME—EXPENSES OF RETURNING FROM OTHER STATES, BOYS WHO HAVE VIOLATED THEIR PAROLE.

Under provision of Section 2215 General Code, parole officers of the boys' industrial home may be allowed their expenses incurred in pursuing and bringing back from other states to the institution, boys who have violated their parole.

COLUMBUS, OHIO, March 27, 1912.

State Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication, dated March 21, 1912, in which you enclose a letter addressed to your board by Hon. F. C. Gerlach, superintendent and secretary of the boys' industrial school of Lancaster, Ohio, in which he states as follows:

> "This institution has two parole officers employed whose salary and expenses for themselves and the return of boys to this institution who have violated their parole is paid by the auditor out of the state fund appropriated for the prosecution and transportation of convicts. (Section 2215, Code of Ohio.)"

and submits the following question:

> "As to whether the expense is a proper one when it is necessary for the parole officer of said institution to go to other states for a boy who has violated his parole."

In reply I desire to say that Section 2091 of the General Code provides that:

> "The trustees (now the board of administration) may establish rules and regulations under which inmates may be allowed to go upon parole, in legal custody, and under the control of the trustees (board of administration) and subject at any time to be taken to the school. * * *"

Section 2092, General Code, provides:

> "The trustees (board of administration) may enforce such rules and regulations, and retake any inmate so upon parole. Their written order certified by the superintendent shall be sufficient warrant for any officer named therein to arrest and return such inmate to the school. An officer named in the order shall be under duty to arrest and return to the school any paroled inmate named therein."

Under the above last quoted section authority is vested in the board of administration to retake any inmate under parole, who has broken the conditions of his parole, and recommit him to the boys' industrial school, through its proper officer, which in this case would be the parole officer of said institution.

Section 2215 of the General Code provides as follows:

> "Upon presentation of itemized vouchers properly approved by the board of managers (now the board of administration), the auditor of state shall issue his warrant upon the state treasurer to pay the salaries and necessary expenses of field officers from the appropriation for conviction and transportation of convicts. In like manner shall be paid the salaries and expenses of the parole officers of the boys' industrial school and the girls' industrial home."

and the legislature having, by the last clause of said section provided how the salaries and expenses of parole officers should be paid from the state treasury, and from which fund, I am of the opinion that the expense of returning a paroled inmate of the boys' industrial school who has violated his parole, to said institution is a proper expense to be paid as in said section provided, whenever it is necessary for the parole officer to go to any other state for such purpose.

There is a discretionary power vested in the board of administration to formulate such rules as it may deem proper, regulating the granting of paroles, and, therefore, should any inmate of the boys' industrial school violate a parole granted to him under the rules and regulations so adopted by said board, it may rearrest such inmate at any time or at any place that it deems best so to do.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

283.

JUVENILE COURT—JURISDICTION OVER DEPENDENT AND DELINQUENT INMATES OF INCORPORATED, NON-INCORPORATED AND STATE INSTITUTIONS—POWERS OF REMOVAL AND RECOMMITMENT.

The jurisdiction of the juvenile court extends to delinquent and dependent children who are inmates of all institutions except state institutions and incorporated institutions.

Jurisdiction of the juvenile court, when once acquired, continues until said child reaches its majority, unless said court commits it to a state institution, in which case control of the child is transferred to the respective state authorities.

When a child inmate which has been committed to an institution other than those above excepted, becomes incorrigible or delinquent, the juvenile court has power in renewed proceedings or probably in the exercise of its continuing jurisdiction, to commit said child to another institution, state or otherwise.

If, in the judgment of the court, the care bestowed upon an inmate by any institution other than a state institution is deficient or detrimental to the child, said court may recommit said child to another institution.

In accordance with the above principles, the court, after having committed a dependent child to a city house of refuge, may, when such child develops incorrigibility, commit him to the boys' industrial home.

COLUMBUS, OHIO, April 11, 1912.

State Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 30th requesting my opinion upon the following question submitted by the superintendent of the boys' industrial school:

> "May a juvenile court after having committed a boy to a local institution such as a house of refuge, either as a delinquent or as a dependent child, re-commit the same boy to the boys' industrial school on the ground that as an inmate of the local institution he is incorrigible and therefore delinquent?"

I have taken the liberty to re-phase the question as submitted by Major Gerlach and if I have not correctly apprehended the point involved in his letter I should be pleased to reconsider the matter upon further advice from your board.

The question is one of the power of the juvenile court and is to be determined, in my opinion, solely by consideration of the statutes under which that court operates.

Section 1642 General Code is in part as follows:

> "Such courts of common pleas, probate courts, insolvency courts and superior courts within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent minors, under the age of seventeen years, not inmates of a state institution, *or any institution incorporated under the laws of the state for the care and correction of delinquent, neglected and dependent children* * * *.

Section 1643 General Code provides as follows:

"When a child under the age of seventeen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attains the age of twenty-one years. *The power of the court over such child shall continue until the child attains such age.*"

Section 1644 provides in part as follows:

"For the purpose of this chapter, the words 'delinquent child' includes any child under seventeen years of age who violates a law of this state or a city or village ordinance, or who is incorrigible; * * *."

Section 1652 General Code provides in part as follows:

"In case of a delinquent child the judge may * * * commit such child, if a boy, to a training school for boys, or, if a girl, to an industrial school for girls, or commit the child to any institution within the county that may care for delinquent children, or be provided by a city or county suitable for the care of such children, or to the boys' industrial school * * *; or to any state institution which may be established for the care of delinquent boys, * * *. A child committed to such institution shall be subjected to the control of the trustees thereof, who shall have power to parole such child * * * and, on the recommendation of the trustees, the superintendent shall have power to discharge such child from custody; * * *"

Section 1683 General Code provides in part as follows:

"This chapter shall be liberally construed to the end that proper guardianship may be provided for the child, in order that it may be educated and cared for, as far as practicable in such manner as best subserves its moral and physical welfare, * * *."

There are certain ambiguities apparent upon the face of these related sections. At the out-set it is provided in Section 1642 that the jurisdiction of the juvenile courts shall not extend to delinquent minors, inmates of an institution of the state or of an institution incorporated under the laws of the state for the care and correction of delinquent or dependent children. On the other hand, it is provided in Section 1643 that any child who comes into the custody of the court shall remain within the power of the court until he attains the age of twenty-one years.

By Section 1644 any child who violates the law or is incorrigible is a "delinquent child," and there seems to be no reason, except the language of Section 1642 insofar as it applies, why an inmate of a municipal house of refuge or other local institution might not become, while such inmate, a "delinquent child" though committed to such institution as a "dependent child."

Again, in seeming contradiction to Section 1643 it is provided in Section 1652 that a child committed to "such institution" (and the antecedent of the word "such" is extremely obscure) shall be subject to the control of the trustees and not of the court.

Section 1683 requires that the provisions of the chapter shall be liberally construed for the purposes therein mentioned, and I confess I do not know what construction would be a "liberal" one with respect to the question which is now submitted.

Without attempting to reconcile the seeming inconsistencies above referred to let it be inquired as to what is "an institution incorporated under the laws of this state for the care and correction of delinquent, neglected and dependent children" within the meaning of Section 1642 General Code. At the out-set permit me to state that I am of the opinion that this phrase is to be limited to its exact primary meaning because it does not appear that to give it any unusual construction would be to accord to it the "liberal construction" enjoined by Section 1683. That is to say, in my judgment, the jurisdiction of the juvenile court ought, under Section 1683 be extended to all persons within the natural intendment of the chapter, the presumption being against a restriction of that jurisdiction. Therefore, unless a local institution is an incorporated one I am of the opinion that its inmates are subject to the jurisdiction of the juvenile court.

Applying this test to the house of refuge of Cincinnati, which is the institution directly concerned in Major Gerlach's inquiry, it at once appears that that institution is one of those, the inmates of which are not excluded from the jurisdiction of the juvenile court. It is an institution of the city under the direction of the director of public safety. (Section 4097, etc., General Code.) It is not "incorporated under the laws of the state," therefore its inmates are subject to the jurisdiction of the juvenile court.

Again, it is apparent that whatever may be the meaning of the phrase "such institution" in Section 1652 above quoted it cannot refer to municipal institutions under the care of the director of public safety, but only to institutions controlled by trustees and presided over by a superintendent. In fact there is strong internal evidence here to the effect that the antecedent of the phrase "such institution" is "the boys industrial school * * * the Ohio state reformatory * * * any state institution which may be established for the care of delinquent boys or * * * the girls' industrial home or * * * any state institution which may be established for the care of delinquent girls."

Such, I believe to be the true construction of Section 1652. If this be the case then as to institutions other than state institutions Section 1643 controls and the commitment of a delinquent or dependent child to an institution other than a state institution does not end the power and jurisdiction of the court over the individual.

For the reasons above suggested, I am of the opinion that the following propositions are true:

1. The original continuing jurisdiction of the juvenile court extends to delinquent and dependent children, inmates of a city institution for the care of such children or to any other institution excepting a state institution and an incorporated institution.

2. When the juvenile court once acquires jurisdiction of a delinquent or dependent child, its jurisdiction of such child continues until majority unless it commits him to a state institution, in which case the care and custody of the child is imposed upon the trustees and superintendent of such institution, or more properly upon the board of administration and the superintendent of such institution.

3. If an inmate of a city institution or of any other institution, excepting a state institution and an incorporated institution, whether committed to such institution by proceedings under the juvenile act or otherwise, is or becomes while therein confined incorrigible or commits a crime or in other respects becomes delinquent, the juvenile court has full power, at least upon proceedings *de novo* and perhaps in the exercise of its continuing jurisdiction to commit the child to another institution and specifically to a state institution.

4. I think it is true, although this question is not directly raised by Major Gerlach's inquiry, that if a delinquent or dependent child is committed by the juvenile court to an incorporated institution for the care of delinquent and dependent children, such court may, in the exercise of its continuing jurisdiction recommit such child to another institution if, in the judgment of the court, the care and treatment of the child at such incorporated institution is improper or leads to delinquency. Such would not be the case, however, as to those committed to a state institution.

As I have already intimated Major Gerlach's specific question is as to whether or not the juvenile court of Hamilton county may lawfully commit an inmate of the house of refuge to the boys' industrial school as a delinquent child. He submits with his letter a statement of a certain case from which it appears that the boy in question was originally committed to the house of refuge as a dependent child, and while at the house of refuge developed incorrigibility and upon complaint, presumably of the authorities of the house of refuge, this boy was adjudged a delinquent child and committed to the boys' industrial school. The proceeding in which this last adjudication was made seems to be a new and independent one.

For the reasons above suggested I am of the opinion that the commitment to the boys' industrial school, under the circumstances above stated, is legal.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

294.

LONGVIEW HOSPITAL—APPROPRIATION—AMOUNT ENTITLED TO FOR YEAR 1912—"MAINTENANCE."

In view of the statement of their intention made by the chairmen of the senate and house finance committees, and of the obligation to keep up Longview hospital as a public institution, the appropriation act with reference to that institution may be broadly construed so as to fully justify the conclusion that said hospital is entitled to the same proportion of the total amount appropriated for the year beginning February 6, 1912, as it received in former years.

COLUMBUS, OHIO, April 15, 1912.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have given further consideration to your letter of January 9, 1912, as to whether Longview hospital should be entitled to the same proportion of the total amount appropriated for the year beginning February 16, 1912, both for maintenance and ordinary repairs and improvements, as it had received in prior years; also to my opinions to you upon this matter, dated December 12, 1911 and January 9, 1912; and I have devoted particular attention to the statement of the respective chairmen of the senate and house finance committees, addressed to me on January 8, 1912, which is as follows:

> "We, the undersigned chairmen, respectively, of the senate finance committee and the finance committee of the house of representatives of the state of Ohio, hereby represent to you that the respective finance committees of both houses of the general assembly, in arriving at the total amount of $3,399,330 appropriated for maintenance of the state in-

> stitutions of the state of Ohio, for the year beginning February 16, 1912, made up said amount with the understanding and belief that the Longview hospital would be entitled to the proportion of said total amount for said year beginning February 16, 1912, as it had received in prior years, and it was also the understanding and intent of the respective finance committee aforesaid, and the belief when the bill was recommended to the general assembly for passage, that the Longview hospital was to participate in the general appropriation of $337,800 made for the respective state institutions for ordinary repairs and improvements, as it had in prior years. And the memorandum of the records of estimates guiding the said respective committees in arriving at said total amounts shows that that was the intention of the respective committees, and in recommending the passage of said appropriation bills the recommendations were made to the general assembly upon such belief."

and also to Section 33 of the act establishing your board, 102 O. L. at page 221, as follows:

> "The state shall continue to provide for the maintenance of Longview hospital, and the board in making estimates for the maintenance of the institutions under their control shall include a suitable amount therefor. Out of the moneys appropriated for the maintenance of state institutions, the board shall apportion a proper allowance for said hospital. In all matters relating to the expenditure thereof, the board shall have the same powers as in other like institutions. In all other matters the board of directors of said hospital shall continue to have and exercise the same power and duties now provided by law."

It seems to me that the first sentence of said section namely: "The state shall continue to provide for the *maintenance* of Longview hospital * * *," can only mean that the state is to continue to provide for Longview hospital in the manner as formerly, and that the word "maintenance," as used here, in Section 33, has its broadest meaning and is not used in the same sense as in Section 31, where it is provided that the appropriations for the institutions shall be of three classes: (1) maintenance, (2) ordinary repairs and improvements, (3) special purposes.

Longview hospital is an institution recognized by the state, and the management of which is provided for by the laws of the state; it is essentially a *public* institution, and though it has been held that it is not really a state institution within the meaning of the constitution, still, the public, in this case, must necessarily mean the public of the state of Ohio and, therefore, unless the legislature plainly expresses its intention to deprive this hospital of part of the assistance heretofore rendered it by the state, it seems to me it should be held, in view of Section 33, that this assistance is to be given to the same extent as formerly; in other words, that this institution is not to be deprived of this assistance by implication, but that if any implication is necessary it must be favorable to the institution. The word "maintenance," in its broad sense, means (Century Dictionary):

> "To hold in an existing state or condition; preserve from lapse, decline, failure or cessation; keep up; to furnish means for the subsistence or existence of; sustain or assist with the means of livelihood; provide for; support."

and I take it that this is the meaning of the word "maintenance" as used in Section 33.

Before the passage of this act, appropriations for this institution were not divided into the three classes of maintenance, ordinary repairs and special purposes; nor were appropriations made for said separate purposes. This classification, it must be remembered, is made by the act which provides for your board, and which contains Section 33, above quoted; and, therefore, the appropriation formerly made for this institution may well be considered in arriving at the intention of the legislature towards this institution. I do not deem it necessary to go through all the appropriation acts, but I find that the appropriation made for Longview hospital in 1910, 191 O. L. 29, is as follows:

Longview Hospital

"Salaries of officers and trustees' expenses	$4,000 00
"Ordinary repairs and improvements	5,000 00
"Current expenses	65,000 00"

and again, at page 186, the appropriation is as follows:

Longview Hospital

"Current expenses	$135,000 00
"Salaries of officers and trustees' expenses	4,300 00
"Ordinary repairs and improvements	10,000 00
"Furniture and carpets	2,500 00"

It is readily seen that all the items mentioned in these appropriations can properly be classed under the head of "maintenance," though, in fact, none of them were made under that head; but they were, undoubtedly, made for the purpose of maintaining the hospital, under the definition above given; and, in my view, it was the intention of the legislature that that maintenance should be provided for as in former years. In think that this conclusion, bearing in mind the fact that this is a public institution, favored and fostered by the state, can reasonably and justly be deduced from the language used by the legislature; by taking into consideration the statement given by the chairman of the finance committees of the house and senate, which I have quoted above, all doubt as to its correctness is removed.

It is, therefore, my opinion that Longview hospital is entitled to the same proportion of the total amount appropriated for the year beginning February 6, 1912, both for maintenance and ordinary repairs and improvements, as said terms are used in Section 31 of the act referred to, as it has received in prior years.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

299.

CLEVELAND STATE HOSPITAL—LEGISLATIVE ACT PRESCRIBING SALE OF LAND TO CITY OF CLEVELAND BEFORE SEPTEMBER 1, 1911, IS DIRECTORY AND NOT MANDATORY.

The legislative act providing for the sale of land to the Cleveland state hospital, is directory and not mandatory in its provision that the city was to pay for said property before September 1, 1911, *and when the city has acted in good faith and is unable to complete the necessary legislation within the time specified, the power of the board of administration to execute the proper deed is not affected.*

COLUMBUS, OHIO, April 20, 1912.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter dated April 17th, which is as follows:

> "The last general assembly authorized the board of trustees of the Cleveland state hospital and their successors to sell to the city of Cleveland, for $18,000.00, at private sale, certain property described in said act. (102 O. L., 384-5) and in said authority specified that the city of Cleveland was to purchase and pay for said property before September 1, 1911.
>
> "For the reason specified in the correspondence herewith transmitted to you for your consideration, the city of Cleveland was unable to pass the necessary legislation to enable the city to pay for and take over said property as provided for in said act before said date, September 1, 1911, but has now passed the necessary legislation and tendered said board of administration, as successors of the board of trustees of the Cleveland state hospital, the purchase price and now ask this board to execute a deed for said property described in said act.
>
> "In view of the fact that the act provided same should be done before September 1, 1911, we would ask your opinion as to whether or not this board now has authority to execute a deed for said premises to the city of Cleveland, as provided by said act, the time having elapsed within which the city of Cleveland had a right to purchase same from the state."

In reply I desire to say that I have carefully examined the act referred to authorizing your board to sell and execute a proper deed to the city of Cleveland, Ohio for the land described in the said act, and also find that on August 19, 1911, the director of public service of the city of Cleveland, the proper official in charge of such matters, notified the board of trustees of the Cleveland state hospital that the council of the city of Cleveland was not in session and that the city solicitor of said city had been instructed to draw the necessary legislation which would permit the issuing of bonds to the extent of $18,000.00 in order that the city might acquire the land specified in the said act for park purposes, and stated therein that it would be impossible to have the necessary legislation enacted so that this property could be purchased prior to September 1st. In view of all the facts the said director of public service requested the said board to delay action on the sale of this property to other than the city until such time as the city would be able to pass the necessary legislation, issue the bonds, and pay for the said property.

I am of the legal opinion that this act of the legislature authorizing the board of trustees of the Cleveland state hospital or its successors in office to sell and execute the proper deed to the city of Cleveland, although it specified a duty devolved upon a public board and specified therein the time for the performance, must, nevertheless, be regarded as directory and not mandatory. It is a fundamental rule recognized in law that there is a consequential distinction between directory and mandatory statutes in that:

> "The consequential distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the latter is productive of serious results. The distinction grows out of a fundamental difference in the nature, importance and relation to the legislative purpose of the statutes so classified. The statutory provisions which may thus be departed from with impunity without affecting the validity of statutory proceedings are usually those which relate to the mode or time of doing that which is essential to effect the aim and purpose of the legislature or some incident of the essential act."

Again,

> "Where a statute is affirmative it does not necessarily imply that the mode or time mentioned in it is exclusive, and that the act provided for, if done at a different time or in a different manner, will have no effect."

And it is a general rule in the construction of statutes to give to the intention of the legislature, and also that the legislature intended what is reasonable and especially that the act shall have effect and that its purpose shall not be thwarted by any trivial omission or a departure from it in some formal, incidental or comparatively unimportant particular.

Under the rules above stated, I am thoroughly of the opinion that it was the intention of the legislature that the city of Cleveland, which is a political subdivision of the state, should have the first right and privilege of purchasing the real estate described in the said act for park purposes, which is a power vested in the municipality to maintain, and that being the case, it was necessary to specify some time within which the same should be done, and in fixing the time—namely, September 1, 1911—did not make it, in my opinion, a mandatory duty for the board of trustees to its successors in office to refuse to sell and execute the proper deed to the said city of Cleveland, and especially is that true in view of the fact that the said act was not approved until June 14, 1911, and the further fact of the inability of the city of Cleveland to enact the proper legislation necessary to provide for the necessary funds to pay for the said land, and, therefore, I am of the further opinion that the purpose and intent of the legislature should not be thwarted by this trivial omission as to the time of purchasing and execution of the deed because the city of Cleveland had acted in good faith and through its director of public service it had notified the board of trustees of the said hospital of its inability to purchase and take over the said property by the time specified in the act itself but notified them of its intention and took initiative steps in the premises to carry out the things specified in the act.

There is another general rule of construction recognized almost universally by the courts which is:

> "Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards."

For the foregoing reasons I am of the legal opinion that your board has authority to sell and execute a proper deed to the city of Cleveland for the said land described in the said act, believing that a great injustice would be done to the city of Cleveland were your board to take any other action than carrying into effect the intention of the legislature as shown by said act.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

470.

CONVICT LABOR—STATE HIGHWAY COMMISSIONER MAY CONTRACT FOR, WITHOUT ADVERTISING FOR BIDS—COST OF MAINTAINING LABORERS DEVOLVES ON BOARD OF ADMINISTRATION—STATE NOT WITHIN STATUTE UNLESS SPECIFIED.

Sections 14 *and* 24 *of the act of* 102 *O. L.* 215, *empowers the board of administration to fix the price of labor supplied by the board, from institutions under its control.*

When such labor is contracted for by the state highway commissioner, with the board of administration, under the rule that the state is not subject to a statute unless expressly contained within its terms, the requirement of advertisement and bids is not applicable, and the highway commissioner may advertise for bids with the labor item omitted.

The cost of the maintenance of the laborers must be borne by the board of administration and cannot be borne by the department hiring the same from the board.

COLUMBUS, OHIO, June 26, 1912.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 24th, wherein you state that the state highway department has entered into certain contracts for road improvements under its jurisdiction, less the common labor in connection therewith, which the board of administration is expected to furnish from the penitentiary. You state, also, that the board of administration is ready to furnish the labor, but is not desirous of paying the additional expenses for the maintenance of the men to be engaged therein. You request my opinion as to the propriety of charging the expense of maintaining the prisoners and the entire expense of building and keeping up the camps which would have to be constructed from the state aid fund, and suggest that each county ought to bear this expense.

Your question invites a consideration of the following provisions of law; Section 14 of the act creating the state board of administration (102 O. L., 215) provides that:

> "The board shall fix the prices at which all labor performed and all articles manufactured in said institutions shall be furnished to the state or to the political subdivisions and public institutions thereof, as is or may be provided by law, which shall be uniform to all and not higher than the usual market prices for like labor and articles."

Section 24 of the act provides:

> "The board may detail temporarily from a correctional or penal institution, with the consent of the managing officer thereof, any inmates under its control, to perform specified labor."

My examination of the act from which these sections are quoted leads me to the conclusion that Section 24 is controlled by Section 14, so that laborers temporarily detailed from a correctional or penal institution are to be regarded as performing the labor "in the institutions" within the meaning of Section 14. It thus follows that it is the duty of the board of administration to fix the prices at which labor will be performed by laborers temporarily detailed from correctional or penal institutions in accordance with Section 14.

The following sections of the state highway law (102 O. L., 333 et seq.) governs the matter of letting contracts for improvements thereunder.

> "Section 27. * * * the state highway commissioner shall advertise for bids for two consecutive weeks * * *. Such notice shall state that plans and specifications * * * are on file, * * * and the time in which bids therefor will be received. Subject to the approval of the county commissioners the state highway commissioner shall award the contract to the lowest responsible bidder."

Section 28 provides for the award and making of the contract, and expressly authorizes the highway commissioner to contract separately for the grading and surfacing respectively, but not separately for the labor and materials.

Sections 29, 30 and 31 provide detailed regulations which are not necessarily involved here.

Section 32, and succeeding sections, deal with the apportionment of the cost of making an improvement, as follows:

> "Section 32. Upon the completion of the improvement the state highway commissioner shall immediately ascertained the cost and expense thereof and apportion the same to the state, county, township or townships and abutting property. He shall certify the total cost and expense of the improvement and a statement of the apportionment to the county commissioners and trustees of the township or townships.
>
> "Section 33. The state's proportion of the cost and expense of the construction, improvement, maintenance or repair of any highway under the provisions of this chapter shall be paid by the treasurer of state upon the warrant of the auditor of state issued upon the requisition of the state highway commissioner from an appropriation made to carry out its provisions. The county's, township's and property owner's proportion of the cost and expense of such construction, improvement, maintenance and repairs, shall be paid by the treasurer of the county, in which the highway is located upon the warrant of the county auditor issued upon the requisition of the state highway commissioner from any funds in the county treasury for the construction, improvement, maintenance or repair of roads.
>
> "Section 35. Except as otherwise provided, one-fourth of the cost and expense of such improvement shall be apportioned to the township or townships in which such road is located. Of the amount so apportioned three-fifths shall be a charge upon the whole township or town-

ships, and two fifths shall be a charge upon the property abutting on the improvement. The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of land so located. * * *

"Section 39. Payment of the cost of construction of such improvement shall be made as the work of construction progresses, upon estimates made by the engineer in charge of the work when approved by the state highway commissioner. No payment made by the state or county on a contract for such work before its completion shall be in excess of ninety per cent. of the value of the work performed. Ten per cent. of the value of the work performed shall be held until the completion of the contract in accordance with the plans and specifications."

There are other provisions of the highway law describing in detail the procedure of paying for an improvement made thereunder, but none of them are material to the question which you submit.

It is clear there is no specific authority for the use of convict labor upon the highways of the state. That question, however, is not submitted to me, and I shall assume the right of the highway commissioner to use convict labor. If he has this right, he has the right, I think, to contract separately for such labor and to include the cost therof in the total cost of the improvement which is to be divided as provided in the sections above quoted.

On the other hand, the board of administration is without authority to make a charge against any state department or subdivision for housing or maintaining any of the state's wards or charges. It is the duty of the state and of the board of administration, as the agent of the state, to house and maintain all the inmates of all the state institutions whether in buildings provided at such institutions, or elsewhere. The board of administration, however, has the power to fix the price of the labor of convicts, and, as I interpret the statutes, it is its duty so to do; so that the board is without authority to permit the highway department or any other state department or subdivision to have the benefit of convict labor without paying for it.

It seems to me, therefore with the foreging considerations, the answer to your question at once suggests itself. The cost of maintaining prisoners furnished for labor on the public highways under the supervision of the state highway commissioner is not a proper subject of contract by the commissioner, nor a proper charge upon any fund of the state or county. The cost of labor, however, is a matter with respect to which the board of administration and the highway commissioner may contract (assuming the right of the highway commissioner to use convict labor at all); and the board having fixed the price of such labor, and the highway commissioner having entered into a contract with the board for the use of such labor in a specific capacity, the amount due the board of administration then becomes an item of the total cost of the construction of the improved road or roads to be apportioned in accordance with the provisions of the highway department laws.

In addition to the legal obstacles at which I have already hinted, another one exists which I think I ought to mention. It is the duty of the state highway commissioner to advertise for bids preparatory to entering into any contract in connection with the construction of roads, so that, assuming that it is proper for the commissioner to separate the common labor from the other items of service to be performed by the principal contractor, it would seem still to be his duty to advertise for bids for furnishing such common labor. I am inclined to the opinion, however, that in the absence of a statute expressly forbidding the high-

way commissioner from contracting directly with the state to the exclusion of competitors in this particular, and in the face of the express provision of the act creating the board of administration, to which I have already called attention, that both the right of the commissioner to let contracts less the common labor involved, and his further right to contract with the board of administration for the common labor without inviting competitive bids, rest upon a common foundation; namely, the doctrine of statutory interpretation by virtue of which the state is not deemed bound by its own statutes unless specifically so provided therein. That is to say, it not being provided that in furnishing labor to a state department required to advertise for bids in the doing of work committed to its administration, the state board of administration, the state's agency, shall compete with private contractors, nor that such state departments in inviting bids shall notify or otherwise solicit their participation in the competitive bidding of the board of administration, it follows that the two state departments are free to contract with each other regardless of the provisions for competitive bidding, and regardless, also, of the failure of the act creating the department using the labor specifically to authorize either the use of such convict labor or an agreement to pay for it entered into without competitive bidding. The case is one of implied exceptions to an otherwise express provision of the highway law, and the exception is no greater in the case of the requirement that competitive bids shall be invited than it is in the case of the requirement that the contract for construction shall be let as a whole.

The conclusion which I have reached will enable the board of administration to protect the state against payment of more than its proper share of the expense of the highway improvement, and will otherwise meet the situation which you desire to guard against, excepting in one particular—that it will necessarily diminish the maintenance appropriation for the Ohio penitentiary. This, however, is unavoidable as the prisoners of the Ohio penitentiary at all events must be maintained by the state.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

472.

DISPOSITION OF ILLEGITIMATE CHILDREN OF INMATES OF HOSPITALS FOR INSANE AND GIRLS' INDUSTRIAL HOME—DUTIES OF CHILDREN'S HOMES, COUNTY COMMISSIONERS, BOARD OF ADMINISTRATION AND FATHER OF CHILD—CRIMINAL PROCEDURE.

Illegitimate children born of girls who are inmates of the girls' industrial home or of unmarried girl inmates of hospitals for the insane, should be placed in the children's home of the county or district of the residence of the mother before her confinement in the institution. Or, if such county has no children's home the county commissioners should be notified to provide for them. The father of the child should be required to pay for its keeping.

The officers of the institution, or of the county, township or municipality that is maintaining such child may enter into an agreement with the acknowledged father for the payment of its keep and require security from said father to save the public the expense of keeping such child.

The children of married women should be turned over to the father if he is the husband of the mother and is able to provide properly for such child.

Facts suggesting criminal liability should be presented by the board of administration to the prosecuting attorney of the county wherein the offense was committed.

The Ohio Board of Administration, HON. A. W. THURMAN, *President, Columbus, Ohio.*

GENTLEMEN:—Your favor of June 5, 1912, is received in which you inquire as follows:

> "First: What is the lawful disposition to be made of the illegitimate children born of girls who are inmates of the girls' industrial home?
>
> "Second: Can we legally enter into any arrangement with the men who acknowledge the parentage of such children, for the support of the same?
>
> "Third: These girls being wards of the state, is it the duty of this board, or the managing officer of the institution, to report to the proper authorities, (you designating such authorities), such cases as above mentioned?
>
> "Fourth: What disposition should be made of children born of unmarried or married women who are inmates of the hospitals for the insane?
>
> "Fifth: Is it our duty or the duty of anyone to bring criminal proceedings against men who are known to be guilty of having sexual intercourse with said wards?"

There is no specific provision of statute regulating the disposition of children born of inmates of the girls' industrial home, or of inmates of the hospitals for the insane. Those mothers who are insane are not competent to properly care for their offispring, even though they were not confined in a hospital for the insane. The inmates of the girls' industrial home cannot properly take care of their children in such institution.

The parent is the natural custodian and support of his child. This control will not be interfered with by the state unless the interests of the child or of society require it.

The foregoing principle is enunciated by Sullivan, J., at page 377, in the case of Travis vs. State, 12 Cir. Court, N. S., 374, where he says:

> "But when the custody, education and moral training of the child is claimed by contending parents, the courts, in determining the question, keep in view solely the interest of the child; and when the interests of the child require it, commits its custody to strangers in face of parental appeal. If the interests of society and good government require the removal of children up to a certain age from evil influences, the state in doing so is in the exercise of its police power.
>
> "The right to the custody and society of children in the parent is a natural one and one which the state claims no right to take away except when the interests of society require it.
>
> "Two interests require such intervention on the part of the state—that of the child, and that of society."

A parent who has been committed to some penal institution has forfeited its right to the control and custody of its child during the time such parent is confined in such institution.

The statute requires the father of a child, legitimate or illegitimate, or the mother if charged by law with the maintenance thereof, to provide a child under the age of sixteen years with necessary or proper home, care, food and clothing, if such parent is able to do so.

Section 13008, General Code, provides:

> "Whoever, being the father, or when charged by law with the maintenance thereof, the mother, of a legitimate or illegitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, being able by reason of property, or by labor or earnings, to provide such child or such woman with necessary or proper home, care, food and clothing, neglects or refuses so to do, shall be imprisoned in jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

Such parents are required to pay the reasonable cost of the keeping of their child, when such child is in a county or district home, by virtue of Section 13012, General Code, which provides:

> "Whoever, being the father, or when charged by law with the maintenance thereof, the mother, of a legitimate or illegitimate child under sixteen years of age, being legally an inmate of a county or district children's home in this state, neglects or refuses to pay to the trustees of such home, the reasonable cost of keeping such child in such home when able so to do by reason of property, or by labor or earnings, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

The first obligation to support a child is upon the father, and if he is able so to do by reason of property, or by labor or earnings, and neglects or refuses to so support his child under sixteen years of age, he may be punished criminally for

such neglect and refusal. The mother, if she is charged by law with the maintenance thereof, is also required to support the child if she is able. These statutes apply to both legitimate and illegitimate children.

If neither parent is able to support or provide for the child, and such child is not otherwise provided for, it becomes a public charge.

The statutes provide for the establishing and maintaining of childrens' homes by the county and for admission thereto of abandoned, neglected, or dependent children.

Children's homes may be established by a county by virtue of Section 3077, et seq., General Code.

Section 3089, General Code, provides for admission thereto as follows:

> "The home shall be an asylum for children under the age of sixteen years, of sound mind and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them."

A child to be admitted to such home must be under sixteen years of age. There is no minimum age fixed. There is a requirement that the child must have resided in the county one year. This provision is made to establish the county which is liable for the keeping of the child in the home, and does not limit the right of admission to children over one year of age. The domicile of the child is that of the parent. If the parent has had a legal residence of one year in the county, a child under one year of age, would be entitled to admission to the children's home of that county. In the case of the persons who are to become mothers in the institutions mentioned, the legal residence of the child is that which its mother had before her confinement in the institution.

Sections 3090 and 3091, General Code, provide how children may be admitted to such homes.

Section 3090, General Code, provides:

> "They shall be admitted by the superintendent on the order of a majority of such trustees, accompanied by a statement of facts signed by them, setting forth the name, age, birthplace, and present condition of the child named in such order, which statement of facts contained in the order, together with any additional facts connected with the history and condition of such children shall be, by the superintendent, recorded in a record provided for that purpose, which shall be confidential and only open for inspection at the discretion of the trustees."

Section 3091, General Code, provides:

> "When a child maintained in the infirmary of any county becomes eligible to the children's home of such county or district, such fact shall be certified to the trustees thereof by the infirmary directors. All children found by township trustees to be proper subjects for the care of the county, and eligible to such children's home, shall be certified to the trustees of the home by the trustees of the township of which they

are residents, and shall be conveyed to such home by the township trustees, and the expenses thereof paid from the township poor fund. The superintendent of the home may provide and care for temporarily until the proper officers are notified, any child found abandoned and destitute, and which is eligible to the children's home."

The provisions of Section 3092, General Code, govern where a county has not provided a children's home. Said section provides:

"Except such as are imbeciles, idiots or insane, no child or children entitled to admission into a children's home shall be kept or maintained in any county infirmary in this state. In any county where such home has not already been provided, the board of commissioners shall make temporary provisions for such children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, or by leasing suitable premises for that purpose, which shall be furnished, provided and managed in all respects as provided by law for the support and management of children's homes, but the commissioners may provide for the care and support of such children within their respective counties, in the manner deemed best for the interest of such children, and they shall levy an additional tax, which shall be used for that purpose only."

By virtue of this latter section the commissioners of a county not having a children's home, are required to make provision for such children, either in the nearest children's home, or within the county.

Two or more counties may join to form and establish a district children's home by virtue of Section 3109, et seq., General Code.

Section 3109, General Code, provides:

"In accordance with the purposes, provisions, and regulations relating to county children's homes, when in their opinion the public good so demands, the commissioners of two or more adjoining counties, not to exceed four, may form themselves into a joint board, and proceed to organize a district for the establishment and support of a children's home, and provide for the purchase of a site, and the erection of necessary buildings thereon."

Section 3122, General Code, provides for admission to a district children's home as follows:

"Children under the custody of parents, guardian or next friend, who, by reason of neglect, abuse or from the moral depravity, habitual drunkenness, incapacity or unwillingness of such legal custodian to exercise proper care or discipline over them, are being brought up to lead idle, vagrant, or criminal lives, shall be committed to the guardianship of the trustees of a county or district children's home, if the trustees of the township in which they have a legal settlement, or the infirmary directors of the county, after a careful and impartial investigation of the condition and facts, as they exist, deem it manifestly requisite for the future welfare of such children, and for the benefit and protection of society."

Section 3121, General Code, provides:

> "The commissioners and trustees of townships in counties in which no children's home or other similar institution is located, and adjoining a county or district in which there is such a home, may send to it children for whom they have to provide, if the trustees of the home can receive them without detriment to children of their own county or district. The cost of maintaining these children in the home shall be no greater than the per capita cost of suitably providing for and educating the children of the county or district in the home to which they are so sent."

The foregoing provisions of the statutes are sufficient to authorize your board to provide for the disposition of the children of the inmates of the institutions you mention.

The father should be looked to first for the care and custody of the child. If the father is the husband of the mother, such child should be placed in his charge if he is a proper person to take care of it, and is able to provide for it. The reputed father of an illegitimate child should be required to support such child. His liability can be fixed in the manner hereinafter set forth.

In their present condition the mothers are not able, by labor and earnings, to keep the child. If they are able by reason of having property, they are liable for the support of their children.

If such child becomes a public charge, by reason of the inability of the parents to provide for it, then application should be made to the superintendent of the county or district children's home of the county of its mother's legal residence for admission of the child to such home. If such county has no county or district children's home, then application should be made to the county commissioners for the relief of the child.

Section 2542, General Code, provides:

> "Unless the approval of the probate court is first obtained, no child under the age of one year shall be separated from its mother, if such mother is an inmate of a county infirmary."

This section applies to persons in the county infirmary and does not apply to inmates of a state institution.

You ask further as to an agreement for the support of a bastard child by the acknowledged father.

Section 12110, General Code, provides:

> "When an unmarried woman, who has been delivered of or is pregnant with a bastard child, makes a complaint in writing, under oath, before a justice of the peace, charging a person with being the father of such child, he thereupon shall issue his warrant, directed to any sheriff or constable of the state, commanding him to pursue and arrest such accused person in any county therein, and bring him forthwith before such justice to answer such complaint."

Section 12114, General Code, provides:

> "If, during the examination before the justice, or before judgment in the court of common pleas, the accused pays or secures to be paid, to the complainant, such amount of money or property as she agrees

to receive in full satisfaction, and gives bond to the state with sufficient surety, to be approved by the justice, court or judge in vacation, conditioned to save any county, township, or municipal corporation within the state free from all charges for the maintenance of such bastard child, such justice, court or judge, shall discharge him from custody, on his paying the costs of prosecution. Such agreement must be made or acknowledged by both parties, in the presence of the justice, court or judge, who thereupon shall enter a memorandum thereof on his docket, or cause it to be made upon the journal."

Section 12134, General Code, provides:

"When a woman has a bastard child, and neglects to bring a suit for its maintenance, or commences one and fails to prosecute it to final judgment, the trustees of a township, or treasurer of a municipal corporation, interested in the support of such child, or the directors of a county infirmary in which she becomes a charge, when sufficient security is not offered to save such county, township, or municipal corporation from expense, may make complaint in behalf thereof, against him who is accused of begetting such child, or take up and prosecute a complaint begun by the mother of such child."

Section 12135, General Code, provides:

"The directors of a county infirmary, trustees of a township, or treasurer of a municipal corporation, in which a bastard child becomes a charge, may sue and recover upon any bond given to the state in a proceeding against such child's reputed father. The provisions of this chapter, and all the remedies herein allowed, apply to all cases in which the infirmary directors, trustees of townships, or treasurers of municipal corporations, are authorized to commence or prosecute a complaint against the reputed father of an illegitimate child."

In order for an agreement between the mother and father of a bastard child for full satisfaction to the mother to be binding it must be signed and acknowledged before a justice of the peace, court or judge, in a proceeding in bastardy.

If the mother refuses to bring such action, or fails to prosecute an action of bastardy and the child becomes a public charge the officers of the political division that is interested in the support of the child may maintain the action.

There is no provision authorizing such officers to enter into an agreement with the father for the support of the child. Section 12134, General Code, contains this clause:

"* * * when sufficient security is not offered to save such county, township or municipal corporation from expense, may make complaint in behalf thereof, * * *"

The right of such officers to maintain such action for bastardy depends upon whether sufficient security is offered to save the public from the expense of keeping such child. This contemplates that the officers may take security for the support of the child without bringing a bastardy proceeding. The father is legally bound to support his illegitimate child, and if he enters into an agreement with a person or public institution to keep said child and he binds himself to pay for such keeping, such a contract would be legal and binding upon the father.

The officers of the county, township, or municipality who are put to expense in keeping a bastard child may enter into an agreement with the father to pay for such expense and may take a bond or other security from him that such child will not be of expense to the public. Such an agreement may be entered into without the bringing of a proceeding in bastardy.

Your questions will be answered in the order in which asked:

First: The illegitimate children born of girls who are inmates of the girls' industrial home, should be placed in the children's home of the county or district of the residence of the mother before her confinement in the institution. If such county has no children's home, then the county commissioners of such county should be notified to provide for them. The father of the child should be required to pay for the keeping of the child.

Second: The officers of the institution, or of the county, township, or municipality, that is supporting and keeping such child may enter into an agreement with the acknowledged father for the payment of the expense of keeping such child.

Third: Your board through its officers, or through the managing officer of the institution should notify the superintendent of the children's home, or the county commissioners to provide for such dependent children.

Fourth: The children of married women should be turned over to the father, if he is the husband of the mother, and is able to provide for such child. In the case of unmarried women in the hospitals for the insane, the child should be disposed of as in case of children of the inmates of the girls' industrial home.

Fifth: If your board or the managing officer of an institution, have knowledge, or have reason to believe that the criminal laws of the state have been violated in connection with the wards of the state, the facts should be laid before the prosecuting attorney of the county wherein the offense was committed, so that the same may be investigated and prosecutions brought by him as he deems best.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

486.

PAROLE OF PRISONERS—CONTROL OF BOARD OF ADMINISTRATION AND CONTROL OF COURT—PROCEDURE FOR RELEASE OF PAROLE—SUSPENSION OF SENTENCE TO PENITENTIARY OR REFORMATORY AND TO OTHER INSTITUTIONS.

Under the act of 99 O. L. 339, the jurisdiction of the board of administration over persons sentenced to the penitentiary or the reformatory, is exclusive and when the sentence to these institutions is suspended and the defendant placed upon probation, the court has no further control.

When such defendants are placed on probation, triplicate copies of the judgment shall be made; one for the board, and one for the warden of the penitentiary or for the superintendent of the reformatory to which defendant was sentenced.

Until these copies have been made, and forwarded by the clerk, and the board has sent back to the clerk, the order for parole, and until the requirements of the board have been complied with, the defendant cannot lawfully be released.

The board has no control over persons sentenced to institutions other than the penitentiary or reformatory. The defendant so sentenced and paroled is under the supervision of the court through the probation officer appointed by it.

COLUMBUS, OHIO, July 1, 1912.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—You have requested my opinion as to the construction of the sections of the General Code of Ohio governing the parole of persons who have pleaded or been found guilty of felonies or misdemeanors, and sentence suspended by the court. Your request is particularly as to the jurisdiction of your board over such persons and the method to be followed in granting paroles.

I shall quote the sections of the General Code covering this matter, following, however, the sequence in which the said sections appeared as originally enacted in 99 Ohio Laws, 339, as an act entitled, "An Act to Provide for Probation of Persons Convicted of Felonies and Misdemeanors," passed May 9, 1908.

I call attention to the title of the act as it discloses the purpose of the legislature to provide for the probation of two classes of persons, 1st, those convicted of felonies; 2nd, those convicted of misdemeanors.

The sections, in the order indicated, are:

Section 13706 (Section 1 of the act, first part).

> "In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse, or correctional institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence and place the defendant on probation in the manner provided by law."

Section 13707 (Section 1 of the act, second part).

"This subdivision of this chapter shall not affect the laws providing the method of dealing with juvenile delinquents nor shall detention in an institution for such juvenile delinquents be considered as imprisonment."

Section 13708 (Section 2 of the act).

"No person convicted of murder, arson, burglary of an inhabited dwelling house, incest, sodomy, rape without consent, assault with intent to rape, or administering poison shall have the benefit of probation."

Section 2210, (Section 3 of the act).

"Whenever a sentence to the penitentiary or to the Ohio state reformatory has been imposed, but the execution thereof has been suspended and the defendant placed on probation, the effect of such order of probation shall be to place said defendant under the control and management of the board of managers of the institution to which he would have been committed, and he shall be subject to the same rules and regulations as apply to persons paroled from said institutions after a period of imprisonment therein."

Section 2211, (Section 4 of the act).

"It shall be the duty of the board of managers of the penitentiary and the board of managers of the state reformatory to furnish the clerk of courts of each county with blank forms setting forth the requirements and conditions used by them in the parole of prisoners of their institutions, but amended so as to be applicable to cases of probation."

Section 13709, (Section 5 of the act, first part).

"When it is the judgment of the court that the defendant be placed upon probation and under the supervision of the penitentiary or the reformatory, the clerk of such court shall forthwith make a full copy of the judgment of the court, with the order for the suspension of the execution of sentence thereunder and the reasons therefor, and certify them to the warden of the penitentiary as to the superintendent of the reformatory, to which the court should have committed the defendant but for the suspension of sentence."

Section 13710, (Section 5 of the act, second part).

"Upon entry in the records of the court of the order for the probation provided for in the next preceding section, the defendant shall be released form custody of the court as soon as the requirements and conditions required by the board of managers have been properly and fully met."

Section 2212, (Section 6 of the act).

"The board of managers of the penitentiary and the board of managers of the Ohio state reformatory shall appoint and employ one or more officers, to be known as field officers, for their respective institutions, who shall carefully look after the welfare of all persons whose sentences have been suspended, and those who have been paroled from said institutions after a period of imprisonment therein."

Section 2213, (Section 7 of the act).

"Whenever a person placed upon probation, as aforesaid, does not conduct himself in accordance with the rules and regulations of the institution in whose charge he has been placed, a field offier thereof may, without warrant or other process, arrest said person and convey him to said institution, and the board of managers may, after a full investigation and a personal hearing, because of such conduct, forthwith terminate the probation and cause said person to suffer the penalty of the sentence previously suspended. Any person under probation who has violated the conditions of his probation shall, upon order of the board of managers, be subject to arrest in the same manner as in the case of an escaped convict. In all cases of such termination of probation, the original sentence shall be considered as beginning upon the first day of imprisonment in the institution."

Section 2214, (Section 8 of the act).

"Whenever it is the judgment of the board of managers that a person on probation has satisfactorily met the conditions of his probation, they shall cause to be issued to said person a final discharge from further supervision; provided that the length of such period of probation shall not be less than the minimum or more than the maximum term for which he might have been imprisoned."

Section 2215, (Section 9 of the act).

"The auditor of state shall issue his warrant upon the state treasurer to pay from the appropriation for conviction and transportation of convicts, the salaries and necessary expenses of the field officers, upon presentation of itemized vouchers properly approved by the board of managers. In the same manner shall be paid the salaries and expenses of the parole officers of the boys' industrial school and the girls' industrial home."

Section 13711, (Section 10 of the act).

"When the sentence of the court or magistrate is that the defendant be imprisoned in a workhouse, jail or other institution, except the penitentiary or the reformatory, or that the defendant be fined and committed until such fine be paid, the court or magistrate may suspend the

execution of said sentence and place the defendant on probation, and in charge of a probation officer named in such order, in the following manner:

"1. In case of sentence to a workhouse, jail or other correctional institution, the court or magistrate may suspend the execution of the sentence and direct that such suspension continue for such time, not exceeding two years, and upon such terms and conditions as it shall determine;

"2. In case of a judgment of imprisonment until a fine is paid, the court may direct that the execution of the sentence be suspended on such terms as it may determine and shall place the defendant on probation to the end that defendant may be given the opportunity to pay such fine within a reasonable time, provided that upon payment of such fine, judgment shall be satisfied and the probation cease."

Section 13712, (Section 11 of the act, 1st sentence).

"In case of probation provided for in the next preceding section, no order for probation shall be issued, unless the court or magistrate designate some suitable person to act as probation officer in such case, who shall make written reports, at designated periods not less than once each month, concerning the conduct of a probationer in his charge."

Section 13713, (Section 11of the act, 2nd sentence).

"A probation officer shall be entitled to necessary expenses in the performance of his duty, and, for cause hereafter named, without warrant or other process, at any time until the final disposition of the case, may re-arrest a person so placed in his care, and bring him before the court; or the court or magistrate, may issue a warrant for the re-arrest of such person and thereupon revoke and terminate such probation, if the interest of justice requires, and if the court or magistrate has reason to believe from the report of a probation officer or otherwise than the probationer is violating the conditions of his probation, engaging in a criminal practice, or has become abandoned to improper associates or a vicious life."

Section 13714, (Section 11 of the act, 3rd sentence).

"Upon such revocation and termination, the court or magistrate may pronounce judgment at any time after such suspension within the longest period for which the defendant might have been sentenced, whereupon the judgment shall be in full force and effect, and the person shall be delivered over to the proper officer to serve his sentence."

Section 13715, (Section 11, 4th sentence).

"The court or magistrate, at any time during the term of probation, may revoke or modify its order of execution of sentence, and, at any time, when the ends of justice will be subserved thereby and the good conduct and reform of the person so held in probation shall warrant it, may terminate the period of probation and discharge the person so held. If the court or magistrate has not revoked the order of probation, the defendant, at the end of the term of probation, shall be discharged."

The entire act, as quoted above, plainly falls in these provisions:

First. Sections 13707, 13707 and 13708 (Sections 1 and 2 of the act) which specify the cases in which probation may be granted and the exceptions.

Second. Sections 2210, 2211, 13709, 13710, 2212, 2213, 2214 and 2215, (being Sections 3 to 9, inclusive, of the original act) which relate solely to the parole of persons who have been sentenced to the penitentiary or Ohio state reformatory, and the execution of such sentence suspended. I take it that these sections are so clear as to the jurisdiction of your board over this class of persons as to require no explanation. As the statute expresses it (Section 2210, Section 3 of the act):

> "Whenever a sentence to the penitentiary or to the Ohio state reformatory has been imposed, but the execution thereof has been suspended and the defendant placed on probation, *the effect of such order of probation shall be to place said defendant under the control and management of the board of managers of the institution to which he would have been committed, and he shall be subject to the same rules and regulations as apply to persons paroled from said institutions after a period of imprisonment therein.*"

after a person has been sentenced to the penitentiary or reformatory and has had his sentence suspended and been paroled, he comes completely under the control and jurisdiction of your board, and the officials of the county where he was convicted have no further control over him in any contingency. If he violates his parole, or disregards the conditions under which the same was granted, or fails to observe the rules and regulations of your board, then your board deals with him, not the court which imposed sentence.

Third. Sections 13711, 13712, 13713, 13714 and 13715 (being sections 10 and 11 of the act). These sections relate solely to defendants who have been sentenced to a workhouse, jail or other institution, *except the penitentiary or Ohio state reformatory,* or who have been fined and ordered committed until payment of the fine. With this class of persons your board has no concern. There is no provision for any control being exercised by your board, nor is your board required to take any action whatever in regard to these cases. They never reach you. The defendants paroled under these statutes are under the supervision of the court imposing the sentence, through the probation officer appointed by it (Section 13712). The duties of such probation officer, and his compensation, are provided by Section 13713. Both Sections 13712 and 13713 were included in Sections 11 of the original act. Such probation officer is, of course, a distinct official from your "field officer" provided by Sections 2212 et seq.; this probation officer would have no authority over persons under your control under Sections 2210 et seq., nor would your board have any authority over such officer, just as your field officers would have no authority whatever over persons paroled under Sections 13711 et seq.

BRIEFLY—The jurisdiction of your board over persons sentenced to the penitentiary or reformatory is exclusive; with the parole of persons sentenced to other institutions you have no concern.

Now, as to the method to be followed in the parole of persons who have pleaded or been found guilty and sentenced to the penitentiary or reformatory and sentence suspended, the last clause of the last sentence of Section 13706 is—"such court or magistrate may suspend the execution of the sentence and place the defendant on probation *in the manner provided by law.*" The provisions of law in this regard are Sections 13709 and 13710 above quoted. By Section 13709 the clerk of courts

> "* * * shall forwith make a full copy of the judgment of the court, with the order for the suspension of the execution of sentence thereunder, and the reasons therefor, and certify them to the warden of the penitentiary or to the superintendent of the reformatory, to which the court would have committed the defendant but for the suspension of sentence."

Since the establishment of your board it is now necessary for the clerk to make these copies *in triplicate;* one copy to be certified to your board and one to the warden of the penitentiary or to the superintendent of the reformatory, as the case may be. This should be insisted upon in all cases that the records may at all times be complete.

But the parole is not complete, and the defendant is not entitled to be released sumply upon the making of the entry of the order for probation provided by Section 13709, for Section 13710 provides:

> "Upon entry in the records of the court of the order for the probation provided for in the next preceding section, the defendant shall be released from custody of the court *as soon as the requirements and conditions required by the board of managers have been properly and fully met."*

And it will be noted that the defendant cannot lawfully be released until all the requirements of this section have been met, that is, until the proper certified copies, provided by Section 13709 have ben forwarded by the clerk, as above indicated, and until the board of administration has sent back to the clerk of the court the order for the parole and the defendant has complied with the conditions fixed by said board. This is necessary in all cases, and, until the clerk has received from said board the order of parole of the defendant and had the requirements and conditions of the same properly and fully met and complied with, the defendant cannot lawfully be released.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

549.

INSTITUTION FOR FEEBLE MINDED YOUTH—RULES FOR ADMISSION AND DISCHARGE OF INMATES—BOARD OF ADMINISTRATION.

The admission of inmates to the institution for feeble minded youth is governed by Sections 1891-1904 *of the General Code. All must be admitted under rules prescribed by the board of administration.*

The manner of discharge or releases of inmates is covered by statute and the rules for the same must therefore be formulated by the board of administration by virtue of Sections 1838 *and* 1841 *of the General Code.*

COLUMBUS, OHIO, July 18, 1912.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge yours of July 16, 1912, in which you ask "won't you please be kind enough to give the board of administration an opinion as to its powers concerning the admission and discharge of inmates at the institution for "feeble minded youth?"

The question of admission is a simple one; and only requires that the statutes contained in Chapter 3, Title V, Division 11, of the General Code be followed. Sections 1891 to 1904, inclusive, of the General Code fix every step as to admission and maintenance.

Some can be admitted under contract—Section 1900; some as public charges; some who are non-residents of the state—Section 1893; adults are admitted the same as insane to the state hospitals (Section 1902).

All must be admitted *under rules prescribed by the trustees formerly* (now your board), and blanks must be filled in as prepared by your board, or approved by it. The probate judge is required to *endorse said applications* (Section 1901).

DISCHARGE. The statutes are silent as to the manner of discharging the inmates. It would be almost impossible for the legislature to enact laws regulating the release of persons in such an institution.

Owing to the various grades, ages, mental and physical condition of these wards of the state, the question of their release must be left *absolutely to the governing powers* in charge thereof.

Your board, on August 15, 1911, assumed the duties and powers of the former trustees, and have *"full power to manage and govern"* this institution. Section 1835 of the General Code.

Section 1838 of the General Code says:

> "The board, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions."

Section 1841 of the General Code says:

> "The board shall have power to regulate the admission and *discharge* of the pupils and inmates in said several institutions, etc."

I, therefore conclude that you must, as a board, establish rules for the discharge of pupils from this institution. They should be sensible, practical rules, containing plain language. They should be reasonable and in line of the objects for which the institution was established. If such rules are promulgated by you, the courts will not interfere in their enforcement.

In the case of Gustavus Doren, et al., vs. Joseph Fleming, 6 C. C. n. s. 81 the circuit court of Franklin county said:

> "Courts will not assume authority to prescribe rules for the government of state institutions. Such authority arises only when it is shown that a rule or rules in force are unreasonable and subversive of the purpose for which such institutions are established."

This case, as you know, pertained to this very institution.

There being no statute regulating discharges, you and your chief officer or superintendent must formulate rules.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

574.

PRISONER—VIOLATION OF PAROLE OR CONDITIONAL RELEASE—REINCARCERATION FOR BALANCE OF TERM AFTER DATE OF DELINQUENCY.

Under Section 2174 of the General Code, a prisoner who violates the conditions of his parole or conditional release, must be required to serve the entire maximum term of his imprisonment, deducting therefrom only the time from the date of his first commitment to the date of his declared delinquency.

COLUMBUS, OHIO, August 8, 1912.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Your communication dated August 6, 1912, in which you request my interpretation of Section 2174 of the General Code of Ohio, was duly received.

Said Section 2174, which you desire interpreted, reads as follows:

> "A prisoner violating the conditions of his parole or conditional release, having been entered in the proceedings of the board of managers and declared to be delinquent, shall thereafter be treated as an escaped prisoner owing service to the state, and when arrested, shall serve the unexpired period of the maximum term of his imprisonment. The time from the date of his declared delinquency to the date of his arrest shall not be counted as a part of time served."

After a very careful consideration of the above quoted section which your board desires interpreted, I arrived at the following legal opinion: Any prisoner having been paroled by your board or conditionally released from the institution, and violating the conditions thereof, and said violator having been by your board declared to be delinquent, from the date of such proceedings of the board whereby the said paroled prisoner was declared to be delinquent and such proceedings entered by your board, shall thereafter be treated as "an escaped prisoner owing service to the state," which means that he shall again be arrested, or caused to be arrested, and again committed to the institution from which he was paroled, and when so arrested shall serve the unexpired period of the maximum term of his imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as a part of the time served.

My interpretation of the following part of said section, viz., "shall serve the unexpired period of the maximum term of his imprisonment," means that said prisoner, upon his re-arrest and re-imprisonment, shall serve such time in said penal institution, commencing with the date on which he was declared to be a delinquent under said section, as would constitute the difference between the maximum period of his sentence of imprisonment, deducting therefrom the time the prisoner had actually served after having first been received at the institution, plus the time said prisoner had been out of the institution after his release on parole until the date he was declared a delinquent. For example, if a prisoner was received at the Ohio penitentiary January 1, 1910, to serve a term of five years, and was on January 1, 1911, paroled by your board and released from said institution under said parole, and remained a paroled prisoner until January 1, 1912, at which time he was by your board declared to be a delinquent, upon his arrest and return to the institu-

tion he would be required to serve a term of three full years from the date of his arrest; the three years being, as I interpret the law, the unexpired period of the maximum term of said prisoner's imprisonment.

In other words, said section means that after a prisoner has been paroled and been declared a delinquent as provided in said section, he is compelled to serve all the unexpired period of the maximum term of his imprisonment, no difference how long after said prisoner has been declared a delinquent until he is re-arrested, he being entitled only to have credit on said maximum term of his imprisonment for the time actually served from the date of his original imprisonment to the date of his being declared a delinquent as provided therein, the latter part of the section depriving him of the time from the date of his declared delinquency to the date of his arrest as part of time served.

In other words, I am of the opinion that the legislature intended that a prisoner, or prisoners, paroled from your institution should be credited with the time they are actually out of the institution under their parole during good behavior or until your board has declared them delinquent, and that from the time of the re-arrest they shall not have credit for any good time but serve the full unexpired period of the maximum term of their imprisonment, and by said section they are made subject and to be treated as an escaped prisoner owing service to the state and may be re-imprisoned whether the term for which he was sentenced to imprisonment in the penitentiary has or has not expired after the date of the declaring of said prisoner to be a delinquent and the time of his arrest.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

608.

FISCAL YEAR OF OHIO BOARD OF ADMINISTRATION FOR ANNUAL REPORT TO GOVERNOR ENDS NOVEMBER 15th.

Under Sections 1870 *and* 260 *of the General Code, the fiscal year, with respect to the annual report to the governor, closes on the fifteenth day of November each year.*

COLUMBUS, OHIO, August 29, 1912.

HON. E. F. BROWN, *Fiscal Supervisor of The Ohio Board of Administration, Columbus, Ohio.*

DEAR SIR:—Your communication dated August 26, 1912, in which you request an opinion from me to your board as to whether the fiscal year referred to in Section 1870 of the General Code means the fiscal year of the state, November 15th, or August 15th, which is the end of the twelve-month period covering the administration of your board, is duly received, and in reply I desire to say that under the provisions of Section 1870 of the General Code:

> "The board shall annually report to the governor its acts, proceedings and conclusions for the fiscal year, giving a complete financial statement of the various institutions under its control. * * *"

Section 260 of the General Code provides as follows:

> "In all the departments, institutions, public works and buildings of the state, the fiscal year shall close on the fifteenth day of November

of each year, and all annual reports from such departments and institutions shall be made with reference to that date. On the fifteenth day of February of each year, the auditor of state shall ascertain from the books in his office the balances of all appropriations made for the departments and institutions, and the balances of all other funds remaining in the state treasury on that day, and immediately thereafter report them to the general assembly if in session."

It is clear, from a reading of the last above quoted section, that all departments and institutions which would include *all* the state institutions over which your board has jurisdiction, so far as the fiscal year is concerned, would be amenable to the said section, and that your board would be governed by the provisions thereof, and, taken in conjunction with Section 1870, above quoted, it is my opinion that the fiscal year referred to in said section means the fiscal year of the state, *November 15th,* and not August 15th, the time specified in Section 1835, of the General Code referring to the management and control of the state institutions.

The legislature in fixing the fiscal year for all departments and state institutions did so with a view of the appropriations for the maintenance of the same, that same might be properly and justly made, and the fact that your board assumed its duties on August 15, 1911, has no reference to the fiscal year as fixed by said Section 260 of the General Code.

I am, therefore, of the legal opinion that in making your annual report it is your duty to have the same cover the fiscal year ending November 15th of each and every year during its legal existence without regard to the time of the commencement of the powers and duties of the said board.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

664.

PRISONER—MAJORITY VOTE OF BOARD OF MANAGERS OF PENITENTIARY SUFFICIENT TO REVOKE PAROLE AND REINCARCERATE A PRISONER.

In the absence of a contrary rule of law, a majority of a board acting in a public concern, is sufficient to consummate a decision.

Under 2174 *General Code, the vote of three members of the board of managers of the penitentiary is sufficient to revoke a parole and reincarcerate a prisoner.*

COLUMBUS, OHIO, October 3, 1912.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of September 17, 1912, which is as follows:

"A prisoner was paroled. Afterwards he was returned to the penitentiary for the violation of parole. Upon hearing, three votes of the board were cast to revoke said parole and one vote against. Does the parole stand revoked?"

It is a general rule of law that all acts of public boards are made effective and valid by a majority vote of the various members thereof on any given proposition. This rule obtains and prevails, unless the statute prescribes a different rule and fixes a different number of votes in particular instances. Then the statutory provisions govern and the general rule must yield thereto.

Is there anything in the statutes on return of paroled prisoners which fixes the number of votes of the board required to revoke a parole? I find no provisions on the subject. If the legislature had intended to require *all* the members of the board to concur in such action, it would have said so. The last clause of Section 2169 does provide that in *granting* paroles, all the members shall concur. But this provision applies solely to the *granting* of paroles; and was intended as a check against releasing prisoners and turning them loose on society, *unless each member concurred in the release.*

Section 2170 of the General Code, on the subject of paroles, says:

> "All prisoners on parole shall remain in the legal custody and under control of the board of managers and subject to be taken back within the enclosure of the penitentiary. Such board may make and enforce rules and regulations with respect to the taking and re-imprisonment of convicts under parole. Its written order certified by its secretary shall be sufficient warrant for all officers named therein to return to actual custody a conditionally released or paroled prisoner; and such officers shall execute such orders as in cases of ordinary criminal process."

The prisoner, under this section, is, as a matter of law, still in prison bounds, subject to any rules and regulations as to his retaking and retention, which the board may make. It only requires an order from the board to reincarcerate him.

Section 2174 of the General Code provides:

> "A prisoner violating the conditions of his parole or conditional release, having been entered in the proceedings of the board of managers and declared to be delinquent, shall thereafter be treated as an escaped prisoner owing service to the state, and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment. The time from the date of his declared delinquency to the date of his arrest shall not be counted as a part of time served."

This section, in connection with the one above quoted, gives this board of four members the power to declare a convict delinquent, treat him as an escaped prisoner, and order him retaken to complete sentence. Such procedure is often necessary to be enforced almost summarily, in the interests of society and the law, and could easily be blocked if it required unanimous action of the board. No such intention could be logically imputed to the legislature, or it would have said so on such an important matter.

In the case of State ex rel. vs. Wilkesville Township, in 20 O. S., 288, at page 293 the court says:

> "By the rule of the common law, where power or authority is delegated to two or more persons to transact business of *a private nature,* all interested in the power must concur in its due execution. But in matters of public concern, though it is necessary for all to be present, yet the majority will conclude the minority."

In 29 Cyc., 1434, it is stated:

"Where official authority is conferred upon a board or commission, composed of three or more persons, such authority may be exercised by a majority of the members of such board."

"Where a tribunal or board composed of three or more persons is empowered by the statutes to do any public act, it is necessary upon common law principles that all be present and then the act of the majority is the act of all."

(Slicer vs. Elder 2 West. Law Month., 90.)

"Where a body or board of officers is constituted by law to perform a trust for the public or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done; the act of the majority is the act of the body."

(19 Am. and Eng. Encyc. of Law., 465.)

"The law is well settled that where authority is conferred by law upon three or more persons to execute a public trust or agency, and in the execution thereof all are assembled, or had notice and opportunity to be present, the act of a majority is binding, unless the statute expressly requires the concurrent action of all."

(36 L. R. A., 746.)

OPINION. In my opinion, then, the provisions of Section 2169 of the General Code requiring the concurrence of each member of the board in the granting of a parole has nothing to do with the action of the board in revoking the parole and reincarcerating the prisoner. To hold that it requires the concurrent vote of the full board to declare a convict paroled delinquent would, in my opinion, be too far reaching, and would enable a single member of the board to prevent the return of a recalcitrant. The statutes must be strictly construed, and in the absence of any provision, the ordinary rules of law must prevail and govern. I, therefore, give it as my opinion that a majority of this board of four, or three members thereof, can revoke a parole and order the reincarceration of a prisoner.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

715.

INSTITUTION FOR FEEBLE MINDED—APPROPRIATION FOR NEW LEVEE—EXCEPTION FROM REQUIREMENT OF ADVERTISEMENT AND BIDS.

The appropriation bill, providing a sum for the construction of a new levee for the institution for feeble minded youth, incorporates the exception specified in Section 2314 General Code, with reference to the penitentiary, whereby said institution may construct improvements without advertisements and bids. Said levee may, therefore, be built without such advertisement and bids.

COLUMBUS, OHIO, November 12, 1912.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of November 2, 1912, in which you give the following statement of facts, namely: That the last legislature made an appropriation of $7,929.80 to be expended for a new levee on the bottom lands, the same to be found under the appropriations made for the institution for feeble minded youth, 102 O. L., 388, and you request my opinion as to whether or not your board can proceed and construct said levee and pay for same out of said appropriation without advertising for bids for the construction of same as provided in Section 2314 of the General Code of Ohio.

In reply thereto I desire to say that I have carefully investigated the appropriation bill containing the partial appropriation for the last three-quarters of the fiscal year ending November 15, 1911, and the first quarter of the fiscal year ending February 15, 1912, found on pages 14 et. seq., of 102 Ohio Laws; and the appropriation bill containing the appropriation referred to in your letter; and also the general appropriation bill found in 102 O. L., 393 et seq., which contains the general appropriations for the institution for feeble minded youth for the purpose of paying liabilities incurred on and after February 16, 1912; and I find under said appropriations for the institution referred to in your letter this clause (on page 408 of 102 O. L.)

> "Provided, that the exceptions to the Ohio penitentiary, Section 2314 of the General Code of Ohio, shall be extended to the institution for feeble minded."

And, also, on page 26, under the appropriation for said institution, is found the same proviso.

Section 2314 of the General Code, referred to in your letter, provides as follows:

> "Before entering into contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board or other authority by law charged with the supervision thereof, shall make or cause to be made the following: full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style

required with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof."

From a close inspection of the appropriation bills above referred to, it is plainly to be seen that the legislature in making said appropriations for the said institution had in mind that where the appropriation is to be used for a specific purpose, the said section referred to in the General Code relating to contracts for the erection, alteration or improvement of a state institution, or buildings or additions thereto, or for supplies and materials, therefor, the aggregate cost of which would exceed $3,000.00, should be advertised, and the things required therein be followed so that it would afford bidders all needful information, should not apply.

I am further of the legal opinion that, as stated in your letter, the improvement of the sort referred to in your letter when specifically provided for by the legislature, and furthermore specifically provided that the same exceptions would apply to the appropriation therein specified as applies to the penitentiary were enacted with the specific intent in view that your board should construct, or expend the appropriation for the specific purposes therein named without advertising as provided in Section 2314; and particularly so in the case referred to in your letter, because of the fact that the improvement of the land by the construction of a levee could not be considered as a general improvement in an institution either in the form of general buildings or some particular buildings by additions, etc.

I, therefore, advise you that in view of the proviso made as above referred to in relation to the appropriations for the specific purposes named by the last legislature in the appropriation bills above referred to, that your board has ample authority under private contract, without advertising, to proceed to construct said levee and pay for the same out of the appropriations made for the said purpose.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(State Board of Visitors for State Benevolent and Correctional Institutions.)
178.

CONSTITUTIONAL AMENDMENT MAKING WOMEN ELIGIBLE TO APPOINTIVE OFFICES—ELIGIBILITY OF ALL LEGAL RESIDENTS.

The suggested amendment to the constitution making all legal residents of legal age, eligible to appointive offices, is competent to effect its purpose of making women eligible to such offices.

COLUMBUS, OHIO, March 6, 1912.

MISS BLANCH VIGNOS, *President, State Board of Visitors for State Benevolent and Correctional Institutions, Canton, Ohio.*

DEAR MADAM:—In reply to your letter of January 24, 1912, which is as follows:

> "I would like to have your opinion on the following substitute for Article XV, Section IV, to be submitted to the constitutional convention.
>
> "'No person shall be eligible to an elective office in the state unless possessed of the qualifications of an elector, but any legal resident of the United States, of legal age shall be eligible to an appointive office.'
>
> "What we wish is to place women on an equality with the men on all boards, and also make it constitutional for them to serve as superintendents of institutions for women and girls. We have used the United States so that we need not be confined to the state to select good women as the heads of our institutions. Will this change provide for all these things without any other change of the constitution? We will be glad for any suggestions, and an early reply will be appreciated."

I wish to state that in my opinion the substitute proposed by you for Article XV, Section IV, of the present constitution would effectually accomplish your purpose without any further amendments to the constitution.

Section IV of Article XV of the present constitution is as follows:

> "No person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector."

and your amendment would undoubtedly so alter this provision as, in case it should be adopted, to entirely take away the inhibition against women of legal age, and residents of the United States, being appointed as superintendents of state institutions.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(State Board Canal Arbitration.)

121.

DUTIES OF STATE BOARD OF CANAL ARBITRATION IN FIXING VALUATION OF PART OF MIAMI AND ERIE CANAL LEASED TO CINCINNATI—NO DEDUCTION FOR CONDUIT TO BE BUILT BY CITY—NO CONSIDERATION OF INTENDED USES—ACTUAL VALUE.

In performing the duty of fixing the value of that part of the Miami and Erie canal to be leased to Cincinnati under 102 *O. L.* 108, *the board of canal arbitration are not permitted to deduct the cost of constructing a conduit for the purpose of taking care of existing water leases.*

Were there any ambiguity in the act as to this question, the princple that a deed is to be construed most strongly against the grantor and that in particular a deed from the state must be construed in favor of the state in the light of the facts existing, would decide the question.

There is no ambiguity, however. The lease of the canal to the city is upon the solicitation of and entirely for the benefit of the city, and the construction of the conduit was made a condition to the granting of the lease to the city of Cincinnati.

The lease is subject to no easement in behalf of the lessees of water rights and the state might abandon their contracts at any time, and therefore no value may be deducted for such an easement. Furthermore, the water rights are a source of definite income and in reality a value to be considered in themselves.

The board shall in accordance with the act, fix the actual value of the property as it exists at the time, without regard to the purposes for which the property is intended to be used.

COLUMBUS, OHIO, February 9, 1912.

HONORABLES C. V. HARD, FELIX A. JACOBS, OSCAR W. NEWMAN, *State Board Canal Arbitration, Cincinnati, Ohio.*

GENTLEMEN:—Through Mr. John A. Deasy, my special counsel at Cincinnati, I am informed that certain questions have arisen in the performance of your duties in ascertaining and fixing the values of that part of the Miami and Erie Canal to be leased to Cincinnati under the provisions of the act passed May 15, 1911, 102 O. L., 168, and my opinion is asked upon the following questions:

> "First, as the canal bill provides for the construction of a conduit by the city of Cincinnati for the purpose of taking care of the water leases, etc., now in existence and which the state of Ohio is bound to provide for, the question arises as to whether the cost of constructing such conduit is to be deducted from the valuation placed upon the canal property by the board of arbitration.
>
> "Second, the real estate appraisers employed by the city appraised the canal property simply as a building proposition. In other words, as if a real estate man was to take the whole strip and divide it up into lots suitable for whatever purposes the surrounding property at different points is used for. From this valuation they wish to have deducted anywhere from 25 to 40 per cent. of the appraised value, on account of the expense a real estate investor, under the above conditions, would be under for the purpose of putting the property on the market; that is to say, they wish to deduct the cost of advertising, filling in streets, making crossings, etc. * * *"

The act found in 102 O. L., 168 is as follows:

"Permission shall be given to the city of Cincinnati, in the manner hereinafter provided, to enter upon, improve and occupy forever, as a public or boulevard, and for sewerage, conduit and if desired for subway purposes, all of that part of the Miami and Erie canal which extends from a point three hundred feet north of Mitchell avenue to the east side of Broadway in said city, including the width thereof, as owned or held by the state, but such permission shall be granted subject to all outstanding rights or claims, if any, with which it may conflict, and upon the further terms and conditions of this act.

"Section 2. Such permission shall be granted upon the further condition that said city, in the uses aforesaid of all or any portion herein mentioned of such canal, shall construct or cause to be constructed suitable and sufficient works for a convenient outlet for the discharge of the water of said canal, at a point three hundred feet north of Mitchell avenue, so as not to obstruct the flow of water through the remaining part of such canal, nor destroy nor injure the present supply of water for mechanical or commercial purposes. Such outlet shall be constructed in accordance with plans and specifications to be drawn or approved by the state engineer, and the city of Cincinnati shall give bond in such sum as shall be prescribed by the state board of public works, to be approved by the attorney general for the faithful performance of the work.

"And such permission shall be granted upon the further condition that said city adopt and construct appropriate works for the purpose of supplying water to the lessee users of said water along that portion of the canal to be abandoned, in order to and for the purpose of enabling the state fully to carry out and discharge the obligations now resting upon it by virtue of certain contracts now subsisting and in force between it and said lessee water users, during the remainder of the terms of said contracts, in the same quantity and under the same conditions and at the same rate of rental provided for in said contracts, and provided further that during the period of construction of a street or subway or of appropriate works for the purpose of supplying water to the lessee users of said water, as herein provided said city of Cincinnati shall cause no cessation or diminution of the supply of water to the said lessee water users to which they are entitled under their respective contracts or leases with the state of Ohio except insofar as such cessation or diminution of such supply of water may be absolutely necessary.

"Section 3. Upon the passage of this act the governor shall appoint three (3) arbitrators, none of whom shall be residents of Hamilton county, who shall, whenever the council of said city decided that such canal be used for all the purposes mentioned in Section one (1) hereof, proceed to act as provided in Section four (4) of this act.

"Section 4. The arbitrators thus selected shall constitute a board of arbitration whose duty it shall be, without reasonable delay, to ascertain and fix the actual value of the property of the state specified in Section one hereof. The annual rental to be paid by the city of Cincinnati to the state for the use of such property shall be a sum equal to four (4) per cent. of such valuation so ascertained and fixed. Such board of arbitrators shall report the valuation as above provided for in writing to the governor and the council of such city respectively. And such board of arbitration shall have authority to hear the testimony of

witnesses as to the fair value of such canal so to be taken by said city, to employ such assistants as it may deem necessary, and to fix their compensation, and to incur the expenses incident to its work. Each arbitrator shall receive for his services not exceeding twenty-five dollars a day for the period of time actually employed in the work of acting as arbitrator on such board; and all such expenses and such compensation shall be paid by said city, one-half of the amount so paid to be a credit upon the first installment of rent payable under the lease that may be entered into pursuant to this act. In case of any vacancy occurring in such board from any cause, such vacancy shall be filled in the same manner in which the appointment so becoming vacant was made. Provided that all rentals accruing to the state under this act, shall be paid into the state treasury to the credit of the general revenue fund.

"Section 5. Upon approval by resolution of the council of said city of the amount of such valuation as fixed by such board of arbitration or a majority of them, and upon the governor being satisfied that the interests of the state are fully protected and that the valuation placed upon such property is adequate, which fact shall be endorsed upon such lease by the governor, he shall execute and deliver to the city of Cincinnati a lease for ninety-nine years, renewable forever, which lease shall not be assignable, of such canal so to be taken by the said city of Cincinnati for the uses and purposes before mentioned, and upon the terms and conditions specified in this act; and such lease shall contain covenants on the part of said city for payment of said rental to the state in equal semi-annual payments during such term of such lease, and for compliance with this act, and on the part of the state for quiet enjoyment by said city of Cincinnati of the demised premises, and the attorney general shall prepare such lease, and such lease shall contain the further provision that if said city of Cincinnati fails, neglects or refuses to perform all or any of the terms and conditions of said lease or fails, neglects or refuses to comply with each and every of the terms and provisions of this act, the said lease shall become null and void and said city and the users and occupiers of said property shall forfeit all rights in said lease and in the property located upon the land therein described and such other covenants and provisions as, in the judgment of the attorney general, will protect the interests of the state.

"In case the state of Ohio shall at any time build a canal of not less than nine-foot gauge from Lake Erie to the Ohio river at Cincinnati, the city of Cincinnati shall reimburse the state for the amount of its expenditure in procuring right of way either by purchase or condemnation, or both, for said canal, from a point three hundred feet north of Mitchell avenue, through the Mill creek valley, to the Ohio river."

The sections quoted above are the only sections of the act that need be considered in answering your inquiries, and as, in my opinion, your questions are definitely answered by the act itself, it seemed best for me to copy the same sections in toto.

Answering your first question it will be noted that the primary object of this act is to grant to the city of Cincinnati that portion of the Miami and Erie canal which extends from a point three hundred feet north of Mitchell avenue to the east side of Broadway in the city of Cincinnati, for the purposes mentioned in the act. This grant is to be made upon certain definite conditions to be per-

formed by the city, and the act provides that if the city fails or neglects to perform each and all said conditions the grant (or lease) shall become null and void. See Section 5 of the act:

> "if said city of Cincinnati fails, neglects or refuses to comply with each and every of the terms and conditions of said lease or fails, neglects or refuses to comply with each and every of the terms and provisions of this act, the said lease shall become null and void * * *"

It therefore becomes important to ascertain the nature of the conditions of the act and its terms and provisions with which the city of Cincinnati is to comply. These are, in their order:

(1) The grant is "subject to all outstanding rights or claims, if any, with which it may conflict" (Section 1). This provision was necessary on account of an outstanding lease to the Miami & Erie Canal Transportation Company, which lease is claimed by the state to be void, but has not as yet been so decided by the courts.

(2) "Said city, in the uses aforesaid of all or any portion herein mentioned of such canal, shall construct or cause to be constructed suitable and sufficient works for a convenient outlet for the discharge of the water of said canal, at a point three hundred feet north of Mitchell avenue, so as not to obstruct the flow of water through the remaining part of such canal, nor destroy or injure the present supply of water for mechanical or commercial purposes. Such outlet shall be constructed in accordance with plans and specifications to be drawn or approved by the state engineer, *and the city of Cincinnati shall give bond in such sum as shall be prescribed by the state board of public works, to be approved by the attorney general* for the faithful performance of the work." (Section 2.)

(3) "Said city shall adopt and construct appropriate works for the purpose of supplying water to the lessee users of said water along that portion of the canal to be abandoned, in order to and for the purpose of enabling the state fully to carry out and discharge the obligations now resting upon it by virtue of certain contracts now subsisting and in force between it and said lessee water users, during the remainder of the terms of said contracts, in the same quantity and under the same conditions and at the same rate of rental provided in said contracts, and provided further that during the period of construction of a street or subway or of appropriate works for the purpose of supplying water to the lessee users of said water, as herein provided, said city of Cincinnati shall cause no cessation or diminution of the supply of water to the said lessee water users to which they are entitled under their respective contracts or leases with the state of Ohio except insofar as such cessation or diminution of such supply of water may be absolutely necessary." (Section 2.)

(4) "All annual rental to be paid by the city of Cincinnati to the state for the use of such property shall be a sum equal to four (4) per cent. of such valuation so ascertained and fixed." (Section 4.)

(5) "*All such expenses* (i. e. the expenses of the arbitration) *and such compensation* (i. e. the compensation of the arbitration) *shall be paid by said city, one-half of the amount so paid to be a credit upon the first installment of rent payable under the lease* * * *." (Section 4.)

(6) "All rental accruing to the state under this act, shall be paid into the state treasury to the credit of the general revenue fund." (Section 4.)

(7) "In case the state of Ohio shall at any time build a canal of not less than nine-foot gauge from Lake Erie to the Ohio river at Cincinnati, the city of Cincinnati shall reimburse the state for the amount of its expenditures in procuring

right of way either by purchase or condemnation, or both, for said canal, from a point three hundred feet north of Mitchell avenue, through the Mill creek valley, to the Ohio river." (Section 5.)

In answering the first question it may be helpful to consider the situation of this property at the time this grant was made. The state was the owner in fee simple of the portion of the Miami and Erie canal, in Cincinnati, described in this act. The property was and is very valuable. The city desires to have the state grant this property to it, to be used, presumably for street or boulevard, sewerage and subway purposes. The experience of the state in making grants of this character had been very unfortunate, to say the least. As, see the cases of State vs. Railway Company, 53 O. S. 189, and State vs. Cleveland Terminal and Valley Railroad Company et al., 85 O. S.—and other cases. I refer to these two cases for in each grant of canal land was made by the state presumably to be used only for public purposes. In one instance, the grant was to the city of Cincinnati; in the other, to the city of Cleveland.

In each instance the property, in some manner, passed with remarkable celerity into possession of railroad companies and was used for railroad purposes. On account of this diversion, by indirect means, of valuable state property to private corporations, without any consideration being paid to the state for the same, the state has become very jealous of all such grants, and the question has been raised as to the right of the legislature to give away the valuable property of the state either directly or indirectly. Therefore, the proposition to have the legislature grant this property to the city of Cincinnati did not meet with approval when first presented to the legislature. The board of public works was opposed to it, as the state had for years been selling surplus water of this part of the canal to persons and corporations in Cincinnati by contracts in the form of leases; the rentals accruing on these leases went into the state treasury and the property in that way has been a continuous source of revenue to the state. All of these water users, naturally, were desirous of having their leases continue, and, therefore, opposed the grant to Cincinnati, which would destroy their means of water supply.

Aside from the fact that the city of Cincinnati wanted this property and that it could be made into a boulevard which would be a benefit to the city, there was no reason for the state to part with the property, on the contrary, the interest of the state was to hold on to it as it was of great present value, a distinct source of revenue to the state, and, perhaps, essential to the state for future use. There was also the matter of good faith on the part of the state not to terminate its contracts with the water users, unless the interest of the public required it to do so. Therefore, the first act introduced in the legislature providing for this grant to Cincinnati was defeated. This act, I am informed, contained no provision for the city to build the necessary works to supply the water necessary to carry out the state's contracts. Afterwards the present bill was introduced and it was passed with the understanding that the state should be put to no expense whatever as to this property, that the city should pay a fair rental for the same, and was to provide the necessary means for supplying the water to fulfill the contracts of the state so long as they lasted. This act is to be construed as a contract by which the state owning valuable income-producing property, and having no reason to part with the same, agreed at the urgent solicitation of the city of Cincinnati which desired the state to grant the same to the city, and, at the express request of the city, the grant is made, not as an outright purchase where value is paid for what is received, but in the form of a perpetual lease—without any cash consideration—divesting the state of the title as effectually as a grant in fee simple, and simply upon the condition that the city shall pay a fair rental upon the actual value of the property and upon the other conditions enumerated above.

Coming now to construe this act, in the light of what has been said, it is difficult to conceive how the construction that the cost of the conduit, which the act provides must be built by the city, is to be deducted from the valuation placed upon the canal property by your board, can be read into this act, or deduced from its terms. Certainly there is no language to that effect in the act itself, nor can it reasonably be implied. In fact, the implication is directly opposite. If *A.* owns property which he is using for certain purposes and *B.* desires that property, and A. grants it to B. upon certain conditions to be performed by B., it is presumed that B. will perform the conditions at his own cost; in other words, that A. will not give the property to B. upon certain conditions to be performed by B. and then perform the conditions himself.

In case of grants by the state the rule is that such grants are to be strictly construed against the grantee. Any ambiguity of the terms must operate in favor of the state.

> "The words of a private grant are taken most strongly against the grantor, though if the meaning cannot be discovered the instrument is void. But this rule is reversed in cases of public grants. They are construed strictly in favor of the government on grounds of public policy. If the meaning of the words be doubtful in a grant designed to be of general benefit to the public, they will be taken most strongly against the grantee and for the government, and therefore should not be expended by implication in favor of the former beyond the natural and obvious meaning of the words employed. In Central Transporting Co. vs. Pullman's Palace Car Co., the supreme court of the United States says:
>
> "'By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solocitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public agent any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms.'
>
> "Any ambiguity in the terms must operate in favor of the government. Whatever is not unequivocally granted is taken to be withheld. Whether the grant be of property, franchises or privileges, it is conconstrued strictly in favor of the public; nothing passes but what is granted in clear and explicit terms; but it will be construed reasonably for the purpose the act contemplates. The object and aim of all governments is to promote the happiness and prosperity of the people by which it is established; and it cannot be assumed that the government intended to diminish its power of accomplishing the end for which it was created. It is therefore never implied that it has surrendered, in whole or in part, any of its soverign power of legislation for the general welfare of police, of taxation, or of eminent domain. *In its grants of land there is implied no covenant to do or not to do any further act in relation thereto.*"

(Lewis Sutherland" Statutory Construction, Vol. 2, Sec. 548.)

(See also, Coosaw Mining Co.vs. So. Carolina, 144 U. S., 555; Water Company vs. Knoxville, 200 U. S., 22; Water Company vs. Hutchinson, 207 U. S., 393. and other cases.)

Therefore. assuming for the sake of argument that an ambiguity or uncertainty exists as to whether the city can deduct from the actual value of this property to the state the cost of building the conduit, this ambiguity or uncertainty must be resolved in favor of the state.

As stated before, I can discover no ambiguity in the act, the grant is made to the city subject to certain conditions to be performed by the city, in fact, the grant absolutely depends upon the performance by the city of this condition. If it had been the intention of the legislature to grant this property to the city and to agree on the part of the state that the state would pay the expense necessary to construct the conduit (or to allow the city to deduct the cost of the same from the valuation of the property) the legislature would have so provided in unequivocal terms. In grants of this character no covenants to do or not to do certain things can be implied, and, in the absence of express language to the effect that the state is to have the actual value of its property reduced by whatever amount the city may expend in building this conduit (which it is to build as a condition precedent to this grant) no such implication can arise. This is made all the clearer by considering Section 4 of the act. It is there expressly provided:

> "All such expenses and compensation shall be paid by the said city, *one-half of the amount so paid to be a credit upon the first installment of rent payable under the lease.* * * *"

This is the only place in the act where the proposition is made for the credit to the city on account of any expenditures made by it in complying with the conditions of the grant. All other expenses, therefore, must be borne by the city— Expressio est unius est Exclusio Alterius— I shall not burden you with citations of this very familiar maxim.

It has been suggested that the deduction from the cost of this conduit from the actual value of the land is proper on account of the rule that where land is subject to an easement this may be shown in the reduction of its value, in appropriation proceedings. This may be a rule of law applicable to proceedings in eminent domain, but as this property is subject to no easement I do not see how it can be applicable to this case. If it has been assumed that the contracts by the state to supply persons and corporations along this part of the canal with water constitute easements against said property of the state, then such assumption is entirely without foundation. All contracts entered into by the state for supplying water from the canals to persons or corporations may be terminated by the state at anytime without becoming liable to damages thereby.

> "Every lease, grant or conveyance of water power shall contain a reservation and condition, that the state, or its authorized agents, may, at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with, and injuriously affect the navigation of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or omitted to the purchaser or lessee, his heirs or assigns."

Section 23, of the act found in 38 O. L., 87.)

This act has been construed by the supreme court many times, and it has been held that no easement can be acquired by property owners by user or contract in the waters of the canals. One citation is sufficient as to this.

> "3. Owners of lands abutting on a canal, incidentally benefited by the water it affords, or its facilities for drainage, have no property interests in these incidental benefits, and cannot, on such ground, enjoin the abandonment of the canal, or claim compensation therefor.
>
> "4. Contracts made with the board of public works or other agents of the state, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the state and no action will lie against the state for damages resulting from such abandonment."

(Syllabii in case of Vought vs. Railroad Company, 58 O. S. 123.)

> "What has just been said applies with equal, if not greater, reason to the claim of Shotwell. It is certainly settled by the decisions just cited, that a contract made by the state through its board of public works with an individual for the use of the water of any of its canals for a period of years, terminates with the use of the canal, and that it is under no obligation to keep up the canal for such purpose after the canal has become useless for the purpose of navigation and has been abandoned. The agents of the state have no power to make such a contract in the name of the state or to bind it thereby."

(Id. Opinion at page 161.)

This effectually disposes of the proposition that this land, as far as the state is concerned, is subject to an easement, but again, for the sake of argument, assuming these contracts to supply water amount to easements, then, so far as the state is concerned, these easements (contrary to the usual variety of easements) are of distinct value to the serviente state, they are the source of a definite, continuous income.

Now, by what canon of construction can it be asserted that the existence of these income-producing contracts decrease the value of the property to the state? My conclusion is that there is no foundation whatever in the act itself, or in the conditions surrounding its passage, or in custom or in law, upon which to base an interpretation that the amount which the city of Cincinnati may expend in building this conduit is to be deducted from the actual value of the property of the state as fixed by your board.

My answer to your second question will be brief. Section 4 of the act provides it shall be your duty "to ascertain and fix the *actual* value of the property of the state specified in Section 1 hereof." This means that you are to fix the actual value of the property as it exists today. I cannot see that it would be any more proper for you to assume that this property is to be used as a building proposition than it would be for you to assume that it is to be used by some railway for an entrance to Cincinnati. If you are to assume anything as to its use, you should assume it will be used for the purposes contemplated by the act. It occurs to me that the purposes for which the property is to be used can have no influence in determining the question as to its actual present value. The question to be determined by you is simply what is the value of this property today no matter for what it may be used.

I do not take it that you wish me to attempt to lay down rules to be applied by you in fixing this valuation. The matter rests largely in your discretion and you are authorized to proceed by whatever method will be most satisfactory in assisting you to arrive at a correct conclusion at to the actual value of this property as it now exists.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(Engineer Canal Land Department.)

237.

CANAL LANDS—POWER OF BOARD OF PUBLIC WORK TO REVOKE PRIVILEGES OF SALE TO NEWARK, OHIO, AND SELL IN ACCORDANCE WITH LATER ACT.

The terms of the act passed March 28, 1911, to permit the city of Newark, Licking county, Ohio, to use and occupy as a street a part of the bed of the Ohio canal (102 O. L. 177) have not been complied with and the act is not yet effective.

By virtue of the express terms of said act, privileges extended thereby may be revoked and the same land be sold in accordance with "An act to abandon certain portions of the Ohio canal and to provide for the selling and leasing of the lands connected therewith;" 102 O. L. Page 293.

COLUMBUS, OHIO, April 4, 1912.

HON. E. E. BOOTON, *Engineer Canal Land Department, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of February 27, 1912, where you inquire as follows:

> "The Seventy-Ninth General Assembly of Ohio passed an act giving the city of Newark, Licking county, 'the right to use and occupy for street purposes that part of the bed and banks of the Ohio canal in such city on what is known as Canal street, extending from the east side of Front street to the west side of Sixth street within the limits of such city.'
>
> "By the terms of the act the city is to fill and level the same, lay and maintain an 18 inch pipe wherever the same is filled up, and upon the further conditions 'that such city, whenever said part of such canal is desired by the state of Ohio for *any use, purpose* or *sale,* it shall give notice in writing through its board of public works or any other board having the management and control of such canal, to the city of Newark, Ohio, that the state of Ohio has revoked the privilege therein granted, which the state reserves the right to do without any consideration to such city, while the city is required to restore the canal to its condition at the time of taking over the same. Said city of Newark is to pay 4 per cent. interest upon the value of said canal property as fixed by a commission to be appointed by the governor.' (See O. L. 102 p. 177.)
>
> "It will be observed that the benefits to be derived by the city of Newark are of a doubtful character, since it apparently leaves the situation subject to the will of the board of public works.
>
> "We are fully convinced from conversation held with numerous citizens of Newark that the city will never take over the canal property on anything like a fair valuation, and this would be the case even though the law was not inconsistent.
>
> "You will note that the act did not even abandon the property for canal purposes.
>
> "In view of the facts set forth above, we are of opinion that the best interests of the state will be subserved by leasing or selling the lands in question in accordance with the act entitled *'An act to abandon certain portions of the Ohio canal,* etc.,' (See O. L. 102, pages 293-294).

"Such a lease or sale should be made subject to an easement for street crossings over the canal property, which is about all that the average citizen of Newark is interested in.

"The property in question is worth probably $40,000.00, and if you find it can be legally done, the board would like to have your opinion so that it may take some action in reference to disposing of the property at its next regular meeting which will be held on April 9th."

In reply thereto I desire to say that the act passed by the Seventy-Ninth General Assembly entitled "An act to permit the city of Newark, Licking county, Ohio, to use and occupy as a street a part of the bed of the Ohio canal within the city limits of said city," 102 O. L. 177, provides as follows:

"Section 1. That there is granted to the city of Newark, Licking county, Ohio, the right to use and occupy for street purposes that part of the bed and banks of the Ohio canal in such city on what is known as Canal street, extending from the east side of Front street to the west side of Sixth street, within the limits of such city, and for that purpose to fill and level the same, but upon and subject of these conditions, viz.: That such city shall, at its expense, lay and maintain at or near the present bottom of the canal bed an iron pipe of the diameter of not less than one and one-half feet, wherever the bed of such canal is filled up, through which to conduct and flow from the canal bed at the west side of Sixth street to the east side of Front street in such city, water to supply the factories or establishments which now use, or which may hereafter apply to, use water for manufacturing purposes, and provides on demand the usual facilities for connections with such pipe; and upon the further condition that such city whenever said part of such canal is desired by the state of Ohio for any use, purpose or sale, it shall give notice in writing through its board of public works or any board having the management and control of such canal, to the city of Newark, Ohio, that the state of Ohio has revoked the privilege herein granted which it hereby reserves the right to do without any consideration to such city, then such city shall within six months after such notification restore such canal within the limits aforesaid, to its present condition and remove such pipe; and upon the further condition that such city of Newark by its council shall accept this grant and its conditions by ordinance duly passed and approved.

"The said city shall pay to the state for the use of said property an annual amount equal to four (4) per cent. of its actual value, so long as such property is so occupied by said city. Such value shall be determined by three commissioners to be appointed by the governor and the rights granted under this act shall not become effective until after the governor shall have approved such valuation.

"Such money so paid into the state shall be credited to the general revenue fund.

"Section 2. That such grant and privilege shall continue in force until the notification aforesaid is given."

The act passed by the Seventy-Ninth General Assembly, entitled "An act to abandon certain portions of the Ohio canal and to provide for the selling and leasing of the lands connected therewith," 102 O. L. page 293, provides in part as follows:

"Section 1. That the portion of the Ohio canal commencing at the junction of said canal with what is known as the Dresden Side Cut near Trinway in Muskingum county, Ohio, and extending thence southwesterly to the southerly end of the aqueduct across Raccoon creek in Newark, Licking county, Ohio, also that portion of said Ohio canal commencing at the flume that connects Buckeye lake with said Ohio canal at the west end of said reservoir in Fairfield county, Ohio, and extending thence southwesterly and southerly with the line of said Ohio canal to its junction with the Ohio river, near Portsmouth in Scioto county, Ohio, be and the same is hereby abandoned for canal purposes.

"Section 2. That the state board of public works and the chief engineer of public works, acting jointly, shall cause such surveys to be made of said canal property as in their judgment is necessary for the purpose of carrying out the provisions of this act, together with such maps and plats of the same as will facilitate the selling or leasing of said canal lands, which plats shall be preserved as permanent records in the office of the state board of public works.

"Section 3. As soon as such surveys and plats have been completed, the state board of public works and the chief engineer of public works, acting as a joint board, shall proceed to appraise, and lease or sell, as they may deem for the best interest of the state, subject to the approval of the governor and attorney general, said canal lands, except as hereinafter noted, in strict conformity with the various provisions of the statutes of Ohio relating to the leasing and selling of state canal lands, except that the grant of such leases shall be for a term of not less than fifteen nor more than twenty-five years, and that the bed and banks of said abandoned canal property may be included in any lease of such canal lands.

"Section 8. Nothing in this act shall interfere with any leases, rights or privileges heretofore granted by the state of Ohio and in force at the date of approval of this act."

It appears that the portion of the Ohio canal described in the first quoted act as follows: "that part of the bed and banks of the Ohio canal in such city on what is known as Canal street, extending from the east side of Front street to the west side of Sixth street, within the limits of such city" is also included in the "act to abandon certain portions of the Ohio canal and to provide for the selling and leasing of the lands connected therewith."

The first quoted act became a law May 28, 1911, and the second quoted act became a law on June 7, 1911. The first act above quoted was enacted by the general assembly upon certain conditions, first, that the city of Newark by its council should accept the grant and its conditions by ordinance duly passed and approved. It follows, therefore, that if the city of Newark has not yet accepted said grant and its conditions by ordinance of its council duly passed and approved, then said act by virtue of that fact is not yet effective.

Said act contained the further provision:

"The said city shall pay to the state for the use of said property an annual amount equal to four (4) per cent. of its actual value, so long as such property is so occupied by said city. Such value shall be determined by three commissioners to be appointed by the governor and the rights granted under this act shall not become effective until after the governor shall have approved such valuation."

If such valuation has not been so determined as provided, and has not been approved by the governor, then it follows that the provisions of said act are not yet effective by reason of such non-compliance.

Said act also contains the following provisions:

> "Whenever said part of such canal is desired by the state of Ohio for any use, purpose or sale, it (the state) shall give notice in writing through its board of public works or any other board having the management and control of such canal, to the city of Newark, Ohio, that the state of Ohio has revoked the privilege herein granted, which it (the state) hereby reserves the right to do without any consideration to such city."

It, therefore, follows that even if said act has become effective by reason of compliance with all the afore-mentioned conditions nevertheless the state can revoke and set aside any interest or rights granted to the city of Newark in the manner specified in said act, to-wit, "Whenever said part of such canal is desired by the state of Ohio for any use, purpose or sale, it (the state) shall give notice in writing through its board of public works or any other board having the management and control of such canal, to the city of Newark, Ohio, that the state of Ohio has revoked the privileges herein granted, which it (the state) hereby reserves the right to do without any consideration to such city."

In conclusion, it is my opinion that the board of public works can legally revoke the privilege granted to the city of Newark in the manner above specified, and that after so doing the board of public works can legally sell or lease the said portion of the Ohio canal as described in the first above quoted act in the manner provided in said act entitled " an act to abandon certain portions of the Ohio canal and to provide for the selling and leasing of the lands connected therewith."

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Girls' Industrial Home.)

633.

INMATES OF GIRLS' INDUSTRIAL HOME—MARRIAGE DOES NOT AFFECT CONTROL OF BOARD OF ADMINISTRATION.

The statutes give the board of administration the legal control and custody of any inmate of the girls' industrial home from the time of commitment until legally discharged, or until such inmate attains the age of twenty-one, regardless of whether or not such inmate is married at the time of commitment or becomes married during the term of the board's control.

MISS CHARLOTTE DYE, *Chief Matron, Girls' Industrial Home, Delaware, Ohio.*

DEAR MADAM:—I beg to acknowledge receipt of your letter of July 13, 1912, in which you request my opinion upon the following question:

> "Who is to have jurisdiction over girls from the girls' industrial home, who are married but are still under twenty-one years of age?"

In reply thereto I desire to say that Section 2112 of the General Code provides that,

> "A girl committed to the home (meaning the girls' industrial home) shall be kept there, disciplined, instructed, employed and governed under the direction of the trustees, until she is either reformed or discharged, or bound out by them according to their by-laws *or has attained the age of twenty-one years, etc.*"

Section 2112-1 of the General Code provides:

> "That the board of trustees of the girls' industrial home shall establish rules and regulations under which inmates may be conditionally released upon parole in legal custody and under the control of the trustees, *and subject at any time to be returned to the institution.* * * *"

Section 2112-2 provides that,

> "The trustees may enforce such rules and regulations and return any inmate so upon parole. Their written order, certified by the superintendent, shall be sufficient warrant for any officer named therein to arrest and return such inmate to the home. An officer named therein shall be under duty to arrest and return to the girls' industrial home paroled inmate named therein."

From a reading of the above sections, it is clear, first, that any girl duly committed to your institution may be detained therein until she attains the age of twenty-one years; second, that the board of administration, as successors to the board of trustees of your institution, shall establish rules and regulations under which inmates may be conditionally released upon parole but still under the legal custody and control of said board, and subject at any time to be returned to the institution; and third, that the board may enforce such rules and regulations and return any inmate so upon parole.

Section 2116 of the General Code provides that the trustees may bind out as an apprentice or servant, any girl committed to their charge for a term not longer than until she arrives at the age of eighteen years, etc.

Section 2119 provides that the trustees shall be the guardians of each girl so bound or held to service, shall take care that the terms of the contract are faithfully fulfilled, that she is properly treated, and shall cause any grievance to be redressed.

It is plain from a reading of the above sections that the board of administration may adopt such rules and regulations as may be best for the conduct and discharge of inmates of said institution, and may discharge an inmate at any time before attaining the age of twenty-one years, if convinced that said inmate is reformed.

There can be no question but that the board of administration has the legal control and custody of any inmate of said institution from the time of the commitment thereto until legally discharged by it according to law, or until such inmate attains the age of twenty-one years. The fact, as stated in your inquiry, that a girl, an inmate of your institution, under twenty-one years of age, is married, does not change the legal status of said inmate as far as the jurisdiction of the board of administration, over her, is concerned. I apprehend from what you say in your communication that such a case would arise where an inmate of your institution had been bound out as an apprentice or servant and while so away from your institution became married; or where an escaped inmate of said home became married during the time of her absence after her escape; but in neither event, in my opinion, does the fact of such marriage change the legal status of said inmate, and she would still remain under the jurisdiction of the board of administration, and said board would have the legal right to have any such married inmate of the home returned thereto and retained until discharged according to law and the rules as above stated.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Superintendent, Athens State Hospital.)

590.

INSANE HOSPITAL—INMATES AS WITNESSES—POWER OF COURT TO SUBPOENA BEFORE GRAND JURY OR COMPEL SUPERINTENDENT TO PERMIT APPEARANCE.

Under the present status of the law the mere fact that a person is confined as an inmate of an insane asylum does not constitute him incompetent as a witness.

If a subpoena to testify before the grand jury is issued to an inmate of an insane asylum the superintendent may or may not in his discretion permit the inmate to obey the subpoena without liability for his action.

The court has inherent discretionary right, however, to issue a writ of habeas corpus ad testificandum to said superintendent, and to order him to bring in said patient for testimony before the grand jury and the superintendent is obliged to obey such writ.

COLUMBUS, OHIO, August 21, 1912.

DR. O. O. FORDYCE, *Superintendent Athens State Hospital, Athens, Ohio.*

DEAR SIR:—Your letter of August 9, 1912, received. You inquire:

> "First. Whether or not the prosecuting attorney has a legal right to subpoena before the grand jury of Athens county, patients confined in the Athens state hospital?
>
> "Second. In case the prosecuting attorney has the right, what constitutes legal service?
>
> "Third. In case I fail to honor the subpoena by refusing permission to patients to appear before the grand jury what penalty, if any, can be inflicted upon me?"

In order to answer your inquiry it will be first necessary to determine whether any patient confined in your institution and under your charge is a competent witness in any court proceedings, civil or criminal. If incompetent and incapable of being a witness at all, the prosecuting attorney would have no right to subpoena and you would have the right to refuse to honor the subpoena.

There was a period when lunatics were treated as incapable of being witnesses at all. However, this indiscriminate rule of exclusion has been modified. The law no longer excludes absolutely whenever some degree of derangement or imbecility exists; it asks whether the aberration is, in the instance in hand, sufficient to negative trustworthiness. (Wigmore on Evidence.)

True the General Code of Ohio, Section 11493, provides that "all persons are competent witness except those of *unsound mind* * * *." It may be claimed that this statute makes a person of unsound mind absolutely incompetent as a witness in Ohio, but in the case of Pittsburgh Ry. Co. vs. Thompson, 82 Fed. Rep., 720, Justice Lurton said:

> "But the question remains, who is a person of unsound mind? That the person has been found insane and is an inmate of an asylum, affords prima facie evidence that he is of unsound mind, within the meaning of the provision, and operates to throw the burden of proving competency upon the party offering him. This was the ruling of Judge Ricks, who tried this case, and, in our judgment, was a correct exposition of the

law. Whether he was so unsound in mind and memory as to be totally incapable of testifying is as open a question under this statute as at the common law. The statute is but a declaration of the common law. To suppose that it was meant to disqualify every person who is of any degree of unsoundness would bring about an intolerable condition of things, and, under such circumstances, it is not to be presumed that the common law was intended to be altered or modified to any greater extent than indicated by a reasonable construction of the words of the statute. To say that a person of unsound mind is incapable of testifying is but to state the general rule of the common law. But at the common law the unsoundness must be such as that he is incapable of understanding the nature of an oath or giving a coherent statement touching the matter upon which he is examined. * * * We think the court did not err in permitting him to be heard as a witness."

True this case decided by Lurton, J., was a civil case, but his reasoning and the doctrine laid down therein is applicable to criminal cases as well.

Justice Campbell, in the case of R. vs. Hill, 2 Den. & P. C. C., 254, said:

"It has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases in proof either of guilt or innocence; *it might also cause serious difficulties in the management of a lunatic asylum.* I am, therefore, of the opinion that the judge must, in all such cases, determine the competency and the jury the credibility."

Justice Chapman, in the case of Kendall vs. May, 10 All., 64, said:

"Persons who are affected to such an extent that it is expedient to place them in insane hospitals or under guardianship often possess sufficient knowledge of events that took place in their presence to make them useful and trustworthy as witnesses."

It is everywhere accepted now that derangement, in order to disqualify, must be such as substantially negatives trustworthiness upon the subject of testimony. (Wigmore on Evidence, Vol. 1, 492.)

I am of the opinion, therefore, that the fact that a person is a patient of your hospital does not, of itself, disqualify him as a witness. He may or may not be a competent witness in a given case, under the laws of Ohio.

Having decided that patients of your institution may be competent witnesses, I come now to the question. Can they be subpoenaed before the grand jury? The form of document used for this purpose is a writ of subpoena which commands the witness to appear at a certain court on a certain day to testify what he knows in a certain case between parties in civil cases, or it commands the witness to appear before the grand jury to testify at a certain time. If the desired witness is confined in a jail or asylum a subpoena to him would be of no avail, since he cannot obey it, and his custodian would still lack authority to bring him; accordingly, a writ to the custodian is necessary.

Section 13665 of the General Code gives authority to issue a subpoena to the keeper of a penitentiary, workhouse or prison, to bring the person named in the subpoena before the court; but there is no statutory authority given to issue a subpoena to the superintendent of insane asylums. The custody and control of the superintendent of an insane asylum of the patients is just as complete and

absolute as the control of the warden of the penitentiary and superintendent of workhouses and prisons over prisoners, and a subpoena issued to a patient thereof could not be obeyed by the patient unless the superintendent would consent to the bringing of the patient before the grand jury. I see no legal objections to having service upon your patients in the usual manner, and you consenting to allow the patients to go before the grand jury of your county. However, the question remains, in case for any reason you desire to not honor the subpoena and refuse to grant permission to the patient to testify, would you have a legal right so to do? Wigmore on Evidence, Vol. 4, Sec. 2199, says:

> "If the desired witness is confined in jail, a subpoena would be of no avail, since he could not obey it and his custodian would still lack authority to bring him; accordingly, a writ to the custodian is necessary, ordering the prisoner be brought to give testimony; this writ of habeas corpus ad testificandum, grantable in discretion at common law, is now usually authorized by statute as a matter of course."

The legislature has enacted a statute authorizing the bringing in of prisoners confined in penitentiaries and prisons to testify in criminal cases, but has not seen fit to grant this right, by statute, to bring patients from the insane asylums to testify in criminal proceedings or before the grand jury. However, I think the court has an inherent right, in the interest of justice, to order the superintendent of an asylum to bring before the court and the grand jury, witnesses who may be competent to testify before the court or grand jury. The supreme court of Ohio, in the case of State vs. Townley, 67 O. S., 21, held:

> "Every court has inherent power to do all things which are reasonably necessary for the administration of justice, within the scope of its jurisdiction."

It is held in the case of O'Mara vs. Lamb, 166 Fed. Rep., 71, that:

> "1. A writ of habeas corpus ad testificandum may be properly issued to obtain the testimony of a person confined in jail or in a state hospital for the criminal insane.
>
> "2. A writ of 'habeas corpus ad testificandum' is not the high prerogative writ of habeas corpus, but is merely the ancient common law precept to bring a prisoner into court to testify, and is the process of the court from which it issues, although it emanates from a judge in chambers."

The court in this case said:

> "The rule of the common law has always been that this writ (habeas corpus ad testificandum) *is grantable in discretion.*"

In the case of O'Mara vs. Lamb a writ of habeas corpus ad testificandum was issued to the superintendent of the Matteawan state hospital of New York, directing him to bring the body of Henry K. Thaw before the common pleas court at Pittsburgh, Pa., forthwith, and there to have him present to testify in the proceedings before said court. A hearing was had and a writ was refused because it did not clearly appear that there was immediate necessity for his testimony. It was plainly shown that his competency to testify was open to very serious question and it is not to be presumed that any court would issue a writ of habeas

corpus to bring before it a person to testify, who, when brought, could not testify.

I am of the opinion, therefore, that the court of common pleas of Athens county has an inherent right to bring before the grand jury any competent witness who may be confined in your asylum, not in obedience to any subpoena that may be issued to a patient and served upon you, but in case a subpoena was issued and you did not desire to honor it and, therefore refused permission for the patient to go before the grand jury then, in that event, a petition could be filed by the prosecuting attorney, praying the court to make an order that a writ be issued to you, directing you to bring before the court the person named therein and have him present to testify as required by the court. You could resist this order by showing that the person desired as a witness was not competent, by reason of derangement of his mental facilities, or perhaps, you could show that it would be injurious upon the patient to have him called as a witness, and the court could make an order in reference thereto, and you would be bound by the ruling of the court in the premises.

However, answering your questions specifically, I hold, first, the prosecuting attorney has the legal right to subpoena before the grand jury, insane patients when confined in the Athens state hospital, and it is discretionary with you whether you permit the patient to obey the subpoena.

I further hold that in a proper case, in the interest of justice, the court of patient to appear before the grand jury and no penalty can be inflicted upon you for such refusal.

I further hold that in a proper case, in the interest of justice, the court of common pleas has an inherent right, by proper proceedings, to compel you to bring before the court and grand jury, in criminal proceedings, any competent witness who may be subpoenaed from your institution.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio State Penitentiary.)

567.

PRISONERS—PENALTY FOR VIOLATION OF PAROLE OR CONDITIONAL RELEASE—MAXIMUM TERM WITHOUT DEDUCTION FOR GOOD TIME.

By Section 2174 providing for the reincarceration of prisoners who violate paroles or conditional releases, it is intended to subject such to the penalty of serving out the entire maximum term of their imprisonment without deductions for former or later "good time."

COLUMBUS, OHIO, July 24, 1912.

HON. T. H. B. JONES, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your communication dated July 18, 1912, received, in which you request me to interpret Section 2174 of the General Code, which reads as follows:

> "A prisoner violating the conditions of his parole or conditional release, having been entered in the proceedings of the board of managers and declared to be delinquent, shall thereafter be treated as an escaped prisoner owing service to the state, and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment. The time from the date of his declared delinquency to the date of his arrest shall not be counted as a part of time served."

You also state in your letter that:

> "It has been the custom under former administrations, and also the present one, to figure the time in this way: The prisoner is given credit for every day from the date of his incarceration to the date on which the parole is revoked by the board. The 'good time' which the prisoner has earned during this period is then figured and taken from him. After he is recommitted to prison, he is permitted to gain "good time" at the rate provided by law for his term, the same as any other prisoner, and as if he had not violated his parole. For example:
>
> "John Smith No. 23456 comes in January 2, 1910, to serve 5 years for burglary. Under the statute a 5 year man gains 10 days 'good time' a month, or 600 days on the sentence. John Smith is paroled on January 2, 1911, and his parole is revoked on January 2, 1912, two years after his incarceration. During these two years he has gained 240 days 'good time' which are now taken from him. When he was first committed to prison his 'short time' was arrived at by adding 3 years and 4 months to the date of his arrival, which gave May 1, 1913. We now add 240 days to May 1, 1913, which makes his new 'short time' expire January 1, 1914 (240 days later). If his conduct continues good during the remainder of his imprisonment he leaves the prison 360 days before the full five years have elapsed."

In reply to your inquiry I desire to say that the section referred to in your communication is very plain and easy to interpret—it simply means that—

When a prisoner has been paroled or conditionally released from the Ohio penitentiary, and has broken or violated the conditions of his parole or con-

ditional release, and the board of administration has entered in its proceedings that fact, and declared the prisoner so violating this parole or conditional release to be delinquent, such prisoner shall thereafter be treated as an escaped prisoner owing service to the state, and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment.

The custom followed by former and the present administrations, as set forth in your letter, is *absolutely in violation* of said section.

When a prisoner violates a parole or conditional release under the section above referred to the legislature has imposed a penalty upon him for so doing, and that penalty is that said prisoner shall be returned to the prison and be *ineligible* to receive any further concessions as to good time, but that he shall be kept therein for the *"unexpired period of the maximum term of his imprisonment,"* and when the legislature specifically provided the unexpired period of the maximum term of said prisoner's imprisonment, it meant "entire period," and not any deductions for good time after his return to the prison.

I, therefore, suggest to you, as warden of the Ohio penitentiary, that in case the custom which you state has been followed by the past and present administrations has not been changed, that you at once notify the board of administration of the unlawful practice and desist from discharging any such prisoners now or hereafter confined in your institution as such violators of paroles or conditional releases, until they have served out the full unexpired term of their imprisonment for which they were sentenced.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

735.

SENTENCE TO PENITENTIARY—SENTENCES BEGINNING AT SAME DATE SERVED CONCURRENTLY UNLESS OTHERWISE STATED IN CERTIFICATE OF COMMITMENT.

When a prisoner is received at the penitentiary with two certificates of commitment, for different offenses of the same date for one year, each sentence begins with the date of entry and they run concurrently.

COLUMBUS, OHIO, December 2, 1912.

HON. T. H. B. JONES, *Warden, Ohio State Penitentiary, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge your letter of even date wherein you request my opinion as follows:

> "John Smith is received at the Ohio penitentiary with three different certificates of sentence of one year each, two of them for burglary and larceny and the other for horse stealing. No mention is made on these certificates of any intention on the part of the court to make him serve one sentence at the expiration of the other, and the three commitments bear the same date.
>
> "Kindly advise me if it is my duty to discharge this prisoner after he has served a one year sentence or to hold him and oblige him to serve two other one year sentences after he has served the first. In other words, do these three sentences run concurrently?"

It is well settled that a sentence of imprisonment must be definite and certain and that it is only required to state the duration and the place of imprisonment. It is not necessary to specify the time upon which the imprisonment is to commence.

The general rule of laws, applicable to the situation presented, is stated in 12 Cyc. 967 as follows:

> "When term begins: (1) in general. The general rule is that the term of imprisonment for which the convict is sentenced begins with the first day of actual incarceration in the prison to which his sentence has consigned him."

and on page 968 of the same volume, the following appears;

> "When terms are concurrent. In the absence of a statute, if it be not stated in either of two or more sentences imposed at the same time, that the imprisonment under any of them shall take effect at the expiration of the others, the periods of time named will run concurrently and and the punishment be executed simultaneously. The fact that the terms of imprisonment are to be successive must be clearly and expressly stated."

I am unable to find any statute in Ohio which has definite bearing on this case, and therefore, conclude that these three sentences imposed at the same time, without specification of the time of their commencement, will be served concurrently. As the prisoner in this case was given three sentences on the same date, of one year each, it is your duty to discharge him after he has served one year's sentence.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Superintendent, Cleveland State Hospital.)

287.

CLEVELAND STATE HOSPITAL—COSTS OF HABEAS CORPUS PAYABLE BY STATE—SUPERINTENDENT NOT PERSONALLY LIABLE.

Under Section 12189 *General Code, the costs of a habeas corpus proceeding for release of an inmate of the Cleveland state hospital, are chargeable to the state and the superintendent of said hospital may therefore, not be held for the same.*

COLUMBUS, OHIO, April 10, 1912.

CHARLES, H. CLARK, *M. D., Superintendent The Cleveland State Hospital, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 21, 1912, in which you inquire whether the costs in habeas corpus proceeding for the release of an inmate of your institution, resulting in his discharge by the court, can be assessed against you either personally or as superintendent of the institution. Replying thereto I desire to state that a proceeding in habeas corpus is a statutory one and is found in Section 12161 to Section 12189, inclusive, of the General Code. Section 12189 provides as follows:

> "The fees of officers and witnesses shall be taxed by the judge, on return of the proceedings on the writ, and collected as a part of the original costs in the case. When the prisoner is discharged, the costs shall be taxed to the state, and paid out of the county treasury, upon the warrant of the county auditor. * * *"

Therefore, the costs in the proceeding referred to by you cannot be taxed against you personally or against you as superintendent of the institution, but must be paid out of the treasury of Cuyahoga county.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Superintendent, Ohio State School for Blind.)

280.

STATE SCHOOL FOR BLIND—INCIDENTAL EXPENSES—GYMNASIUM SUITS, DENTISTRY AND OPTICIAN'S SERVICES—PERSONS LIABLE FOR SUPPORT OF CLAIMS—LIABILITY OF COUNTY.

Items of expense for gymnasium suits, filling teeth, repairing glasses, etc., are "incidental expenses" within the meaning of Sections 1815 *and* 1816 *General Code and when such are not collectable by the authorities of the state school for blind, from the persons liable for the support of the inmates, they must be met by the county, as provided in said statutes.*

COLUMBUS, OHIO, April 13, 1912.

HON. EDWARD M. VAN CLEVE, *Superintendent Ohio State School for the Blind, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of inquiry of the date of February 7, 1912, wherein you inquire as follows:

> "Under date of February 5, 1912, Hon. F. M. Sayre, auditor of Franklin county, writes me that the bill of this school against Franklin county for clothing and incidental expenses furnished to certain pupils at the state school for the blind, whose residences are in Franklin county, is incorrect in that there are certain items which should be eliminated. For your information I enclose herewith his letter together with the bills referred to upon which you will note that he has checked the items for filling teeth, for gymnasium suits, and repairing glasses.
>
> "You are requested to furnish an opinion upon this question which has been raised by Mr. Sayre, and if he is correct in his contention we must take some steps that will secure the payment of such bills by the parents or eliminate such incidental expenses altogether, which latter course of procedure would be in my judgment unfortunate to say the least."

The items to which Mr. Sayre, auditor of Franklin county objects are as follows:

Franklin county, Dr. to Ohio State School for the Blind

June 6, 1911, 1 gymnasium suit	$2.10
May 27, 1911, filling teeth	3.00
March 24, 1911, repairing glasses	.25
September 22, 1910, repairing glasses	1.25
October 15, 1910, repairing glasses	1.25
June 1, 1911, gymnasium suit	2.00

Section 1815 of the General Code (formerly Sec. 631 Bates Revised Statutes) provides as follows:

> "All persons admitted into a benevolent institution, except as otherwise provided in chapters relating to particular institutions, shall be maintained at the expense of the state. They shall be neatly and comfortably clothed and their traveling and incidental expenses paid by themselves, or those having them in charge."

Section 1816 of the General Code (formerly Section 632 Bates Revised Statutes) provides as follows:

> "In case of failure to pay incidental expenses, or furnish necessary clothing, the steward or other financial officer of the institution may pay such expenses, and furnish the requisite clothing, and pay therefor from the appropriation for the current expenses of the institution, keeping and reporting a separate account thereof. The account so drawn, signed by such officer, countersigned by the superintendent, and sealed with the seal of the institution, shall be forwarded to the auditor of the county, from which the person came, who shall pay the amount of such bill from the county funds to the financial officer of the institution and charge the amount to the current expense fund. The county auditor shall then collect the account, in the name of the state, as other debts are collected."

I desire to say that if the duty of supplying patients with clothing as required by Section 1815 is not performed, the remedy in case of such failure is for the institution to furnish it under this section, and for the amount so furnished it is to be reimbursed as provided in Section 1816 of the General Code above quoted.

In support of this proposition, I herewith submit the following to-wit:

State vs. Kissewetter, 37 O. S. 546.

> "1. Under Section 700 of the Revised Statutes, prior to its amendment March 18, 1881, patients, after their admission into the asylums of the state for the insane, were clothed at the expense of the state. Since the amendment, the expense of furnishing such clothing is under Section 631, chargeable on the estates of the patients or on those who would be legally bound to furnish it, if they were not in the asylum.
>
> "2. If the duty of supplying patients with clothing, as required by Section 631, should not be performed, the remedy, in such case of failure, is for the institution to furnish it under Section 632; and for the amount so furnished, it is to be reimbursed as therein provided."

On page 548 of the opinion the court says:

> "In title five the benevolent institutions of the state are classified; and a chapter is devoted to prescribing rules for the government of each class. Chapter one, in which are Sections 631 and 632, applies to all the institutions without reference to the class to which they belong, except as is otherwise provided in chapters relating to particular institutions. Chapter nine relates to asylums for the insane, and Section 700, which is found in that chapter, prior to the amendment of March 18, 1881, made special provision for clothing the patients admitted into such asylums, by declaring that they should 'be maintained therein at the expense of the state.' *The maintenance thus provided including clothing as well as other necessaries.*"

I gather from your inquiry that the auditor of Franklin county objects to said items on the ground that the same are not included within the items of "incidental expenses" or "necessary clothing." The question then to be determined is whether or not these items objected to are embraced within the terms of "incidental expenses" or "necessary clothing."

In construing said Sections 1815 and 1816 of the General Code (formerly Sections 631 and 632 Bates Revised Statutes respectively) the Hon. Wade H. Ellis, one of my predecessors held as follows:

"The statutes above referred to have been repeatedly construed by this department to mean that the state shall be at the expense of maintaining the inmates of the institution, but that the clothing used by such inmate shall be a charge against the county from which he or she may be sent, ultimately chargeable against the relatives of the inmate; that the term 'incidental expenses' does not include medical attendance, school books, postage stamps, etc.; in other words, the county may be properly charged with the expense of clothing the inmate, the actual traveling expenses and the incidental expenses incurred in taking the inmate to the institutions."

Later in an opinion rendered to the Hon. J. W. Jones, superintendent of the state school for the deaf, Mr. Ellis reversed his former opinion and held as follows:

"In answer to yours of January 6th, I beg to say that in my opinion the expense for the special work of an oculist for treatment of a pupil in the Ohio institution for the education of the deaf and dumb, is such an incidental expense as is provided for under Sections 631 and 632 of the Revised Statutes, and should be charged to the pupil or to the county from which he comes."

I am inclined to the view adopted in the last opinion of Mr. Ellis. It *is* certainly true that the filling of teeth is not only an "incidental expense" but a very necessary one. Likewise and for the same reason the expense of repairing glasses is also not only an "incidental expense" but a very necessary one, and furthermore such expenses are as much "incidental expenses" as the expense for the special work of an oculist for the treatment of a pupil in the state school for the deaf. The gymnasium work is necessary for the health as well as the physical training and development of the pupils of the Ohio state school for the blind, and I am of the opinion that gymnasium suits are as necessary to the physical health and welfare of the unfortunate pupils of the state school for the blind as any other items of clothing or wearing apparel.

Section 1815-9 of the General Code, which is a part of the same act as are Sections 1815 and 1816 of the General Code above quoted, provides as follows:

"It is the intent of this act that a husband may be held liable for the support of a wife while an inmate of any of said institutions, a wife for a husband, a father or mother for a son or daughter, and a son or daughter, or both, for a father or mother."

Therefore it follows that if the items of expense as above enumerated are not paid by such relatives of the pupil of the state school for the blind, then it is proper and legal for the financial officer of such institution to pay such expenses from the proper appropriation and to certify the same to the county auditor of the respective county from which such pupils came and it then becomes the duty of such auditor to issue his warrant for the payment of said items as provided in Section 1816 General Code above quoted. The auditor shall then collect the account in the name of the state, as other debts are collected, from the parties liable for the support of said pupil, provided, of course, that said parties are so fincially situated that the respective accounts are collectible.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Superintendent of State School for Deaf.)

279.

STATE SCHOOL FOR DEAF—"INCIDENTAL EXPENSES CHARGEABLE TO PUPIL OR COUNTY—MEDICAL, DENTAL AND OPTICIAN'S SERVICES AND CLOTHING.

Items of school supplies, special work, medical and surgical attendance, dental work and optician's services, gymnasium uniforms and shoes are such incidental expenses of the state school for the deaf as are provided for in Sections 1815 *and* 1816 *General Code and such items should be charged to the pupil or to the county from which said pupils come.*

COLUMBUS, OHIO, April 13, 1912.

HON. J. W. JONES, *Superintendent State School for the Deaf, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 6, 1912, wherein you inquire as follows:

> "Hon. F. M. Sayre, county auditor of Franklin county, has returned our bills for maintenance of pupils in this school with all such items marked off as school supplies, special work of operating the throat for the removal of adenoid tissue, gymnasium uniforms and shoes and special work of dentist and optician, claiming such items do not come under incidental expenses spoken of in Sections 631 and 632, Revised Statutes.
>
> "I shall be glad to have your decision as to whether or not Franklin county shall pay such bills."

In reply to your inquiry I desire to say that I have just prepared an opinion to Hon. E. M. Van Cleve, superintendent Ohio state school for the blind, which said opinion substantially and in nearly all respects answers your inquiry, and accordingly I am enclosing to you a copy of that opinion.

Based upon the reasoning of that opinion, I wish to say that it is my judgment and opinion that the items of school supplies, special work of operating the throat for the removal of adenoid tissue, dentistry and special optical work for the pupils in the Ohio state school for the deaf are such "incidental expenses" as are provided for in Sections 1815 and 1816 of the General Code (formerly Sections 631 and 632 Bates Revised Statutes) and such items should be charged to the pupil or the county from which said pupils came in accordance with said sections and in accordance with my opinion above referred to.

Furthermore, in my opinion, the items of expense for gymnasium suits and shoes are likewise items of expense for necessary clothing, and as such, said are provided for in Sections 1815 and 1816 of the General Code (formerly Sections 631 and 632 Bates Revised Statutes) and should be charged to the pupils or the respective counties from which said pupils came.

The copy of the opinion which I am herewith enclosing I think fully states my reasons upon which my conclusions and opinion herein are based.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

Enclosures.

399.

SUPPLIES FOR HORSE MAINTAINED BY SUPERVISOR OF PUBLIC PRINTING AT STATE BINDERY, CANNOT BE PURCHASED BY BOARD OF ADMINISTRATION AND PAID FOR BY SUPERVISOR OF PUBLIC PRINTING.

Neither the board of administration nor the officials of the state school for the deaf, can purchase supplies in behalf of the state supervisor of public printing, to be paid for by him, and employed by him for maintaining a horse owned in connection with the state bindery.

Vouchers made by the supervisor of public printing for payment of such supplies so ordered by the board of administration, were rightly dishonored by the auditor of state.

COLUMBUS, OHIO, May 16, 1912.

HON. J. W. JONES, *Superintendent State School for the Deaf, Columbus, Ohio.*

DEAR SIR:—I am pleased to take up for reply, your inquiry of April 11th, which is as follows:

> "For many years this institution has been boarding the horse belonging to the department of state printing, for which payment has been made by the supervisor of state printing out of his contingent fund at the rate of $150 per year. Until February, 1911, that money became part of our current expense fund and was used to buy supplies including feed. Since February, 1911, all such receipts are required to be turned into the state treasury. Therefore, when the state printer gave us his warrant on the state treasurer last June for $150, we were compelled to return it at once to the state treasury and therefore received, in fact no pay at all for the service we had rendered and the expense we had incurred in boarding this horse.
>
> "I therefore, by authority of the state board of administration, took up with the state printer, Mr. Crawford, the advisability of his department furnishing the school with feed to the amount of $150 per year instead of making cash payment. He readily agreed to this. Accordingly we purchased upon the competitive plan, feed to the amount of approximately $104 and had the bills rendered to the supervisor of state printing. He presented them to the auditor of state for payment and the same were rejected as being irregular.
>
> "I took this matter up this morning with the deputy auditor, Mr. Beatty and he said he would have to be advised by you before he could honor the voucher. The question resolves itself into this: If the supervisor of state printing can pay us $150 per year out of his contingent fund for feeding the horse belonging to that department, may payment be made in feed, or may he buy the feed out of the same fund and turn it into our bins in lieu of the $150 in warrant on the treasurer? The latter is the only way by which we can receive any pay at all."

As there could have been nothing inequitable in former proceedings in as much as in their culmination, the benefits were substantially equal with respect to either party, and as your inquiry is made solely with reference to the existing situation, the former practice may be ignored and the problem dealt with solely with a view to present difficulties.

Section 750 of the General Code provides as follows:

> "The supervisor of public printing shall have charge of the book binding establishment at the state school for the deaf; he shall provide the necessary materials, implements, machinery and fixtures therefor; he shall have supervision and control thereof and the exclusive management of its practical operation."

By virtue of this section, the supervisor of public printing is given exclusive powers of control, management and supervision of the state bindery, which establishment, by virtue of Section 1080 General Code, must be maintained at your institution. Section 750 General Code also requires the supervisor to furnish the necessary materials for the bindery, which are to be supplied and paid for by him as directed in Section 750 General Code. Therefore, a horse maintained as an adjunct to the bindery and employed by the supervisor of public printing solely for the purpose of such conveyancing as is required in the operation of that establishment, can, by provision of Section 1880 aforesaid, be kept in the barns of the state school for the deaf and cared for by the supervisor and employes without rental or other charge therefor, and the supplies for said horse can be purchased by the supervisor under the head of materials necessary for the operation of said bindery.

The situation then, is as follows:

The supervisor drew a voucher for one hundred and fifty dollars in favor of your institution in payment for feed and supplies to be furnished by the state school for the deaf for the ensuing year. This money however had to be immediately turned into the state treasury and there it must remain. In pursuance of a substitute plan, the board then purchased feed and supplies for said horse upon competitive bidding and the supervisor drew vouchers in behalf of the dealers furnishing said supplies in the amount of one hundred and four dollars, which vouchers the auditor refused to honor. These vouchers now remain unpaid and the feed for which they were intended to pay is now in the bins of the state school for the deaf.

A careful investigation of the statutes relating to the respective officials has revealed nothing which would seem to authorize an arrangement, the result of which would be to shift the duties and obligations incidental to the office of supervisor of public printing upon other state officials, namely: the purchase of these materials necessary for the operation of the state bindery.

The voucher was therefore, rightly dishonored by the auditor and the bill should be paid by the board of administration and the feed retained for the purposes under its immediate control. The supervisor of public printing should be required to purchase the feed and supplies for the horse in question and to keep the same separate and apart to be used solely for the purpose of sustaining this animal or at least for purposes incidental to his own office.

Should the board, by reason of this purchase, have on hand more supplies than are necessary for its own purpose, the same could be disposed of to the supervisor of public printing or to any other public official, under the procedure set out in Section 1847 General Code.

As any moneys paid for the same however are required to be paid into the state treasury weekly, by virtue of Section 1864 General Code, such action would be of no avail for the purchase of reimbursing the board in any manner or form.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Superintendent, Boys' Industrial Home.)

238.

BOYS' INDUSTRIAL HOME—COMMITMENT OF BOYS UNDER TEN BY VIRTUE OF THE JUVENILE ACT.

Section 2084 General Code providing a minimum age of ten years for boys who may be committed to the boys' industrial home, applies only to offenses against the state and does not interfere with the powers of a judge under the juvenile act to commit delinquent, neglected or dependent minors under the age of seventeen years, to any state or county institution.

A boy of nine years of age may therefore, be committed under these provisions to the boys' industrial home.

COLUMBUS, OHIO, April 6, 1912.

HON. F. C. GERLACH, *Superintendent Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 26, 1912, wherein you inquire as follows:

> "Kindly give your opinion as to the legality of the commitment to this institution of Charles Ely, a resident of Steubenville, whose age is nine years. Find commitment papers herewith enclosed."

In reply to your inquiry I desire to say that Section 1642 General Code, (juvenile act) gives to the common pleas, probate, insolvency and superior courts jurisdiction over neglected and delinquent minors as follows, to-wit:

> "Such courts of common pleas, probate courts, insolvency courts, and superior courts within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent minors, under the age of seventeen years, not inmates of a state institution, or any institution incorporated under the laws of the state for the care and correction of delinquent, neglected and dependent children, and their parents, guardians, or any person, persons, corporation or agent of a corporation responsible for or guilty of causing, encouraging, aiding, abetting or contributing toward the delinquency, neglect or dependency of such minor."

It will be noted that said section fixes the jurisdiction of said courts as to the maximum age of such minors but is silent as to the minimum age. In connection with the section above quoted, Section 1653 of the General Code provides as follows:

> "When a minor under the age of seventeen years is found to be dependent or neglected, the judge may make an order committing such child to the care of some suitable state or county institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or an industrial school, as provided by law, or to the care of some association willing to receive it, which embraces within its objects the purposes of caring for or obtaining homes for dependent, neglected or delinquent children or any of them, and which has been accredited as hereinafter provided. When the health or condition of

the child shall require it, the judge may cause the child to be placed in a public hospital or institution for treatment or special cure, or in a private hospital or institution which will receive it for like purposes without charge."

Section 2084 of the General Code provides as follows:

"Male youth, not over sixteen nor under ten years of age, may be committed to the boys' industrial school by any judge of the common pleas court, probate court or police court, on conviction of an offense against the laws of the state."

Section 1680 of the General Code provides as follows:

"Nothing herein shall be construed to repeal any provision of law relating to the boys' industrial school or the girls' industrial home."

In my opinion said Section 2084 of the General Code, above quoted, insofar as the age limit fixed therein is concerned, applies only to convictions for offenses committed against the state, and does not interfere with or in any way abrogate said Section 1642 and Section 1653 of the General Code of the so-called "juvenile act," under the provisions of which the common pleas, insolvency and superior courts have undoubted jurisdiction to commit any delinquent, neglected or dependent minor under the age of seventeen years to any state or county institution including the boys' industrial school.

Therefore, in conclusion it is my opinion that the commitment of Charles Ely, a resident of Steubenville, whose age is nine years, to the boys' industrial school at Lancaster is both proper and legal.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio State University)

445.

OHIO STATE UNIVERSITY—AGREEMENT TO ACCEPT DORMITORIES FROM CORPORATION ORGANIZED TO ERECT AND DONATE DORMITORY BUILDINGS TO THE BOARD OF TRUSTEES, VALID.

Under the power vested in the trustees of the Ohio state university to contract, to receive donations of personal property without qualification as to method, and to control and supervise all buildings and other property belonging to the university, said trustees may enter into an agreement of acceptance with a corporation organized to erect dormitories upon the university campus and ultimately to donate the buildings to the university, when the plans of the buildings are subject to the approval of the trustees and a joint control of expenditures and the entire scholastic management of the buildings vested in the trustees pending completion.

COLUMBUS, OHIO, May 31, 1912.

HON. F. E. POMERENE, *President, Board of Trustees, Ohio State University, Coshocton, Ohio.*

DEAR SIR:—You have submitted to me with your letter of May 13th, plans whereby the Ohio state university alumni association proposes to secure by private subscription the erection and equipping of a system of dormitories to be located upon the campus of the university.

The proposed plans which I have carefully examined contemplate the following features:

"First. The organization of a corporation under the laws of Ohio, not for profit, with charter powers to construct, erect, operate and ultimately to donate to the trustees of the Ohio state universiy, a building or buildings to be used as a dormitory for students at the Ohio state university under the scholastic control of the trustees of the university.

"Second. The making of a contract between the trustees of the university and the corporation whereby the corporation shall be permitted to construct, equip and maintain upon the campus of the university such a system of dormitories for the use of the students and a limited number of professors.

"Third. As one of the terms of such contract an agreement of the corporation that the plans and specifications of proposed building be approved by the trustees of the university.

"Fourth. As a further stipulation of said contract the reservation in the corporation of the right to maintain and operate the dormitory, and to use the income therefrom for the payment of expenses of maintenance, insurance, repairs and the extinguishment of the indebtedness incurred as hereinafter described, subject to the right of the trustees or state at any time to pay the outstanding indebtedness on the building and acquire the title thereto.

"Fifth. An issue of bonds by the corporation, secured by a deed of trust covering the buildings but not the grounds upon which they are to be erected, the proceeds of such bond issue to be used in the construction of the necessary buildings.

"Sixth. A stipulation in the aforesaid contract to the effect that in matters of scholastic discipline the management, including the assignment of said buildings when constructed, joint supervision and authority management of the trustees of the university in precisely the same manner in which the dormitory already provided for women students is now managed. The matter of rental and other features of the management of said buildings, when constructed, joint supervision and authority to be vested in the trustees of the university, and those of the corporation until such time as the indebtedness against the buildings is paid.

"Seventh. Upon the payment of the indebtedness on the buildings, the deed of trust is to be cancelled and the property is thereupon to become that of the state of Ohio, subject to the control of the trustees of the university, and the corporation thereupon to be dissolved."

I call attention to the following provisions fo the General Code of Ohio: Section 7950 General Code provides:

"The board of trustees shall have general supervision of all lands, buildings, and other property belonging to the university, and the control of all expenses therefor, but shall not contract a debt not previously authorized by the general assembly of the state."

Section 7951 General Code provides:

"The board of trustees may receive, and hold in trust, for the use and benefit of the university, any grant or device of land, and donation or bequest of money or other personal property, to be applied to the general or special use of the university. All donations or bequests of money shall be paid to the state treasurer, and invested in like manner as the endowment fund of the university, unless otherwise directed in the donation or bequest."

Section 7952 General Code provides:

"The title for all lands for the use of the university shall be made in fee simple to the state of Ohio, with covenants of seizen and warranty, and no title shall be taken to the state for the purposes aforesaid until the attorney general is satisfied that it is free from all defects and incumbrances."

Section 7943 General Code provides:

"The trustees and their successors in office shall be styled the 'board of trustees of the Ohio state university' with the right as such of suing and being sued, of contracting and being contracted with, of making and using a common seal, and altering it at pleasure."

The following are apparent from a casual reading of these sections:.

First. The trustees of the university have the power to enter into any contract necessary or appropriate to the execution of any of the other powers and duties vested in or imposed upon them. That is to say, the grant of the power to contract and being contracted with undoubtedly carries with it the power to bind the state and their successors as trustees in any agreement which is necessary to effectuate any purposes for which the trustees as a board exist.

Second. The trustees must have supervision of all buildings belonging to the university and control of expenses therefor. The phrase "property belonging to the university" need not, in my judgment, be construed so broadly as to refer to all buildings erected upon the campus. In its natural and primary meaning, it refers to and describes those buildings only which belong to the university in the proprietary sense. To be sure, there are no buildings, the title to which is in the university as such; all the property on the campus vests in the state of Ohio. The university and its trustees, being the agents of the state, are charged with the control and maintenance thereof. This fact lends some color to the assumption that the phrase "belonging to the university" as used in Section 7950 means and refers to such property as is devoted to university purposes. In this connection, however, I am of the opinion that the complete control and management on the scholastic side, which under the proposed plans would be vested in the trustees of the university, together with a joint control of the expenditures for repairs and similar matters contemplated by the plans would be sufficient to satisfy this section under whatever construction might be put upon it.

Third. The trustees are empowered to receive and hold in trust for the use and benefit of the university grants of land, donations of money, and gifts or *personal property other than money.* As to the manner in which they shall take title to the land so received by them the statutes are explicit; likewise as to the disposition of the money donated for the use of university specific provision is made by statutes, and the trustees could be without power to accept a qualified title in lands granted for university purposes. On the other hand, however, no requirement is found in the statute as to the nature of the title which may be taken, or accepted by the university trustees in and to personal property other than money given to them for university purposes. I regard this feature of the statutes as highly significant in connection with the question now under consideration. There is perhaps a single qualification here, viz.: that the trustees are without power to incur indebtednesss without specific authority from the General Assembly. The plan, however, does not contemplate the contracting of any indebtedness on the part of the trustees. As I view it, the question resolves itself into a single proposition of law, namely: "Is the power to receive and hold in trust for the purpose of the university personal property other than money broad enough to permit the acceptance of a gift which does not vest in the trustees for the state immediate and unqualified legal title to the property donated, but which does give the trustees complete control of such property on the scholastic side, and joint or qualified control thereof on the fiscal or business side, and which title and control upon the happening of certain conditions are to become complete in all respects?"

The significance of the omission from the statutes of any provision as to the nature of the title to personal property other than money which may be accepted as a gift by the trustees now becomes apparent. Whatever may be the rule of construction applicable to a statute which merely grants power to receive gifts or real and personal property without further stipulation as to what title is to be taken on behalf of the state, I am convinced that under the peculiar phraseology of Sections 7951 and 7952 *supra* the trustees of the university have the power to accept donations of personal property other than money without requiring that the immediate and complete legal title of such property be vested in them for the state.

Now the proposed buildings in the hands of the proposed donors would already be personal property, and the donation of such buildings, especially under the offer outlined by you, would have to be treated and regarded as a donation of personal property other than money.

I think I have said enough to show that my opinion is that the trustees of Ohio state university are empowered to accept the gift of a building or buildings,

the legal title of which is to remain in the donors as security for the payment of the indebtedness for which it is pledged, until such indebtedness be discharged.

The exact nature of the interest received in the building under such an arrangement need not be discussed. It is sufficient that they would have a real and vested interest thereon upon acceptance of the gift, and that the control of the property aside from the extinguishment of the debt, would be complete enough to satisfy the requirements of Section 7950 General Code.

I have the following suggestions to offer which may in a way modify some of the features of the plans that you have submitted:

After the corporation is organized it should offer to give to the university the buildings to be erected under the plans as proposed; the trustees should then accept the offer of the gift under the conditions imposed by the donors, which acceptance will complete the contract. The contract should then be reduced to writing as a contract embracing the terms of the proposed donation. The program may then proceed as above outlined, except that I suggest that the trustees of the university be given some rights in respect to making of repairs on the buildings.

I confess that I have been influenced to a considerable degree in making up my mind as aforesaid by the fact that through the plans which you have submitted to me, the state is to acquire a valuable and useful property without expense to it. I believe that the power of the trustees to accept donations was vested in them by the general assembly in order to enable the university to become the beneficiary of such generosity as is exemplified in this plan. Certainly, no taxpayer could object to a plan, which without expense to him, will produce a result so beneficial to the state, and which in reality tends to reduce the burden of taxation. Inasmuch as no taxpayer would have any standing in a court of equity to enjoin the proposed arrangement, and inasmuch further as this department, as long as I am in charge of it, will certainly not be disposed to interfere therewith, but on the contrary will do all in its power to assist in perfecting the necessary arrangements, I am at a loss to understand how any question could possibly be raised as to the legality of the proceedings.

I shall be pleased to advise the trustees more specifically as to the legal or various steps which are to be taken in carrying the program out as it is my duty so to do under Section 7953 General Code.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

254.

AGRICULTURAL EXTENSION SCHOOL—POWER OF OHIO STATE UNIVERSITY TO HOLD ON CAMPUS

The statutes confer authority upon the Ohio state university to lawfully hold an agricultural extension school upon the campus of the university, provided no other such school is held in Franklin county during the same year.

COLUMBUS, OHIO, April 11, 1912.

DR. W. O. THOMPSON, *President Ohio State University, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 3rd, requesting my opinion as to the following question:

> "May the Ohio state university hold an agricultural extension school on the campus of the university for the convenience of the farmers and other interested persons of Franklin county and other parts of the state?"

I am referred to Sections 7973 and 7974 General Code which provide as follows:

Section 7973:

> "The college of agriculture and domestic science of the university shall arrange for the extension of its teachings throughout the state, and hold schools in which instructions shall be given in soil fertility, stock raising, crop production, dairying, horticulture, domestic science and kindred subjects. No such school shall exceed one week in length, and not more than one be held in any county during a year."

Section 7974:

> "In addition to the holding of such schools, such colleges shall give instruction and demonstration in various lines of agriculture at agricultural fairs, institutes, granges, clubs or in connection with any other organizations, that, in its judgment, may be useful in extending agricultural knowledge. The work in agricultural extension may also include instruction by mail and the publication of bulletins designed to carry the benefits of its teachings to communities remote from the college."

These sections are in form mandatory and are broadly to be construed as imposing a duty and not as conferring a power, and that being the case they are upon fundamental principles of statutory interpretation to be given a liberal construction for the purpose of promoting the end sought to be attained by their enactment rather than a strict construction such as is accorded to statutes conferring powers upon officers and other agents of the state.

Having regard to this principle, I am of the opinion that the course suggested in your letter may lawfully be taken by the authorities of the university. No inference may properly be drawn from either Section 7973 or Section 7974 to the effect that an agricultural extension school may not be held in Franklin county. If such a school may be held in Franklin county I know of no reason why it may not be held upon the campus and in the buildings used for the ordinary instructional purposes of the university. The words "extension of its teachings throughout the state" are not to be given a restricted application here, and even if given such an application, the holding of a school such as is prescribed by the second section under consideration, though on the campus, would be of itself an extension of the teachings of the university in agriculture beyond those which the university would otherwise engage in.

I am, therefore, of the opinion that the Ohio state university may lawfully hold an agricultural extension school upon the campus of the university, provided no other such school is held in Franklin county during the same year.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio University)

12.

ABSTRACT—OHIO UNIVERSITY—PURCHASE—ESTATE OF ELLA C. WELCH.

COLUMBUS, OHIO, January 15, 1911.

DR. ALSTON ELLIS, *President, Ohio University, Athens, Ohio.*

DEAR SIR:—There have been submitted to me for examination and approval an abstract and deed for the following described real estate which your university propose to purchase from Ella C. Welch, to-wit:

> "Situate in the township of Athens in the county of Athens, and state of Ohio, and in the village of Athens, to-wit:
>
> "*First Tract.* Beginning at the northwest corner of out-lot No. 187 in said village; thence south along the west line of said out-lot No. 187 to a point 178 feet north of the southeast corner of in-lot No. 65 in said village; thence west on a line parallel with the south line of said in-lot No. 65, 198 feet to the east side of Vine street; thence south 99 feet; thence east on a line parallel with the south line of said in-lot No. 65 to the east line of out-lot No. 187; thence in a northwesterly direction along the northeast side of said out-lot No. 187 to the place of beginning.
>
> "*Second Tract.* 1.34 acres off of the north end of the following premises: Beginning at the southwest corner of out-lot No. 32 in said village; thence north 28 west 3.20 chains; thence north 56 links; thence east 6.50 chains to the east line of said out-lot; thence south 3.37 chains to the south line of said out-lot; thence west to the place of beginning.
>
> "Also the following premises:
>
> "Beginning 13¾ rods north of the southwest corner of out-lot No. 31; thence east across out-lot No. 31 to within 50 feet (at right angles) of the middle of the Baltimore and Ohio Southwestern Railroad in out-lot No. 30; thence southwesterly parallel with and 50 feet from the middle of said railroad to a point directly east of the southeast corner of the 1.34 acre tract described above; thence west to the southeast corner of said 1.34 acre tract; thence north to the place of beginning, containing 1.15 acres in out-lot No. 31, and eight hundredths (.08) of an acre in out-lot No. 30.
>
> "Said first and second tracts above described being all those parts of in-lot No. 65 and out-lots Nos. 30, 31, 32 and 187 in said village of Athens owned by Johnson M. Welch at the time of his death."

The abstract discloses that mortgages have been given on those premises at various times and that some of these mortgages remain uncanceled of record. Action on all of them, however, has been long since barred by the operation of the statute of limitations, and I am not inclined to attach any importance to them at this time.

It further appears (page 86) that one, Robert S. King, at the May term, 1911, of the court of common pleas of Athens county, Ohio, recovered a judgment against J. M. Welch in the sum of four thousand dollars and costs, and that said judgment was thereafter assigned to Ella C. Welch. No showing having been made of the payment of the amount of this judgment to the assignee I would suggest that Ella C. Welch formerly cancel the same of record.

In addition to the foregoing the following things remain to be done in order to perfect the title:

1. Paying the Ohio university rents, amounting to $17.26 (p. 89).
2. Obtaining a governor's deed, as provided by the act of 1883, and which will cost $68.16 (pages 12 and 89).
3. Paying the taxes amounting to $161.91 (p. 90).
4. Recording the administrator's deed to Ella C. Welch (p. 87).
5. Recording the deed of Ella C. Welch to the president and trustees of the Ohio university (p. 88).

Upon the completion of the abstract in the respects above indicated, I am of the opinion that the president and the board of trustees of Ohio university will acquire a good and sufficient title in fee simple to the premises hereinbefore described.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

496.

ABSTRACTS OF TITLE OF PROPERTY OF DANIEL A. RARDIN IN ATHENS, OHIO—DEFECTS AND OMISSIONS

COLUMBUS, OHIO, July 6, 1912.

HON. ALSTON ELLIS, *President, Ohio University, Athens, Ohio.*

DEAR SIR:—You have submitted to me for examination and approval an abstract of title and deed from Daniel A. Rardin for the following described premises:

> "* * * situate in the city of Athens, in the county of Athens and state of Ohio, to-wit:
>
> "Beginning at the northwest corner of in-lot No. (183), on old Union street, in the said city of Athens; thence each along said old Union street (12) feet to the south side of the road leading around the Ohio university heating plant; thence in a southeasterly direction along the south side of said road (111) feet to the Ohio university heating plant lot; thence south 44 degrees west along the line of the said the Ohio University heating plant lot, (62.9) feet to the right of way line of The Baltimore & Ohio Southwestern Railway Company; thence in a northwesterly direction along the said right of way line to the west line of said in-lot number (183).
>
> "Also the following premises situate in said city, county and state, to-wit: Beginning at the southwest corner of in-lot No. (180) in the said city of Athens; thence east to the right of way line of The Baltimore & Ohio Southwestern Railway Company; thence in a northwesterly direction along said right of way line to the west line of said in-lot No. (180); thence south to the place of beginning."

At the outset I want to call your attention to an apparent error in the description of the first tract mentioned in the deed. The course commences at the northwest corner of lot 183 and ends in the west line of said lot. The description should be extended to the point of beginning.

The legal title, as disclosed by the abstract, dates back to 1848, when leases for a period of 99 years, renewable forever, were granted by the president and trustees of the university to various persons pursuant to authority given by several acts of the legislature, which it is unnecessary to set out here.

The title descended from the original lessees by a series of deeds until it finally became vested in Daniel A. Rardin, the present owner, by virtue of a quit claim deed from The Athens Mining Company, dated May 9, 1907, and recorded in Volume 103, page 136 of the deed records of Athens county, Ohio.

The deed from Joseph Herrold and wife to The Athens Mining Company reserves a right of way across the west end of lots 180 and 181, which does not appear to have been extinguished. A deed for same should be obtained, or it should be excepted in the deed from Rardin to the president and trustees of the university.

It further appears from the abstract, that the taxes on lots 180, 181, 182, 183 and 202 for the years 1891 and 1892 were suffered by The Athens Mining Company to become delinquent, and on January 17th, 1893, said lots were sold by the treasurer of Athens county to A. W. Ullom. The county auditor, on November 30th, 1895, executed a deed therefor to D. P. Pratt, who was the assignee of Ullom. The tax title thus acquired was transferred by Pratt to Nora F. Mansfield, and from her, through several mesne conveyances, to Daniel A. Rardin.

No deed from Pratt to Nora F. Mansfield is shown by the abstract, and her title is established by an affidavit of Johnson M. Welch, who claims to have knowledge of the facts, that on the 10th day of October, 1899, said Pratt and wife sold said premises to said Nora F. Mansfield, who immediately entered into possession thereof. It also appears that Nora F. Mansfield and husband executed mortgages on said premises to Pratt and others. In order to leave no question of the sufficiency of the title, I would suggest that a quit-claim deed be obtained from D. P. Pratt and wife.

The taxes for the year 1912 are, so far as disclosed by the abtsract, unpaid, and are a lien against said premises.

No othed liens are disclosed by the abstract.

A certificate of the clerk of the United States court, as to the pendency of suits and judgment in said court against Daniel A. Rardin, should be attached to the abstract.

An affidavit should be obtained as to whether the Joseph Herrold, *second,* who received a lease from the Ohio university for a part of said premises, and the Joseph Herrold, who conveys same to The Athens Mining Company, are one and the same person. If they are not, evidence should be submitted as to how the latter acquired title.

The certificate of the resolution of The Athens Mining Company, authorizing its president and secretary to execute a deed for said premises to Daniel A. Rardin, is incomplete, in that the vote by which the resolution was adopted is not set forth. Said certificate purports to be made by *Ada M. Rardin,* as president of the company, and signed by *Charles M. Rardin,* as secretary. This discrepancy should be corrected and the certificate of the resolution embodied in an affidavit. No resolution of the stockholders, authorizing the directors to make the sale, is shown.

The deed from The Athens Mining Company to Daniel A. Rardin recites that it is executed in behalf of said company by John C. Rardin, as president, and Ada M. Rardin, as secretary, but it was signed by J. Clarence Rardin, as president. The contradiction between the recital of the deed and the signature should be corrected by affidavit.

Subject to the foregoing, I am of the opinion that the title of Daniel A. Rardin to the premises above described, is clear and free from encumbrances.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Wilberforce University)

352.

CATTLE RUNNING AT LARGE—"INCLOSED LANDS" A TYPOGRAPHICAL ERROR IN STATUTE—REMEDIES BY SEIZURE OF CATTLE ON HIGHWAYS—FEES FOR HOLDING.

The word "inclosed" in Section 5809 General Code prohibiting the permission of cattle to run upon highways or "inclosed" lands is probably a typographical error, as this word is "uninclosed" in all former records wherein the statute appears.

In this connection, however, error may be avoided by seizing cattle upon roads and highways which are so permitted to roam at large, when the fees provided in Section 5820 General Code may be collected from the owner of said cattle.

COLUMBUS, OHIO, April 24, 1912.

MR. WM. A. JONES, *Superintendent and Financial Officer, Combined Normal and Industrial Department, Wilberforce University, Wilberforce, Ohio.*

DEAR SIR:—Under date of March 7th you state that the grounds of your institution are not fenced, and for that reason your grounds are frequently encroached upon by the stock of your neighbors which is permitted to run at large. You, therefore, wish to know what remedy you have by reason of said stock running at large over your ground.

The law covering your inquiry is found in the General Code Section 5809 et seq., which we would suggest that you examine in this matter. We would, however, specifically call your attention to Sections 5809, 5811 and 5817 General Code.

Section 5809 General Code provides as follows:

> "A person or corporation being the owner or having the charge of horses, mules, cattle, sheep, goats, swine, dogs or geese, shall not permit them to run at large in the public road, highway, street, lane or alley, upon inclosed land or cause such animal to be herded, kept or detained for the purpose of grazing on premises other than those owned or occupied by the owner or keeper thereof, except as provided in Section fifty-eight hundred and eleven."

Section 5811 General Code provides:

> "General permission may be granted by the commissioners of a county for any animal named in Section fifty-eight hundred and nine, to run at large. In counties where such general permission has not been so granted, township trustees may grant special permits for particular animals described therein, revocable at the discretion of such trustees upon three days notice in writing to the owner of such animal. Such permission, whether general or special, shall terminate on the first Monday of March in each year."

Section 5817 General Code provides:

> "A person finding an animal, mentioned in Section fifty-eight hundred and nine, at large, contrary to law, may, and a constable of a township, road superintendent in a township or village, or marshal

> or constable of a city or village, on view or information, shall take and confine it, forthwith giving notice thereof to the owner, if known, and, if not known, by posting notices describing such animal therein, in at least three public places within the township. If the owner does not appear and claim the animal and pay all charges for so taking, advertising and keeping it, within ten days from the date of such notice, the animal may be proceeded with under the laws regulating estrays."

Section 5811 General Code provides that general permission may be granted by the county commissioners for any animal named in Section 5809 to run at large. We assume for the purposes of answering your inquiry that such general permission has not been granted by the county commissioners. The section also provides that in case such general permission has not been granted the township trustees may grant such permits for *particular* animals described therein, revocable at the discretion of the trustees. We also assume that the township trustees in this instance have not granted any such permits to those owning the animals trespassing upon your property.

Section 5809 supra states that the owners of animals therein set forth shall not permit them to run at large in the public road, highway, street or alley, or upon inclosed land. It is to be noted that this section provides that the owner of the animals therein set forth shall not permit them to run at large upon inclosed lands. Upon an examination of Section 4202 Revised Statutes, which was codified in Section 5809 General Code, I find that the word "inclosed" reads in said section "uninclosed." I further find that to be the fact in relation to all sections which preceded such Section 4202 R. S. in point of time upon the same subject. So that it would appear that the change occurring in Section 5809 from the word "uninclosed" to "inclosed" was a typographical or other error and that it was not the intention of the legislature to change the meaning thereof. However, this matter becomes unimportant as Section 5817 G. C. supra provides that a person finding an animal mentioned in Section 5809 at large contrary to law may and a marshal or constable of a city on view or information shall take and confine such animal, forthwith giving notice thereof to the owner if known, and if not known, by posting notices describing such animal therein in at least three public places within the township. As Section 5809 provides that owner of animals therein mentioned shall not, permit them to run at large on public roads, highways, streets, lanes or alleys and as in order to trespass upon your premises we assume that such animals would necessarily have to run at large upon such public roads, etc., such animals could be taken up, and confined while on such public road, etc., and thus the question of change in language from "uninclosed" to "inclosed" would be avoided.

I know of no other remedy that you would have other than in a proceeding at law. The fees for taking up the animal are provided for in Section 5820 General Code as follows:

> "The person, road superintendent or officer taking such animal shall be entitled to charge and receive from the owner thereof the following fees in addition to those authorized by law regulating estrays, to-wit: for taking and advertising each horse or mule, one dollar; each head of meat cattle, seventy-five cents; each swine, fifty cents; each sheep, dog or goose, twenty-five cents; and a reasonable fee for keeping it. The fee for taking a single herd or flock shall not exceed five dollars, when such flock or herd belongs to one person."

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Board of Trustees, Bowling Green, Normal School)

207.

ABSTRACT OF TITLE—PROPERTY OF J. N. EASLEY LOCATED IN CITY OF BOWLING GREEN, WOOD COUNTY, OHIO, TO BE PURCHASED BY BOWLING GREEN NORMAL SCHOOL—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, March 14, 1912.

HON. D. C. BROWN, *Secretary Board of Trustees, Bowling Green Normal School, Napoleon, Ohio.*

DEAR SIR:—We have carefully examined the title to the real estate offered to your board by Mr. J. N. Easley in the city of Bowling Green, Wood county, Ohio, for the purpose of erecting the normal school on said site. The property consists of eighty-two and five tenths (82.5) acres in said city of Bowling Green, being in Section nineteen (19), township five (5) north, range eleven (11) east, center township, Wood county, Ohio, and is described as follows:

> "A certain tract or parcel of land beginning at the point of intersection of the east line of Thurston street in the city of Bowling Green, Wood county, Ohio, with the south line of Ridge street in said city; thence south along the east line of said Thurston street from said Ridge street to a point half way from Court street to Wooster street on the south; thence directly east and parallel with Wooster street to the east line of Wayne street in said city; thence south on the east line of Wayne street to said Wooster street; thence east on the north line of Wooster street to the west line of out-lot number ninety-two (92) in said city; thence north on the west line of said out-lot number ninety-two (92) to said Ridge street; thence west on the south line of said Ridge street to the point of beginning."

which general description embraces the following:

> "In lots number three thousand one hundred and fifty-one (3151); three thousand one hundred and fifty-two (3152); three thousand one hundred and fifty-three (3153); three thousand one hundred and fifty-four (3154); three thousand one hundred and fifty-five (3155); three thousand one hundred and fifty-six (3156); three thousand one hundred and fifty-seven (3157); three thousand three hundred and twelve (3312); three thousand three hundred and thirteen (3313); three thousand three hundred and fourteen (3314); three thousand three hundred and fifteen (3315); three thousand three hundred and sixteen (3316); three thousand three hundred and seventeen (3317); three thousand one hundred and fifty-eight (3158); three thousand one hundred and fifty-nine (3159); three thousand one hundred and sixty (3160); three thousand one hundred and sixty-one (3161); three thousand one hundred and sixty two (3162); two thousand eight hundred and thirteen (2813); two thousand eight hundred and twenty-one (2821); two thousand hundred and fifteen (2815); two thousand eight hundred and sixteen (2816); two thousand eight hundred and seventeen (2817); two thousand eight hundred and eighteen (2818); two thousand eight hundred and nineteen (2819); two thousand eight hundred and twenty (2820);

two thousand eight hundred and twenty-one (2821); two thousand eight hundred and twenty-two (2822); two thousand eight hundred and twenty-three (2823); two thousand eight hundred and twenty-four (2824); two thousand eight hundred and twenty-five (2825); two thousand eight hundred and twenty-six (2826); two thousand eight hundred and twenty-seven (2827); two thousand eight hundred and twenty-eight (2828); two thousand eight hundred and twenty-nine (2829); two thousand eight hundred and thirty (2830); two thousand eight hundred and thirty-one (2831); two thousand eight hundred and thirty-two (2832); two thousand eight hundred and thirty-three (2833); two thousand eight hundred and thirty-four (2834); two thousand eight hundred and thirty-five (2835); two thousand eight hundred and thirty-six (2836); two thousand eight hundred and thirty-seven (2837):

"Out-lots eighty-four (84); eighty-five (85); eighty-six (86); eighty-seven (87); eighty-eight (88); eighty-nine (89); ninety (90); ninety-one (91); ninety-four (94); ninety-eight (98); the north one hundred and fifteen (115) feet of out-lot ninety-five (95); also that part of out-lot number ninety-seven (97), running thence south along the west line of said out-lot number ninety seven (97) to the northwest corner of a lot now owned by Benjamin L. Loomis; thence east along the north line of said lot of Benjamin L. Loomis to the northeast corner of said lot owned by him; thence in an easterly direction parallel to the south line of Court street to the west line of Wayne street; thence north along the west line of Wayne street to the south line of Court street; thence west along the south line of Court street to the place of beginning."

While there are many minor defects set forth in the various abstracts submitted covering said property, I do not believe that any of such defects affect the title of the property, except in relation to out-lot number ninety-one (91) being the west sixteen (16) acres of the northeast quarter (N. E. ¼) of the southeast quarter (S. E. ¼), section nineteen (19), which abstract until the title is quieted in the present owner, Mr. Jacob N. Easley, I do not consider should be approved.

The title to the rest of the property, save and except the sixteen acres before mentioned and being out-lot number ninety-one (91) as stated, is a good and sufficient title in law and equity to said property.

As soon as the title to said out-lot number ninety-one (91) is quieted I will pass upon the abstract in reference thereto. From the abstracts as submitted I find that there are no liens, and that the taxes have been paid in full for the year 1911.

I have retained the abstracts until I am informed that the title to said out-lot ninety-one (91) has been quieted by Mr. Easley. If appears from the deed submitted to this department by Mr. Easley transferring the entire property to the state of Ohio that the same has been recorded. I, therefore, herewith send said deed to you, together with my opinion as to the title. Said deed covers said out-lot number ninety-one (91) heretofore mentioned, the title to which is to be quieted.

As soon as the title to out-lot number ninety-one (91) before mentioned is quieted either in the state of Ohio or in Jacob N. Easley, I am of opinion that the title to said property is good and sufficient both in law and equity in and to the entire foregoing mentioned property as conveyed by Jacob N. Easley to the state of Ohio.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

678.

BOWLING GREEN NORMAL SCHOOL BUILDINGS—APPROPRIATIONS AVAILABLE FOR TWO YEARS FROM DATE OF PASSAGE.

In accordance with Article II, Section 22, of the Constitution, no appropriation made by the general assembly shall be available for a longer period than two years.

Since, therefore, the acts do not provide otherwise the appropriations made for the erection of suitable buildings on the Bowling Green normal school site are available for two years from the dates upon which the bills were approved.

COLUMBUS, OHIO, October 22, 1912.

HON. D. C. BROWN, *Secretary, Board of Trustees, Bowling Green Normal School, Napoleon, Ohio.*

DEAR SIR:—You have telephoned to this department inquiring whether or not the appropriation of one hundred and fifty thousand ($150,000.00) dollars by the last legislature to your board for the erection of suitable buildings on the Bowling Green Normal School site would lapse unless the contract for such building was let before the meeting of the next legislature, you stating that you had been informed that there was a statute to that effect.

We find that the said one hundred and fifty thousand (150,000.00) dollars was appropriated in three different acts, each act giving an appropriation of fifty thousand ($50,000.00) dollars, as follows:

> "(a) In house bill No. 112, passed March 30, 1911, approved April 11, 1911, appropriated $50,000.00 to the credit of the trustees.
>
> "(b) In general appropriation bill of 1911, house bill 566, passed May 31, 1911, approved June 14, 1911, we find the following:
>
> "Appropriations, state normal school—'For construction at Bowling Green $50,000.00.' Section 2 of said bill states that the moneys appropriated shall be available to pay liabilities incurred on and after February 16, 1911.
>
> "(c) In house bill 616 for general appropriation 1912, passed May 31, 1911, approved June 14, 1911, we find the following:
>
> "Appropriation, state normal school—Construction at Bowling Green, $50,000.00. Section 2 of said bill states that the moneys appropriated shall be available to pay liabilities incurred on and after February 16, 1912."

It will thus be seen that the said appropriations were made at different times to-wit:

The first appropriation was approved April 11, 1911, and available immediately.

The second appropriation of $50,000.00 was approved June 14, 1911, and available immediately.

The third appropriation of $50,000.00 was approved June 14, 1911, but only became available on February 16, 1912.

Section 22, Article II of the constitution reads as follows:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation, made by law; and *no appropriation shall be made for a longer period than two years.*"

Since there is a constitutional provision that no appropriation shall be made for a longer period than two years an appropriation at the end of the two year period necessarily lapses into the general fund and must be re-appropriated. It makes no difference whether or not a contract is or is not let as no money can be paid out of the state treasury after the appropriation has lapsed.

Coming now to the appropriation made to your board it is to be noted that the first fifty thousand dollars was appropriated for two years from April 11, 1911, and that the second fifty thousand dollars was appropriated for two years from June 14, 1911, and the third appropriation of fifty thousand dollars likewise for two years from June 14, 1911, although such third appropriation of fifty thousand dollars was not to be available for use of the board until on and after February 16, 1912. In other words, the first fifty thousand dollars appropriated under house bill 112 is available until April 10, 1913; the second fifty thousand dollars until June 13, 1913, and the third fifty thousand dollars likewise available until June 13, 1913. In order to pay any bills after that time the money must be re-appropriated by the general assembly.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

(To the Columbus Centennial Commission)

318.

COLUMBUS CENTENNIAL COMMISSION—CONTROL OF MONEYS RECEIVED BY POPULAR SUBSCRIPTION.

Money received by the Columbus centennial commission, through voluntary subscription, is within the control of the commission, under the terms of the act authorizing said commission to receive and solicit popular subscriptions.

COLUMBUS, OHIO, April 26, 1912.

MR. LEE M. BODA, *Secretary, Columbus Centennial Commission, Columbus, Ohio.*

GENTLEMEN:—I am in receipt of your letter of April 22, 1912, which is as follows:

> "A question has arisen as to the proper person or persons to have the control and expenditure of the money for the Columbus centennial celebration which has been or may be raised by voluntary subscriptions in the city of Columbus and elsewhere. This commission holds that under the appropriation act, senate bill No. 107, page 465, laws of Ohio, 1911, Section third of this act places the control of said money in the hands of this commission.
>
> "If, in your opinion, such is the fact, we should esteem it a favor if you will give us that opinion in writing at your earliest convenience. Furthermore, we desire your opinion as to whether the section referred to above requires that said voluntary subscriptions shall be deposited with the state treasurer, subject to this commission's voucher, as provided for, or whether the commission may select a bank as a depository, through its treasurer, under bond, and deposit said voluntary subscriptions therein subject to voucher duly signed as provided in Section three of the act above referred to."

The act making an appropriation by the state of Ohio in behalf of the Ohio-Columbus Centennial celebration, found in 102 O. L., 465 is (omitting the preamble) as follows:

> "Section 1. That there be and hereby is appropriated from the general revenue fund of the state, out of moneys in the treasury not otherwise appropriated, the sum of twenty-five thousand dollars for the use of the 'Columbus centennial commission,' appointed under the joint resolution adopted March 9, 1909, in preparing and carrying out plans for the celebration, in the year 1912, in the city of Columbus, of the one hundredth anniversity of the permanent location of the seat of government of the state.
>
> "Section 2. The sum hereby appropriated shall be paid out of the treasury upon the warrant of the auditor of state, on the treasurer, on proper vouchers signed by the president and secretary of the Columbus centennial commission, which vouchers shall contain itemized statements of accounts, properly vertified.
>
> "Section 3. The Columbus centennial commission is hereby authorized to solicit and receive popular subscriptions to carry out the plans

and purposes of the commission and to expend the same in pursuance of such plans. An account shall be kept of all moneys so received, which shall be expended upon proper vouchers signed by the president and secretary thereof.

"Section 4. Said centennial celebration shall be held during and in conjunction with the Ohio state fair in the year 1912, and the Ohio state board of agriculture is authorized and directed to appoint a general publicity agent who shall devote his entire time to the exploitation of said celebration, and his compensation shall be fixed by the said Ohio state board of agriculture, his duties to commence within six months from and after the passage of this act. The compensation of such general publicity agent shall be paid from the amount herein appropriated and in the manner provided in Section 2 hereof."

In my opinion, Section 3 of the said act gives the commission the power to control and expend the funds raised by popular subscription. The language of this section, in fact, reads as follows:

"The Columbus centennial commission is hereby authorized to solicit and receive popular subscriptions * * * and to expend the same * * *."

The only fund over which the treasurer of the state of Ohio is custodian is the appropriation made by the state of Ohio and covered by the first two sections of this act. This is an appropriation duly made by law out of the funds of the state of Ohio in the treasury of the state, and is to be paid out only as provided in Section 2 of this act and under Section 4 of the act, the publicity agent appointed by the Ohio state board of agriculture is to be paid out of the appropriation made by the state, and the rest of the appropriation is to be used by the Columbus centennial commission in preparing and carrying out the plans for the celebration.

Unless special provisions were made for the same, the treasurer of state could not assume control of the fund raised by popular subscription as provided in Section 3 of the act, and the money raised by popular subscription could not be paid into the treasury unless there were some authority given for such payment; and I fail to find authority in this act for paying this money into the treasury, or for the treasurer to assume control of the same.

As stated above, the centennial commission is to solicit and receive these popular subscriptions and to expend the same in pursuance of its plans, keeping an account of all such moneys so received and expending the same only upon the vouchers signed by the president and secretary of the commission; and the selection of the depository for these funds should be provided for by the commission.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

324.

PUBLICITY AGENT OF COLUMBUS CENTENNIAL CELEBRATION—POWERS OF STATE BOARD OF AGRICULTURE AND OF COMMISSION—APPOINTMENT, COMPENSATION, CONTROL AND DISMISSAL.

The powers of appointment and removal, and the fixing of the compensation of the publicity agent for the Columbus centennial are vested, by the act providing for the celebration, in the state board of agriculture.

The powers of direction and control of said officer are vested, however, in the centennial commission, and his reports should be made to that commission.

The publicity agent may contract no bills and may incur no expense except upon the authorization of the centennial commission.

In the event that the proposed celebration should fail of accomplishment through lack of co-operation on the part of the city of Columbus, there would be no legal or financial responsibility on the part of the centennial commission provided the funds were expended only as provided by the act.

By the terms of the act, the legislature has shown an intent that the publicity agent should be employed, but should it be clearly established that his services would be valueless, the board of agriculture would be warranted in dispensing with his services.

If the publicity agent is derelict in his duty, the commission through the board of agriculture could procure his dismissal.

COLUMBUS, OHIO, April 29, 1912.

HON. W. O. THOMPSON, *Chairman, Columbus Centennial Commission, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 27, 1912, asking my opinion upon five questions with reference to the powers, rights and duties of your commission under the act of the Ohio legislature, passed May 3, 1911, making an appropriation for the Columbus centennial celebration. This act is found in Volume 102, Ohio laws, page 465, and (omitting the preamble) is as follows:

> "Section 1. That there be and hereby is appropriated from the general revenue fund of the state, out of moneys in the treasury not otherwise appropriated, the sum of twenty-five thousand dollars for the use of the 'Columbus centennial commission,' appointed under the joint resolution adopted March 9, 1909, in preparing and carrying out plans for the celebration, in the year 1912, in the city of Columbus, of the one hundredth anniversity of the permanent location of the seat of government of the state.
>
> "Section 2. The sum hereby appropriated shall be paid out of the treasury upon the warrant of the auditor of state, on the treasurer, on proper vouchers signed by the president and secretary of the Columbus centennial commission, which vouchers shall contain itemized statements of accounts, properly verified.
>
> "Section 3. The Columbus centennial commission is hereby authorized to solicit and receive popular subscriptions to carry out the plans and purposes of the commission and to expend the same in pursuance of such plans. An account shall be kept of all moneys so received, which shall be expended upon proper vouchers signed by the president and secretary thereof.

"Section 4. Said centennial celebration shall be held during and in conjunction with the Ohio state fair in the year 1912, and the Ohio state board of agriculture is authorized and directed to appoint a general publicity agent who shall devote his entire time to the exploitation of said celebration, and his compensation shall be fixed by the said Ohio state board of agriculture, his duties to commence within six months from and after the passage of this act. The compensation of such general publicity agent shall be paid from the amount herein appropriated and in the manner provided in Section 2 hereof."

Your questions, in order, together with my answers are as follows:

"Question 1. The publicity agent provided for under the act of May 31, 1911, being appointed by the state board of agriculture, information is sought as to the duties of said agent; to whom shall he report; under whose direction shall he work and to whom is he responsible? What control, if any, has the centennial commission over the time and services of said publicity agent?"

Under Section 4 of the act above quoted the publicity agent is to be appointed by the Ohio state board of agriculture, and is to be paid out of the appropriation made by the state by Section 1 of the act, upon vouchers signed by the president and secretary of the Columbus centennial commission. His compensation is to be fixed by the Ohio state board of agriculture, and his duty is to devote his entire time to the exploitation of the celebration. It really amounts to this, the state of Ohio furnishes to your commission a publicity agent and pays him. Your commission has no concern with the appointment of, or determination of the compensation paid to said publicity agent. It was undoubtedly presumed by the legislature, when it provided that said centennial celebration should be held during and in conjunction with the Ohio state fair, that your commission and the Ohio state board of agriculture would work in entire harmony, and, though the centennial celebration and the Ohio state fair are separate and distinct affairs, yet, the success of one is bound to conduce to the success of the other. Therefore, as the state made the appropriation for the centennial celebration, it was probably thought only proper that the publicity agent, to be paid out of this appropriation, should be named by a state board. But, as he is to devote his entire time to the exploitation of the centennial celebration, and as the centennial celebration is distinct from the state fair, your commission having no control over the arrangements for, or management of the state fair, and the board of agriculture having no control over the arrangements for, or management of the centennial celebration, it necessarily follows that the publicity agent is to work under the direction of your commission; his duty is to exploit the centennial celebration, of which your commission is in charge; and it is the province of your commission to decide as to the manner in which you desire said duty performed. Briefly, he has been furnished to you for a certain purpose, provided by the act, namely, "the exploitation of said celebration," and it is your duty to decide in what manner you wish such exploitation made; in other words, to put this publicity agent to work in such manner as you deem will be most conducive to the success of the celebration. As your commission is to decide as to the nature of the work of this agent, his reports should be made to you. He should work under your direction. It is presumed, of course, that the publicity agent appointed by the state board of agriculture will be a proper and competent person, capable of performing the work for which he is chosen. He is responsible, primarily, to the appointing power, that is the state board of agriculture, as, in the

absence of provision to the contrary the appointing power would have the power to remove; but this responsibility, in a sense, comes through your commission to the state board of agriculture; as it is under your direction and supervision that he is to work; and, if the publicity agent appointed by the state board of agriculture should prove imcompetent, or derelict in his duty, or unsuitable for, or incapable of doing the work assigned to him, then undoubtedly, upon proper representation being made by your commission to the state board of agriculture, the state board of agriculture would take such action as would be proper. Thus, in a sense, this agent is under the control of both your commission and the state board of agriculture. Your board has no concern with his appointment, or with the amount of his compensation, and the state board of agriculture has no control over, or concern with his work except through your commission.

> "Question 2. Under what terms and conditions may the said publicity agent contract bills or expenses for which the commission is liable?"

The publicity agent can contract no bills, or incur no expenses for which the centennial commission is liable, except upon express authority given him by the centennial commission.

> "Question 3. In the event the proposed celebration should fail of accomplishment through lack of co-operation upon the part of the city of Columbus would there be any legal or financial responsibility on the part of the commission for the funds expended?"

In the contingency mentioned in this question there would be no legal or financial responsibility on the part of the centennial commission, provided the funds expended were expended for the purposes provided in the act.

> "Question 4. Do the terms of the act under consideration, providing that the services of the publicity agent are to commence within six months after the passage of the act making the appropriation, render it mandatory to keep any agent under salary, if, in the judgment of the commission, such agent is not necessary or desirable for the promotion of the celebration?"

The answer to the first question probably answers this question also.

It must be presumed from the act that the legislature considered that a publicity agent would be of value in making the celebration a success, otherwise this provision would not have been found in the act, but. if the legislature was mistaken as to this, and it could be shown by your commission that a publicity agent is entirely unnecessary, and could render no services of any value whatever, in short, that such an agent is entirely useless, then probably the Ohio state board of agriculture could dispense with his services. But, as stated above, as the legislature evidently considered such an agent necessary and provided for his appointment and compensation, it must necessarily be very clear that the services of such an agent would be valueless before the state board of agriculture would be warranted in disregarding this provision of the act.

> "Question 5. In the event that the publicity agent should fail to devote his entire time to the exploitation of the said centennial celebration, as provided in the act directing his appointment, has the commission any relief?"

This question, in a manner, is answered by the first answer also.

If the publicity agent is derelict in his duty in any way, then, upon that fact being referred to the state board of agriculture by your commission, the state board of agriculture will undoubtedly take such action as may be proper.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the State Commissioner of Soldiers' Claims)

372.

SOLDIERS' RELIEF—CERTIFICATION OF AMOUNT NECESSARY BY SOLDIERS' RELIEF COMMISSION TO COUNTY COMMISSIONERS —AMOUNT OF LEVY DISCRETIONARY WITH COUNTY COMMISSIONERS—CONSTITUTIONAL LAW.

Under Section 2936, General Code, the amount levied by the commissioners for soldiers' relief, after the soldiers' relief committee has certified the probable amount required, is optional with the commissioners.

To hold that it was mandatory upon the commissioners to levy the amount certified by the soldiers' relief commission would confer the levying power upon the commission and thereby contravene Sections 1 and 7 of Article X of the Constitution, which vests the powers of taxation in county commissioners, township trustees, and similar boards.

COLUMBUS, OHIO, May 6, 1912.

HON. B. J. BROTHERTON, *State Commissioner of Soldiers' Claims, Columbus, Ohio.*

DEAR SIR:—You have referred to me for my opinion thereon the following question submitted to you by a certain member of a soldiers' relief commission. The question is as follows:

> "Must county commissioners levy the amounts requested by soldiers' relief commission, or is the amount of the levy to be made by the commissioners for such purpose optional with the commissioners?"

The following provisions of the General Code of Ohio must be considered in answering this question:

> "Section 2930. There shall be a commission known and designated as 'the soldiers' relief commission,' in each county, composed of three persons, residents of the county, each of whom shall serve for three years. Two of the persons so appointed shall be honorably discharged soldiers, sailors or marines of the United States. On or before the first Monday in April of each year, a judge of the court of common pleas in such county shall appoint one commissioner for such term."
>
> "Section 2936. * * * The commission shall meet and determine * * * the probable amount necessary for the aid and relief of such indigent persons for the ensuing year, together with an amount sufficient in the judgment of the commission, to furnish relief to any such indigent persons not named on such lists, whose rights to relief shall be established to the satisfaction of the commission. After determining the probable amount necessary for such purpose, the commission shall certify it to the county commissioners, who, at their June session shall make the levy necessary to raise the required relief, not to exceed five-tenths of a mill per dollar on the assessed value of the property of the county hereinafter authorized."

Section 2942, General Code, provides also for a levy by the county commissioners, but it will not be necessary to consider this section in answering the question submitted.

In my opinion, the amount to be levied by the county commissioners is optional with them. To be sure, this does not seem to be the primary meaning of Section 2936, as quoted above. In my judgment, however, this meaning must be given to the section or else the section and the entire act must be regarded as unconstitutional. Without citing any cases, it has become well settled in Ohio that the power to levy county taxes cannot be delegated to a non-elective officer or board of officers. This is by reason of the provisions of Sections 1 and 7, of Article X of the Constitution, which are as follows:

> "Section 1. The general assembly shall provide by law, for the election of such county and township officers as may be necessary.
>
> "Section 7. The commissioners of counties, the trustees of townships, and similar boards, shall have such power of local taxation, for police purposes, as may be prescribed by law."

You will observe that Section 2936 imposes the levying power in the commissioners. That is to say, the section does not provide that the soldiers' relief commission shall itself make the levy, but merely that the commissioners shall make the levy when requested. To be sure, the section vests in the soldiers' relief commission the power to determine the amount that is necessary for that purpose, and upon the county commissioners, the duty of making the levy—"necessary to raise the required relief." So that my holding really does some violence to the exact language of the section.

The members of the soldiers' relief commission, however, have many characteristics which seem to stamp them as officers. In my opinion, if the statutes should be so construed as to give to them the power to control the discretion of the county commissioners, it would have to be held unconstitutional upon the ground that I have suggested. Rather than reach such a conclusion, I have arrived at the conclusion which I have already expressed.

I might add that, in my opinion, the commissioners are obliged to make some levy when requested by the soldiers' relief commission, and would not be permitted to exercise their discretion arbitrarily. The soldiers' relief commission has rights in the premises which it may enforce, as against such arbitrary action by the commissioners.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

(To the State Librarian)

104.

STATE LIBRARIAN—DISPOSITION OF PAMPHLET IRREGULARLY PRINTED BY PREDECESSOR—POWERS OF BOARD OF LIBRARY COMMISSIONERS.

The question of the regularity of the allowance of the requisition for the printing by a former state librarian of the pamphlet which is now in custody of the present state librarian entitled "Our national constitution and the constitution of Ohio," is a mooted question with which the latter official is not concerned.

The disposition of this pamphlet is within the power of the library commissioners and the librarian is advised to retain custody of said pamphlet awaiting the decision of the aforesaid body.

COLUMBUS, OHIO, February 9, 1912.

HON. JOHN H. NEWMAN, *State Librarian, Columbus, Ohio.*

DEAR SIR:—Under date of December 12, 1911, you wrote me to the effect that on April 13, 1911, the board of library commissioners elected you librarian of the Ohio state library, and that you assumed the duties of such position on July 1, 1911; that on June 30, 1911, your predecessor in office, Hon. C. B. Galbreath made requisition upon the supervisor of public printing of the state of Ohio for the printing of 2,000 pamphlet copies of a document prepared by said Galbreath entitled, "Our national constitution and the constitution of our state;" that the minutes of the meetings of the state library commissioners do not disclose that said librarian was authorized by them to have said work printed as a state document and at the state's expense; that although said document purports to have been sent to the printer on June 30, 1911, it contains matter which is dated as late as October 29, 1911. Two questions are suggested by your inquiry, viz.:

1st. Was the printing of this document regular?

2nd. What should now be done with it?

As to the regularity of the printing of this document I express no opinion at this time for the reason that it is now a moot question. I have been informed that the printer did the work and was paid for it, and anything that I might say on that subject would not now change the status of the matter.

Under the provisions of Section 788, etc., of the General Code, the board of library commissioners are charged with the management of the state library and invested with the power to make such rules for the government thereof as it deems necessary and proper. When the aforesaid pamphlets were delivered to your office they became the property of the state of Ohio, subject to such disposition as the board of library commissioners might see fit to make. I, therefore, advise that you retain the custody of said pamphlets awaiting the orders of the board concerning them.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the State Fire Marshal)

132.

TELEPHONES IN RESIDENCE OF FIRST DEPUTY AND FIRST ASSISTANT OF STATE FIRE MARSHAL—DISCRETION OF STATE FIRE MARSHAL AS HEAD OF DEPARTMENT.

The discretion with which the state fire marshal as head of his department is intrusted empowers him, if he deems it necessary, to install telephones in the residence of his first deputy and first assistant, and to provide for the payment of the same from the state fire marshal fund.

COLUMBUS, OHIO, February 16, 1912.

HON. JOHN W. ZUBER, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of February 2, wherein you inquire as follows:

> "So construing the above statutes (relating to the duties of the state fire marshal) and from experience as state fire marshal knowing that it is important to reach the scene of a fire as soon as possible and commence our investigation and finding that many fires which need immediate investigation are reported by telephone at night, I believe it proper, legal and right for the proper performance of my duties to provide a means whereby these night calls and reports could be received and given immediate attention.
>
> "I, therefore, had telephones installed in the residences of my first deputy and first assistant at Columbus and have paid the charges for such telephone service from the state fire marshal fund. I deemed this expense a necessary one for the performance of my duties and one which is legal under the discretion given me by law.
>
> "May I have your official opinion as to whether or not such expense is permissible under the provisions of Section 821 of the General Code and the sections of the General Code defining the duties and the nature and scope of the duties of the state fire marshal."

In reply to your inquiry I beg to say that Section 821 of the General Code, provides as follows:

> "The state fire marshal shall appoint a first deputy fire marshal, a second deputy fire marshal, and a chief assistant, each of whom he may remove for cause. He may employ such clerks and assistants, and incur such other expenses as are necessary in the performance of the duties of his office."

Section 822, G. C., provides as follows:

> "The state fire marshal shall not engage in any other business. He or one of his deputies shall at all times be in the office of the state fire marshal for the performance of the duties required of him by law."

Section 833 of the General Code, provides:

> "In the performance of the duties imposed by the provisions of this chapter, the state fire marshal and each of his subordinates, at all times of day or night may enter upon and examine any building or premises where a fire has occurred, and other buildings and premises adjoining or near thereto."

Among the statutory duties required of the state fire marshal's department are included the investigations of fires, the arrest of persons suspected of arson and the examination of buildings in which a fire has occurred, as set forth in Sections 824, 828 and 833, of the General Code, respectively.

It is apparent from the foregoing sections that the state fire marshal's department is a part of the police branch of the state goverment, subject to be called in the performance of such police duties at any hour of the day or night, under Section 822 of the General Code, above quoted.

The state fire marshal is left considerable discretion as to the necessary expense he may incur in the performance of the duties of his office. Section 822 of the General Code, above quoted, requires that the state fire marshal or one of his deputies shall be at his office at all times, ready for the performance of such duties as may be required of him or his deputies. If, in the judgment of the state fire marshal, it is for the best interests of the state, and is necessary in the performance of the duties of his office that a telephone be placed in the residences of the first deputy fire marshal and the first assistant fire marshal at Columbus; then it may be so installed, and it is my opinion that the charges for such telephone service may legally be paid from the state fire marshal's fund.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

ADDENDUM:

The facts in your question are different from those wherein I have heretofore held against payment by the state for the use of telephones in the homes of officers. The underlying principle in holding in favor of the allowance in your case is based upon the fact that the telephones in the residences of the officers you name are necessary in your judgment as distinguished from the judgment of the occupant of the residence. This also you can observe from time to time by considering the extent of the use. I have held that under ordinary circumstances the state is not to pay for the use of a telephone in a private residence, rulings to which I still strictly adhere. The exception arises where, in the judgment of the head of the department, the welfare of the state requires that he should see to the use of those means which best subserve that purpose. I am also particularly impressed with the idea that it is the duty of the officers you name to respond to your call either day or night.

156.

POWERS OF ATTORNEY GENERAL AND DUTY TO APPEAR IN COURT —LIMITATIONS—JURISDICTION AS TO PROSECUTING ATTORNEYS.

As the attorney general is obliged by the statutes to appear for the state only in the supreme court and not in other courts except when required by the governor or general assembly, and as under Section 336, he is governed by the same restrictions with respect to appointment of assistants to the attorney general, he may not supersede the prosecuting attorney in prosecutions for arson or similar crimes pending in any county.

The attorney general is authorized to give legal advice to administrative officials, only with reference to their official duties, and it is not the duty of the state fire marshal to institute impeachment proceedings against a prosecuting attorney.

COLUMBUS, OHIO, February 23, 1912.

HON. JOHN W. ZUBER, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of January 29, calling my attention to your previous letter of January 5, and requesting my opinion in writing upon the following questions which I quoted from your letter of January 5:

> "Is there any authority vested in the attorney general whereby he can supersede the prosecuting attorney in prosecutions where the prosecuting attorney neglects and fails to perform his duty?
>
> "Can your office give to our department your services to the end that you take exclusive charge and control of prosecutions for arson and similar crimes which are now pending in the courts of a certain county?
>
> "May I have your opinion as to the proceedings necessary for impeachment of a prosecuting attorney where he is guilty of dereliction of duty?"

The duties of the attorney general in so far as they relate to the administration of the purely criminal law of the state are completely prescribed by Chapter 5 of the Third Division of the First Title of the General Code, consisting of Sections 331 to 351, inclusive, thereof. By examining these sections it will be observed that the only ones which bear upon the questions submitted are Sections 333 and 336, General Code, which provide in part as follows:

Section 333:

> "The attorney general shall be the chief law officer for the state and all its departments * * *. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the *supreme court* in which the state may be directly or indirectly interested. When required by the *governor* or the *general assembly*, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor he shall prosecute any person indicted for a crime."

Section 336.

> "If in his opinion, the interests of the state require it, the attorney general may appoint special counsel to represent the state in civil actions, criminal prosecutions or other proceedings in which the state is a party or directly interested." * * *

This department has always construed Section 336 as limited by the provisions of Section 333. That is to say—and I think it cannot be otherwise held—the attorney general is without authority to appoint special counsel to represent the state in a proceeding in which he himself as attorney general would have no standing or right whatever.

The plain provisions of Section 333 then being the only ones concerned here furnish a complete answer to your first question. The attorney general is authorized upon the written request of the governor to prosecute any person indicted for a crime or upon the request of the general assembly to appear in any case in which the state is a party, which properly includes criminal prosecutions. Only then by the direction of the governor or the general assembly may the attorney general take part in the trial of a criminal case. There is no authority inferable from this section whereby the attorney general can supersede the prosecuting attorney. In any case in which the attorney general is directed to prosecute a person indicted for a crime he may take his position at the trial table, and I should say assume charge of the case, but he cannot deprive the prosecuting attorney of his right to participate actively therein.

From what has been said it follows that I am not at liberty to offer my services or those of any of my assistants or special counsel to the state fire marshal to the end that this department take exclusive charge and control of prosecutions for arson or similar crimes which are now pending in any county.

With respect to your request as to the proceedings necessary for the impeachment of a prosecuting attorney, I beg to cite you to Section 341, General Code, a part of the same chapter in which the sections already discussed are found, which provides in part as follows:

> "The attorney general, when so requested, shall give legal advice to a state officer * * * in all matters relating to their official duties."

It is not the duty of the state fire marshal to institute impeachment proceedings against a prosecuting attorney. I might observe that the language of this section seems to have been designedly clear. That of Section 342, for example, is much broader; it directs the attorney general to "give his written opinion on questions of law to either house of the general assembly." It follows, of course, that either house of the general assembly has the right to ask any questions of law of the attorney general. Not so, however, with administrative state officers. The power of the attorney general to advise them is limited to matters relating to their official duties.

I am, by your own suggestion, limited to the strict letter of the law which prescribes my official duty. My advice to you is in accordance therewith.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Constitutional Convention)

128.

CONSTITUTIONAL CONVENTION—POWER TO PUBLISH PROCEEDINGS—LIMITATION OF EXPENSE—APPROPRIATION.

Section 4 of 102 O. L. 298, gives the constitutional convention full power to do all things necessary for the publication of its debates and proceedings with the limitation that the appropriation made for its expenses shall not be exceeded.

COLUMBUS, OHIO, February 12, 1912.

HON. GEORGE W. KNIGHT, *Chairman of Special Committee, Columbus, Ohio.*

DEAR SIR:—Your favor of January 20, 1912, is received, in which you ask an opinion of this department upon the following:

> "By direction of the special committee of the constitutional convention 'created to consider the subject of reporting and publishing the debates of this convention,' which said committee is under instruction to report to the convention not later than Tuesday, January 23, I beg to submit for your interpretation and opinion, a question rising under the act of the general assembly pursuant to which this convention is now in session, and which has an important bearing upon the subject referred to this committee.
>
> "The convention is assembled pursuant to 'An act for the election to and assembing of a convention to revise, alter or amend the constitution of the state of Ohio.' (O. L. 102, p. 298.)
>
> "Section 4 of the said act provides:
>
> "'Said convention shall have power to determine its own rules of proceeding * * *; to make provisions for the publication of its proceedings or any part thereof, during its session; to provide for the publication of the debates and proceedings of the convention in durable form; and for the securing of a copyright thereof for the state; * * *'"
>
> "The question we desire to submit for your consideration is this:
>
> "Since the act is in the nature of a special or extraordinary measure, and the phrase in the section above recited authorizes the convention to 'provide' for the publication of the debates, etc., and does not follow the usual formula of merely 'authorizing the publication' of debates and other matter, is it not contemplated that under said act the convention shall have full and plenary power, within the limits of the money at its disposal, to make any and all arrangements for the method under and by which said debates and proceedings may be published?"

Section 4 of the act referred to, 102 Ohio Laws 298, provides as follows:

> *"Said convention shall have authority to determine* its own rules of proceeding, and to punish it members for disorderly conduct, to elect such officers as it may deem necessary for the proper and convenient transaction of the business of the convention, and to prescribe their duties; *to make provisions for the publication of its proceedings, or any part thereof, during its session; to provide for the publication of the debates and proceedings of the convention, in durable form, and for the*

securing of a copyright thereof for the state; and to fix and prescribe the time and form and manner of submitting any proposed revision, alterations or amendments of the constitution to the electors of the state; also the notice to be given of such submission."

Section 18 of said act provides:

"The journal and proceedings of said convention shall be filed and kept in the office of secretary of state. Said secretary of state shall furnish said convention with all needed stationery, and shall do such other things relative to the distribution and publication of matter pertaining to the convention as it may require. He shall forthwith cause such number of copies of this act to be published and transmitted to the electors several boards in the state as will be sufficient to supply a copy thereof to each board of judges of election in their respective counties, and such election boards shall distribute the same to such boards of judges of election."

Your inquiry calls for a construction of the foregoing sections. The provisions of Section 18 do not limit in any way the power and authority granted to the constitutional convention by Section 4 of said act.

A construction of the provisions of Section 4 under consideration calls for a definition of the words "provide" and "provisions" as therein used.

The various definitions of the word "provide," as construed by the courts, are summarized in 32 Cyc. 740, as follows:

* * * "to procure beforehand; get, collect or make ready for future use; prepare, furnish, supply; to make ready; to prepare; to furnish or supply; to furnish and supply; to procure as suitable or necessary; to prepare; to make ready for future use; to furnish; to procure beforehand; to make ready for future use; to furnish; to supply."

The word "provision" is defined in Webster's dictionary as follows:

"The act of providing or making previous preparation."

Applying these definitions to the provisions of Section 4 under consideration, they would read: That said convention shall have authority to prepare and supply the publication of its proceedings; and to furnish, or to supply the publication of the debates and proceedings of the convention.

Said Section 4 gives to the constitutional convention full power and authority to do all things necessary for the publication of its proceedings during the convention; and for the publication of its debates and proceedings in durable form, within the limits of the appropriation made for the expenses of the convention, and not otherwise expended.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

182.

CONSTITUTIONAL ENACTMENT FOR *ROAD* TAX LEVY—POWER OF CONVENTION TO MAKE "SELF-EXECUTING."

A constitutional provision may be enacted for a tax levy for a road improvement so as to make the enactment "self-executing," i. e., not requiring auxiliary action by the legislature. To effect such purpose, however, the act must be complete in every detail.

COLUMBUS, OHIO, March 6, 1912.

HON. S. S. STILWELL, *Member of the Constitutional Convention, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 16, 1912, which is as follows:

> "I want to inquire as to the probable effect that the possible action of the constitutional convention may have, if, for instance, in the good roads controversy that is now on in the convention, the convention should decide to submit to the voters of the state the proposition to make a small levy upon the state tax duplicate, could that levy be enforced without the intervention of the general assembly? If it could not be so enforced without such action by the general assembly, in your judgment, would it be possible for the convention to specifically direct the auditor of state to make such levy without such intervention by the general assembly?"

A constitutional provision can, undoubtedly, be adopted which will obviate the necessity for any legislative action in order to put the same into operation. This is what is termed "a self-executing provision." A good description of a provision of this kind is found in the opinion of Mr. Justice Brown, in the case of Davis vs. Burke, 179 U. S. 399, at page 403:

> "Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a constitution asserts a certain right or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law and is full authority for all that is done in pursuance of its provision. In short, if complete in itself it executes itself."

It is my opinion, therefore, that a provision, such as is indicated by you, could be placed in the constitution, but it would be necessary to make the provision complete in every detail; that is, to provide for the amount of the levy; how and by whom the levy shall be made and collected; in fact, each and every step must be provided for. For it seems to be the rule, in all cases upon this subject, that if anything remains to be done to complete the object contemplated by the provision, then, the provision to that extent is inoperative, that is, is not self-

executing, and requires further action by the legislature to make it entirely operative.

The subject of self-executing and non-self executing provisions is quite an extensive one, and there are a great number of cases in which the point to be decided was whether a particular provision was or was not self-executing; but I do not think it necessary to enter further into the subject, as you will see, from what I have said above, that the only safe way is to make the provision entirely complete in itself; that is, to provide for each and every step necessary to place it in full operation.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Member of Constitutional Convention)

265.

APPROPRIATION—JOINT RESOLUTION NOT A LAW—INVESTIGATION OF OCCUPATIONAL DISEASES BY STATE BOARD OF HEALTH.

Inasmuch as a joint resolution cannot have the effect of a law, and furthermore as the joint resolution providing for an investigation for "occupational diseases" by the board of health does not specifically provide an appropriation, Article II, Section XXII of the Constitution has not been complied with and no appropriation has been made for this purpose.

COLUMBUS, OHIO, April 10, 1912.

HON. HARRY D. THOMAS, *Member of Constitutional Convention, Columbus, Ohio.*

MY DEAR SIR:—I am in receipt of your letter of March 27, 1912, requesting my opinion upon two questions, first, as to whether an employer's liability insurance company is authorized to issue policies insuring employers against the results of accidents to employes caused by the employer's wilful act or his violation of the statutes. I enclose you herewith a copy of my opinion rendered to the state liability board of awards on April 4th, which covers this same question.

Your second question is whether senate joint resolution 19, 102 O. L., 749, carried with it an appropriation to the state board of health to make the investigation referred to in the resolution. This section is as follows:

> WHEREAS, The employment of men and women in certain occupations is known to be attended with more than ordinary danger to health, giving rise to what is known as 'occupational diseases,' and
>
> "WHEREAS, Unnecessary sickness and shortening of life from whatever cause, is a serious loss of grave concern to the state and to all the people, and
>
> "WHEREAS, It is believed to be possible, by public education and by the enforcement of proper measures, to largely prevent unnecessary sickness and premature death among employes in various trades and occupations, therefore
>
> "Be it Resolved by the General Assembly of the State of Ohio, That the state board of health is hereby authorized and directed to make a thorough investigation of the effect of occupations upon the health of those engaged therein with special reference to dust and dangerous chemicals and gases, to insufficient ventilation and lighting, and to such other unhygienic conditions as in the opinion of said board may be specially injurious to health, and to report to the next general assembly the results of such investigation, with such recommendations for legislative or other remedial measures as it may deem proper and advisable, provided that the cost of such investigation shall not exceed the sum of five thousand dollars."

This resolution does not attempt to make an appropriation as the only language in any way bearing upon the expenditure necessary to make the investigation is the last clause of the last sentence of the resolution, which simply attempts to limit the amount that may be expended.

Section 22 of Article II of the Constitution provides:

> "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

It has been held that a joint resolution is not a law and cannot have the effect of a law. The latest expression of our supreme court as to this is found in the case of The Cleveland Terminal and Valley Railroad Company et al. vs. The State of Ohio, 85 O. S., 139, where, on page 152 the court says:

> "It should not need the citation of authorities to establish the proposition that a joint resolution is not an act of legislation, and that it cannot be effective for any purpose for which an exercise of legislative power is necessary. * * *"

Therefore, as an appropriation must be made by law, the joint resolution above quoted would be ineffective, even if it expressly provided for an appropriation for the purpose of making this investigation.

I am very sorry that no appropriation for this purpose is available for I believe it is very important that an investigation such as is provided for by this resolution should be made in order that legislation appropriate to remedy conditions existing in the industries referred to may be enacted as soon as possible.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Official Reporter of Debates of Constitutional Convention)

385.

OFFICIAL REPORTER OF DEBATES OF CONSTITUTIONAL CONVENTION—COMPENSATION FOR INDEXING AND SUPERINTENDING PUBLICATION OF DEBATES AFTER ADJOURNMENT.

For work done, after the adjournment of the convention in indexing and superintending the publication of the debates, warrants may be issued to the official reporter of the constitutional convention by the auditor upon certificate authorized by the convention and signed by the presiding officer.

COLUMBUS, OHIO, May 19, 1912.

MR. CLARENCE E. WALKER, *Official Reporter of Debates at the Constitutional Convention, Columbus, Ohio.*

DEAR SIR:—In your letter of May 11, 1912, you state that on February 6, 1912, you were duly elected as the official reporter of the constitutional convention, and that you had been informed that there was no authority in law for any warrants to issue on the state treasurer for any work performed after the adjournment of the convention, except to the official reporter; that it will be necessary for you to index and superintend the publishing of the debates of the constitutional convention, which work must necessarily be done after the convention adjourns; that the compensation paid to you as official reporter would be exorbitant for the services required in superintending the indexing and publishing of the debates, and you ask for my construction of the act providing for the constitutional convention as to this matter.

By Section 4 of the act providing for the constitutional convention, 102 O. L., 278, the convention is given authority to provide for the publication of its debates and proceedings, in durable form, and for securing of copyright thereof for the state.

By Section 20 of the said act it is provided that no warrants shall issue on the treasurer for moneys for the uses of the convention, except on the order of the convention, and the certificate of the presiding officer thereof.

These sections do not require that the services must be performed while the convention is in session, but under Section 4, above mentioned, the convention can, in providing for the publication of its debates and proceedings, employ you to do this work at a compensation to be fixed by it. This would comply with the provisions of Section 20 as to the compensation being ordered by the convention, and a certificate upon which the warrant of the auditor of state is issued can be signed by the presiding officer of the convention after the services have been performed, or at any time; or the certificate could be signed by the said presiding officer at stated periods, if so provided by the convention.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

(To the Constitutional Convention)

419.

MILEAGE TO OFFICERS AND EMPLOYES OF CONSTITUTIONAL CONVENTION CANNOT BE ALLOWED.

Inasmuch as, under the act of 102 *O. L. p.* 298, *officers and employes of the convention must receive the same compensation as is allowed similar officers of the general assembly, under Section* 51, *General Code, these officers and employes cannot be allowed their mileage to and from their homes for every two weeks that the convention has been in session.*

Under Section 56, *General Code, the compensation of pages when once fixed, cannot be changed and, therefore, having fixed their salaries, the convention may not now provide for their mileage.*

COLUMBUS, OHIO, June 7, 1912.

HON. C. B. GALBREATH, *Secretary, Constitutional Convention, Columbus, Ohio.*

DEAR SIR:—I have your verbal request, asking my opinion as to whether or not the following resolution submitted to the constitutional convention for adoption, would be valid if passed:

> "RESOLVED, That the employes of this convention be allowed mileage to and from their respective homes for every two weeks that the convention has been in session."

In reply thereto I beg to advise that Section 20 of the act passed May 31, 1911, to provide for the election to, and assembling of a convention to revise, alter or amend the constitution of the state of Ohio, laws of Ohio, 102, page 298 provides as follows:

> "Any elector of the state shall be eligible to membership in such convention and any disqualification now imposed by law upon persons holding any other office under the laws of the state is hereby removed insofar as the right to be a delegate to such convention is concerned. The *delegates* of the convention shall be entitled to the same *compensation and mileage* for their services as is allowed by law to members of the general assembly for one year, and the *officers and employes* of the convention, as far as practicable, *shall be entitled to the same compensation for their services as is allowed by law for similar services to officers and employes of the general assembly;* and compensation for all such services shall be paid out of the state treasury on the warrant of the auditor of the state; provided, an additional alowance may be made to the official reporters of the convention if deemed proper. And no warrant shall issue on the state treasury for such compensation, of for money for uses of the convention, except on the order of the convention and certificate of the presiding officer thereof."

Section 51 of the General Code, in relation to the per diem of officers of senate and house, provides:

> "The clerks and sergeants-at-arms of the senate and house of representatives, and their assistants, shall each be paid five dollars for

each day's attendance during the session. For services rendered at the organization of the general assembly, each of the officers named in Section thirty-three, unless re-elected to his position, shall be paid five dollars for each day, for not exceeding ten days."

Section 56 of the General Code, under the head of compensation of pages and other employes, provides as follows:

"The compensation of pages and other employes of either house shall be fixed by resolution of such house and not changed during the term for which fixed."

It, therefore, appears that as to the clerks, sergeant-at-arms and their assistants, such compensation is fixed by Section 51; there being no provision therein for mileage.

As to the pages and other employes, their compensation has already been fixed by resolution of the constitutional convention, and the provisions of Section 56 apply to them, whereby the compensation fixed shall not be changed during the term.

I am, therefore, of opinion that there is no warrant in law for the adoption of the resolution proposed.

Very respectfully yours,

TIMOTHY S. HOGAN.

Attorney General.

(To the Secretary of the Constitutional Convention)

465.

PER DIEM OF SERGEANT-AT-ARMS OF CONSTITUTIONAL CONVENTION NOT CONTINUED DURING TEMPORARY ADJOURNMENT—TERM OF OFFICE CONTINUES.

Inasmuch as the constitutional convention has provided a "per diem" compensation for the sergeant-at-arms and further made specific provision for a continuation of the "per diem" for ten days after temporary adjournment, the intent that payment shall cease during the time intervening between the expiration of said ten days and the final adjournment, is manifest.

The term of office, however, is unaffected and the "per diem" is to be allowed for any further work which might be required by the body.

COLUMBUS, OHIO, June 25, 1912.

HON. C. B. GALBREATH, *Secretary of the Constitutional Convention, Columbus, Ohio.*

DEAR SIR:—Under date of June 17, 1912, you requested the opinion of this department as follows:

> "On January 9, 1912, the constitutional convention elected Mr. J. C. Sherlock sergeant-at-arms. His office was provided for under the following rule of the convention:
>
> "Rule 1. The officers of the convention shall be a president, a vice-president, a secretary and a sergeant-at-arms. These officers shall be elected by a majority vote of all the members elected to the convention. Any officer of this convention may be recalled and another elected in his place, upon a majority vote of all those elected to the convention.
>
> "The duties of the sergeant-at-arms are prescribed by the following rule:
>
> "Rule 17. The sergeant-at-arms shall have general charge of the hall, galleries and smoking room of the convention under the direction of the president and of the committee rooms under the direction of the secretary. He shall cause all such halls and rooms to be properly cleaned and ventilated. He shall enforce the rules as to admission to the hall and smoking room of the convention. He shall sign all requisitions for supplies for the use of the convention and its members. He shall perform such other duties as the president or convention shall from time to time determine upon.
>
> "By adoption of the report of the committee on employes the salary of the sergeant-at-arms was fixed in the following recommendation:
>
> "We recommend that all the above named appointees, as well as the sergeant-at-arms, shall receive as compensation the sum of five dollars ($5.00) per diem.
>
> "The report of the committee was adopted January 17, 1912.
>
> "The convention, by resolution, on June 6, 1912, adjourned to meet at 2 o'clock in the afternoon of Monday, August 26, 1912, unless a meeting of the convention shall be called in the meantime. The written demand of any twenty-five members of the convention filed with the

secretary of the convention shall constitute a call for any such meeting.

"The same resolution provided further:

"Section 3. The services of the sergeant-at-arms, J. C. Sherlock, and of the custodian, Fred Blankner, are hereby continued for the period of ten days after June 7th, and they are hereby instructed to procure boxes and all necessary material for packing and shipping documents of the delegates; they are hereby authorized to retain from the present force, the necessary help required, not to exceed five persons; they shall receive for such service the same per diem as is now being paid them by this convention; the president of the convention is hereby authorized and instructed to sign vouchers thereof and for necessary material and express charges.

"Section 4. Ten days after June 7, 1912, the sergeant-at-arms of this convention shall turn over the hall and committee rooms to the proper custodians thereof; except such rooms as may be required by the president and secretary of the work authorized by this convention, which rooms are hereby retained until August 26, 1912.

"Mr. Sherlock, it will be seen, is one of the elective officers of the convention. Does his term of office extend to the final adjournment of the convention or does it expire on June 17th 'ten days after June 7, 1912?'"

The compensation of the sergeant-at-arms is governed by the recommendation of the committee on employes which was adopted by the convention as follows:

"We recommend that all the above named employes, as well as the sergeant-at-arms shall receive as compensation the sum of five ($5.00) dollars per diem."

It is well settled that the term "per diem" when employed in fixing the compensation of an officer, restricts the payment to the time actually spent in the performance of the duties of the office. The century dictionary defines the term "per diem" as follows:

"Per diem—By the day; in each day; daily; used of the fees of officers *when computed by the number of days of service.*"

Should the convention body have intended that the sergeant-at-arms was to receive payment for the entire period of its existence, it would have expressed that intent by fixing a compensation for longer periods or by fixing a salary. Not having done so, the conclusion follows, in view of Section 3, of the amended resolution quoted above, that that official cannot receive pay after June 17th, i. e. at the expiration of ten days after June 7, 1912, and before August 26, 1912, unless a meeting is called during that time.

In further support of this construction, attention is called to the following language is Section 3, of the amended resolution:

"They shall receive for such service the same per diem as is now being paid them by this convention."

These words refer to the added services of the sergeant-at-arms during the period of ten days after June 7th, and were it intended, in the recommendation of the committee on employes, that the compensation of the sergeant-at-arms was

to continue until the end of the session, this language would have been altogether unnecessary.

While these rules govern as to compensation, I see no reason why the term of office of the sergeant-at-arms may not continue until the end of the session and should any duties be required of him upon the re-assembling of the body on August 26, 1912, or by reason of a meeting being called prior to that time, there is nothing to prevent his being compensated for these services on the five ($5.00) dollar per diem basis during the time of their performance.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Ohio State Archaeological and Historical Society)

1.

OHIO STATE ARCHAEOLOGICAL AND HISTORICAL SOCIETY—APPROPRIATION FOR 1911 AND 1912—MUSEUM AND LIBRARY BUILDING—ASSESSMENTS FOR PAVING PROPERTY ABUTTING SPIEGEL GROVE STATE PARK.

The appropriation bill providing $100,000 *for a museum and library building "complete" imports that this amount is to be applied to the building including its equipment.*

The amount applied to these purposes may be proportioned by this society at its own discretion; but the greater part thereof should preferredly be applied to the building itself.

2. *The bill imports that Spiegel grove state park may be improved by payment on the property adjoining its three triangular sides.*

COLUMBUS, OHIO, January 2, 1912.

HON. E. O. RANDALL, *Secretary, The Ohio State Archaeological and Historical Society, Columbus, Ohio.*

MY DEAR SIR:—I am in receipt of your letter of December 21, 1911, in which communication you ask my opinion upon two questions which are stated by you as follows:

> "The general appropriation bills for 1911 and 1912, (102 O. L., 375 and 396), under the appropriations for the Ohio state archaeological and historical society, contain among other items, the following:
>
> "Building for museum and library purposes to cost $100,000 complete ---------- $50,000.00
>
> "Our society desires to know the meaning of the word 'complete.' Under the item as expressed, does the appropriation pertain simply to the building, without equipment or furnishings? Does it mean that the entire $100,000 must be expended on the building itself, and that the society cannot reduce the cost of the building say to $85,000 and expend the remaining sum of $15,000 on equipment and furnishings?
>
> "Also the item:
>
> "For the proportion of the state of Ohio on account of improvement of abutting property of Spiegel grove state park for the street paving (1,300 ft.) on Hayes and (2,000 ft.) on Buckland avenues, state's proportion complete ---------- $10,000.00 ------ $5,000.00
>
> "The Spiegel grove park is practically in the shape of a triangle, one side of which faces Buckland avenue (2,000 ft.), one side on Hayes avenue (1,300 ft.) and the third side of the triangle being Wilson avenue, something like 1,000 ft. The improvement of Hayes avenue is practically completed. We find that the cost of the state for its proportion for Hayes avenue and the probable cost to the state for Buckland avenue, together, will not exceed $7,500 to $8,000, and that Wilson avenue can be improved in the same way for the remaining sum over and above the cost of improving Buckland and Hayes avenue.
>
> "The society desires to improve Wilson avenue in the same manner as the other two avenues. Can we use the fund in excess of that expended for Buckland and Hayes avenues, as above indicated, for similar improvements of Wilson avenue?"

In answer to your first question, my opinion is that the legislature has appropriated the sum of $100,000.00 with which your society is to construct a building, completed for museum and library purposes. The word "complete," it seems to me, was used to express the intention of the legislature, that this sum was intended to provide a building sufficiently equipped for the purposes named. The manner in which this money is to be expended rests entirely with your society, that is, the proportion to be expended for the building proper and for the equipment. You might expend $85,000.00 on the building itself and $15,000.00 upon the permanent equipment; or, $99,000.00 on the building and $1,000.00 on the equipment. In brief, the legislature has appropriated this money to provide a suitable building for your society to be used for museum and library purposes, and it is presumed you will expend the same in such manner as to erect the building best adapted to your present needs. But, as the state, by providing a permanent, safe, and beautiful home in which the most valuable collections of your society, while being safely kept, may also be seen and used, gives expression to the approval with which it regards the Ohio state archaeological and historical society and its purposes, it would seem that in making your plans more regard should be given to the future than to the present; the building will be permanent and probably of such design that future alterations cannot be made without ruining its symmetry; furniture and equipment are transitory, at the best and therefore if it becomes necessary to reduce your estimates either on the building or the equipment, would not the interests of the public require that the sacrifice be made from a temporary rather than from a permanent improvement?

As to your second question, you state that Spiegel grove state park is practically in the shape of a triangle, one side of which faces Buckland avenue, one side, Hayes avenue and the third, Wilson avenue. The obvious conclusion, from the language used in making the appropriation, is that the legislature intended to appropriate enough money to pay the state's proportion of the paving of *all* the streets upon which this park abuts, namely, Buckland, Hayes and Wilson avenues; you state that the amount of the appropriation is sufficient to pay the state's proportion of the paving on all of the said streets, that fact is conclusive. The words and figures:

"(1,300 ft.) on Hayes and (2,000 ft.) on Buckland avenues" can either be disregarded, as surplusage; or if these words and figures remain, then the name of Wilson avenue and the number of feet the park faces on this avenue may be inserted, as being inadvertently omitted. The controlling language is:

> "For the proportion of the state of Ohio on account of improvement of abutting property of Spiegel grove state park for the street paving * * state's proportion complete ----------$10,000.00----------$5,000.00"

My opinion is, therefore that this appropriation is to be used to pay the state's proportion of the cost of paving all three streets.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

448.

ABSTRACT OF TITLE—"SPIEGEL GROVE" IN FREMONT, SANDUSKY COUNTY.

HON. E. O. RANDALL, *Secretary Ohio State Archaeological and Historical Society, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of an abstract of title to certain real estate in the city of Fremont, Sandusky county, Ohio, known as "Spiegel Grove" upon which the state is to erect and equip the Hayes commemorative library and museum building. You have requested my opinion as to the legality of the title to be derived by the state thereby.

An examination of said abstract discloses no serious defects. No patent is shown from the United States government to Moses Nichols, Randall Jerome and David Gallagher for tract 12, nor does Randall Jerome appear to have conveyed his one-third interest in said premises. Jonathan H. Jerome, whose relationship to Randall Jerome is not disclosed, conveyed a one-third interest in said tract 12 to Barzillia Inman on July 21, 1832 as shown by deed No. 13. These omissions, however, I do not regard as material at this time, inasmuch as Webb C. Hayes the last owner of this property and his immediate predecessors in title have had adverse possession for more than twenty-one years.

The records of Sandusky county should be examined for unpaid taxes and assessments against said property and a certificate of the clerk of the United States court for the northern district of Ohio as to suits and judgment against Webb C. Hayes should be attached to the abstract.

Two deeds for twenty acres of this property have been heretofore executed and delivered to the state of Ohio and are of record in Sandusky county, Ohio. The same have been approved by my predecessor, Hon. U. G. Denman. A deed for the remaining portion of Spiegel grove, consisting of five acres, has been executed by Webb C. Hayes to certain trustees, who are authorized to convey said premises to the state of Ohio, upon condition that the state shall provide for the erection of said building within three years from the date of said last named deed, to-wit: March 12, 1910, the deed to the state from said trustees to contain certain restrictions, as set forth in said deed of trust. The latter deed has been left with you in escrow, and I am informed by you that said building is to be erected upon the said five acre tract, notwithstanding a statement in the deed itself that said building is to be erected upon another part of Spiegel grove heretofore conveyed to the state.

The first condition in the deed of trust is that "the said the archaeological and historical society shall secure the erection upon that part of Spiegel grove, heretofore conveyed to the state of Ohio for a state park, a suitable fire-proof building on the sight reserved opposite the Jefferson street entrance, for the purpose of preserving and forever keeping in Spiegel grove all papers," etc.

In view of the foregoing provision nothing should be done toward the erection of said building on any other part of Spiegel grove than that expressly stipulated, unless the consent, in writing, of Webb C. Hayes is first obtained, nor until the title is fully vested in the state of Ohio for the use and benefit of the Ohio state archaeological and historical society.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Veteran Volunteer Firemens' Association)

484.

PENSION FUNDS—VOLUNTEER FIREMEN NOT INCLUDED AMONG BENEFICIARIES.

The present statutes providing for the police and fire departments of a city and for the establishment and management of pension funds, do not extend to volunteer firemen.

Inasmuch as volunteer firemen were not under former statutes accorded the benefits of pension funds, Section 4613, *General Code, providing for the preservation of the rights of all firemen formerly entitled to benefits of former funds, is of no avail.*

MESSRS. ROBERT RAITZ, *President, and* P. H. GALLOWAY, *Secretary, Veteran Volunteer Firemen's Association, Toledo, Ohio.*

GENTLEMEN:—I have given most careful consideration to the question you submit through Senators Deaton and Keller and Representative Hillenkamp, as to whether there is legal authority for participation by volunteer firemen in the regular firemen's pension fund. Before arriving at a conclusion I considered very carefully the communications of these gentlemen. I also have before me the opinion of Hon. Cornell Schreiber, city solicitor of Toledo, copy of which I herewith enclose. Inasmuch as the arguments in favor of allowing participation in the pension fund are so strong, and appeal to the charitable side of one's nature, I went over the question very carefully with many attorneys in this department, so as to be doubly sure of my conclusion, they all concurring.

I quote the following provisions of the General Code of Ohio, under which municipal corporations are authorized to provide pension funds for firemen:

> "Section 4382. The director of public safety shall classify the service in the police and fire departments in conformity with the ordinance of council determining the number of persons to be employed therein, and shall make all rules for the regulation and discipline of such departments, except as otherwise provided in this subdivision.
>
> "Section 4383. Council may provide by general ordinance for the relief out of the police or fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty. Nothing herein shall impair, restrict or repeal any provision of law authorizing the levy of taxes in municipalities to provide for firemen's police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds.
>
> "Section 4600. In any municipal corporation, having a fire department supported in whole *or in part* at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a fireman's pension fund. Thereupon a board of trustees, who shall be known as 'trustees of the firemen's pension fund' shall be created, which shall consist of the director of public safety, and in villages of the fire chief, and five other persons, members of such department. * * *"
>
> "Section 4601. On the second Monday of the month following the determination of such director or fire chief to create such fund, an election shall be held to choose five trustees from the department. * * * *

Between the hours of nine o'clock in the forenoon and six o'clock in the afternoon on the day designated, each person in the fire department, *who by its rules, is designated a member thereof,* shall send or cause to be sent by mail or otherwise, in writing the names of five persons, members of the department who are his choice.

"Section 4607. All fines imposed upon members of the fire department of the municipality by discipline or punishment by the authority having charge or control thereof, and the proceeds of all suits for penalties for the violation of a statute of the states or ordinances of such municipality with the execution of which such department is charged, and licenses or other fees payable thereunder, shall be credited to the pension fund.

"Section 4608. The trustees of the fund may take by gift, grant, devise or bequest, moneys, or real or personal property, upon such terms as to the investment *or expenditure* thereof as is fixed by the grantor or determined by such trustees.

"Section 4609. The trustees of the fund may also receive such uniform amounts from each person *designated by the rules of the fire department, a member thereof,* as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries.

"Section 4612. Such trustees shall make all rules and regulations for the distribution of the fund, *including the qualifications of those to whom any portion of it shall be paid and the amount thereof,* but no rules or regulations shall be in force until approved by the director of public safety or the fire chief of the municipality, as the case may be."

Section 4382, above quoted, is to be read in connection with the provisions of the chapter relating to civil service. From such reading—without elaborating further on the matter—it appears that only the regular or salaried members of the fire department of a municipal corporation are in the strict sense members of the department to be classified as such.

From this it follows that the power of council to provide otherwise than through the agency of the pension fund authorized in Section 4600 et sep. of the General Code, and which power exists under Section 4383, above quoted, extends only to salaried members of the department.

There is no specific mention of volunteer firemen in any of the present statutes relating to cities. Village volunteer firemen are recognized, and their status is fixed by Section 4390 of the General Code which I did not quote. Apparently, however, volunteer firemen in cities have no present status.

This distinction between village and city originated with the adoption of the municipal code of 1902. Prior to that time, as is well known, special legislation as to the several principal cities of the state was the rule; thus, Toledo being a "city of the third grade of the first class" was governed by an act found in 86 O. L., 54, designated in Bates Annotated Statutes as Sections 2476-1 to 2476-16, inclusive, which said portions establish a board of four fire commissioners, which board was to have the administration of the fire department. The act did not, however, define the personnel of the fire department, excepting that in Section 9 it was provided that,

"The board * * * shall * * * appoint *such members and* employes as may be necessary for the efficient management of the department."

thus seeming to recognize the existence of a department other than the employes thereof.

The last section of this special act provides, in effect, that except insofar as inconsistent therewith, the provisions of the general law relating to fire departments should apply to "cities of the third grade of the first class." The effect of this provision was to adopt those of Section 2470 Rev. Stat., which was in part as follows:

> "The council of any city * * shall have power to * * * establish and maintain a fire department and to provide for the establishment and organization of fire and hose company, and to provide such by-laws and regulations for the government of such companies as may be deemed necessary and proper, provided that *no active volunteer firemen* * * shall be required to serve on juries. * * *"

Volunteer firemen, then, were expressly recognized as members of a fire department under the general law as it existed prior to the adoption of the municipal code of 1902.

At the same time there were several firemen's pension fund acts similar to the one quoted above (which was enacted in 1904, after the adoption of the municipal code of 1902), thus there was one applicable to Cincinnati alone (Sections 2477-1 et seq. Revises Statutes); one which applied to Cleveland (Sec. 2477-15 et seq. Rev. Stat.); one which applied to Columbus (Sec. 2477-32 et seq. Rev. Stat.); a general pension fund law (Sec. 2477-51 et seq. Rev. Stat.); and one specifically applicable to Toledo (Sec. 2477-67 et seq. Rev. Stat.). I quote from the provisions of that act found in 92 O. L., 346:

> "Section 1. Be it Enacted by the General Assembly of the State of Ohio, That the persons who, from time to time, compose the board of fire commissioners, or such other board or committee of the city council of any city of the third grade of the second class, having control or management of the fire department of such city, and three other persons, members of the fire department therein, elected as herinafter provided, shall constitute and be the trustees for the distribution of the pension fund now existing or hereafter provided, and shall be called the board of trustees of the firemen's pension fund.
>
> "Section 2. The three persons to be elected as such trustees shall, together with three other persons, also members of said fire department, be nominated for such office of trustee in a convention to be composed of one delegate from each engine, chemical engine, fire boat, hook and ladder or hose company, fire alarm telegraph company and the general office belonging to the fire department of any such city and called by chief of such fire department or three members of such fire department, and convened at least two weeks prior to the election of such three trustees. * * *"

(Here follow detailed directions for the payment of benefits, for the retirement of members, etc., all which is made applicable generally to "members of the fire department" without any definition in said act itself of who should constitute such members within the meaning thereof.)

I have already pointed out that seemingly under Section 2470, supra, active volunteer firemen were regarded as members of the department. It does not necessarily follow, however, that a definition is thus afforded as to what constitutes a

member of the fire department within the meaning of the pension fund laws of the city of Toledo.

Now, Section 4613 of the *General Code,* which I have not as yet quoted, provides as follows:

> "All persons drawing pensions or entitled to them from existing firemen's pension fund shall be and remain beneficiaries in pension funds credited under this chapter in the same municipality where they are beneficiaries in such existing funds, and shall receive such amounts and be subject to the rules and regulations adopted by the board of trustees."

The significance of this section is this: It preserves to the beneficiaries of the existing pension funds the right to participate in pension funds created and preserved under the act found in 97 O. L., 244, and which now constitutes the above quoted section of the General Code; and, if therefore, volunteer firemen in the city of Toledo were regarded as members of the fire department under the special pension fund law applicable to that city, by the adoption of the municipal code they would be entitled to continue as beneficiaries to the fund in the same manner as they were formerly entitled to participate therein. If, on the contrary, from the time of the amendment of the special law applicable to the city of Toledo until the present time voluntary firemen in that city have not been regarded as proper beneficiaries of the fund, then, I should be inclined to give great weight to this practical construction of the statutes and not at this late date to disturb it.

I assume from the very existence of the question which you submit that voluntary firemen have not heretofore been receiving the benefits of the pension fund, nor contributing to it. That being the case, it would seem that all the parties concerned do not regard the old law as applicable to such volunteer firemen. This is, of course, a mere inference and may not be warranted by the actual facts. If I am in error in assuming the facts to be such as I have stated them, then, of course, the conclusion which I have stated does not follow.

Upon this assumption, however, I would hold, in deference to the aforesaid practical construction of the old law, that voluntary firemen of the city of Toledo are not entitled as of right to participate in or contributed to the firemen's pension fund.

This brings me to the question as to the power of the trustees of the pension fund under Section 4612 above quoted to determine the qualifications of those to whom any portion of such fund shall be paid. Does this power authorize such trustees to extend the membership of the pension list beyond the regular membership of the fire department, or beyond the membership of the pension list as it existed at the time of the enactment of what is now Section 4612 of the General Code?

Upon careful consideration I am unable to reach the conclusion that the word "qualification" as herein used refers to the manner of determining the membership of the class from which membership shall be drawn, but rather to the determination of the right of one who has contributed to the fund to receive benefits therefrom—the question of membership in the department, that of the extent of injuries, or of disability, etc.—in other words, I do not find in this section authority to extend the benefits of the fund generally speaking to those who are not members of the fire department, or to those who are not beneficiaries of the pension fund existing at the time the act of which the section is a part went into effect.

The question is a very difficult one on account of the vagueness of the statutory language, and the lack of authorities upon the exact point. I have been obliged to assume certain facts of which I have no direct statement. Upon this assumption, however, as aforesaid, and upon the construction of the statutes, which

seems to me to be the only possible one, I am of the opinion that under the existing laws voluntary firemen in the city of Toledo are not entitled to the benefits of the firemen's pension fund of that city. The doubt which has been in my mind arises from the provisions of Sections 4608 and 4609 of the General Code, above quoted. The one permits the trustees of the fund to take by gift, etc., moneys upon such terms, and the expenditure thereof as is fixed by the grantor, This might enable the trustees to administer in a quasi-official capacity the proceeds of any separate fund which might be entrusted to their care and management by volunteer firemen for the benefit of disabled volunteer firemen, but would not authorize them to distribute any money derived from contributions made by the regular members of the department for such purposes. That is to say, even if these statutes could be construed so as to permit the trustees of the firemen's pension fund to manage and disburse funds entrusted to them by voluntary firemen, such funds would have to be kept separate from the regular firemen's fund.

Section 4609 speaks of "persons designated by the rules of the department as members thereof." Standing by itself this might seem to authorize the director of public safety, the administrative head of the fire department, to designate such as are members of the fire department. However, this inference is dispelled by a consideration of the immediate context which provides that the amount to be received from such persons "shall be deducted from his monthly pay."

On the whole, then, I can find no authority for participation by volunteer firemen in the regular firemen's pension fund. Nor do I find any authority vested in council to create a pension fund other than that provided for in the statutes. Such authority is inconsistent with all principles of statutory construction. Having prescribed in detail the kinds of firemen's pension funds which council may provide for, it necessarily follows that the legislature did not extend authority to council to provide for some other kind of pension fund.

In conclusion permit me to suggest that the matter is one you should submit to the legislature. They have the power to make right any wrongs done your association; while I have not such power. My duty is confined to an interpretation of the statutes as I find them; and the same is true of your worthy city solicitor, Mr. Schreiber. I am quite sure that he feels about it as I do; but neither of us are permitted to do violence to the law working out its interpretation.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Ohio State Building Code Commission)

50.

BUILDING CODE—FIRE DOORS REQUIRED—EXCEPTIONS OF SPECIAL PROVISIONS TO GENERAL PROVISIONS—STATUTORY CONSTRUCTION.

The fact that certain sections of the building code provide for specified fire doors and that a section further on states that doors of a different variety may be used, under special circumstances, designated therein, does not necessarily invalidate either the one or the other of said sections.

The general provisions of a statute may be departed from and exception made thereto by the special provisions of the same act or of another act relative to the same subject.

COLUMBUS, OHIO, January 16, 1912.

HON. THOMAS P. KEARNS, *President Ohio State Building Code Commission, Columbus, Ohio.*

DEAR SIR:—In your communication of January 2nd, you submit the following question:

> "Part 3, Title 3, Section 5 of the Ohio building code states that standard fire doors shall be constructed in a certain manner. Under same part, same title and Section 13, the code states that a different or special standard door may be used under certain conditions.
>
> "The questions at issue are these, viz., does the word *may* as herein used conflict with the word *shall* and does the use of either or both of these words invalidate either or both above sections referred to?"

Title 3 of part 3 refers to "standard fire doors," Section 1 providing the number of doors and where used; Section 2 making a provision regarding "opening in walls for standard fire doors;" Section 3 detailing the character of "door sills for standard fire doors," and Section 4 providing for "lintels over standard fire doors." Section 5 details the "construction of standard fire doors."

There is no question but that the legislature intended that the requirements as set forth in the last named section should be complied with in the construction of standard fire doors.

Section 13 provides for "special standard fire doors," and reads as follows:

> "In the *finished* parts of the building where standard fire doors are required and where such doors are used to enclose elevators, stairways, or to subdivide a building of one kind of occupancy into smaller floor area, special standard fire doors constructed and equipped as follows may be used in place of standard fire doors previously prescribed.
>
> "In the finished parts of the building where double fire doors are required or where doors are placed on both sides of the walls, a standard automatic fire door or a standard roller steel shutter shall be used on one side of the wall, and a special standard fire door may be used on the other side in place of standard fire doors previously described.
>
> "(Then follows in detail the manner, kind and character of construction allowed in the special standard fire doors.)"

It is readily apparent that the provisions of Sections 1 to 5, *supra* are the general provisions, while the provision found in Section 13 is an exception to the general provision. Under the rules of statutory construction there is no question but that the later exception, while it prevails in the particular instances, as provided in the exception, does not in any way invalidate the general rule which applies in all instances other than as provided in the exception.

It is so axiomatic that there is hardly any necessity of quoting authority that the general provisions of a statute may be varied by the special provisions of the same or another statute relative to the subject.

> "The courts presume an intention in the legislature to be consistent in the making of laws; and also to have had a purpose in each enactment and all its provisions, special circumstances often create a necessity for appropriate special provisions, differing from the general rule upon the same subject; and so, where such provisions are found in a statute, different from the general provisions that would apply to the case, the courts must assume that the special provisions were made for adequate reasons, and give them effect by construing them as exceptions to the general rule contained in the general provision of the statute. In this way, without disregarding any of its provisions, effect is given to each and all the provisions of a statute. Potter's Dwarris, 272; Sedgwick Stat. Law 423.
>
> "State ex rel Crawford vs. McGregor, 44 O. S. 631."

I am, therefore, of the opinion that Section 13 is the exception to the general rule provided in the other Sections, 1 to 5 of part 3, title 3 of the Ohio building code, and should be read together, each section given full effect, and that there is no conflict between the several provisions, but that the provisions of Section 13 are to be regarded as the exception.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Probate Judges)

43.

JUVENILE COURT—POWER TO EMPLOY REGULAR PHYSICIAN.

If, in the judgment of the judge exercising the juvenile jurisdiction, the regular employment of one or more physicians for the purpose of examining those alleged to be juvenile delinquents or indigent persons and brought into court as such, would be of less expense to the county than the calling of such physicians as witness in separate cases and the taxing of ordinary witness fees in their favor, the court may under Section 1682, General Code properly employ such physicians regularly and certify their compensation to the county treasurer as an incidental expense of the court.

In as much as no mention of such physicians is made in the juvenile act, they are not officers of court nor is their selection an "appointment."

COLUMBUS, OHIO, January 16, 1912.

HON. SAMUEL L. BLACK, *Probate Judge, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 1, 1911, wherein you request my opinion as to the power of the judge exercising the juvenile jurisdiction to appoint physicians to examine children brought into juvenile court, as to contagious and infectious diseases.

You point out that it would be much less expensive to the county for physicians to be employed than to be called in separate cases, and their witness fees taxed as costs.

You refer to an opinion said to have been rendered by this department, in which you understand that is was held that such physicians might be regularly appointed. No such opinion has been, in point of fact, rendered. The opinion which was actually rendered was that it is proper for the juvenile court, or any court committing to the girls' industrial home or boys' industrial school, to require the testimony of medical witnesses as to the physical condition of children proposed to be committed to these institutions, but that it is not proper to pay so-called expert witness fees to such witnesses.

Section 1682, General Code, provides that,

> "Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

Section 1683, General Code, provides that,

> "This chapter shall be liberally construed to the end that proper guardianship may be provided for the child * * *."

I am of the opinion that if, in the judgment of the judge exercising the juvenile jurisdiction, the regular employment of one or more physicians for the purpose of examining those alleged to be juvenile delinquents or indigent persons and brought into court as such, would be of less expense to the county, than, the

calling of such physicians as witnesses in separate cases, and the taxing of ordinary witness fees in their favor in such cases, the court may properly employ such physicians regularly and certify their compensation to the county treasurer as an incidental expense of the court.

Inasmuch as no mention of such physicians is made in the juvenile act they are not to be regarded as officers of the court, nor is their selection to be regarded as in the nature of an "appointment."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

80.

DETENTION HOME—POWERS OF COUNTY COMMISSIONERS TO ESTABLISH—LEASE OR PURCHASE—NECESSITY FOR VOTE OF ELECTORS.

The county commissioners have authority under Section 2434, General Code to purchase land to establish a detention home without the vote of the electors within the limitations of this section and also those of Section 5638 General Code.

The commissioners may lease a building to be used as a detention home under ample authority without the vote of the electors.

COLUMBUS, OHIO, January 24, 1912.

HON. DAVID F. GRIFFITH, *Probate Judge, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 15th, requesting my opinion upon the following question:

> "Have the county commissioners the authority to establish a detention home, either by purchase or lease, without first submitting the question to a vote of the people?"

You cite me, as bearing upon this question, the provision of Sections 1670 and 1671, General Code, which, in effect, authorize the county commissioners upon the recommendation of the judge exercising the juvenile jurisdiction, to provide by purchase or lease a detention home in connection with the juvenile court. You also cite Sections 2433 and 2434, General Code, as amended 102 O. L., 54. Section 2433 authorizes the county commissioners to purchase a site for a detention home.

Section 2434, as amended by said act, contains the following proviso:

> "Provided, that if the judge designated to transact the business arising under the jurisdiction provided for in Section 1639 of the General Code of the state of Ohio, shall advise and recommend in writing to the county commissioners of any county the purchase of land for and the erection of a place to be known as a detention home, or additional land for an infirmary or county children's home, the commissioners without first submitting the question to the vote of the county may levy a tax for either or both of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property on the tax duplicate of said county."

Without this proviso the acquisition of land as a site for a detention home, or the purchase of a building for such purpose, would, in my opinion, have been subject to Section 5638, General Code and the succeeding sections which provide, in effect, that the commissioners shall not appropriate any money for such purposes when the total expense thereby to be incurred exceeds fifteen thousand dollars, without submitting the question as to the policy thereof to a vote of the electors.

The related sections are, in my opinion, to be construed as follows: Land as a site for a detention home may be purchased, or a building may be purchased for that purpose if the cost of the transaction exceeds fifteen thousand dollars but does not exceed an amount equal to two-tenths of one mill of every dollar of taxable property on the tax duplicate of the county, without submitting the policy thereof to a vote of the electors. If, however, the amount to be expended in such a transaction exceeds both the fifteen thousand dollars mentioned in Section 5638, General Code, and the amount equal to two-tenths of one mill for every dollar of taxable property on the tax duplicate, then the commissioners may not establish a detention home in this manner without a vote of the people. If, however, the sum of fifteen thousand dollars is greater in amount than a sum equal to two-tenths of one mill for every dollar of taxable property on the county duplicate, then, in my opinion, the fifteen thousand dollar limit would apply, and in a county having such a duplicate, a building could be purchased or a site could be acquired by purchase at a cost greater than two-tenths of one mill for every dollar on the tax duplicate and less than fifteen thousand dollars. In other words, the purpose of the proviso of Section 2434, General Code, does not seem to create a new limitation in place of fifteen thousand dollars, but rather to remove that limitation only in cases in which it would prevent the commissioners from proceeding with respect to a detention home without a vote of the people. Stated in a word—whichever of those two limitations is the greater, governs. These conclusions follow from the fact that there is no procedure in Section 2434, General Code, or in any directly related sections, for submitting such questions to popular vote, hence this proviso must be regarded as a special case under Section 5638, General Code.

If the judge and the commissioners desire merely to lease a building to be used as a detention home, the commissioners have ample authority in the premises without a vote of the electors.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

390.

NEWSPAPERS OF GENERAL CIRCULATION—PUBLICATION OF APPOINTMENT OF ADMINISTRATORS AND EXECUTORS—CATHOLIC COLUMBIAN.

Although devoted primarily to the propagation of religion, the Catholic Columbian is a paper devoted to the dissemination of news of a general character and its circulation is sufficiently wide to bring it within the category of "newspapers of a general circulation." The paper is therefore, a lawful vehicle for the publication of legal advertisements of the appointments of administrators and executors, under Section 10712 *General Code.*

COLUMBUS, OHIO, May 24, 1912.

HON. SAMUEL L. BLACK, *Judge of Probate Court of Franklin County, Ohio, Columbus, Ohio.*

DEAR SIR:—In your communication of March 9, 1912, you advise as follows:

> "We are in receipt of a communication from James T. Carroll, manager of The Catholic Columbian, a newspaper printed in this city, soliciting legal advertisements of the appointments of administrators and executors, as required under Section 10712.
>
> "Mr. Carroll states that the Columbian has a circulation reaching fifty thousand readers, a great many of these being non-catholics. That business men, regardless of religion, are advertising in his paper, and the Catholic Columbian, from a legal point is a newspaper of 'general circulation' and entitled to publish legal notices and advertisements.
>
> "As the title of real estate would be affected if appointments were published in the Catholic Columbian, and it should afterwards be held as not a paper of 'general circulation,' we will kindly ask you to give us an opinion in the matter at your earliest convenience."

Section 10712 of the General Code provides as follows:

> "Within three months after giving bond for the discharge of his trust, every executor or administrator must cause notice of his appointment to be published in some newspaper of general circulation in the county, in which the letters were issued, for three consecutive weeks."

The questions to be determined, therefore, are 1st. Is the Catholic Columbian a newspaper? 2nd. If it be a newspaper, has it "general circulation" within contemplation of law?

The supreme court of Nebraska in the case of Hanscom vs. Meyer, 48 L. R. A., 409, throws light upon what is a newspaper, the first syllabus of that case being:

> "Evidence examined, and found that the Omaha Mercury is a *weekly publication,* circulating among various classes of people within the county and state; that its printed matter consists principally of legal notices and information regarding the courts, and of legal matters in general, and also advertising of a miscellaneous character, literature of a general kind, and a limited amount of general news of current events.
>
> "Held, that such publication is a newspaper within the meaning of Section 497 of the code of civil procedure; that the fact that it also makes a speciality of some particular class of business and conveys intelligence of particular interest to those engaged in such business, will not thereby deprive it of its general classification as a newspaper, within the meaning of the statute."

The supreme court of Indiana in the case of Lynn vs. Allen, found in 33 L. R. A., 779, held:

> "A daily journal having a circulation of about 3,000 copies among judges, lawyers, bankers, collection and commercial agenices, real estate dealers, merchants, and other professional and business men, and kept

on sale at public news stands, although devoted primarily to legal matters, but publishing proceedings of the board of public works and a complete record of deeds filed in the recorder's office, as well as mortgages, mechanics' and other liens, assessments and sheriffs' sales of real estate, together with the quotations of local securities, railroad timetables, and having one or more columns devoted to the general news of the day, is a 'newspaper of general circulation' within the meaning of Rev. Stat. 1894, Sections 320, 1296, relating to the publication of legal notices."

I find that the following from the case of Lynch vs. Durfee in the supreme court of Michigan, 24 L. R. A., 793, is pertinent:

"A weekly journal devoted primarily to the interests of the legal profession, but containing matters of interest to the general public, such as personal items, notices of passing events, a record of property transfers and mortgages, and general trade advertisements, and having bankers, brokers, real estate agents, merchants and business men, as well as judges and lawyers among its subscribers, is a newspaper within the Michigan statutes providing for publication of legal notices in a newspaper."

I find another opinion of interest from the supreme court of Nebraska, 17 L. R. A., 821, whereof the second syllabus is as follows:

"It is not necessary that the newspaper circulate to any considerable extent, if at all, out of the state, or that it circulate in every county of the state, but it must extend beyond the county in which it is published, and have a general circulation."

The principles of law laid down in the foregoing cases apply in my judgment, to the matter at hand. The courts referred to give ample light for answer to your inquiry as measured by the publication to which you refer. However, the courts of this state have spoken on the subject. The syllabus in the case of Bigalke vs. Bigalke, 19 O. C. C. Reports, 331, is as follows:

"'The Cleveland Daily Record'" although principally devoted to news of a legal character, is a 'newspaper' within the meaning of Section 5050, R. S., and the publication therein of legal notices, required by law to be published in a newspaper, is a compliance with the law."

And in this case, Judge Caldwell, speaking for the court, quotes Judge Wade on the "Law of Notices," Section 1066, as follows:

"What is a newspaper? In order to fulfill the terms of the law, the notice must be directed, by the court or officer, to be inserted, for the statutory time, in some paper printed and circulated for the dissemination of *news;* but it is not essential that, to answer the description, the paper shall be devoted to the dissemination of news of a general character. It may, with equal propriety, be published in a paper devoted exclusively to the discussion of religion, legal, commercial or scientific topics, and the diffusion of knowledge touching special matters within its limited sphere, as in a public journal, the columns of which are

open to news of a general character. It may be a religious newspaper, a commercial newspaper, a *legal newspaper, or a scientific newspaper, or a political newspaper."*

I am personally familiar with the Catholic Columbian, having read it weekly for a quarter of a century, and I casually picked up the issue of May 17th to note somewhat definitely the character of the publication. Therein is to be found contributions from a regular correspondent, who writes on general subjects, and among them a discussion of the attorney general's opinion on the Kimble corrupt practices act; news about the state conclave of the Knights of Columbus; news from the national capital in relation to the United States army; reference to the conferring of medals by educational institutions; an article on the future of China; and an article on labor and Memorial day; and article concerning James Boyle's book on Socialism; an industrial page covering a multitude of subjects; an article concerning books; a column from Cincinnati entirely devoted to current news items; an announcement of Mr. Brumbaugh's candidacy for congress from the 12th district; likewise one from Mr. Mulby, candidate for county commissioner; one from Mr. Williams candidate for sheriff, in the form of a news item; article concerning the present campaign in reference to women's suffrage; a news column devoted exclusively to current local news items; comments and incidents in relation to the bond issue voted upon at the recent primaries; an account of a trip down the Ohio and Mississippi rivers in pioneer days; and numerous items of news scattered throughout the paper; much historical matter, much of a philosophical nature, the origin of Arbor day, and advertisements of all kinds from banks, ice cream parlors, trust companies, lumber companies, health resorts, brokers, undertaking establishments, real estate concerns, notices of meetings of stockholders of realty companies, one signed by George T. Spahr and Daniel H. Sowers, distinguished attorney of the city as attorney, advertisements from shoe stores, furniture stores, etc.

Indeed, the paper seems to be a first-class weekly advertising medium. I have given you only a few of the items contained in the paper. It is likewise the practice of the paper at stated periods, either semi-yearly or yearly, I do not know which, to give a resume of all the important events in our country, political, religious, social and industrial. It also gives news of nominations of candidates, state, national and local.

The decisions quoted disclose that a paper is no less a newspaper because it may be devoted primarily to the propagation of religion, and this appears clear from the decision of the Ohio court quoted.

I do not deem it necessary to say more on this, but I am clearly of the opinion that the paper is a newspaper.

Upon the second proposition, *has it general circulation.* I will say that the circulation of the paper, I am told, reaches several thousand subscribers in Franklin county, a circulation that is not limited to any class either religious or political, the same being among business men, lawyers, court officials, state officials and people in all walks of life. At this point I will quote that third syllabus of the case of State ex rel. Sentinel Company vs. Wood Co., (Comrs.) in the 6th circuit court of Ohio, found in The Ohio Law Bulletin of March 11, 1912, at page 93:

"A newspaper of 800 *circulation in county of* 50,000 *with but sixteen in part of county containing* 35,000 *inhabitants is of general circulation.* A newspaper having a circulation of about 800 subscribers in a country of about 50,000 inhabitants, in fifteen of the twenty townships of which it had a circulation of thirty-six subscribers out of a population of

> 35,000 or more, and the remainder of its circulation being in a part of the county containing the other five townships, is a paper of general circulation within the meaning of General Code, Section 2508."

The Catholic Columbian circulates extensively in the city of Columbus, in all parts of the city, and throughout the townships and municipalities of Franklin county. In addition to this, the paper has a very wide circulation for a weekly paper in all the cities of the state, and there is perhaps not a county in the state in which the paper has not some readers, and it likewise circulates extensively in the various states of the Union. Its exchange list is also very large in the county, state and country. The subscription to the paper is $2.00 per year, payable in advance.

Without going further into detail, I have no doubt whatever about its being one of general circulation.

As to the selection of a newspaper for advertising sheriffs' sales, I will quote from the 3rd syllabus of the case of Augustus vs. Lynd et al., 7th Ohio N. P. Reports, 473, which is of interest:

> "The statute making it the duty of the sheriff to give public notice of the time and the place of sale in a newspaper; and he may select any paper he pleased, subject only to the statutory requirement that the paper so selected be one printed and of general circulation in the county."

The same principle that applies to the sheriff in reference to the selection of a newspaper would apply to the probate judge.

I might say in addition to what is heretofore stated, that the Columbian frequently carries legal advertisements inserted by careful and competent attorneys, residents of Columbus, who understand the character of the paper and the extent of its circulation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

561.

"COSTS"—PARTY LOSING IN APPEAL TO PROBATE COURT UPON AWARD OF DAMAGES BY COUNTY COMMISSIONERS FOR ALTERATION OF ROAD—JURY FEES AND MILEAGE PAYABLE FROM COUNTY TREASURY.

The term "all costs," as employed in Section 7085 of the General Code providing for the payment of the same by a party who appeals to probate court upon an allowance of damages by the county commissioners, when such party fails to obtain a greater award upon such appeal, does not include the fees and mileage of the jury. These are to be paid from the county treasury as provided in Section 3008 of the General Code.

COLUMBUS, OHIO, July 26, 1912.

HON. A. L. SMITH, *Probate Judge, Marietta, Ohio.*

DEAR SIR:—Your favor of July 19, 1912, is received, in which you inquire:

"I have before me an appeal from the county commisioners, for the allowance of compensation and damages for alteration of county road.

"The appeal bond was given, transcript duly filed, jury drawn, etc., proceedings all regular. In a county road appeal of this kind should the jury fees and mileage be taxed as a part of the costs and adjudged against the loosing party, or should said fees and mileage be paid by the county under the general law relating to juries?"

Section 7085, General Code, provides for the taxing of costs in appeals for compensation and damages on account of the alteration of a county road, as follows:

"If by the final decision in the probate court, a claimant of compensation and damages does not obtain a greater sum than was awarded to him, by the order of the commissioners or township trustees from which he appealed, he shall *pay all costs created* by his appeal, so far as the court can ascertain them, and judgment shall be rendered against him therefor. In cases not hereinbefore specially provided for, the court shall give such judgment in respect to costs as is equitable, and the county commissioners may pay out of the county treasury any part, or all, of any costs that may be adjudged against defendants if in their opinion the public utility and the justice of the case justifies it."

The question to be determined is, does the term "all costs created by the appeal" include the fees and mileage of the jurors?

Section 7080, General Code, provides:

"Upon such appeal, whether joint or several, the probate court shall confine itself to the questions of compensation and damages presented by it, and, after the docketing thereof, shall forthwith cause a jury of twelve men to be selected and returned by the sheriff and clerk of the county, as provided by law. After receiving the names of such jurors, the court shall issue a venire commanding them to appear in court, on a day and hour named in the venire, which shall not be later than the twentieth day from its date, to serve as jurors upon the trial of such claims."

Section 7094, General Code, provides:

"For their services required by this chapter, the officers herein mentioned shall be entitled to the fees which they are entitled to by law for like services in other cases. The persons appointed to show premises to a jury shall receive such compensation, to be taxed in the cost bill, as the court directs."

Section 3008, General Code, provides for the fees and mileage of grand and petit jurors and that the same shall be paid by the county treasurer, as follows:

"Each grand or petit juror drawn from the jury box pursuant to law, each juror selected by the court as talesman as provided by law, and each talesman, shall receive two dollars for each day of service, and if not a talesman, five cents each mile from his place of residence to the county seat. Such compensation shall be certified by the clerk of the court and paid by the county treasurer on the warrant of the county auditor."

Section 11204, General Code, provides:

> "The fees of witnesses, jurors, sheriffs, coroners and constables, for all services rendered in the probate court, or by order of the probate judge, shall be the same as provided by law, for like services in the court of common pleas."

In case of State vs. Board of Commissioners, 7 Cir. Dec. (14 C. C. R. 26), it is held:

> "The word "costs" has long had a legal signification, and in Ohio it covers only those expenditures in a suit which by law are taxable, and to be included in the judgment therein.
>
> "Under the law of this state, the fees of persons summoned as jurors in criminal cases, whether used on the trial or discharged, are not taxable as costs against a party convicted of an offense.
>
> "This term, as used in Section 7264 Revised Statutes which provides for a change of venue in criminal trials, and for the re-imbursement of the county to which a case is thus sent, for "costs accruing" from such change, must be read as having its usual legal import. Therefore, L. being indicted in M. county for murder, the venue changed to G. county, where the case was tried, and he convicted of manslaughter; held, that the latter county is not entitled to recover from the former, fees it was compelled to pay to persons summoned as jurors in the case, notwithstanding they were necessarily and properly called for such service."

The term "costs accruing" as used in the statute under consideration therein was held not to include the fees of the jurors. The theory of the court is that the term "cost" does not include all the expenses of a proceeding.

The foregoing case is referred to by Spear, J., in case of Thurlow vs. Board of Commissioners, 81 Ohio St. 447, on page 449, where he says:

> "The matter of jury fees was involved in State ex rel. vs Board of Commissioners, 14 O. C. C. 26, and it was held by the circuit court, opinion by Sibley, J., that the costs in such case which the county where the indictment was found has to pay do not include expenses incurred for securing a jury to try the case.

The provisions of the statute under consideration in 7 Cir. Dec. 351, supra, are not substantially different from the provisions of Section 7085, General Code, now under consideration as to the payment of the costs. The statute as to the payment of costs on a change of venue in a criminal case has now been amended so as to specifically include the fees of the jury as shown by Section 13638, General Code, which reads:

> "The cost accruing from a change of venue, including the compensation of the attorneys so appointed, the reasonable expense of the prosecuting attorney incurred in consequence of the change of venue, the fees of such clerk and the sheriff, and the fees of the jury sitting in the trial of the case in the court of the county to which the venue is changed, shall be allowed and paid by the commissioners of the county in which such indictment was found."

In proceedings in the common pleas court the fees of jurors are not taxable as costs against the parties. the statutes in reference to appeals of the kind now in question do not specifically provide that the fees of the jurors shall be taxable as costs. Without such specific provision the rule will be the same as in the common pleas court.

I am, therefore, of the opinion that the term "all costs" as used in Section 7085, General Code, does not include the fees and mileage of the jury. These are to be paid from the county treasury as provided in Section 3008, General Code.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

(To the Judge of Common Pleas)

183.

CRIMINAL JURISDICTION OVER UNNATURALIZED CITIZENS—POWERS OF PROSECUTING ATTORNEY AND ATTORNEY GENERAL.

When one unnaturalized citizen who has killed another unnaturalized citizen, has been indicted in Ohio, for murder in the first degree, the prosecuting attorney has ample authority to prosecute the case and to hire assistants for that purpose.

The attorney general is not authorized to lend assistance in such case except upon the written request of the governor..

COLUMBUS, OHIO, March 5, 1912.

HON. WILLIAM T. DEVOR, *Judge of the Court of Common Pleas, Ashland, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 19, 1912, in which you say that

> "Two men indicted for murder in the first degree are now confined in our county jail and they have entered a plea of 'not guilty' to said indictments. They are charged with having killed one Martin Sxabol, a Hungarian, and the two indicted men are also Hungarians and not citizens of the United States. What I would like to know is, whether the state of Ohio is required to bear the expense of the prosecution of these men?
>
> "Also, would the state furnish an assistant to aid the prosecuting attorney in prosecuting said defendants without any expense to Ashland county?"

and in reply to your first inquiry I desire to say that I have given this matter careful consideration and I can see no reason why any person regularly indicted for the heinous crime of murder in any county of this state could escape trial under the said indictments on the ground that they were of foreign birth and had not become naturalized citizens of the United States, as under the law, not only federal but state prosecutions for crime are not exempt on account of said parties committing the same, or accused of committing said crime with which they are charged, being foreigners.

It is the policy of our laws that all persons accused of the crime should be tried therefor and under our constitution, the right of trial by jury shall be inviolate and justice shall be administered without denial or delay. And the law relating to the trial of those accused of the commission of a felony in this state guarantee the things above referred to to each such person, and the state has provided under Section 13618 that if the prisoner under indictment is indigent the court shall appoint counsel to defend him, and I know of no federal or state law, and I am unable to find any, which would hold any foreign government liable to the state of Ohio for re-imbursement thereto for the necessary expenses incurred in the trial of the parties you say are indicted in Ashland county for murder in the first degree.

As to your second question, I desire to say that Section 333 provides that the attorney general shall be the chief law officer for the state and all its departments, that he shall appear for the state in the trial and argument for all civil and criminal cases in the supreme court in which the state may be directly or in-

directly interested; and when required by the governor or the general assembly he shall appear for the state in any court or tribunal in a cause in which the state is a party or in which the state is directly interested. *Upon the written request of the governor, he shall prosecute any person indicted for crime.*

The section of the General Code above referred to very clearly defines the powers and duties of the attorney general in relation to the question you ask as to the attorney general's assisting in the prosecuting the parties indicted for murder in Ashland county without any expense to said county, and only in cases where the written request of the governor has been made of the attorney general shall he prosecute any person indicted for a crime, and the governor not having requested my assistance in the matter referred to in your letter, I will have to refuse to assist the prosecutor, as our appropriations are limited and our duties are so arduous and many that it would be almost an impossibility to assist the respective prosecutors of the state in the conducting of criminal trials in the respective counties which they represent.

I would suggest to you that you have ample authority under the statutes to employ assistants for your prosecutor in such grave matters as prosecuting any person or persons charged with murder in the first degree, and think that a matter of expense to the county should not interfere with justice being honestly and speedily administered.

Regretting very much that I am unable to give you any further assistance than the suggestions above stated, I am,

Very sincerely yours,

TIMOTHY S. HOGAN,
Attorney General.

233.

SUSPENSION OF EXECUTION OF SENTENCE—POWERS OF COURT IN MISDEMEANOR AND FELONY CASES—DUTIES OF SHERIFF AND CLERK INDIVISIBLE.

The common pleas court upon a plea or verdict of guilty in a felony case, may not sentence the defendant to the penitentiary for a term of years and in the same judgment suspend the execution thereof as to a part of the term of years.

The power of a court to suspend execution of a sentence extends only to the natural subdivisions of the same. The statutes provide separate and entire duties with respect to the sheriff and clerk in the execution of fine and costs or of imprisonment or sentence to the penitentiary. These duties are each indivisible and may not be commanded in part or restrained in part.

COLUMBUS, OHIO, April 4, 1912.

HON. ALBION Z. BLAIR, *Judge Common Pleas Court, Portsmouth, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of January 30, 1912, requesting my opinion upon the following question:

> "May the common pleas court upon a plea or verdict of guilty in a felony case sentence the defendant to the penitentiary for a term of years, and in the same judgment suspend the execution thereof as apart of the term of years? If not to what extent does the power to suspend execution of sentence exist?"

In the case of Webber vs. State, 58 O. S. 616 it was held in the language of the syllabus that,

> "In a criminal case the court has the power to suspend the execution of the sentence in whole or in part unless otherwise provided by statute; and has power to set aside such suspension at any time during the term of court at which sentence was passed."

The facts of this case need not be analyzed further than to state that the suspension of sentence referred to in the syllabus thereof was of the jail part of a sentence consisting of a fine, costs and imprisonment in jail for a number of days. When the court then used the language "in whole or in part" in its syllabus it is apparent that it did not necessarily have in mind the separation of a sentence for the purpose of suspension of the execution thereof excepting into its natural elements, so to speak; that is to say, the part suspension which the court had in mind was the suspension of the *whole* term of imprisonment as a part of the entire sentence which consisted of fine and costs in addition thereto.

This case then is not authority in support of an affirmative answer to the first branch of your question. I have sought for adjudications upon this question but without success. The consideration which I have given to the question has induced me, however, to reach a negative conclusion thereon. My reasons for such a conclusion are as follows:

Section 13720 provides in part as follows:

> "A person sentenced to the penitentiary * * * shall be conveyed to the penitentiary * * * by the sheriff * * * and delivered into the custody of the warden * * * with a copy of such sentence there to be kept until the term of his imprisonment expires or he is pardoned * * *."

Section 13722 General Code provides that:

> "Upon sentence of a person for felony * * * the clerk * * * shall make and certify * * * a complete bill of the costs * * *."

Section 13723 provides that:

> "The clerk shall forthwith issue to the sheriff * * * executions against his property for the costs of prosecution * * *."

The execution of the sentence of the court, as I understand it, consists of the two acts described and provided for in these three sections. If the execution of the imprisonment part of the sentence be suspended, the sheriff will not proceed to discharge his duty under the section, and if that of the costs be suspended the same would be true of the clerk and sheriff under the other provisions quoted. The duty of the sheriff is indivisible; that of the clerk likewise. It consists merely of the performance of a ministerial act. It may be commanded or restrained; but it cannot be commanded in part and restrained in part.

In the case of a misdemeanor there might be, of course three separate acts necessary to execute a sentence. The sheriff would be obliged under one branch of the sentence to convey the prisoner to jail, under another branch to levy upon his property or body for the fine and under still another to take similar action to secure the costs of the prosecution. The sheriff may be commanded to do or not

to do any one of these acts, but he may not be ordered to collect a certain part only, say, of the costs adjudged or to levy for a portion only of the fine imposed, or to convey to the county jail and there keep the prisoner for ten or twenty days.

The foregoing reasons are sufficient to my mind for the conclusion which I have reached. I forbear to discuss the bearing upon the question of the parole statutes which seem to impose upon what is now the board of administration a function practically the same as that which would be assumed by the court if it had the power referred to in the first branch of your question. This might be an additional reason for holding that the power to order the release of a prisoner sentenced for a certain term of years before the expiration of that term under suspension of sentence as to the remainder, is not a judicial power. I mention this possible argument, and do not dwell upon it further, not because I do not believe it valid but because the reasons I have already suggested are, in my opinion, sufficient for the conclusion I have reached.

It is then my opinion that a common pleas court may not lawfully adjudge in its sentence in a felony case that the prisoner shall be confined in the penitentiary for a term of years but shall be released before the term of years expires and the sentense be considered suspended for the remainder of the term.

The discussion in which I have indulged myself has doubtless already suggested to you the answer to the second branch of your question which I believe to be correct. I content myself, therefore, with a simple statement of it.

In my opinion the common pleas court, in common with other courts of criminal jurisdiction has the power to suspend the execution of any single act required in order to carry its sentence into effect; and if the sentence is such as would require the performance of more than one separate and distinct duty by the executive officer charged with its execution, the sentence which would otherwise set such officer in motion, so to speak, in each of the respects in which he would be required under the sentence to act, may be suspended as to one or more of those acts; but the court may not direct the performance of any of the acts enjoined upon the executive officer in a manner different from that prescribed by the sentence and by the law authorizing the rendition thereof. That is to say, it is my opinion that the court may lawfully suspend the imprisonment part of a sentence consisting of imprisonment, fine and costs or of imprisonment and costs, or may suspend the imprisonment and fine, parts of a sentence consisting of imprisonment, fine and costs but may not further sub-divide its sentence for the purpose of suspension of any part thereof.

I am sure I have not misunderstand the object of your inquiry. I take it that it will be understood that I have been speaking of the suspension of the execution of the sentence in whole or in part and not of the revision, revocation or alteration of a sentence by a court of record during the term at which a sentence was pronounced. This matter, of course, is quite separate and distinct from that which I have been discussing.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

450.

WARRANT LOST OR DESTROYED—DUPLICATE MAY NOT BE ISSUED WITHOUT LEGISLATIVE ACTION.

When a warrant upon the county treasury for an officer's salary has been lost or destroyed, a duplicate may not be issued by the auditor without an express authorization of the legislature.

COLUMBUS, OHIO, June 13, 1912.

HON. HARVEY R. KEELER, *Judge Common Pleas Court, Cleveland, Ohio.*

DEAR SIR:—Under favor of June 7th, you requested the opinion of this office as follows:

> "A warrant for my salary due from the state for the month of May, 1912, was mailed to me from the office of the auditor of state at Columbus nearly two weeks ago. It has not yet reached me, and I suspect that the same has been stolen and either cashed or destroyed. Mr. Beatty, deputy auditor of state, informs me, in a letter of June 6th, that there is no law that would authorize the department to issue a duplicate without warrant from the general assembly. As you may well see, this would put me to great inconvenience, delay and some considerable expense. I do not know that you have ever heretofore had a like matter before you, but it strikes me as singular that a duplicate cannot be issued upon sufficient affidavits, etc. Should the original warrant ever reach me after its travels about the earth, and after a duplicate had been received, I would of course return the same to the state.
>
> "May I ask you to look into this matter and advise me, and also the department of the auditor of state, as I am greatly inconvenienced by this delay."

It has been the universal practice, when a warrant has been lost or destroyed, to require an express authorization of the legislature for the issuance of a duplicate warrant. As examples of this practice, permit me to point to the act of 102 O. L. p. 298 which follows:

> "Be it enacted by the General Assembly of the state of Ohio:
>
> "Section 1. That the auditor of state is hereby authorized to issue duplicate warrants on the state treasury, as follows, the originals of which have been lost or destroyed:
>
> "Warrant No. 20789 favor of Captain Charles E. Frye, series 1910, for $85.00.
>
> "Warrant No. 17355 favor of F. M. McCleary, series of 1910, for $1.90.
>
> "Warrant No. 16980 favor of Central District and Printing Telegraph Company, series 1910, for $26.65."

There are to be found no statutory provisions authorizing the auditor of state to issue such warrants without legislative action. There is, furthermore, a complete omission in the statutes of any authorization of duties on the part of the auditor which would be necessary as safe-guards in such proceedure by way of the requirement of affidavits and other securities against a possible re-appearance of the missing warrant.

In the absence of statutory authorization, therefore, and particularly in view of the action which the legislature has universally taken in these cases, there can be no doubt of the legislative intent to exclude from the auditor, the exercise of this important power which, without question, would be liable to abuse without statutory safe-guarding obligations.

I realize, with regret, the hardship which this holding fails to alleviate, but cannot, in the nature of things, come to a different conclusion.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Judge of Juvenile Court)

341.

ANNUAL REPORT—JUVENILE COURT MAY NOT PUBLISH.

There is no authorization in law for the publication of an annual report by the juvenile court.

COLUMBUS, OHIO, May 2. 1912.

HON. GEORGE S. ADAMS, *Judge of the Juvenile Court, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your communication in which you submit for my opinion the following:

> "In common with other courts throughout the state, we are desirous of publishing an annual report of the work of the juvenile court. We presented the matter to the county commissioners and they desire a ruling from you as to whether or not there is warrant in law for the expenditure of funds for the same."

In reply I desire to say that after a careful and extended review of the statutes, I am of the opinion that the county commissioners are without power to authorize the expenditure of funds for the purpose of publishing such report as referred to in your letter, and be made a charge against the state or the county. I can find no power expressly granted by the statutes authorizing any judge of the juvenile court to publish an annual report of the work of such court, and you are familiar with the rule laid down in Doan et al. vs. Biteley, 49 O. S., 588, to the effect that the powers of the court are those expressly granted and such as are necessary to carry them into effect. I cannot reach any other conclusion, therefore, as to the power of the juvenile judges to order the publishing referred to in your letter for the reason that it is not expressly conferred upon this court, and it is not of such a nature as may be deemed necessary to carry existing powers of such court into effect.

Coming to the question of the power of the county commissioners in this connection, there is presented a question of some difficulty. The problem becomes difficult in view of the principle that the statutes conferring powers upon the officers must be strictly construed to the end that no functions are permitted which are not authorized or directed by necessary implication. The only measure which seems material is Section 6252 of the General Code providing generally for the publications of the county. That section is as follows:

> "A proclamation for an election, an order fixing the time of holding court, notice of the rates of taxation, bridge and pike notices, notice to contractors and such other advertisements of general interest to the taxpayers as the auditor, treasurer, probate court or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

Under the above quoted section, all the notices, orders, etc., provided for therein have an element of notice in their intendment to get them before the public, but the report of the juvenile court referred to in your letter does not, in my opinion, come within that class specified in the said section authorizing the county commissioners and other officers to publish the same.

I am, therefore, of the opinion that the authorization of Section 5252 of the General Code does not extend to the publication of the annual report of the juvenile court proceedings, and there being no legislative provision for the publishing of the annual report is indicative of the intent that none should be published.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Justice of the Peace)

263.

JUSTICE OF PEACE—TERM OF OFFICE—VACANCY—CONSTITUTIONAL LAW—DE JURE AND DE FACTO OFFICER.

By virtue of Article 17, Section 2 of the constitution, a justice of the peace may not be authorized by statute to hold office for a longer term than four years nor when a vacancy occurs in such office, can the appointee to the same be authorized by statute to hold longer than the unexpired term of the officer whose place he fills.

As regards an officer, however, at the expiration of whose term no provision is made for a successor either by election or appointment, the above rule simply means that, that said officer under an established rule of public policy, holds by sufferance, not only as a de facto officer but as a de jure officer, as against all except persons holding evidence of proper election or appointment.

COLUMBUS, OHIO, March 19, 1912.

HON. A. A. DAPPER, *Justice of the Peace, Crestline, Ohio.*

DEAR SIR:—Some weeks ago this office was in receipt of a file of correspondence which had passed between yourself and the governor's office and I have been asked to render an opinion upon the facts disclosed thereby as follows:

> "May one appointed to fill a vacancy in the office of justice of the peace continue to hold beyond the expiration of the term during which he is appointed and until his successor is elected and qualified?"

From the facts disclosed by the correspondence I ascertain that the incumbent in question was appointed to fill out a term which would otherwise have expired on December 31, 1911. That being the case it appears that the term of office of his predecessor must have begun not earlier than January 1, 1908 and that the predecessor took office on January 1, 1910 and elected in the fall of however, that the reference in the letter is to the alleged term of the appointee and that the predecessor took office on January 1, 1910 and was elected in the fall of 1909. These facts are of importance as will become apparent upon further consideration.

Sections 1714 and 1715 General Code provide as follows:

> "Section 1714. If a vacancy occurs in the office of justice of the peace by death, removal, absence for six months, resignation, refusal to serve, or otherwise, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred.
>
> "Section 1715. At the next regular election for such office, a justice of the peace shall be elected in the manner provided by law, for the the term of four years commencing on the first day of January next following his election."

It is thus seen that it would be possible for the appointment to have been made under Section 1714 as well during the first half of the term of the prior incumbent as during the latter half, so that the "next regular election for justice of the peace" referred to in Section 1714 might have been the election of 1909 or that of 1911. No where in the correspondence do I find any statement of facts on this point.

Sections 1714 and 1715 General Code must de read in connection with Article 17, Section 2 of the constitution, known as the biennial election amendment thereto, which in part provides as follows:

> "The term of office of justice of the peace shall be such even number of, not exceeding four, as may be prescribed by the general assembly * * *.
>
> "All vacancies in other elective offices (than state offices) shall be filled for the *unexpired term* in such manner as may be prescribed by law."

In State ex rel. vs. Brewster, 44 O. S. 589, the syllabus which distinctly states the nature of the case and the holding of the court is as follows:

> "1. Where the term of an office is fixed and limited by the constitution, there is no power in the general assembly to extend the term or tenure of such office beyond the time so limited.
>
> "2. At the October election of 1883 Brewster was elected auditor of Hamilton county for the term of three years, commencing on the second Monday of November next after his election. At the November election of 1886, Raine was elected auditor (pursuant to an amended provision of the constitution and section of statute changing the time of election) for a term of three years, beginning on the second Monday of September next after the election. The constitution provided, both before and after such amendment, that county officers should be elected for such term, *not exceeding three years,* as may be provided by law. *Held,* 1. At the expiration of Brewster's term of office, to-wit, on the second Monday of November, 1886, there was a vacancy in such office. 2. Section 8, Revised Statutes, which provides that 'any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the constitution or laws,' did not have the effect to continue Brewster in office beyond his term of three years."

This decision has never been over-ruled and remains the law of this state. The following propositions may be deduced from it:

1. Where a term of office is fixed by the constitution a statutory right to continue therein until a successor is elected and qualified is limited to the period fixed by the constitution.

2. Such statutes while enacted in pursuance of a well understood rule of public policy yield the plain language of constitutional provisions.

Applying these principles to the case of a justice of the peace whose tenure of office is limited by Article 17, of the Constitution above quoted, it appears that no person may hold the office of justice of the peace more than four years under one election or appointment; therefore if the predecessor of the person inquired about in your correspondence was elected in November, 1907, and began his office in January, 1908, he could not hold office beyond December 31, 1912, even though

no successor to him was elected and qualified in November, 1911. So also if the appointee inquired about in your letter, and who I take it is now assuming to act as justice of the peace, may continue to hold his office beyond January 1, 1912 by virtue of his right to hold until a successor is elected and qualified under Section 1714, he may nevertheless not hold more than four years from the date of his appointment, and at the expiration of that time there would be a vacancy in the office of justice of the peace held by him to be filled by appointment by the township trustees under Section 1714.

Whether or not the person to whom your inquiries relate could continue to hold office beyond December 31, 1911 depends upon the proper construction of Section 2 of Article 17 above quoted as applied to the possible facts as above suggested. That is to say the constitution provides that all vacancies in other elective offices (which includes justices of the peace) shall be filled for the *unexpired term* in such manner as may be prescribed by law.

The question is here suggested as to whether or not a statute would be constitutional under which one appointed to fill a vacancy in a legislative office might be empowered to continue therein after the expiration of the term of the person whom he was appointed to succeed. If a negative answer be returned to this question then the question of fact as to whether the predecessor of the person inquired about in your letter was elected in 1907 or in 1909 would become important. If he were elected in 1907 his term would have expired on December 31, 1911, and if Article 17, Section 2 be given the construction just suggested the general assembly would be without power to authorize the appointment of a person to fill the vacancy in that office for a period extending beyond December 31, 1911. You will thus understand why I have mooted the question as to the date of the election of the person whom the present incumbent was appointed to succeed.

It is true that Article 17 as a whole must be understood as having been adopted with a view of separating state elections from local elections and with a view to insuring biennial elections in both instances. The language "for the unexpired term" was evidently inserted in Article 17 for the purpose of insuring against the enactment of statutes whereby, because of the occurrence of death or otherwise, an election for an office would be shifted from the even numbered years to the odd numbered years or vice-versa. This was possible under the constitution before it was amended in 1905. Whether or not the framers and adopters of Article 17 intended to do away with continuity in office, which is so much a rule of public policy, by providing against an appointee to fill a vacancy holding beyond the term of office of his predecessor is doubtful, yet such intention can only be ascertained by recourse to the language actually used. The mere fact that this could not have been the primary intent of the electors in the adoption of the article as a whole would not militate against its being a subsidiary intention harmonious with such primary intention.

There is no authority, of course, upon a question of this sort as I do not believe there is another similar constitutional provision in force in the United States. On careful consideration I have come to the conclusion that Article 17, Section 2 means just what it says and that the legislature is without power thereunder to provide for the filling of a vacancy in an office for a period longer than the remainder of the term interruped by the occurrence which occassioned the vacancy.

At to whether or not Sections 1714 and 1715 insofar as they authorize the election of the successor of a justice of the peace at the next regular election for that office occurring after the vacancy takes place and appointment to fill it was made and the choosing thereat of a successor who shall serve the full term of four years are constitutional under the provisions of the organic law just

discussed is a question not squarely raised in your letter. Although some of the details of facts which are important in your case are left to the imagination by the correspondence it is at least clear that there has been no attempt to elect a successor before the expiration of the term of the person whose retirement from office occasioned the vacancy. Therefore I do not pass upon the exact application of Article 17, Section 2 of these sections of the General Code. My conclusion is limited to the proposition that an appointee to fill a vacancy in the office of justice of the peace or any other office may not be authorized by statute to hold office until his successor is elected and qualified.

This is quite a different thing from holding that at the expiration of the original term the appointee must give up his office and that all his attempted official acts thereafter are void. It simply means that his right to continue in office as against others holding evidence of appointment or election, is terminated and he continues to hold by sufferance and not as of right. I have already indirectly referred to the rule of public policy which presumes against and will not permit a break in the continuity of public service. This proposition will be found to be fully discussed in Meeshem of Public Officers. It leads to the conclusion that although a public officer's right to hold office may have terminated, yet if the appointing power or the electing power has failed to provide him with a successor he may continue in office as well a *dejure* officer as a *de facto* officer until such power is exercised.

The application of this general principle to the case you speak of is as follows: The justice of the peace who has been serving by virtue of the appointment may continue to serve until the township trustees appoint another justice of the peace to fill the vacancy occurring in the office by reason of his lack of right further to hold until his successor so appointed has qualified. It is now, however, the right and the duty of the trustees to make another appointment, and if they desire the present justice to continue in office they should re-appoint him. In the mean time, however, the incumbent may lawfully exercise all the powers, duties and functions of a justice of the peace.

The foregoing conclusions are based upon one of the two possible statements of fact above referred to, viz., that December 31, 1911 was the end of what would have been the term of office of the predecessor of the present incumbent. If, however, said original term would not have expired until December 31, 1913, that is to say, if the incumbent's predecessor was elected in 1909 instead of 1907 then the present incumbent has a right to continue in office under his present appointment undisturbed by the appointing power until December 31, 1913, at which time if there be no election in the fall of that year the above principles will apply to him just as they would now apply if the original term had expired on December 31st of last year.

Your letter speaks of the effect of the commission which you have received. You are advised that, in my opinion, the language in the commission has no effect whatever. The commission is evidence of appointment or election as the case may be, but the lawful tenure of the officer thereunder is fixed by law and not by anything that appears in the commission.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Judge of Police Court)

258.

COUNCIL—MANDATORY DUTY TO PROVIDE FOR APPOINTMENT AND FIX COMPENSATION OF PROBATION OFFICER IN POLICE COURT.

By virtue of Sections 4587 *and* 4588 *General Code, it is mandatory upon the council to provide for the appointment and to fix the compensation of at least one probation officer in the police court.*

COLUMBUS, OHIO, March 29, 1912.

HON. JAMES AUSTIN, JR., *Judge of Police Court, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 16th, requesting my opinion upon the following question:

> "May council be compelled to provide at least one probation officer for the police court, under Section 4587, General Code?"

You state that this matter has heretofore been the subject of litigation and cite to me a case in which the common pleas and circuit courts, sustaining the then city solicitor's contention, held Section 4587 to be mandatory upon the council; and the supreme court, upon other grounds, dismissed the case.

The question does not impress me as one of great difficulty. The language of Section 4587, especially taken in connection with that of Section 4588, which was a part of the same section of the law found in 99 O. L. 342, is very explicit. For the sake of brevity I quote only two sections of the General Code formerly comprising Section 12 of the original act.

> "Section 4587. In each municipality having a police court, the council, by ordinance, shall provide for the appointment of one or more persons to be konwn as probation officers. Probation officers shall devote their time to the interests of persons placed upon probation. Upon the order of the police court, they shall investigate the circumstances of any case that may come before the court for final jurisdiction.
>
> "Section 4588. The probation officers shall be appointed by the police court, and serve at its pleasure. They shall receive such compensation as the council by ordinance prescribes. If a member of the police department is appointed probation officer, he shall have the privilege of returning at any time to the active service in the department and to the same rank and standing as he held at the time of appointment as probation officer."

It was clearly the intention of the general assembly that there shall be probation officers attached to every police court. It is true that the word "shall" is sometimes read "may" where the context requires; however, the context in this instance confirms the propriety of the use of the word "shall." All that follows the first sentence of Section 4587, in that section and in Section 4588, is positive and not conditional. The sections concern the public interest and are to be liberally construed for the purpose of subserving that interest.

The mere fact that council is a legislative body does not inject any difficulty

into the question. Such a legislative discretion as it has under this section may not be controlled; that is, it may not be compelled to fix any particular compensation or provide any particular number of probation officers. It may, however, be compelled to provide for the appointment of one probation officer and to fix some compensation for him. The whole subject of mandamus as a remedy for the enforcement of rights dependent upon the action of municipal councils is fully treated in the late edition of Dillon on Municipal Corporations, a separate chapter being devoted to that theme. It is unnecessary for me, therefore, to cite decisions in support of the doctrine I have referred to. A familiar instance of council's liability to mandamus is that which would arise if a village council should fail to make a levy for sinking fund purposes to meet a judgment obtained against the corporation. There are many other like instances, all of which point to the conclusion that I have above stated.

I am, therefore, of the opinion that council may be compelled by mandamus to act under Section 4587, General Code, although the manner of its action may not be controlled by that writ.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Board of Trustees of Public Affairs)

22.

TERM OF OFFICE OF BOARD OF TRUSTEES OF PUBLIC AFFAIRS—COUNCILMAN'S BOND.

Members of a board of trustees of public affairs hold their office until their successors are elected and qualified.

In the absence of a requirement made by a previous council therefor, members of council do not have to give a bond.

COLUMBUS, OHIO, January 15, 1912.

MR. CHARLES H. ELLIS, *Secretary Board of Trustees of Public Affairs, Yellow Springs, Ohio.*

DEAR SIR:—Answering your letter of December 30th wherein you state,

> "The members of the board of trustees of public affairs were elected two years ago and did not qualify for re-election at the municipal election November 7, 1911, the question now arises will these members hold over until the next municipal election or will the same or a new board have to be appointed by the new mayor? Also do members of the village council where there is a salary attached have to give bond?"

Section 4358 of the General Code provides:

> "When the council, in accordance with the provisions of this chapter, establishes a board of trustees of public affairs, the mayor of the village shall appoint members thereof, subject to the confirmation of the council. Such appointees shall hold their respective offices until their successors have been elected according to law and such successors shall be elected at the next regular election of municipal officers held in such villages."

The preceding Section 4357 provides that in villages where certain public utilities are situated or where such public utilities have been ordered by council to be constructed, leased or purchased,

> "Council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of *two years.*"

So it appears that the term of office of the members of the board of trustees of public affairs elected by your village two years ago was for two years.

Section 8 of the General Code provides:

> "A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

In consequence of Section 8, the incumbents of the aforesaid office would hold until their successors were elected and qualified.

In State vs. Wright, 56 O. S. 53 the court uses the following language:

> "As was said by McIlvain J., in State vs. Howe, 25 Ohio St., "the incumbent continues in office, not as a mere *de facto* officer or *locum tenens,* but as its rightful possessor until such successor' is duly chosen and qualified. * * * That where an officer elected by the people is authorized to hold office for a fixed period and until his successor is qualified, a failure to elect a successor does not create a vacancy to be filled by appointment under general authority to fill vacancies."

Judge Spear in State ex rel. vs. McCracken, 51 O. S. 123-129 uses the following language:

> "The recognized policy of the state is to avoid if practicable, the creation of a vacancy in an elective office, and where the right to hold over is given in language that is not limited, and the same is not otherwise qualified, the court would hardly be justified in seeking for an unnatural construction by which a limit would be placed upon the right."

Attention is called to Section 4359 of the General Code which provides that in case "of vacancy on such board * * * it shall be filled for the *unexpired term* by appointment * * *." It is the unexpired term for which the appointment may be made. An appointment for a full term is not contemplated nor is any authority given by this or any other section to the mayor to make the appointment for other than an unexpired term.

Answering your first inquiry I am, therefore, of the opinion that there is no vacancy in the office spoken of, and that the mayor cannot make any appointment of members of the board of public affairs under the circumstances you enumerate, but that the present incumbents hold over until the next municipal election.

Answering your second inquiry as to whether members of the village council, where there is a salary attached, have to give a bond, I am of the opinion that in the absence of any requirement made by a previous council that bonds should be given, members of council would not have to give a bond.

Section 4219 General Code provides,

> "Council shall fix the compensation and bonds of all officers, clerks and employes in the village government except as otherwise provided by law * * *."

There is no specific provision for the giving of a bond by a member of council, and I incline to the view that it would be optional with council whether or not they would require a bond, and of course if the same had not been provided for by council, the member, even though a salary attached, would not have to give a bond.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Board of Review)

513.

CITY BOARDS OF REVIEW—DUTY TO APPRISE AUDITOR OF PROPERTY DISCOVERED TO HAVE BEEN OMITTED PRIOR TO CURRENT YEAR.

If a city board of review during its investigation, finds that property has been omitted for years prior to the current year, the board should lay the facts before the county auditor so that he may proceed under the provisions of Section 5398 of the General Code, et seq. and so have the property entered on the tax list.

COLUMBUS, OHIO, July 10, 1912.

HON. PAUL MILLER, *President Board of Review, Sandusky, Ohio.*

DEAR SIR:—While it is preferable that questions arising before boards of review come before this department through the state tax commission, I beg leave to answer your communication of June 3rd, wherein you state:

> "If the said city board of review, during their investigation, find that a person failed to list all their personal property for the year 1911, can said city board of review make said addition for 1911 and add 50 per cent, penalty, or should the said city board of review turn the evidence over to the county auditor, and the said county auditor proceed under Section 5398 General Code of Ohio."

Section 5624 of the General Code provides:

> "Boards of review, within and for their respective municipalities, shall have all the powers and perform all the duties, provided by law, for all other municipal boards of equalization and revision. They may hear complaints and equalize the valuations of real and personal property, moneys and credits within their respective municipalities. Upon the appointment of a board of review in a municipality all other boards of equalization and revision therein shall be abolished. At the conclusion of the quadrennial appraisement of real property in such municipal corporation the board of review therein shall sit as a board for the equalization of the value of such real property. Boards of review, within their respective municipalities, shall sit as boards of review, when notified by the auditor of the county to meet for that purpose, and shall have the same powers and be governed by the same rules, as provided in this chapter, with respect to county boards of equalization sitting as boards of revision."

Section 5624-1 of the General Code provides:

> "Boards of review for municipal corporations sitting as boards of equalization and revision, shall have and exercise, insofar as the same may be applicable, all the powers and perform all the duties, and be governed by the same rules and limitations, conferred or imposed by law upon annual county boards of equalization of real and personal property, moneys and credits and quadrennial county boards of equalization of real

property outside of cities, and such boards sitting as boards of revision; and such authority, power, rules and limitations are hereby made applicable and extended to and imposed upon such boards of review, sitting as boards of equalization or revision, when reconvened by order of the tax commission of Ohio as provided in Section 5542-9a of this act."

Section 5591 of the General Code provides:

"Such boards shall hear complaints and equalize the assessments of all personal property, moneys and credits, new entries and new structures returned for the current year by the township assessors and county auditor. It may add to, or deduct from the valuation of personal property, or moneys, or credits, of any person returned by the assessors or county auditor, or which may have been omitted by them, or add other items upon such evidence as is satisfactory to the boards whether the return is made upon oath of each person or upon the valuation of the assessor or county auditor."

A cursory examination of the above sections, which contain the powers and duties of boards of review, discloses that when such boards sit merely as the annual boards of review, they hear complaints and equalize the assessments of the personal property, moneys and credits, new entries and new structures *returned for the current year* by the township assessors and county auditors.

Since their duties are, in a great measure, inquisitorial, it not infrequently happens that in their investigations disclosures are made of failures to make returns and false returns for other years than the year under investigation. As taxing officials it is their duty to see that all property gets upon the duplicate, and that the taxing districts receive their just proportion of taxes.

It is my view that, when investigations disclose evidence of omitted property for years prior to the current year, that the board should lay the facts before the county auditor, so that he might proceed under the provisions of Section 5398 et seq. of the General Code, and so have entered on the tax lists the proper amount.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

654.

BOARD OF REVIEW—COMPENSATION FIXED FOR YEAR BY COUNTY COMMISSIONERS IN JUNE CANNOT BE CHANGED.

Upon the authority of State ex rel. vs. Edwards auditor, the salary of the members of a board of review must be fixed at the beginning of each year's session in June and such salary shall remain unchanged during the year.

When the commissioners fix the compensation at five dollars per diem, therefore, in June, they cannot in March reduce such salary to $3.50 *per diem for an extended term required of the board.*

COLUMBUS, OHIO, September 30, 1912.

HON. JAY E. SMITH, *Secretary, Board of Review, Norwalk, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 16th, wherein you state:

"I am sending you the following resolutions of the county commissioners of Huron county, Ohio, and ask you to kindly give your opinion as to what per diem I shall make to the board of review of Norwalk City—whether it shall be $5.00 or $3.50 per day.

"Resolution No. 1.

"In the matter of fixing the per diem of the board of review for Norwalk City and Bellevue City. } June 3, 1912.

"It is moved by Grant and seconded by McDonald that the per diem of the boards of review for Norwalk City and Bellevue City be, and is hereby fixed at $5.00 per day.

"Voting—Grant, aye;Trimmer, no; McDonald, aye. Motion carried.

"In the matter of fixing the per diem of the members of the board of review for Norwalk City. } August 8, 1912.

"WHEREAS, the board of review for Norwalk City of Huron county has received an extension of 40 days in which to complete its work, and

"WHEREAS, this board of county commissioners has previously fixed the per diem of said members of this board of Norwalk City at $5.00 per day, it is moved by Grant and seconded by McDonald that the per diem of the said members of the board of review of Norwalk City be, and is hereby fixed at $3.50 per day from this date.

"Voting—Grant, aye;·Trimmer, aye; McDonald, aye. Motion carried."

Section 5621, General Code provides:

"The county commissioners shall fix the salary of the members of the board of review, which shall not be less than three dollars and fifty cents per day for each day the board is in session, and not to exceed two hundred and fifty dollars per month for the time such board is in session. Such salary shall be payable monthly out of the county treasury upon the order of said board and the warrant of the county auditor. The board shall meet in rooms provided by the county commissioners, and when in session, shall devote their entire time to the duties of their office. No member thereof shall be engaged in any other business or employment during the period of time covered by the session of the board."

You will notice that the statute authorizes the commissioners to fix *"the salary"* of the members, and that *"such salary"* shall be payable in the manner provided. When the commissioners have fixed the salary they have done all that the statute authorizes them to do; and when this is once done for the *session* of the board the power of the commissioners is *functus officio.*

The only case that has come to my attention, wherein the authority of the county commissioners to change the compensation of members of the board of review was involved, is an unreported case arising in the circuit court of Montgomery county, to-wit: State ex rel. vs. Edwards, auditor, etc. This was a suit in mandamus against the county auditor, to compel him to issue a warrant to a member of the board for his salary, at the old rate, the auditor refusing on the

ground that the commissioners had, at a March meeting, sought to change the salary theretofore fixed. Upon a hearing of the case the circuit court held that the salary of the members of the board of review could be fixed by the county commissioners at the beginning of each year's session in June, *and that that salary remain unchanged during the year.*

I am constrained to follow the decision of the circuit court in this matter, and it is my opinion that under the circumstances set forth in the two resolutions, supra, the members of the board are entitled to a salary computed upon the per diem fixed in the resolution of June 3, 1912, to-wit: five dollars per day.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

136.

TAXES AND TAXATION—VALUATION FOR TAXATION OF MORTGAGE NOTES—TRUE VALUE IN MONEY A QUESTION OF FACT.

In listing mortgage notes for taxation there is no arbitrary rule as to their value. In accordance with the words of the statute "all real and personal property shall be taxed according to its true value and money."

The question of the value of such mortgage notes is one of fact to be determined by all surrounding facts and circumstances, and the owner or trustee of such property should be obliged to report all conditions and circumstances which may throw light upon the value, to the board of review.

COLUMBUS, OHIO, February 20, 1912.

MR. THOMAS SHOCKNESSY, *Member City Board of Review, Springfield, Ohio.*

DEAR SIR:—I have your favor of the 16th as follows:

> "Enclose you letter from Geo. S. Dial regarding the listing of some mortgage notes, and we would be pleased to have your opinion at what they should be returned at as he refused to list them for more than 80 per cent. An early reply will be appreciated."

Accompanying it is a letter from Mr. George S. Dial, trustee, copy whereof is as follows:

> "Referring to our conversation of today with reference to the taxation of the mortgages held by me as trustee of Margaret J. Plattenburg, which you said you intended to refer to attorney general Hogan for his opinion, I wish to place before you the true situation, in order that the attorney general may have the facts before him upon which to decide the question.
>
> "I am trustee by order of court, of a fund of money, which is required to be loaned out, and the income paid to Mrs. Plattenburg. I had in my possession, on the day before the second Sunday in April, 1911, ten different mortgages, upon ten different pieces of real estate, and for various amounts, but aggregating $6,956. The oldest one of these mortgage loans is dated 1883; another is dated in 1894; two in 1899; one in 1903; two in 1907; one in 1908; one in 1909 and one

in 1911. The interest upon all these mortgages has been paid each year except in one case in which one mortgage was delinquent for nearly two years' interest.

"Under the decision of the supreme court in the case of McCurdy, guardian against Prugh, 59 Ohio St., page 477, these mortgages should be returned for taxation in my judgment at 80 per cent. of their face value, taking into consideration the risk and probability of loss incident to the loaning and collection of the funds of my said ward. I assert that 80 per cent. of their face value is their true value in money, and the supreme court of Ohio, in the above entitled case has so decided.

"If I wanted to sell them, I could not get their face value. Most of them are long over due. In order to even transfer this fund to a new trustee all of these mortgages would have to be collected; titles would have to be examined; foreclosure suits brought possibly; and lawyers fees incurred. They are therefore not worth their face value, and a reduction of only 20 per cent. is reasonable.

"I am therefore willing to increase my return so that it shall be for $5,565.

"Respectfully submitted,
Geo. S. Dial, Trustee."

The question before you is one of fact and not of law. The law of the case is plain, to-wit, "all real and personal property shall be taxed according to its true value in money." You are the judges of the question of fact involved. You should list these notes at what you think they are really worth in money. Mr. Dial, you will observe, says, "under the decision of the supreme court in the case of McCurdy, guardian against Prugh, 59 Ohio St., page 477, these mortgages should be returned for taxation in my judgment at 80 per cent. of their face value, taking into consideration the risk and probability of loss incident to the loaning and collection of the funds of my said ward I assert that 80 per cent. of their face value is their true value in money, and the supreme court in the above entitled case has so decided."

I cannot concur in this statement as one by which you are to be guided. Mr. Dial is correct in pointing out that the supreme court in the case mentioned has indicated the true rule, but it has not said that a certain per cent. is to be picked out and applied to all cases. Some notes may not be worth to exceed 60% and others worth 100%. It all depends upon the probabilities of collection and what difficulties attend the collection. Neither is the age of the note material. Mr. Dial says in his letter that, "the interest upon all of these mortgages has been paid each year except in one case in which one mortgage was delinquent for nearly two years' interest." No reason is assigned why the interest has not been paid for two years. It may be a mere matter of neglect. Mr. Dial knows the facts surrounding these notes and if any reason exists why any of them or all of them are impaired in value he should state it to you. Prima facie they are supposed to be worth dollar for dollar. If he has knowledge of any fact which indicates that they are not worth that amount the duty devolves upon him to make a full disclosure to the end that you may have knowledge of the facts which constitute the impairment. Men who loan money do not do so with the expectation of having an impaired security. The presumption is that the loan is a good one or it would not be made. I have encountered many instances in the practice of law where the holder of a note would insist upon the taxing bodies that it was only worth 60 per cent. of its face value, yet the loan was made with full knowledge of all the facts and with the expectation of profit in the way of interest. Men do not ordinarily make loans

for the purpose of procuring interest without any regard for the safety of the principal. From aught that appears from Mr. Dial's statement all he need to do to make collection is to insist upon payment.

If I were to loan $1,000 tomorrow to John Doe and he were to secure the loan by first mortgage on a farm in Madison county worth $10,000 I would have before me the risk and probability of loss incident to the loaning and collection of my money, and in order to sell the note the title would have to be examined and possibly there might be a foreclosure suit and lawyers' fees, yet no ordinary business man would say the loan was not worth dollar for dollar. Where the loan is secured by first mortgage lien and the property is worth substantially more than the loan the notes evidencing such loan should be listed at their face value. The real question is, what are the loans fairly and equitably worth. The matter is entirely one for you to determine. There is no arbitrary rule. You should look to all of the facts in the matter, ascertain what these notes are in good faith reasonably worth and list them accordingly.

From all the information you give me the notes would appear to be worth dollar for dollar. However, there may be facts not disclosed in your communication or that of Mr. Dial's which would impair their worth. For instance if there be a second mortgage upon the premises or a third mortgage, and the amount so high in proportion to the value of the property as that a foreclosure suit might be necessary, then the notes would not be worth their face value. On the other hand there are numerous cases where foreclosures are necessary and the property is still worth more than eighty per cent. No trustee need ordinarily pay twenty per cent. to an attorney for enforcing the collection where the security is ample.

I trust from what I have said you will be able to list this property at its true value in money in a spirit of fairness toward the public on the one hand and toward the ward on the other so that no wrong may be done either.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Clerk of the City Council)

191.

ORDINANCES OF COUNCIL—PUBLICATION AND SEPARATE ENACTMENTS OF RESOLUTION OF NECESSITY AND ORDINANCE TO PROCEED.

It is the intention of the statutes that a city council shall provide by separate legislative acts in their respective order for a "resolution of necessity" and an "ordinance to proceed with the improvement."

Publication of the first is expressly required by statute and as the second is an "ordinance" providing for an improvement, publication thereof is required by Section 4227 General Code.

COLUMBUS, OHIO, March 7, 1912.

MR. WADE J. BEYERLY, *Clerk of the City Council, Chillicothe, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 27th, in which you request my opinion upon the two following questions:

> "Can the city council combine the legislation required by Sections 3814 and 3825 of the General Code of Ohio, the 'resolution of necessity' and 'ordinance to proceed with improvement' in one legislative act?
>
> "Is it necessary to publish the 'ordinance to proceed with the improvement,' as required by section 3825 of the General Code of Ohio, when the 'resolution of necessity,' as required by Section 3814 has already been published?"

As Sections 3814, 3815, 3816 and 3817 are all included in Section 51 of the Municipal Code, as originally passed (97 O. L., 121), I now quote each of the said sections:

> "Section 3814. When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, council shall declare the necessity thereof by resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided. Such resolution shall be published as other resolutions, but shall take effect upon its first publication.
>
> "Section 3815. Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevtion of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment and whether or not bonds shall be issued in anticipation of the collection thereof. * * *.
>
> "Section 3816. At the time of the passage of such resolution, council shall have on file in the office of the director of public service in cities, and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested.
>
> "Section 3817. When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of

the improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided."

Sections 3825 and 3826 of the General Code are both included in Section 55 of the Municipal Code as originally passed (97 O. L., 122). These sections are as follows:

Section 3825. If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement, shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution therefore passed for such improvement with date of its passage, and a statement of the intention of council to proceed therewith in accordance with such resolution and in accordance with the plans, specifications, estimates and profiles provided for such improvement.

"Section 3826. In setting forth specifically the lots and lands abutting upon the improvement and to be assessed therefor, it shall be sufficient to describe them as all the lots and lands bounding and abutting upon such improvement between and including the termini of the improvement, and in describing those which do not so abut, it shall be sufficient to describe the lots by their appropriate lot numbers, and the lands by metes and bounds, and this rule of description shall apply in all proceedings in which lots or lands are to be charged with special assessment."

Now, considering the language of Section 3825, "a reference to the resolution therefore passed for such improvement with date of its passage," which seems to me to clearly refer to the resolution of necessity provided for by Section 3814, and the fact that a municipal corporation is not bound until it decides to proceed with an improvement by ordinance provided for by Section 3825, it seems clear that council cannot combine the resolution provided for by Section 3814 with the ordinance provided for by Section 3825 in one enactment; by the statutes themselves the ordinance provided by Section 3825 must be subsequent to the resolution provided for by Section 3814.

Answering your second question as to whether it is necessary to publish the ordinance to proceed with improvement provided for by Section 3825 when the resolution of necessity provided for by Section 3814 has already been published.

Section 4227 of the General Code (Revised Statutes, Section 1695) is as follows:

"Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

Section 3825, which is quoted in full above, is undoubtedly an ordinance providing for an improvement. It is true that Section 3814, quoted above, also provides for an improvement and, in the case you mentioned, the improvement provided for by Section 3814 is the same as that provided for by Section 3825; and as there is a specific direction in Section 3814 that the resolution provided thereby must be published, there might be an inference that this was the only publication needed as to this improvement, and that the ordinance to proceed with the improvement, provided for by Section 3825 would therefore be unnecessary, but it is my opinion that in view of Section 4227, above quoted, which must be held as providing that all ordinances for improvements must be published, and as Section 3825, as pointed out above, provides for an improvement, the only safe and proper plan is to publish the ordinance provided for in Section 3825, even though the resolution provided for by Section 3814 has already been published.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the Prosecuting Attorneys)

2.

WARDENS AND POLICE OFFICERS—CRIMINAL PROCEEDINGS INSTITUTED WITHOUT APPROVAL OF ATTORNEY GENERAL OR PROSECUTING ATTORNEY—PAYMENT OF COSTS BY COUNTY.

If the approval of the prosecuting attorney or the attorney general is not obtained by a warden or other police officer before instituting a suit, when the offense is not committed within his presence, the county auditor is in no event compelled to issue warrants on the county treasury for costs.

2. A blanket authority from the attorney general or the prosecuting attorney is not sufficient.

COLUMBUS, OHIO, January 3, 1912.

HON. T. J. KREMER, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I am in receipt of your inquiry of November 14th, wherein you submit the following inquiries:

> "If the approval of the prosecuting attorney of the attorney general is not obtained before instituting a suit by a warden or other police officer, when the offense is not committed in his presence, and the defendant is discharged either on motion or upon the merits, is the county auditor compelled to issue warrants on the county treasury in payment of the costs?
>
> "Second. In the case at bar, the court having sustained said motion and necessarily held that the approval of the prosecuting attorney or attorney general was not obtained, is the auditor compelled to issue a warrant for said costs as provided in Section 1404 of the General Code?
>
> "Third. Can a blanket authority be given the game warden or must the authority be obtained for each particular case?"

In reply thereto I desire to quote Section 1397 of the General Code, which provides as follows:

> "Sheriffs, deputy sheriffs, constables and other police officers shall enforce the laws for the protection, preservation and propagation of birds, fish and game and for this purpose they shall have the power conferred upon the wardens and receive like fees for similar services. Prosecutions by a warden or other police officer for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed or upon the approval of the attorney general."

also Section 1404 of the General Code, which provides as follows:

> "A person authorized by law to prosecute a case under the provisions of this chapter shall not be required to advance or secure costs therein. If the defendant be acquitted or discharged from custody, or if he be convicted and committed in default of payment of fine and

costs, such costs shall be certified, under oath by the justice to the county auditor who shall correct all errors therein and issue his warrant on the county treasurer payable to the person or persons entitled thereto."

You will note that said Section 1397 provides, in substance, that prosecutions, by warden or other police officer for offenses not committed in his presence, shall be instituted only upon the approval of the prosecuting attorney of the county wherein the offense was committed, or upon the approval of the attorney general.

Section 1404 provides, in substance, that any person authorized by law to prosecute a case under the provisions of this chapter shall not be required to advance or secure costs, and further provides that if the defendant be acquitted or discharged then such costs shall be certified under oath by the justice to the county auditor.

I am of the opinion that a warden or other police officer is not authorized by law to prosecute a party for a violation of the fish and game laws not committed in their presence without the approval of the prosecuting attorney of the respective county wherein the offense is committed, or the attorney general. Therefore, it follows, that if the approval of the prosecuting attorney, or the attorney general is not obtained before instituting a suit by a warden or other police officer when the offense is not committed in his presence, and the defendant is discharged, either on motion or upon the merits, then the county auditor is not compelled to issue warrants on the county treasury in payment of the costs.

For similar reasons, I am of the further opinion, in answer to your second question, that when the approval of the prosecuting attorney or attorney general is not obtained in such cases, as provided in Section 1397 of the General Code, the auditor is not required to issue a warrant for said costs as provided in Section 1404 of the General Code as above quoted.

In answer to your third question, it is my opinion that the following provision "prosecutions by warden or other police officers for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed, or upon the approval of the attorney general" as contained in Section 1397, means that in such cases authority must be obtained in each individual case, so that either the prosecuting attorney of the county wherein the offense is committed, or the attorney general may pass upon the sufficiency or insufficiency of the evidence in each individual case of violation of the fish and game statutes not committed in the actual presence of a game warden or other police officer. Said section would utterly fail to accomplish this purpose if a blanket authority were given indiscriminately to the game warden to prosecute all such violations.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

4.

VETERINARY SURGERY—APPLICANT TO PRACTICE WITHOUT EXAMINATION.

An applicant for license to practice veterinary surgery who had practiced prior to May 21, 1894, may be granted such license even though he had not on May 21, 1894 reached the age of majority.

COLUMBUS, OHIO, December 8, 1911.

HON. SHELTO M. DOUGLASS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Under date of November 22nd you wrote me as follows:

> "Section 1174-1, as amended, in Ohio Laws 101 v. 355 and 356 provides that any veterinary surgeon practicing prior to May 21, 1694, was entitled to a certificate without taking any examination. I can find no place where the law requires that an applicant for such a certificate must be of the age of 21 years.
>
> "I therefore desire to ask if in your opinion such as applicant must have been 21 years of age or over in 1894 before he would be entitled to such certificate."

Section 1174-1 passed May 10, 1910, approved May 23, 1910, (101 O. L. 355) provides as follows:

> "Any person who within six months after the passage of this act, submits satisfactory evidence to the state board of veterinary examiners that he was engaged in the practice of veterinary medicine and surgery in this state prior to May 21, 1894, and who pays a fee of $2.50 to said board, shall be entitled to practice veterinary medicine and surgery in this state and shall receive a certificate from the said board signed by the members thereof, which certificate shall state that the person to whom it is given is legally entitled to practice veterinary medicine and surgery in this state; and no person shall, after six months following the passage of this act, practice veterinary medicine and surgery in this state, without first having obtained from the state board of veterinary examiners a certificate entitling him to engage in such practice."

It will be noted by an examination of said section that there is no provision therein which requires that the applicant for a license under said section should have been twenty-one years of age or over on May 21, 1894.

A license to practice veterinary medicine and surgery has none of the elements of a contract, but is purely a permission to a party holding such license authorizing such party to pursue such occupation thereunder. The power to regulate the practice of veterinary medicine and surgery is by virtue of the police power vested in the state. The state may exercise its police power in such manner as it sees fit, provided it is uniform and is not unreasonable. It may make such restrictions as it sees fit, and such restrictions must be met by the party applying for a license thereunder. In the statute under consideration the legislature did not see fit to make one of the conditions for the issuance of such license that the applicant should on the twenty-first day of May, 1894, have been at least twenty-one years of age.

The legislature has in reference to medicine and surgery, pharmacy and

dentistry, made one of the requirements for admission that the applicant be of the age of twenty-one years, and having failed in the case of veterinary medicine and surgery so to do, I am of the opinion that it was not necessary that an applicant for a license under Section 1174-1 should have been twenty-one years of age or over on May 21, 1894.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

5.

SCHOOL BOARD—RULES AND REGULATIONS FOR THE QUALIFICATION OF JANITOR—CIVIL SERVICE, CLASSIFIED AND UNCLASSIFIED.

A janitor of a school building is a member of the classified service, and is, therefore subject to civil service regulations.

The board of education has power to fix reasonable rules and qualifications for its janitors but they shall not be inconsistent with the policy or the laws of the state.

COLUMBUS, OHIO, January 3, 1912.

HON. RALPH A. BEARD, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your favor of December 14, 1911, is received in which you ask an opinion upon the following:

> "There is a dispute here between the board of education and a janitor by the name of J. L. as to their rights to discharge him.
>
> "I have been appealed to in the matter and would like to have your opinion as to the validity of his discharge.
>
> "I enclose you herewith his claim in the matter, certain rules by the board of education, copy of the state law, letter concerning the school and statement from the people who placed the boiler in the school as to the capacity of it, and his license which are the originals and not copies. Mr. L. is very anxious not to lose these so be sure to return them to me with your opinion.
>
> "The question is this, there being no engine or boiler in the building that requires a licensed engineer under the state law, could the board of education discharge him without cause, that is, is he under the civil service law?"

The first question to be determined is whether a janitor of a school building is in the classified or unclassified service.

The merit system was extended to schools by act of April 30, 1910, as set forth in 101 Ohio Laws, 154.

Section 7690-1, General Code, of said act, provides:

> "All employes in each city school district shall be divided into two classes to be known as the classified and unclassified service. The unclassified service shall include the position of officers elected by the people or appointed to fill vacancies in such offices; persons who by law are to serve without remuneration; persons who are required by law

to have a teacher's certificate; the superintendent of instruction, the director of schools and the clerk of the board of education, school physicians and nurses, secretaries, chief deputies in the offices of the director and clerk of the board of education, the chief truant officer, all unskilled labor when but temporarily employed, and such other appointees as the civil service commission may by rule determine, *The classified service shall comprise all offices and positions not included in the unclassified service.*"

A janitor is not included in the enumerated positions which are placed in the unclassified service. As all positions other than those mentioned in the section are to comprise the classified service, it makes a janitor of a school building subject to civil service regulations.

Section 7690-5, General Code, prescribes for the removal and suspension of those in the classified service, as follows:

"No officer or employe within the classified service who shall have been appointed under the provisions of this act or *who shall have been continuously in the employment of the board of education for a period of three* (3) *years shall be removed, reduced in rank or discharged except for some cause relating to his* moral character or his *suitableness and capacity to perform the duties of his position,* though he may be suspended from duty without pay for a period of not exceeding thirty (30) days pending the investigation of charges against him. Such cause shall be determined by the removing authority and reported in writing with a specific statement of the reasons therefor to the commission, but shall not be made public without the consent of the person discharged. Before such removal, reduction or discharge shall become effective the removing authority shall give such person a reasonable opportunity to know the charges against him and to be heard in his own behalf, and if such charges be not sustained by the commission he shall be re-instated in his position."

It appears that the janitor in question has been continuously in the employment of the board of education for more than three years, and cannot, therefore, be removed without cause.

The board of education has passed a rule fixing a qualification for janitor or custodian of a school building, which cannot be met by the janitor in question.

The rule is as follows:

"Rule 2. *The custodian of a school building in which there is a boiler shall have a second class engineer's license.* In buildings where there is special machinery, such as pumps, engines, dynamos, etc., a first-class engineer's license is required."

The building over which the janitor in question had charge has a boiler of twenty horse power, and the janitor has no engineer's license and cannot secure the same, because of his lack of experience.

Section 7690-6, General Code, authorizes the board of education to fix the duties of its various employes and to make rules and regulations governing their services, as follows:

"Nothing herein contained shall prevent the board of education of each city school district from defining the duties of its various

employes, and prescribing the rules and regulations under which they shall serve nor from exercising proper supervision over them. Nor. shall the board of education of such city school district be precluded from securing labor or assistance for short periods within its discretion in cases of emergency."

Section 7690, General Code, gives the board of education the management and control of public school houses, as follows:

"Each board of education shall have the management and control of all the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. If deemed essential for the best interests of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings, and such other employes as it deems necessary, and fix their salaries. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

The board of education has control and management of all public schools, can appoint janitors, fix their salary and prescribe their duties. By virtue of this power they have a right to fix reasonable qualifications for its janitors.

The qualification which the board of education has fixed for a custodian in a school building having a boiler, is greater than the qualification required by the statutes of Ohio of a person who has charge of and operates a boiler.

Section 1058-1, General Code, 101 Ohio Laws, 324, provides:

"Any person who desires to operate or have charge of a stationary steam boiler of more than thirty horse power, except boilers which are in charge of a duly licensed engineer, shall make application to the district examiner of steam engineers for a license to do so, upon a blank furnished by the examiner, and shall successfully pass an examination upon the following subjects; the construction and operation of steam boilers, steam pumps and hydraulics, under such rules and regulations as may be adopted by the chief examiner of steam engineers, which rules and regulations and standard of examination, shall be uniform throughout the state. *If, upon such examination, the applicant is found proficient in said subjects a license shall be granted him to have charge of and operate stationary steam boilers of the horse power named in this act.* Such license shall continue in force for one year from the date the same is issued, and upon application to the district examiner may be renewed annually without being required to submit to another examination. Provided, however, the district examiner may, on written charges, after notice and hearing, revoke the license of any person guilty of fraud in passing the examination, or who, for any cause has become unfit to operate or have charge of a stationary steam boiler, provided, further, that any person dissatisfied with the action of any district examiner in refusing or revoking a license or renewal thereof, may appeal to the chief examiner who shall review the proceedings of the district examiner."

Section 1058-5, General Code, 101 Ohio Laws, 324, provides:

"*Section* 1047 *of the General Code,* insofar as it has relation to the

operation and having charge of stationary steam boilers *shall not apply to persons holding license issued under the provisions of this act.*"

The janitor in question has been granted a boiler license by virtue of the above sections, to have charge of and operate stationary steam boilers for one year from November 20, 1911.

Section 1047, General Code, 101 Ohio Laws 362, referred to above provides:

> "No person shall operate a stationary steam boiler or engine of more than thirty horse power without obtaining a license to do so as provided in this chapter. A horse power as used in this section shall mean twelve square feet of boiler heating surface. No owner or user or agent of an owner or user of any such steam boiler or engine shall permit it to be operated unless it is directly in charge of a duly licensed engineer"

The janitor in question, from the statements submitted, is not eligible to secure an engineer's license, as provided in Section 1047, General Code, because of insufficient experience.

However, he has secured a boiler license under Section 1058-1, General Code, and by virtue of Section 1058-5, General Code, he is not required to secure an engineer's license in order to have charge of and operate a stationary steam boiler.

The statute does not require any license whatever of a person who has charge of and operates a boiler of thirty horse power or less. It appears that the boiler in the building in which Mr. L. was janitor, has a boiler of but twenty horse power. The janitor in question is qualified under the statutes of Ohio to have charge of the boiler in said school building.

The board of education, however, has fixed a greater qualification, which cannot be met by the janitor.

Can the board of education fix a qualification greater than that prescribed by statute?

If this rule is consistent with the statutes of Ohio, it is a nullity.

On page 440, in case of city of Canton vs. Nist 9, O. S., 419, Scott, J., lays down the rule as follows:

> "But the powers here conferred are expressly limited, in the preceding part of the same section, to such ordinances as are not 'inconsistent with the laws of this state.' And this limitation, even if not expressed, must, doubtless, be regarded as implied in all such general grants of power; for it must be presumed that the legislature would not intend to give a corporation the power of contravening and defeating state policy by ordinances inconsistent with the laws of the state. Is, then, the second section of this ordinance consistent with the policy of the state as indicated by her legislation?"

The ordinance in question in the above case prohibited business on Sunday and did not exempt therefrom persons who conscientiously observed the seventh day of the week, and was held invalid.

In State vs. Prendergast, 6 Cir. Dec. 807, the second syllabus is as follows:

> "But in view of the fact that by Section 4403, Revised Statutes, the legislature of the state has provided as to those who shall not practice medicine in any of its branches, in this state for reward, and thereby, in

effect, allows all persons not excluded thereby, of by other statutes of the state, to do so; and by Section 5992, Revised Statutes, has provided that it shall be unlawful for persons to practice medicine in any of its departments, without having the qualifications therein set forth, under the penalties therein mentioned.

"Held: That while in the exercise of police power, a regulation requiring all persons practicing medicine or surgery in such city, to register as such, would probably be valid; that such a regulation as the one in question which makes the right to register depend upon sanction or approval of an officer of the board, and of his view as to the qualifications of such persons to practice, and provides that the person violating it shall be punished, is not authorized by any law of the state, and is invalid."

On page 810, of the opinion, Smith, J., says:

———"But when it is attempted, as it seems to us, is done here by this regulation, to prevent persons, who under the laws of the state are authorized to practice their profession (even if they cannot recover for their services), without liability under any of the criminal laws, from doing so in Cincinnati, unless with the sanction and approval of one or more officers of the corporation, and make them liable to fine and imprisonment if they do attempt to practice without being so registered, that this is going beyond the power conferred upon municipal corporations by the state, and that such regulations cannot stand. *The general assembly itself having assumed to legislate upon the subject, and by general law made provision as to persons who are authorized to practice medicine in the state, unless specific and express power has been conferred upon the municipal corporation to* impose additional restrictions upon, and deprive them of the right to do so, unless with the consent and approval of an officer of the city, to be enforced by fine and imprisonment such regulations cannot be upheld, and we think no such power has been conferred."

A case more nearly in point is that of State vs. Toker, 6 Ohio Dec., 464, the second syllabus of which reads:

"That part of Section 8 of the city ordinance of Cincinnati, passed March 22, 1897, relating to sewer connections, providing that, 'the said line of sewerage may be laid by a licensed sewer tapper, to within three feet of outside foundation of building, but no connection can be made to any part of the house drainage; *all connections must be made by a properly licensed plumber, is invalid and void.*"

On page 466, Jelke, J., in delivering the opinion says:

"Coming to the third and fourth grounds relied on by relator, taking 92 O. L. 263-265 and 92 O. L., 408, and construing them, together with Section 2575-111, Revised Statutes, the last clause of which provides as follows: *'These catch-basin water-closets may be contructed, and the connections to sewer and house drainage may be laid by any sewer tapper licensed by the board of public affairs"* (Board of Administration), I am of the opinion that in passing this part of Section 8 of this ordinance

the board of legislation exceeded the powers the general assembly intended to confer upon it for the purpose of regulating this business by municipal legislation."

In the latter case the statute provided that "catch-basin water-closets may be constructed, and the connections to sewer and house drainage may be laid by" any licensed sewer tapper. The ordinance required that such connections must be made by a licensed plumber.

This case is similar to the situation which confronts us. The statute provides that a person having a stationary steam boiler license, may have charge of and operate a stationary steam boiler of more than thirty horse power. The rule of the board of education denies this right and requires that its boiler shall be in charge of and operated by a licensed engineer.

The legislature has declared the policy of the state upon this subject. The board of education having a limited jurisdiction, cannot enlarge upon this policy without express grant of power to do so. This power has not been granted. The rule which they have passed is inconsistent with the policy of the state as declared in the statutes. This rule, therefore, would not be sufficient ground for the discharge of the janitor.

Respectively,
TIMOTHY S. HOGAN,
Attorney General.

6.

BOARD OF EDUCATION—CONTRACT WITH RETIRED MEMBER.

A board of education may enter into contract with a retired member thereof.

COLUMBUS, OHIO, December 18, 1911.

HON. ARTHUR VAN EPP, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—Your letter of November 27th received. You state in your letter that:

> "The Medina, Ohio, board of education are now engaged in the erection of a grade school building at that place, costing approximately $35,000, and it is proposed to heat said building by steam, either generated on the premises or carried from a distance, and to have accordingly installed in said building, the necessary pipes, apparatus, etc., for that purpose. Mr. 'A' is a member of said board of education and is also a clerk thereof, and is the owner and sole proprietor of the Medina Electric Light and Power Company, which is the only electric light plant at that place, and which plant is located a little less than two blocks from the site of the new school building.
>
> "The board of education is very desirous of entering into a contract with Mr. 'A' whereby the said 'A' will run a line of steam pipe from the said light plant to said school house and furnish said board sufficient steam to heat said school building for a period of ten (10) years for a compensation of $350 per year, or for $500 per year will heat the new school building and the old school building, which stands at the side of it. This new school building contains approximately ten (10) large rooms and basements and the board is informed by reputable engineers that the

foregoing plan of heating said building is very desirable, and that if the board is able to enter into such an agreement, that it will be able to save from three to five hundred * * * * * * * * action the board has taken in this matter, has been with a motive looking only to the best interests of its constituency.

"Mr. A's term as member of said board expires January 1st next, and the question now arises; can the board immediately, at the expiration of his term of office, safely enter into the contract as herein set out. Section 4757 of the General Code of Ohio, insofar as the same applies to this matter reads as follows:

"'No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member, etc.' and Section 12910 of the General Code of Ohio, insofar as the same applies to the matter at issue reads as follows:

"'Whoever holding an office of trust or profit, by election or appointment, or an agent, servant or employe of such office or of a board of such office is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or public institution, with which he is connected shall be imprisoned, etc.'

"Now, to go a little farther into the matter; several months ago at the time the contract for the construction of this building was let, a certain firm which I will designate as the 'heating company' had in a bid or proposal for furnishing the the heating plant and at a special meeting of said board at which there was a quorum present; but at which all members were not present, a motion was passed accepting the bid of the heating company; but the next day, acting under advice and information furnished by its architect, as to the advisability of investigating a way of heating said building other than by heating plant therein, the board then held a meeting at which, I think all members were present, and one of the members who voted in the affirmative on the motion accepting the bid of the heating company then made a motion to rescind such acceptance, which motion was thereupon duly carried by a majority vote of all members of said board, and at that point Mr. A (the member of said board aforesaid) was requested to make the board a proposal for furnishing steam from his light for the heating of said building, which was accordingly done; but no acceptance of any bid from him was ever made by the board or any contract entered into.

"The board is somewhat apprehensive, as is also Mr. A, that possibly the action of the board and of Mr. 'A' has been such as to debar the board from entering into a contract with Mr. 'A' at the expiration of his term, for the heating of said building and if, under all the circumstances as to whether or not said Sections 4757 and 12910 would apply. Also, in your opinion, would this contract for furnishing steam for the heating of said building be such a contract for the purchase of property or supplies as to bring it within the status of said Section 12910?

"This whole matter seems to the writer to be drawn rather close to the line, and I am in doubt just what to advise the board relative thereto."

and you inquire as to whether or not the board of education, at the expiration

of Mr. A's term of office, can safely enter into a contract as set forth in your letter; also whether the action of Mr. A has been such as to bar the board from entering into a contract with Mr. A at the expiration of his term, for the heating of said building; if, under all the circumstances, Section 4757 and Section 12910 would apply; also, if the contract for furnishing steam for heating said building be such a contract for the purchase of property or supplies as to bring it within the status of said Section 12910.

Section 4757, General Code, provides as follows:

"Conveyances made by a board of education shall be executed by the president and clerk thereof. No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board, or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board."

Section 12910, General Code, provides as follows:

"Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Neither Section 4757, General Code, nor Section 12910, General Code, applies to the facts in your case, for the reason that you expressly state that no contract was entered into by the board, and will not be entered by it until after Mr. A's term of office has expired. I would advise, however, that Mr. A. withdraw his proposal, and if he desires at the expiration of his term to resubmit it, the board of education can then accept it without any violation of law on the part of anyone, and that will be the safest course for you to pursue. I believe that all steps in the matter of the contract referred to should be taken after all disabilities are removed.

However, the most serious question presented by your facts is whether the board of education is not bound by its acceptance of the bid or proposal of the "heating company." I am not in possession of all the facts involved in the transaction and cannot say what the rights of the "heating company" are; nor do I know whether they are claiming any rights, by reason of the action of the board, as set out in your letter. Neither does it come within my province to determine the rights as between the "heating company" and the board.

I would advise that you give that matter most careful consideration before proceeding further. Since your school board has not entered into any contract with Mr. A., and, as you state, they will not complete the contract until Mr. A's term of office has expired, Sections 4757 and 12910 of the General Code do not apply to your situation. Therefore, there is no necessity for answering your inquiry, whether the furnishing of steam for the heating of such building be such a contract for the purchase of property or supplies as to bring it within the statute of Section 12910 G. C.

Very truly yours

TIMOTHY S. HOGAN,

Attorney General.

7.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—ERRONEOUS LEVY—POWERS OF COUNTY AUDITOR TO CORRECT ERRORS AND OF COUNTY COMMISSIONERS TO LIMIT EXCESSES—REMEDIES—LIMITATION OF TAXES FOR SINGLE PURPOSES.

Though the General Code provides that the auditor may limit excesses against any individual where the tax payer has not paid for taxes and that the county commissioners may allow a refund to a tax payer who has paid under an erroneous levy, these provisions do not apply to the machinery of the Smith one per cent. tax law, when the error is attributable to the budget commission itself in its general certification of the levy to the auditor.

It is beyond the provisions of the Code to substitute the discretion of the auditor or county commissioners' discretion for that of the budget commission.

REMEDIES—First: The auditor must refuse to obey the certificate, which duty may be enforced by a citizen or tax payer.

Second: The budget commission might be enjoined from making the erroneous certificate or the auditor might be enjoined from proceedings upon it. Suct restraining order must go to the entire tax. Such certificate is illegal in toto and not void merely as to the excess.

Any remedy in the way of re-adjustment must be procured through the budget commission itself.

II. The amount raised in 1910 *for a particular purpose is not a limitation upon the amount to be raised for the same purpose in* 1911 *or any year thereafter, except where the amount raised in* 1910 *for that particular purpose was the extreme amount which could have been so raised by reason of the limitation of the law at that time.*

The fifteen mills limitation applies to the combined rate for all purposes including sinking fund.

COLUMBUS, OHIO, January 3, 1912.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 28th, requesting my opinion on the following questions:

> "1. Can the auditor remit the taxes erroneously charged against any individual under said section where the taxpayer has not yet paid his taxes?
>
> "2. Where the taxpayer has paid his taxes, can the county commissioners allow a refunder to such tax payer for the amount erroneously levied and collected?
>
> "3. Is there anything in the new one per cent. law which prohibits the taxing authorities of any taxing district from levying more taxes for one purpose than was levied for the year 1910, providing the total taxes levied for all purposes does not exceed the amount levied in such district in the year 1910?"

Section 2589, General Code, to which you refer, provides in part as follows:

> "* * * If the auditor is satisfied that any tax or assessment * * * or any part thereof has been erroneously charged, he may give the person

so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessment. If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount * * * so erroneously charged and collected. The county treasurer shall pay such warrant. * * *"

This section is to be read in connection with Section 2588, General Code, of which it was formerly a part of Section 1038, R. S.

This section provides in part as follows:

"From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person, * * * the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment."

In like manner, Section 2590, General Code, must be considered, it having been also a part of Section 1038, R. S.

This section provides in part as follows:

"At the next semi-annual settlement with the auditor of state after the refunding of such taxes, the county auditor shall deduct from the amount of taxes due the state at such settlement the amount of such taxes that have been paid into the state treasury. No taxes or assessments shall be so refunded except as have been so erroneously charged or collected in the *five years* next prior to the discovery thereof * * *. No assessment shall be returned, except from the fund or funds created in whole or in part by the erroneous assessments."

In the light of these related sections, and of the sections of the Smith one per cent. law so-called, your first two questions may be answered together.

Section 5649-2 of the act of June 2, 1910, 102 O. L., 268, provides in part that:

"* * * The aggregate amount of taxes that may be levied on the taxable property in any * * * taxing district, for the year 1911, * * * shall not * * * exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such * * * taxing district, for all purposes in the year 1910. * * *"

Section 5649-3 of the same act provides in part as follows:

"If in any year the taxing authorities of any taxing district shall desire to raise a less amount of taxes for a particular purpose than was levied for such purpose in the year 1910, the amount of taxes that may be levied for another or other purposes may be correspondingly increased; the intent and purpose of this act being to provide the total amount of taxes which may be levied in the year 1911 or in any year thereafter, for all purposes, shall not exceed in the aggregate, the

total amount of taxes levied in the year 1910, plus six per cent. thereof for the year 1912, etc., * * *"

Section 5649-3c provides in part as follows:

"* * * If the budget commissioners find * * * the total amount of taxes to be raised * * * to exceed such authorized amount in any * * * taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget. * * * The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each * * * taxing district, within the limits provided by law.

"When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such * * * taxing district, returned on the grand duplicate, and place it on the tax list of the county."

The question being as to whether or not the certification by the budget commissioners to the county auditor of an amount to be levied for within a taxing district for the year 1911, in excess of the amount of taxes levied in such district in the year 1910, and the placing on the duplicate by the auditor, in pursuance of such certificate, of a levy sufficient to produce such amount in such district constitutes the "erroneous charging" of taxes within the meaning of Section 2589 as above quoted, it becomes necessary to analyze the machinery of the Smith law and to inquire into the joint meaning of all the sections above quoted.

It is, I think, apparent from even a casual study of the above quoted provisions that if the budget commission, in the discharge of its duties, erroneously certifies to the county auditor an amount to be levied in the taxing district in excess of the amount levied therein in the year 1910, such cannot be identified as belonging, so to speak, to a levy for any particular purpose. If the commission has certified a gross amount to be raised within a township in excess of the gross amount therein levied in the year 1910, such gross amount is made up of specific levies for general township purposes, for township road and bridge purposes, for general county purposes, or county sinking fund purposes, for county road and bridge purposes, possibly for village purposes and for local school purposes, including tuition fund buildings and sinking fund, and in all cases for state purposes. No court could change one of these levies in reducing the total levy so as to bring it within the amount in the year 1910; nor could a court substitute its discretion for that of the budget commission or order the county auditor to reduce all levies (excepting state levy) pro rata. What the court could not order the auditor to do the auditor could not himself do. The error of which Section 2589 speaks is, in my judgment, an error cognizable and remediable in a court of law or equity. The error, such as that described, would be cognizable in a court of equity but not remediable by direct process issued to the auditor.

If the budget commission has erroneously acted in the manner above stated, then its duties are not yet completed and the auditor is at liberty, and it is his duty, to refuse to receive or obey a certificate containing such an error. The tax commission of Ohio, or any citizen, might enforce this duty of the auditor. This has been recently decided by the circuit court of this circuit in the case of the tax

commission vs. the Auditor of Franklin County. (Not reported.) Here, then, is one remedy. Another remedy might be a tax payer's injunction directed against the budget commission to enjoin it from making an erroneous certificate or against the auditor to enjoin him from entering the erroneous levies on the duplicate or against the treasurer enjoining him from collecting any taxes thereon. These remedies are still available, but it is to be noted that they go to the restraining of the *entire* tax. A court could not restrain the treasurer from collecting the excess from each tax payer and then each apportion the amount actually collected among the several funds.

In the case of the State vs. Sanzenbacher, recently decided by the supreme court, it was held, upon reconsideration and correction of the journal entry therein, that it was the duty of the budget commission to enforce the limitations of the Smith law by reducing the various estimates submitted to them, having due regard to the needs of each taxing district as evidenced by the proportionate amounts provided for in Section 5649-3a. This holding may be taken as a judicial declaration to the effect that is is the duty of the budget commissioners to respect the relative needs of the various subdivisions over the levies of which they have supervision, but in my judgment it is *not* to be regarded as an indication that the court will substitute its discretion for that the budget commission in any case; it is rather an indication that the court will, upon reasonable ground, set aside a determination of the budget commission for abuse of discretion.

In the case submitted by you, however, it is not an abuse of discretionary power that is manifested by the facts, but rather a failure to perform a duty. The certificate of the budget commission with respect to the taxing district in question is simply illegal in toto, not void merely as to the excess. Yet the illegality of the certificate and of the proceedings of the auditor in pursuance thereof having remained unchallenged during the period of time when it might have been challenged, I question seriously whether the auditor, having made up his duplicate in accordance therewith, may now refund or remit any part of the taxes seemingly due thereon. I am thoroughly of the opinion that he may not divide the entire levy and remit a portion of the taxes due from each tax payer, but that if he has to remit or recommend the refunder of anything it must be the entire tax.

It is, therefore, my opinion that any remedy for the correction of the erroneous certification of the budget commission as described by you must be procured through the budget commission itself. The auditor might lawfully refuse to levy any tax whatever in any taxing district; the treasurer might lawfully refuse to collect any taxes; but neither of these officers have any power to remit the excess, as it would be ratably apportioned to each tax payer. The reduction must be made by the budget commission and apportioned by it to the several taxing districts and funds thereof. Insofar as the taxes may be thus adjusted by proper action of the budget commission and correction of the duplicate by the auditor in pursuance thereof, this remedy is still available, but in my opinion no refunder or remitter on the part of the county auditor and county commissioners would be legal, at least until the budget commission, either on its own initiative or upon the order of the court, has re-adjusted the budgets applicable within the taxing district in question.

I do not desire to express an unqualified opinion as to the power of the court, being satisfied as to the abuse of discretion on the part of the budget commission, or its failure to discharge its mandatory duty, and proceeding to review the action of such commission on this ground to make itself an order such as the budget commission ought to have made in the premises. My better judgment is that the order of the court ought to be directed to the budget commission commanding it to complete its work in accordance with the provisions of law.

In either event, however, an order of the budget commission or of the court, itself, is itself necessary in order to authorize any action like that contemplated in your first and second questions, for the reason already stated, that a re-appointment or re-adjustment of the various budgets and items thereof must be made as a step in the securing of the only available remedy.

The foregoing general discussion sufficiently answers your first and second questions, neither of which can be categorically answered either in the affirmative or in the negative.

Answering your third question, I beg to state that it is clear in my opinion from the language of Section 5649-3, as above quoted, that the amount raised in 1910 for a particular purpose is not a limitation upon the amount to be raised for the same purpose in 1911, or any year thereafter. In this connection, however, permit me to point out the first paragraph of Section 5649-3, not above quoted, which provides in effect that the maximum rate of taxation for a particular purpose, if any, as fixed at the time the act became effective, shall be abolished and in its stead there shall be imposed, as a limitation upon the amount to be raised for such purpose, the amount that would have been raised in the year 1910 for such purpose under the maximum levy then available as applied to the duplicate then existing. So that if in 1910 the maximum levy for a single purpose was made, then the amount thus produced is a limitation upon the amount to be levied for such purpose in the year 1911, or any year thereafter.

In the same connection the form of your question suggests that you may be of the impression that the amount of taxes levied in a district in the year 1910 is the only all-inclusive limitation. This in my opinion is not correct. Section 5649-5b provides that the total amount levied in a taxing district shall not exceed fifteen mills, and this limitation, I believe, applies to the combined rate for all purposes, including sinking fund, in the same manner as that measured by the amount of taxes raised in the district in the year 1910 applies; so that if the amount of taxes levied in the year 1910 in a taxing district can be produced on the 1911 duplicate of such district only by a levy exceeding fifteen mills, then the fifteen mill limitation is to be substituted for the former.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

11.

INTOXICATING LIQUORS—SALE BY COUNTY TREASURER—TAX LEVY —TAXES AND TAXATION—DOW-AIKEN TAX.

A county treasurer who, under provision of 6079 *General Code levies upon and sells spirituous liquors is satisfaction of the tax provided for in Section* 6071, *is not such a dealer in intoxicating liquors that he, himself, should be thereby subjected to the statutory provisions against illegal sale, or to the provisions for a tax upon the liquor traffic.*

COLUMBUS, OHIO, January 8, 1912.

HON. J. R. STILLINGS, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Replying to your letter of recent date wherein you ask:

> "Does proper legal authority exist in the county treasurer of a county, which has duly voted against the sale, furnishing, or giving away

of intoxicating liquors, etc., under 6108, G. C., et seq. to advertise, and offer for sale intoxicating liquors, duly levied on under the provisions of Section 6078 G. C., the tax for the sale of said liquor on the part of the dealer having been duly certified to the county treasurer by the county auditor and to him by the auditor of state."

Section 6071, General Code, provides:

"Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquor there shall be assessed yearly, and paid into the county treasury, as herein after provided, by each person, corporation or co-partnership, engaged therein, and for each place where such business is carried on by or such person, corporation or co-partnership, the sum of one thousand dollars."

Section 6077, General Code, provides:

"If a person, corporation or co-partnership refuses or neglects to pay the amount due under the provisions of this chapter within the time therein specified, the county treasurer shall forthwith collect such amount with the penalties thereon, and four per cent. collection fees and costs, by distress and sale, as on execution, from any goods and chattels of such person, corporation or co-partnership."

Section 6078, General Code, provides:

"The county treasurer shall forthwith call at the place of business of such person, corporation or co-partnership, and, in case of the refusal to pay such amount so due, shall levy on the goods and chattels of such person, corporation or co-partnership, wherever found in such county, or on the bar, fixtures, furniture, liquors, leasehold and other goods and chattels used in carrying on such business. Such levy shall take precedence of all liens, mortgages, conveyances or incumbrances hereafter taken or had on such goods and chattels so used in carrying on such business; and no claim of property by a third person to such goods and chattels so used in carrying on such business shall avail against such levy by the treasurer. No property, of any kind, of any person, corporation, or co-partnership liable to pay such amount, penalty, interest and costs shall be exempt from such levy."

Section 6079, General Code, provides:

"The county treasurer shall give like notices of the time and sale of the personal property to be sold under this chapter as in case of the sale of personal property on execution. All provisions of law applicable to sales of personal property on execution shall be applicable to sales under this chapter, except as herein otherwise provided; and all moneys collected by such treasurer under this chapter, after deducting his fees and costs, shall be paid into the county treasury."

By virtue of and under the authority of the above named statute the county treasurer acts, and his is the obligation of enforcing the collection of the tax when the person fails to make payment on demand, and to levy on or distrain of the

intoxicating liquor, as well as other chattels used in the business, is the bounden duty under 6078 supra.

The above provisions are a part of the Aikin tax law, which was an amendment of the Dow law. The act known as the Rose law, providing for local option in counties, is found in 99 O. L., page 35. This act is carried into the General Code under the provisions of Section 6108, which is as follows:

> "When thirty-five per cent. of the qualified electors of a county petition the commissioners, or a common pleas judge thereof, for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such county, such commissioners or common pleas judge shall order a special election to be held in not less than twenty days nor more than thirty days from the filing of such petition with or the presentation of such petition to such commissioners or common pleas judge. The petition shall be filed as a public document with the clerk of the common pleas court of such county and preserved for reference and inspection."

6112, General Code, provides:

> "If a majority of the votes cast at such election are in favor of prohibition the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding such election it shall be unlawful for any person personally or by agent, within the limits of such county to sell, furnish or give away intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished for beverage purposes."

So it is readily apparent that the provisions of 6078 that the treasurer should sell the liquors levied upon, as upon the execution and the provision of 6112 that it shall be unlawful after a certain date "for any person" to sell, furnish, or give away intoxicating liquors to be used as a beverage within a county are in direct and literal conflict. These sections being found in a subdivision of the same chapter (2 and 4 of Chapter 15, entitled 2, part 2), and having been passed together by the legislature as part of the General Code, it becomes our duty to ascertain, if possible, the intent of the general assembly as determined from the language they have seen fit to use, to discover whether one section is the exception to the general rule laid down by the other, or whether it was ever contemplated to include within the provisions of the one an officer whose duties were expressly defined by the language of the other.

A study of the history of legislation in this state relating to intoxicating liquor might prove very interesting and probably would be profitable and of assistance in determining the question presented, but both space and time forbid more than calling attention to the fact that almost without exception every act dealing with the liquor question expressly states that it is to provide "against the evils resulting in the *traffic* in intoxicating liquors."

From the very first act, passed under the constitution of 1851, which is found in 52 O. L., 153, down to the latest enactment on the subject, successive legislatures use the same language and titles of each act relating to the taxing of intoxicating liquors or making it unlawful to sell same in certain territory, denoting that the object, aim and purpose of all the legislation is to "provide and further provide" against the evils resulting from the traffic.

The *traffic* is sought to be regulated, prevented and prohibited. The use as a beverage is sought to be lessened, but for other purposes intoxicating liquors

are recognized as articles of commerce, the sale of which in the prohibited territory is surrounded with stringent restrictions. Now, it will not be contended that the county treasurer would become a trafficker in intoxicating liquors when he was called upon, and did proceed, to "make" the tax money by sale of the distrained liquors. It is not an unusual thing for the sheriff of a county to be called upon to sell stock of merchandise, drugs, etc., including intoxicating liquors, and it is well settled he does not by doing so become engaged in the business of trafficking in intoxicating liquors, nor is he called upon to make payment of any tax or license fee either to the government or to the state, although the general laws would require dealers in intoxicants to so first do. As held by the Michigan supreme court, under a similar statute to our own, "a sheriff in making a sale of intoxicating liquors under an execution is not engaged in the business of selling intoxicating liquors within either the letter or spirit of the liquor laws. Wildermuth vs. Cole, 77 Michigan 483. He was not exempt by reason of any exception in the law—he was, as stated by the court, "within the letter and spirit" of the statute, and such is the law in our own state.

So with the county treasurer when in so-called "wet" territory it becomes necessary for him, by reason of failure and delinquency on the part of the Aikin tax payer, to seize upon and sell the chattels that he finds used in connection with the liquor business, including intoxicating liquors, he cannot be held to be engaged in the business of trafficking in intoxicating liquors. He is but complying with the statute in enforcing a collection of the tax. In "making" the money from the goods he was bound to seize and sell and no one would have the temerity to say that it would be necessary for the county treasurer to first make application for and pay an Aikin tax before he could sell the intoxicating liquors in that instance, or that, on failure to pay said tax, that the amount thereof would attach as a lien against the premises and real estate whereon the sale happened to take place. Likewise in the Rose county local option territory the treasurer, in the event it should be determined that he could sell the distrained intoxicating liquors, certainly would not be within the provisions of the Aikin tax law for he would not be engaged in the business of trafficking in intoxicating liquors within the purview of the law. 6112 makes it unlawful "for any person * * * within the limits of such county * * * to sell, furnish or give away intoxicating liquors *to be used as a beverage.*"

Section 3 of the original Rose county local option act (now 6103, General Code) specifically excepts sales by regular druggists for certain defined purposes when sold on prescription, and the real question to be answered is, does a county treasurer, under the circumstances as above held, make a sale of intoxicating liquors to be used as a beverage within the purview of Section 6112, General Code? I am of the opinion that the county treasurer has a perfect right to sell such liquors under the provisions of 6078; that this section is controlling and makes it the manifest duty of the treasurer so to do; that such sale although made in local option territory, is not a sale of intoxicating liquors as a beverage; and, finally that the act of the treasurer, done in his official capacity and by virtue of express command of the law, is wholly without both the spirit and the letter of the statute making similar sales unlawful.

I am not unmindful, and have fully considered, the case of Nichols vs. Valentine, 36 Me., 322. That case can well be distinguished from the case at bar. It must be considered in the light of the technical statutes of the state of Maine. So too with the well considered case of Ingalls vs. Baker found in 13 Allen, 449, where the court held, "that intoxicating liquors are not liable to be seized on an execution under the statutes of this commonwealth." As the court says in the latter case the various amendments and changes in the statutes, the legislature at one time

excepting sales of intoxicating liquors on an execution upon a prohibition, and at another time wholly omitting the exception, shows that the law was left as the court found it, "not by inadvertence but by design."

If 6112 G. C. applied to the county treasurer he certainly would be placed in a peculiar, absurd and unreasonable position. Under 6078, it would still be his duty to levy upon or distrain the intoxicating liquors with the other chattels found. He would be liable on his bond for any failure so to do. If he could not sell the intoxicating liquors what would he do with them, and whose property would it become? A reasonable construction must be given both statutes—the construction found which the legislature manifestly intended, and that construction which carries out the entire scheme, on account of which the legislation was enacted, must, if possible, be discovered. The mischief sought to be corrected in the liquor legislation is, as therein stated, the evil resulting from the trafficking in intoxicating liquors when the same is sold to be used as a beverage, so it has been sold in territory where the sale of intoxicants was prohibited without a license and that "a saloonkeeper could sell his business to another with all his stock of liquor on hand" even if he had no license at the time. Smith vs. Henniman, 24 Southern, 364; Forwood vs. State, 49 Maryland, 53; Overall vs. Bezeau, 37 Michigan, 506.

It will be observed under Section 6080, if the levy and sale, as provided in 6078 and 6079, does not provide the entire amount of the tax found due, the balance becomes a lien upon the real estate in which the traffic is carried on. A consideration of this provision but emphasizes the necessity of the treasurer exhausting all of the property of the offender, "the trafficker," would it be contended that he could stand by and negligently refuse to levy upon liquors, no matter what their value, claiming that he could not make sale thereof, and then seek to place the full amount of the tax against the real estate of the landlord, who possibly never dreamed that such traffic was carried on by his tenant? It is the duty of the officer to exhaust the property used in the business, including the stock of liquors, if any, thereby found. And this must first be done before there is any authority for the treasurer to proceed against the real estate in which the business was carried on. Another consideration suggested is that this Aikin tax is a state tax, of which three-tenths goes to the state treasurer. It is the duty of the treasurer to make collection and to distribute to the state its share of the tax, to that extent, at least, he acts on behalf of the state. Can it not be well urged that the ancient common law maxim, "the king is not bound by any statute if he is not expressly named so to be bound." (Brooms Legal Maxims, 51), which principle has been engrafted upon the laws of this country and has been adopted and applied to many states, including our own, has some application? The sovereign state which can make and unmake laws, in prescribing general laws intends to regulate the conduct of subjects only and not its own conduct. (State ex rel, vs. Parrott, 36 O. S., 409). Is there not force and weight in such a contention in view of the fact that a goodly portion of the so-called Aikin tax is collected for the state by the county treasurer? From a consideration of all the foregoing it appears that the treasurer is authorized by law to distrain the chattels used in the business of the sale of intoxicating liquors when the Aikin tax remains unpaid. "Liquors" are specifically enumerated in the list of chattels to be levied upon—the sale that he is authorized to make is to be as upon an execution—the source of his authority in so acting is the very government whose officer he is —his sale is not a sale of intoxicating liquors to be used as a beverage.

I conclude, therefore, that under the circumstances mentioned in your inquiry the county treasurer is fully authorized to sell the intoxicating liquors in question, and that he is completely without the letter as well as the spirit of the statute that makes it unlawful for any person to make sales of intoxicating liquors in prohibited territory to be used as a beverage.

It is my opinion, therefore, that your question should be answered in the affirmative.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

15.

HANCOCK COUNTY AGRICULTURAL SOCIETY—LEVY OF ONE-TENTH OF ONE MILL FOR AGRICULTURAL PURPOSES—CONSTRUCTION OF STATUTES—BUDGET COMMISSION.

The duties of the budget commission with reference to levies of one-tenth of one mill for agricultural purposes are considered in the opinion rendered to J. W. Smith, prosecuting attorney, Ottawa county, October 19, 1911.

Section 9896 *refers to the preceding section providing for the additional tax.*

COLUMBUS, OHIO, December 11, 1911.

HON. CHAS. A. BLACKFORD, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 20th, in which you state:

> "I wish to call your attention to Sections 9894, 9895 and 9896, General Code of Ohio. These sections were formerly 3702-B, 3703 and 3704, Revised Statutes of Ohio.
>
> "The Hancock county agricultural society has under its control land located about two and one-half miles south of the city of Findlay, and up to about four years ago had been receiving assistance from the county under Section 3702-B, Revised Statutes. A great many of the residents of this county objected to the location of the grounds, as they were so located, as it was impossible to reach them by street car or other facilities, and about four years ago, there was organized in this county what was called the Hancock county fair company. Stock was sold and grounds purchased about one mile northeast of the city, and accessible by both street cars and by boats. A private corporation organized for profit and not entitled to assistance from the county.
>
> "Since that time the county commissioners have given the old company no assistance. At the last session of the legislature, the old agricultural society in this county had Section 9894 amended so that the word "may" in the sixth line of the law should read 'shall on the request of the agricultural society.' Under this section, as amended, the old Hancock county agricultural society has demanded that the commissioners make a levy of one-tenth of one mill upon all taxable property of the county for agricultural purposes, and that in anticipation of such levy as demanded, the county commissioners pay to the treasurer of the agricultural society the sum of $1,500.00.
>
> "The budget commission of this county has been forced to cut every department in the county and every department in every municipality of the county, to bring the levy within the ten mills allowed, and under the circumstances it would be absolutely impossible for the commissioners to make a levy for agricultural purposes.
>
> "The agricultural society contends that the law is mandatory and that the commissioners have no option or discretion in the matter. The

commissioners have asked this office for advice in the matter, which was duly given. The agricultural society is very much dissatisfied with the opinion rendered by me and are threatening to commence proceedings against the commissioners to compel them to comply with this law. However, the committee of said agricultural society has informed me that they would abide the opinion of the attorney general in the matter. Therefore, I submit the proposition to your office.

"The question is—Has the legislature the power to authorize an agricultural society to levy this tax, leaving no discretion in the matter to the county commissioners or other officials without first submitting the question to a vote of the people?"

I am enclosing herewith copy of opinion rendered to Hon. J. W. Smith, prosecuting attorney of Putnam county, which I think will answer your question: You further state:

"You will notice that Section 3704, Revised Statutes, reads 'no such *additional* tax,' thus referring to the section immediately preceding it which provides for an additional appropriation from the county treasury.

"In amending these sections, you will notice that the "additional" in this section has been omitted, so that Section 9896, General Code, reads 'no such tax.'

"Does Section 9896 simply refer to Section 9895, or does it also refer to Section 9894?"

Without quoting either Section 3704, Revised Statutes, or Section 9896, General Code, I am of the opinion that Section 9896, General Code, simply refers to Section 9895, General Code.

Our supreme court, in the case of Allen vs. Russell, 39 O. S. 337, has said:

"But where all the general statutes of a state, or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have been changed." (Citing various Ohio cases.)

Of course, if it is clear from the words that a change in substance was intended, the statute must be enforced in accordance with its changed form. I cannot see that the omission of the word "additional" shows any intention to change the meaning of the statute and, therefore, hold, as above stated, that Section 9896 simply refers to the preceding section providing for the *additional* tax.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

COLUMBUS, OHIO, October 19, 1911.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your letter of October 9th wherein you state:

> "The legislature at its last session passed an act providing for the levy of one-tenth of one mill for the use of agricultural societies. I wish to inquire whether or not in your opinion it is mandatory upon the county commissioners to make such a levy on the request of the county agricultural society. Of course, the levy made is subject to the limitations therein provided that the amount produced therefrom shall not exceed in any one year the sum of $15,000.00."

Section 9894 of the General Code, as amended May 10, 1911, reads as follows:

> "When a county or a county agricultural society owns or holds under lease, real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners *shall* on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy."

Section 9894, previous to the amendment of May 10, 1911, reads as follows:

> "When a county owns real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of the lands and buildings of the county, for the purpose of encouraging agricultural fairs, the county commissioners *may* annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Prior to the levy of any such tax, if they determine it to be for the best interest of the county and society, such commissioners may pay out of the treasury any sum from money in the general fund not otherwise appropriated in anticipation of such levy."

Section 9887 of the General Code provides when the county commissioners *may* assist the agricultural societies, providing that they may do so "if they think it for the interests of the county and society."

Section 9895 provides when the county commissioners *may* purchase ground and that "the commissioners may levy a tax upon all the taxable property of the county, the amount of which they shall fix.----------."

These kindred sections appertaining to the same subject are of assistance in determining your question. As stated in Lewis' Sutherland Statutory Construction, Section 640, the words "may" and "shall" are to be taken in the ordinary and usual sense, unless the sense and intent of the statute require one to be substituted

for the other. (Citing 184 Ill. 59.) And again the same authority at page 1155 says:

> "The word 'shall' in its ordinary sense is imperative." And again,
>
> "When the word 'shall' is used in a statute, and a right or benefit to anyone depends upon giving it an imperative construction, then that word is to be regarded as peremptory." (Boyer vs. Onion, 108 Ill. App. 612.)

The amendment of Section 9884 by the last legislature grants more liberal terms to county agricultural societies that come within the act. The old sections merely permitted aid to be given to such societies: they provided the commissioners *may* purchase or aid in purchasing ground. The amended act states that under certain circumstances the commissioners *shall* levy a tax.

The sole object and purpose of county assistance to agricultural societies is for the express purpose of encouraging agriculture. Heretofore it was optional for county commissioners to grant this assistance and the only purpose of the amendment of Section 9894 was to extend the list of societies to whom assistance should be given, to limit the maximum amount of such assistance, and make it mandatory upon the commissioners to make the levy, providing the agricultural societies come within the purview of the statutes. Nor could it be that the legislature intended that the agricultural societies should fix the amount that was to be levied upon their request. The only function in the matter is to make the request and then it is within the authority of the commissioners to determine the amount of the levy that would be made to raise the fund required so long as it did not exceed the limitation the law provides. I take it that it is fairly inferable from the section that if the societies make such representations as would be deemed proper, showing the necessity for a certain amount of money, the commissioners should then determine how much, in their judgment, will be necessary, keeping within the limitation provided, and then it becomes the duty of the commissioners to raise the amount so determined. Of course, this section must be read in the light of the amended tax laws, and now instead of a direct levy, it becomes the duty of the county commissioners to take care of the amount decided to be raised for the purpose in their annual budget, as provided by Section 5649-3a.

I am, therefore, of the opinion that the county commissioners, on request of the agricultural societies, determine the amount of money to be raised for the purpose expressed in Section 9894 of the General Code, always keeping within the limitations of law; that the agricultural societies have no right to determine the amount to be levied; that subject to their discretion in the matter of the amount to be named. It is mandatory on the county commissioners to provide the funds when a request for that purpose has been first made by the proper agricultural society.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

18.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—PERSONAL PROPERTY OMITTED BEFORE 1910—RIGHT OF COUNTY AUDITOR TO MAKE USE OF DISCLOSURES OF PROBATE COURT RECORDS.

By reason of the policy of the Smith one per cent. law and especially by virtue of Section 5403-1 *General Code, the county auditor may not use the knowledge acquired by him through inventories of estates filed in the probate court for the purpose of placing upon the tax list any personal property omitted from taxation in year* 1910 *or in any preceding year with the view of collecting taxes thereon for those years. He may, however, put such property on the duplicate for taxation as of the year* 1911 *if the same has been omitted from that duplicate.*

COLUMBUS, OHIO, January 12, 1912.

HON. JAMES J. WEADOCK, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 28th, requesting my opinion upon the following questions:

> "Inventories of the estate of deceased persons filed in the probate court have directed the attention of the county auditor to the fact that such persons had failed to list their property for taxation in previous years. What power in the premises has the county auditor in view of the provisions of Section 5399, General Code, and those of 5403-1, General Code, 102 O. L., 273?"

Section 5399, General Code, was one of a series of sections providing, in effect, that whenever a county auditor might discover that any person had failed to return personal property for taxation, he might ascertain as nearly as possible the true value in money of the omitted property and place it upon the duplicate at such value, and that his power in this respect should extend to the placing of the omitted property on the duplicate for the five years preceding the year in which the inquiries and corrections were made, if the omissions had occurred during all of the said five preceding years. These sections were themselves amended in 1910, 101 O. L., 432-434, inclusive. It will not be necessary, however, to quote the provisions, either of the original sections or of the amended sections.

Section 5403-1, General Code, as enacted 102 O. L., 273, provides in part as follows:

> "From and after the passage of this act no county auditor, assessor or other officer shall place upon the tax list or duplicate for taxation as of the year nineteen hundred and ten, or as of any year preceding said year, any personal property which should have been assessed for taxation as of such year, but which was not returned for taxation therein; * * * and all acts and parts of acts insofar as they relate to the assessment and valuation of personal property for taxation for the year nineteen hundred and ten, or any preceding year, and insofar as they are inconsistent with the provisions of this section are hereby repealed."

The intention of the legislature in enacting this provision is rendered apparent by consideration of the whole act of which it forms a part. That act, popularly

known as the "Smith one per cent law," seeks to impose a limitation, or rather a series of limitations, upon tax levies so as, as the title of the act has it "to secure hereafter a fair and equitable valuation of property for taxation." It is a matter of common knowledge, I think, that the theory of the whole law is that if a low rate of taxation be insured, intangible property and other property, which has heretofore been escaping taxation, will be brought upon the duplicate, the owners thereof being thus induced voluntarily to return it. This object could not have been attained so long as, by virtue of statutes like Section 5399, General Code, the owner of personal property who had been evading taxation thereon, would be penalized for making a full and fair return thereof.

With this end in view the general assembly of 1910 amended Section 5399 and the other similar sections so as to provide that the power of the county auditor thereunder should not extend to placing property upon the duplicate for taxation as of the year 1910 or any preceding year or years. Some doubt being felt as to the effect of these amendments, the broad language of Section 5403-1 was enacted as a part of the Smith law, which was itself intended as a re-enactment of the act of 1910 for the purpose of making the same effective and workable in every way.

For all of the foregoing reasons, I am of the opinion that the county auditor may not use the knowledge acquired by him in the manner described in your letter in placing any property omitted from taxation in the year 1910, or in any preceding year, upon the duplicate for that purpose as of the year 1910, or any preceding year. He may, however, put such property upon the duplicate for taxation as of the year 1911 if omitted from that duplicate.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

20.

TOWNSHIP TRUSTEES—ROAD ROLLER—RIGHT TO PURCHASE.

Section 7164 of the General Code gives to township trustees the right to purchase a road roller for use on highways of the county. In making such purchase the trustees must conform with the statutory condition precedents.

COLUMBUS, OHIO, January 6, 1912.

HON. CHARLES H. DUNCAN, *Prosecuting Attorney, Champaign County, Urbana, Ohio.*

DEAR SIR:—Under date of Dec. 24, 1911, you inquired of me as follows:

> "One of the boards of township trustees of Champaign county has asked me for information as to their right and authority to purchase a road roller for use on the highways of the county. An examination of the General Code leaves me in doubt on the subject and I therefore desire an opinion from you as to the authority of a board of township trustees to make such a purchase."

Section 7164 of the General Code provides:

> "The township trustees may furnish such tools, implements and

machinery, as they deem necessary, for the construction, repair and maintenance of the roads in the several road districts within their township, to be paid for out of money in the township treasury not otherwise appropriated. They shall take a receipt from each road superintendent for such implements as are delivered to him, showing the number, kind and condition thereof."

The powers granted the township trustees under the foregoing section are very broad as to the furnishing of machinery, tools and implements necessary for the use of road superintendents in the construction, repair and maintenance of roads in the several road districts within the township, and as a road roller is, undoubtedly, embraced in the term "machinery," said section, in my judgment, unquestionably, gives to the township trustees the discretionary power to purchase the same.

Before proceeding to make such purchase, however, the trustees should adopt a resolution declaring the necessity thereof and the township clerk should certify that the money required for the payment of such road roller is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed upon the duplicate and is in process of collection, and not appropriated for any other purpose, as required by Section 5660 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN
Attorney General.

21.

OFFICES COMPATIBLE—JUSTICE OF PEACE AND ASSESSOR OF PERSONAL PROPERTY.

There are no statutory or common law objections to one person holding both the office of justice of the peace and assessor of personal property at the same time.

COLUMBUS, OHIO, January 9, 1912.

HON. ERNEST THOMPSON, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Under date of December 13, 1911, you requested my opinion upon the following:

> "May an elector who has been duly elected, qualified, and is now acting as a justice of the peace and who was afterwards duly elected and gave bond to act as assessor of personal property, legally fill both offices at the same time?"

Upon an examination of the statutes, I am unable to find any provision which expressly prohibits one person from holding the office of justice of the peace and personal property assessor at the same time. The only question to be determined, then, is as to whether the duties of the respective officers are in such conflict with one another as to render the offices themselves incompatible.

In one case of State ex rel, vs. Gebart, 12 C. C., N. S. 274, it is held that "public offices are incompatible when one is subordinate to, or a check upon the other." The statutes prescribing the duties of the incumbent of these offices fail to

show wherein that are in any manner subordinate to, or a check upon, one another. From a consideration of the foregoing, I am of the opinion that there is no legal objection to one person holding the offices of justice of the peace and personal property assessor at the same time.

Very truly yours
TIMOTHY S. HOGAN.
Attorney General.

24.

SCHOOL BOARD—VACANCY—TERM OF OFFICE—ELECTION OF SUCCESSOR.

In the case of vacancies in the school board filled by appointment Section 10 *General Code provides that a successor shall be elected for the unexpired term at the first general election for such office if such vacancy occurs more than thirty days before any election.*

Such appointee, however, has the same right as an elective officer to hold over until his successor is elected and qualified.

Where at an election, five positions were to be filled, two for four years and three for approximately two years and there was no designation upon the ballot to determine who were the candidates for the long term and who were the candidates for the short terms, the terms were not definitely settled and there was no valid election.

COLUMBUS, OHIO, January 11, 1912.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Under date of January 8, 1912, you ask an opinion upon the following:

> "In a township district in 1905 five members were elected on the board of education of that district; W. R. C., B. D. H. and C. McM. to serve four years; and T. B. D. and J. M. to serve for two years. No election has been held for that office since that time until last November. In the meantime McM's. place was filled by appointment of C. A. Y. and M's place was filled by appointment of R. A. H.
>
> "At the last November election all five members of the board of education together with four other candidates were on the ticket for election. The board of elections marked the ballot, as they did the other township school district ballots, "two to elect." C. A. Y. who had previously been appointed to the place made vacant by C. McM. and E. T. W. received the highest number of votes. Who comprises the board of education of said township district?"

It will be necessary to first ascertain the terms of office of members of the board of education and how many members should have been elected at the last election, and for what terms.

Section 4712, General Code, provides:

> "In township school districts, the board of education shall consist

of five members elected at large at the same time township officers are elected and in the manner provided by law."

Section 4713, General Code, provides:

"At the first election in a township district, a board of education shall be elected, as herein provided, *two members to serve for two years and three to serve for four years. At the township election held every second year thereafter, their successors shall be elected for a term of four years.*"

Section 4745, General Code, provides:

"The terms of office of members of each board of education shall begin on the first Monday in January after their election, and each such officer shall hold his office four years and *until his successor is elected and qualified.*"

In 1905, five members were elected to compose the board of education, two to serve for two years from January, 1906, and three to serve for four years from January, 1906. At the election of 1907, two members should have been elected for a term of four years, and at the election of 1911, their successors should have been elected for a term of four years.

At the election in 1909, three members should have been elected for a term of four years and their terms would not have expired until the first Monday in January, 1914. However, no election was held for such offices until 1911. The terms of each of the members for which they were originally elected, or for which appointed have expired and each of them are holding over under the statute until their successors are elected and qualified.

In State vs. Metcalfe, 80 Ohio State, 244, the fourth syllabus is as follows:

"The capacity conferred upon an elective officer by said article to serve until a successor is elected and qualified attaches to and may be enjoyed by one appointed to succeed where the elected officer has resigned. And where, after the election of a judge of the circuit court the person so elected, prior to the time when the term is to commence, and without qualifying as judge, dies, and the judge then holding the office resigns before the expiration of his original term and another is appointed, the appointee succeeds to the entire term including the capacity to hold over enjoyed by his predecessor, and is, by force of the constitution, clothed with the power to hold the office until a successor is elected and qualified."

Section 10 of the General Code, provides:

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term,

> or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

The person who is appointed to fill a vacancy in an elective office has the same right as the elected officer to hold over until his successor is elected and qualified.

The five members of the present board of education are holding over and each stands upon an equal footing as to their rights to the office. Some, however, are filling terms, which would, if proper elections had been held, have expired the first Monday in January, 1912, and others are filling terms which will not expire until January, 1914.

Section 4713, General Code, supra, prescribes that after the first election the members of the board of education should be elected for terms of four years. It is the purpose of this statute to have only a partial change in the membership of such boards each two years. After the first election the statute definitely fixes the terms of the respective members. This purpose should be carried out by keeping the respective terms separate and distinct and to have them end at the proper expiration thereof.

In case of vacancies, filled by appointment, Section 10, General Code, supra, provides that a successor shall be elected for the unexpired term at the first general election for such office if such vacancy occurs more than thirty days before such election.

An officer who serves the term of office for which he was elected and who holds over, does not hold over for a full term, but holds his office only until his successor is elected and qualified. He holds over for an indefinite period. The electorate have the right to have the position filled by election thereto. As soon therefore as a successor is legally elected and has qualified such successor is entitled to the office for the unexpired term. Each of the members of the board are now holding their offices for an indefinite period, to be determined by the election and qualification of their successors.

At the election in November, 1911, successors should have been elected for all of the present members of the board. Two members should have been elected for full terms of four years each from the first Monday in January, 1912. Three persons should have been elected to fill the remainder of the terms which will expire the first Monday in January, 1914.

At this election there were nine candidates for these positions, including the five members of the present board. Upon the ballots appeared the words, "two to elect." And I take it that there was nothing to designate whether the candidates were running for the long or the short terms.

In the case of State vs. Schafer, 10 Cir. Dec. 36, a similar situation arose, and the first syllabus reads:

> "Where three members are to be elected to the board of education, two of them for the full term of three years and one to fill an unexpired term of one year, and the names of six candidates appear on the ballots, but with nothing to indicate which are candidates for the long term and which for the short term, there is no valid election, and the old board holds over, even though one set of candidates were regularly nominated at a party caucus as candidates for the different terms and properly certified to the board of elections."

This case is decisive of the situation which confronts us. Five positions were to be filled, two for four years and three for approximately two years.

There was no designation upon the ballot to determine who were the candidates for the long term and who were candidates for the short terms. The terms were not definitely specified and there was no valid election.

It appears, however, that the board of elections placed upon the ballots the words "two to elect" and I assume that the two receiving the highest number of votes have been declared elected. It might be urged in their behalf that these two are entitled to the offices for the two full terms of four years. I know of no principle of law which would permit of such construction. The ballots were indefinite and did not permit the electors to make their choice as to candidates for the long and short terms. There were terms to be filled of different duration and there was nothing to show which of the candidates were running for the respective terms.

There was no valid election and the old members hold over until the next general election for such offices. At that time, three persons should be elected for a term of four years and two for the unexpired terms.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

30.

OFFICES COMPATIBLE—MAYOR AND COUNTY INFIRMARY DIRECTOR.

A mayor of a village may retain the office of county infirmary director.

HON. JAS. W. GALBRAITH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 13th, in which you state:

> "The newly elected mayor of the village of Shelby, of this county, is one of the regularly elected, qualified and acting infirmary directors of this county.
>
> "Inquiry has been made of me whether one person can hold both offices. I do not find any special prohibition of the constitution or code, nor does it appear to me that the offices are incompatible and it is my opinion that one person can hold both. But as there seems to be a difference of opinion on the part of some, the county commissioners, infirmary directors and solicitor of Shelby, I wish you would give me your opinion upon this question at your earliest convenience."

In my opinion your conclusion is correct; that the offices are not incompatible, and that one person may hold both positions. An examination of the Constitution and General Code does not disclose any express prohibition; nor, as far as I can determine, is one office in any way a check upon the other; nor are the respective duties, in the case concerning which you inquire, in any manner incompatible.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

36.

BONDS—SALE BY COUNTY COMMISSIONERS FOR PUBLIC IMPROVEMENTS—DISPOSITION OF INTEREST ON DEPOSIT OF PROCEEDS.

A fund arising from the sale of bonds by the county commissioners for a public improvement under Section 6949, belongs to the county and therefore the interest accruing from the deposit of such fund should be credited to the general fund of the county in accordance with Section 2737 of the General Code.

COLUMBUS, OHIO, December 4, 1911.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—I am in receipt of your communication of November 14th, wherein you state:

> "In 1910 upon a petition presented to the commissioners of Morrow county, said commissioners constructed a road under and by virtue of the provisions of what was then known as Revised Statutes 4670-14, and following. In accordance with the provisions of the statutes they provided that the payment for the improvement should be divided equally between the land owners owning land within one mile of said improvement and township generally. Part of the assessments upon the land within one mile of the improvement were paid in cash, the remainder of the costs of the improvement was paid by the issuing of bonds by the commissioners and on December 12, 1910, they issued bonds amounting to $23,000.00.
>
> "The proceeds of these bonds were paid into the county treasury and as estimates upon the road were made and approved such estimates were paid out of this fund. As the bonds became due levies are made to take care of the same. Since issuing these bonds there has been a considerable amount of this money in the hands of the treasurer which has been deposited in the county depositaries.
>
> "Will you kindly advise me whether the interest accumulating from the deposited funds should go into the county treasury as its interest on county funds or should the interest go to the credit of these road funds and thus relieve the tax payers who pay for this road to that extent in lessening the levy?"

In reply to your inquiry, Sections 6926 to 6966, inclusive, of the General Code provide for the improvement of stone and gravel roads of the respective counties. Section 6949 thereof provides as follows:

> "The county commissioners, if in their judgment it is desirable, may sell the bonds of any county in which such improvement is to be or has been constructed to an amount necessary to pay, of the costs and expenses of such road improvement, the respective shares of such township or townships and of the landowners whose lands therein are benefited by such road improvement. Such bonds shall state for what purpose issued, bear interest at a rate not in excess of five per cent. per annum, payable semi-annually, and mature, in not more than ten years after their issue, in such amounts and at such times as the commissioners shall determine, but not more than one-fifth of the principal

of said bonds shall mature in any one year. They shall be sold according to law and for not less than par and accrued interest."

Section 2737 of the General Code, as amended, (101 O. L., 354) being part of the county depository act, provides as follows:

"* * * All interest apportioned as the county's share together *with all interest arising from the deposit of funds belonging specifically to the county shall be credited to the general fund of the county* by the county treasurer. * * *"

I am of the opinion that the fund credited by the sale of bonds under the authority of Section 6949 of the General Code, supra, is a fund belonging specifically to the county for the reason that such a fund is created by the sale of *bonds of the county,* and therefore, the fund resulting from such sale must necessarily belong to the political subdivision so selling such bonds, to-wit, the county. Inasmuch as such fund belongs specifically to the county, I am, therefore, of the opinion that the interest derived from such fund or any portion thereof should be credited to the general fund of the county by the county treasurer, as provided in Section 2737 of the General Code above cited.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

40.

ASSISTANT PROSECUTOR—COMPENSATION OF FROM COUNTY TREASURY FOR DEFENDING COUNTY COMMISSIONERS AGAINST MALICIOUS PROSECUTION—DEFENSE OF SUITS AGAINST PUBLIC OFFICIALS ARISING OUT OF OFFICIAL ACTS—PAYMENT FOR DEFENSE.

An assistant prosecutor employed by county commissioners to defend them in a suit against them for malicious prosecution, may be compensated from the county treasury if the suit arises out of a well intended attempt on the part of the commissioners to perform duties attending their official position.

COLUMBUS, OHIO, January 15, 1911.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 29, 1911, in which you request my opinion upon the following question:

"A prosecuting attorney retiring from office is employed by the county commissioners as a special assistant to his successor for the purpose of defending them in a suit brought against them as individuals for malicious prosecution.

"May the person so employed be paid out of the county treasury under a resolution approving his bill or must the individual commissioners pay him personally?"

While there is no direct statutory authority for so holding I am of the opinion

that it is the duty of the legal officer of a county, a city or the state, to defend some actions brought against other executive officers of the subdivision or state, as the case may be, for damages for the alleged wrongful use of their official powers. One instance of this sort that occurs to me is that in which the action which constitutes the alleged abuse of power is taken under the advice of the legal officer himself. In general, whenever the circumstances would indicate to the prosecutor, the solicitor or the attorney general, as the case might be, that the officer against whom the action has been brought in committing the official act complained of has proceeded with due caution and in good faith and has consulted with his official legal adviser under circumstances under which he ought to consult with him, he ought to serve the officer in his official capacity. In such cases public officers ought not to be subjected to suits by private individuals at the peril of being obligated to defend themselves.

To hold otherwise would be to encourage captions or meaningless litigation and discourage the acceptance of public office on the part of those who might be apprehensive of such litigation.

The rule which I have mentioned is one which has been followed by this department within reasonable limits. It is generally advisable, in my judgment, for a public officer who is privately sued to have his own counsel; and if privately employed such counsel should, of course, be privately compensated. The facts of each case ought to determine the question as to whether a special assistant to a prosecuting attorney for example, employed for the purpose of defending such an action, should be paid out of the public treasury. For this reason I would rather not advise you categorically in this matter.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

46.

BOARD OF EDUCATION—TOWNSHIP CLERK AND TOWNSHIP TREASURER MAY DECLINE TO ACT IN THEIR RESPECTIVE CAPACITIES FOR BOARD OF EDUCATION—POWERS OF BOARD TO FILL THE VACANCY AND FIX SALARIES—POWERS OF TOWNSHIP CLERK TO APPOINT A DEPUTY.

A township clerk or a township treasurer may decline to act as clerk and treasurer respectively of the township board of education, and if either does so decline to act, then the board may fill the vacancy by election, and fix the salary of said incumbent.

A township clerk cannot appoint a deputy to do the work of the clerk.

COLUMBUS, OHIO, January 17, 1912.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I herewith beg to acknowledge receipt of your communication dated December 22, 1911, wherein you inquire as follows:

> "The law provides that the township clerk shall also be clerk of the township board of education; can such township clerk decline to act as clerk of the township board of education? If he does so do, can the

board fill the vacancy, and if so, how? If for any reason a deputy was thought necessary, has the township clerk authority to appoint a deputy to do the work for the clerk?"

In answer to your first two questions I am herewith enclosing a copy of an opinion rendered by this department to the bureau of inspection and supervision of public offices on July 31, 1911. I believe that this opinion fully answers your first two questions. You will note that in the enclosed opinion we hold that a township clerk can decline to act as clerk of the township board of education, and if he does so decline to act, then such board of education has the right to fill the vacancy by proceeding to elect a clerk of the board of education. I am further of the opinion that such board of education has the right to fix the salary of a clerk so appointed in accordance with the provisions of Section 4781 of the General Code.

The statutory provisions in reference to township treasurers and township clerks are similar as to their respective duties in connection with their respective township school boards. If the township board of education has the right to elect a treasurer under such circumstances as existed in the case of Stolzenbacher vs. Feltz, No. 9372, decided by the supreme court of this state without report, it, therefore necessarily follows that the board of education has the legal right to appoint a clerk of the board if the regularly elected township clerk refuses to act as clerk of such township board of education.

In answer to your third question I am of the opinion that the township clerk is without authority to appoint a deputy to do the work for the clerk.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

47.

PROBATE JUDGES—NOMINATION AND ELECTION IN 1912.

The election act with regard to judicial officers applies only to elections and has nothing to do with nomination of such officials.

The candidates for the office of probate judges for the election of 1912 *shall be nominated in the same manner as other county officers, by their respective party primary, if the candidate runs for the nomination as a member of his political party; or he may be nominated by nomination papers if he desires to make the race independently.*

COLUMBUS, OHIO, January 16, 1911.

HON. F. A. SHIVELEY, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—I have your letter of January 5th wherein you ask my opinion on the following question:

"In what manner shall candidates for the office of probate judge be nominated for the coming fall election of 1912?"

The sections of the General Code providing for primary elections are found in Chapter 6, Title 14, Part 1st of the General Code.

Section 4949 provides:

"Candidates for member of congress, and for all other public elective officers, delegates provided for herein and members of the con-

trolling committees, of all voluntary political parties or associations, which at the next preceding general election polled in the state or any district, county or subdivision thereof, or municipality, at least ten per cent. of the entire vote cast therein, shall be nominated or selected in such state, district, subdivision or municipality, in accordance with the provisions of this chapter, and persons not so nominated shall not be considered candidates and their names shall not be printed on the official ballots. Delegates, and party controlling committees whose members have not been so selected shall not be recognized by any board or officers."

Section 4950 provides:

"Nothing in this chapter shall repeal the provisions of law relating to the nomination of candidates for office by nomination papers, and no elector shall be disqualified from signing a petition for such nomination of candidates for office by nomination papers, because such elector voted at a primary provided for herein to nominate candidates to be voted for at the same election or because such elector signed nomination papers for such primary."

Section 4959 provides:

"All members of county controlling committees shall be elected, and all candidates for offices of a county or subdivision thereof, or of a municipal corporation, shall be nominated, by direct vote, except as otherwise provided herein for judicial and legislative offices. Their names shall be placed upon the official ballot as hereinafter provided. The candidate or candidates, as the case may be, receiving the greatest number of votes shall be the nominee or nominees, whose name shall be printed on the official ballot at the succeeding election. The person receiving the highest number of votes for committeeman shall be the member of such committee.

"(The phrase 'except as otherwise provided herein for and legislative offices' in Section 4959, *supra,* refers to the provisions of Section 4965 which provides in certain counties legislative and common pleas judgeship candidates under certain circumstances may be nominated by delegate convention.)"

Section 4996 provides:

"Nominations of candidates for any county, township, municipal or ward office may be made by nomination papers signed in the aggregate for each candidate by not less than three hundred qualified electors of the county or fifty electors of the city or twenty-five qualified electors of the township, ward or village, respectively. In counties containing annual registration cities, such nomination papers shall be signed by petitioners not less in number than one for each fifty persons who voted at the next preceding general election in such county."

I believe that the foregoing sections are all of the provisions of the General Code that might apply to the nomination of probate judges. I note your reference to the act of February 8, 1911, approved February 17, 1911, styled "An

act to provide for the election of judicial officers by separate ballot." While that act was a forward step in the attempt to remove judicial officers from the field of partisan politics, still it was only intended to, and does apply to the *election* of judicial candidates.

The manner of nominating persons for the various judicial offices was left as it was, and they are to be nominated either by the political parties authorized to make the nominations at a direct primary or by nomination papers signed by the requisite number of electors for the particular office.

It is my opinion, therefore, that candidates for the office of probate judge for the coming fall election of 1912 shall be nominated in the same manner as other county officers, by their respective party primary, if the candidate runs for the nomination as a member of his political party. If he desires to make the race independently then the manner of securing a place upon the official ballot would be governed by the provisions of Section 4996 providing that the nomination of 'candidates for any county * * * office may be made by nomination papers signed in the aggregate for each candidate by not less than three hundred qualified electors of the county * * *. In counties containing annual registration cities, such nomination papers shall be signed by petitioners not less in number than one for each fifty persons who voted at the next preceding election in such county."

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

56.

PROBATE COURT—EXPENSES IN JUVENILE JURISDICTION—TELEPHONE IN OFFICE RESIDENCE OF PROBATION OFFICER—RESIDENCE TELEPHONES.

In accordance with the ruling of the bureau of inspection and supervision of public offices, residence telephones may not, as a general rule, be paid out of public funds. However, where the business of the probate judge requires frequent communication with a distant probation officer, and where the headquarters of that officer are at his residence, in view of the provision of 1682, *General Code, authorizing re-imbursement for the "incidental expenses of the court and its officers" fortified by the further provision of* 1683 *that the chapter "shall be liberally construed" for the attainment of its purposes, the rule may be departed from and a telephone maintained in the officer's residence at the expense of the county.*

COLUMBUS, OHIO, January 16, 1912.

HON. LEWIS P. METZGER, *Prosecuting Attorney, Salem, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 16, 1911, requesting my opinion upon the following question:

> "The probate judge of Columbiana county exercises the juvenile jurisdiction therein. Many of the cases coming before the juvenile judge in this county arise in cities outside of the county seat, such as East Liverpool. In the city of East Liverpool, for the convenience of the court, a probation officer is employed, having his office in his residence. Also as a matter of convenience and of necessity, in fact, the juvenile judge communicates frequently with the officer by telephone.

The toll charges thus created are very heavy and the expense to the county would be very greatly reduced if it were possible for the probation officer to have a telephone in his residence.

"May the county lawfully pay the exchange service charges for such a telephone if installed in the residence of the probation officer?"

The juvenile law, so-called, is found in Sections 1639 to 1683, inclusive, General Code. The following provisions are of interest in connection with this question:

"Section 1662. The judge designated to exercise jurisdiction may appoint one or more discreet persons * * * to serve as probation officers * * *. One of such officers shall be known as chief probation officer * * *. Such chief probation officer and the first, second and third assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed twenty-five hundred dollars per annum, that of the first assistant shall not exceed twelve hundred dollars per annum, and of the second and third shall not exceed one thousand dollars per annum * * * the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last federal census, and in no case shall the entire compensation of all probation officers in any county exceed the sum of seven thousand five hundred dollars. * * *

"Section 1682. * * * such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court.

"Section 1683. This chapter shall be liberally construed to the end that proper guardianship may be provided for the child * * *"

The thought which first occurred to me in connection with your question was that the entire difficulty might be obviated by increasing the salary of the probation officer, upon the understanding that he was to install a telephone in his house and pay for it nominally from his own resources. The phrase "at the time of the appointment," in Section 1662, as above quoted, however, seems to prohibit changing the compensation of the probation officer after it is once fixed, at least that of the chief probation officer and the first three assistants; so, also, if the assistant is already receiving the maximum compensation provided for in the section, this salary could not, of course, be raised in any event.

Inasmuch as the entire act is to be liberally construed, and inasmuch, also, as the phrase "the incidental expenses of the court and its officers" is, on its face, very broad I am of the opinion that the installation of a telephone in the residence and headquarters of a probation officer, under the circumstances mentioned in your letter, would be an incidental expense, either of the court or of the probation officer. I should prefer to regard it as an expense of the court rather than as an expense of the officer. Inasmuch as the toll charges at present exacted are probably payable in as many cases at the county seat as at East Liverpool.

On the ground, then, that the circumstances of the case are peculiar, that the headquarters of the probation officer are at his residence, that the business of the court requires frequent telephone communications between the judge and

the probation officer, at the instance of either, and that the law is to be construed liberally to effect the object for which it was intended, I am of the opinion that exchange service of a telephone installed in the home of the probation officer, as described in your letter, may lawfully be paid by the county.

In so holding, I do not wish to deviate from the general rule which the bureau of inspection has deemed it advisable to adopt, namely: that residence telephones may not be paid out of public funds. The special circumstances of the case alone justify the conclusion which I have reached.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

57.

POOR RELIEF—INDIGENT FAMILY—COUNTY OF LEGAL SETTLEMENT—REIMBURSEMENT TO OUTSIDE COUNTY—REMOVAL TO COUNTY OF LEGAL RESIDENCE.

Where a family which had supported itself for fourteen months in Washington county, moved to Morgan county and after residing in the latter place for six months were reduced to indigent circumstances, the Morgan county infirmary board are entitled to be reimbursed by the board of Washington county or to have said family removed to the latter county under the same section upon proper notification to the latter under Section 3482 *General Code.*

COLUMBUS, OHIO, January 15, 1911.

HON. T. E. MCELHENEY, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 1st in which you request my opinion upon the following questions:

> "A family consisting of husband, wife and children resided in Washington county for a period of fourteen months, then removed to Morgan county, and have been in Morgan county for about six months or a little less. The family is in indigent circumstances and became sick and heavy expenses were incurred in furnishing medical attention, nursing and provisions. The Washington county board was notified at the beginning, in writing of the condition of this family, but did not see fit to do anything in their behalf. The Morgan county infirmary board then proceeded to look after the family and made further demand upon the Washington county board when said family became in such a condition that they might be removed with safety, that they—the Washington county board—remove them to their county and continue to care for them so long as they were in circumstances justifying them in giving them public relief. This the Washington county board has also failed to do.
>
> "Thereupon, the Morgan county board removed this family to the Morgan county infirmary where they are now being held until it is finally determined to whom this family belongs and who should pay for the relief that has already been granted.
>
> "If said family received no public relief under the poor laws while they resided in said Washington county for the period of fourteen

months, did they by removing from Washington county and being gone for the period above stated, lose such legal residence in Washington county that Washington county would not now be liable for any expenses created in behalf of this family? In other words, the point in controversy the two boards is where this family has, under the poor laws, a legal residence and where the liability attaches for the expenses that have been created and the expenses that may be created in the future."

The following sections of the General Code relate to the matter concerning which you inquire.

"Section 3477. Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor, subject to the following exceptions; (not important in this connection) * * *.

"Section 3482. When it has been * * * ascertained that a person requiring relief has a legal settlement in some other county of the state, such trustees or officers shall immediately notify the infirmary directors of the county in which the person is found, who, if his health permits, shall immedately remove the person to the infirmary of the county of his legal settlement. If such person refuses to be removed, on the complaint being made by one of the infirmary directors, the probate judge of the county in which the person is found shall issue a warrant for such removal, and the county wherein the legal settlement of the person is, shall pay all expenses of such removal and the necessary charges for relief and in case of death the expense of burial if a written notice is given the infirmary directors thereof within twenty days after such legal settlement has been ascertained.

"Section 3483. Upon refusal or failure to pay such expenses, (of removal to the county of legal settlement) such infirmary directors may be compelled so to do by a civil action against them by the board of infirmary directors of the county from which such person is removed, in the court of common pleas of the county to which such removal is made. If such notice is not given within twenty days after such directors ascertain such person's residence, and within ninety days after such relief has been afforded, the directors of the infirmary where such person belongs shall not be liable for charges or expenditures accruing prior to such notice.

"Section 3480. When a person in a township or municipal corporation requires public relief, or the services of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees * * *.

"Section 3481. When complaint is made to the township trustees or to the proper officers of a municipal corporation that a person therein requires public relief or support, one or more of such officers, or some other duly authorized person, shall visit the person needing relief, forthwith, to ascertain his name, age * * * and in what township and county in this state he is legally settled."

Upon the facts which you state, and under the statutes above quoted, I am clearly of the opinion that the infirmary directors of Washington county are liable

to the infirmary directors of Morgan county for the relief afforded to the family described by you after the health of the members thereof became such as to permit them to be removed to Washington county. There is no question whatever but that under Section 3477, and the facts stated, the legal settlement of the family is in Washington county, and this fact is not affected at all by the residence of the family in Morgan county for a period of six months. Neither is there any question, under the facts stated, as to the compliance by the infirmary directors of Morgan county with all the provisions of law necessary to be complied with in order to fix the liability of the Washington county board. This liability extends to the payment of all expenses, as well for medical services as for other relief.

There is, to be sure, some ambiguity in Section 3482, arising by virtue of the peculiar language thereof, which states that "a person shall be removed to the infirmary of the county of his legal settlement if his health permits." I think, however, that, having regard to the manifest intent of the related sections, the word "if," as here used, should be construed as "when."

So, also, the same section provides that if the person refuses to be removed the probate judge of the county shall, upon complaint, of the infirmary directors, issue a warrant for removal etc. Having regard to the same intent, above referred to, I am of the opinion that whether or not there is any proceeding to compel removal or to pay the expenses of removal, when the indigent person is willing to be removed but the infirmary directors of the county to which he belongs are unwilling to receive him, there is at least enough in the sections to fix the liability of the county to which the person belongs for expenditures made by the infirmary directors of the county by which the relief is actually extended.

The case of Commissioners of Ashland County vs. The Directors of the Richland County Infirmary, 7 O. S. 66, decided under statutes slightly different, and therefore, holding that the liability of the county of legal settlement rested upon the county commissioners instead of upon the infirmary directors, is sufficient authority in my opinion for the above conclusion. It did not appear in that case that Ashland county had any county infirmary, and hence any infirmary directors.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

62.

OFFICES INCOMPATIBLE—TOWNSHIP TRUSTEE AND JUSTICE OF THE PEACE.

As a township trustee is required to approve the bond of a ~~trustee~~, the offices are incompatible and may not be held by the same individual.

Several public offices may be held by the same person when there is neither a statutory prohibition nor an inherent incompatibility.

COLUMBUS, OHIO, January 15, 1912.

HON. JOHN G. ROMER, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter wherein you request an opinion upon the following:

> "I request your opinion as to whether the office of justice of peace and township trustee may be held by the same person."

In reply thereto I desire to state that the right of one person to hold two offices at the same time is governed by two well known principles, viz.: statutory prohibition and incompatibility.

Upon an examination of the statutes I am unable to find any express provision to the effect that the office of the justice of the peace and township trustee may not be held by one person at the same time.

The rule of incompatibility of public offices is laid down in the case of State ex rel. vs. Gebert, 12 C. C. (n. s.) 274, wherein it is held that public offices are incompatible when one is a check upon, or is subordinate to the other.

Recourse must, therefore, be had to the statutes defining the duties of these respective offices to determine whether or not they are in fact incompatible.

By the provisions of Section 1721 of the General Code of Ohio trustees are required to approve the bonds of justice of the peace of the township, and in this instance a township trustee might be called upon to approve his own bond as justice of the peace, thus making his position as township trustee inconsistent with that of justice of the peace.

For this reason I am of the opinion that the offices of justice of the peace and township trustee cannot legally be held by one person at the same time.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

66.

TOWNSHIP AND COUNTY DITCHES—RIGHT OF COUNTY COMMISSIONERS TO CONSTRUCT, ALTER OR REPAIR DITCHES—RIGHTS OF TOWNSHIP TRUSTEES—PETITION FOR DITCHES.

The county commissioners may originally entertain jurisdiction of a petition to construct an entirely new ditch which may or may not follow the line of an existing ditch, and in this case, no rights of intervention exists on the part of the township trustees, through whose districts such ditch will run, nor need the trustees be appealed to in this connection.

When the petition, however, is for the widening, boxing, tiling or the alteration of an existing ditch, the trustees must first be appealed to and must refuse to act before the commissioners may entertain jurisdiction.

COLUMBUS, OHIO, January 5, 1912.

HON. JAMES F. BELL, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 20th, requesting my opinion upon the following questions:

> "In case of a petition for the location, construction, cleaning, repairing, enlarging and tiling of a joint county ditch, located in two counties, and such proposed improvements begin in the upper county at the source of an old township ditch, and follows, as near as practicable, the same route of said old township ditch until it intersects an old county ditch and thence following, as near as practicable, the route of said old county ditch, through both counties, to the outlet:
>
> "First. Have the county commissioners of the two counties acting

jointly the authority to proceed in the matter until an application is first made to the township trustees to alter or repair the township ditch and they have refused to act?

"Or, Secondly. If such proceeding and refusal to act on the part of the township trustees is not a necessary prerequisite, is it necessary for such trustees to first sign a waiver relinquishing jurisdiction over such township ditch before the commissioners can proceed in the matter?"

Section 6536 of the General Code provides as follows:

"Ditches, drains or water-courses which provide drainage, or, when constructed, will provide drainage for lands in more than one county, may be constructed, enlarged, cleaned or repaired, as provided in this chapter and the laws prescribed for constructing, enlarging, cleaning or repairing single county ditches, drains or water-courses."

By virtue of this section the provisions of the chapter relating to single county ditches apply as well to the construction of joint county ditches unless a contrary intention is evinced in some provision of the latter chapter.

I find no provision of the chapter relating to joint county ditches which in any way deals with the subject of existing township ditches, excepting Section 6554, General Code. This section, however, is not concerned in your inquiry. It relates exclusively to cases in which an existing township ditch empties directly into an adjoining county or into a ditch, drain or water-course therein.

Section 6443, General Code, which is found among the sections providing for the improvement and construction of single county ditches provides as follows:

"The board of county commissioners, at regular or called session, when necessary to drain any lots, land, public or corporate road or railroad, and it will be conductive to public health, convenience or welfare, in the manner provided in this chapter, may cause to be located and constructed, straightened, widened, altered, deepened, boxed, or tiled, a ditch, drain or water-course, or box or tile part thereof, or cause the channel of a river, creek or run, or part thereof, within such county, to be improved by straightening, widening, deepening, or changing it, or by removing from adjacent land timber, brush, trees, or other substance liable to obstruct it. * * *"

The grammatical construction of this section leads to the conclusion that it deals with a number of different and distinct proceedings. Thus the location and construction of a county ditch is a different proceeding from the straightening thereof, or the widening, the alteration, or the deepening. In a given case the nature of the improvement would be determined, in my opinion, by the prayer of the petition. Of course, it is true that petitioners might seek to use language for the purpose of concealing their real intentions; yet, in an ordinary case, I am satisfied that if the intention is, for example, originally to construct and locate a county ditch the mere fact that there is an existing township ditch the route of which will be in part utilized by the new improvement, will not change the essential nature of the proposed improvement from one of original construction to one of alteration, widening, or the like.

For this reason the case of Sollars vs. Sever, S. C. C. N. S. 364 must be distinguished. In this case, so far as is disclosed by the language of Sullivan, J., who delivered the opinion of the circuit court, the petition was for the straightening, widening, alteration, deepening, boxing and tiling of an existing township

ditch. The petition was filed with the county commissioners who proceeded to entertain jurisdiction thereof without further formality. The court held their proceedings void because of the express provision of Section 6517 of the General Code, which is in part as follows:

> "The county commissioners, on application of one or more freeholders actually benefited, if the township trustees refuse to alter or repair a ditch, as provided in this title, may cause such ditch or part thereof, or part of a creek, river or run that has been straightened, widened, deepened or changed under the provisions of this chapter, to be altered, deepened, widened, enlarged, repaired, boxed or tiled. * * *"

Here, it will be observed, the petition was for the alteration of an existing ditch, not for the construction of a new improvement over the line of the existing ditch.

In Miller vs. Commissioners 3 C. C., 617, it was expressly held that:

> "An injunction will not be granted to restrain the board of county commissioners from constructing a county ditch—for the reason that a part of the line is over and along the line of an established township ditch."

Of course, in case of the construction of a new improvement over the line of an existing ditch, the owners of abutting property cannot be assessed therefore in excess of the benefit actually conferred upon their property by reason of the new improvement. This follows from the express provisions of the statute which are to the effect that the assessments shall be according to the benefits, and also from the decision of the supreme court in the cases of Blue vs. Wentz, 54 O. S., 247; and Mason vs. Commissioners, 80 O. S., 151.

Upon consideration of all the related sections, however, and of the cases decided thereunder, I am of the opinion that if an existing township or county ditch is inadequate to provide the necessary drainage for the lands within a water shed, it is competent for the county commissioners originally to entertain jurisdiction of a petition to construct an entirely new ditch which may or may not follow the line of the existing ditch, and in so doing the commissioners need not either satisfy themselves that the trustees have been appealed to to alter or repair the ditch, or procure from the trustees a waiver of their jurisdiction over the existing township ditch. The existence of the township ditch becomes a matter of importance, however, when the assessments are made.

It must be clearly understood, however, that when the petition is for the widening, boxing or tiling, or the alteration of an existing ditch, the trustees must be first appealed to, and must refuse to act before the commissioners may entertain jurisdiction.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

75.

TOWNSHIP TRUSTEES—ESTABLISHMENT OF A DEPOSITORY—ADVERTISEMENT FOR BIDS—PROCEDURE WHEN TWO BANKS BID EQUALLY.

When township trustees in pursuance of Sections 3320 *and* 3321, *General Code, providing for the establishment of a depository receive bids from three banks, two of which were highest and each bidding equally, the trustees should apportion the funds.*

COLUMBUS, OHIO, January 26, 1912.

HON. W. V. WRIGHT, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 13, 1912, in which you ask my opinion as to the following situation as detailed by you:

> "The board of trustees of Goshen township, Tuscarawas county, having provided by resolution for the depositing of all moneys coming into the hands of the treasurer of the said township, and otherwise having complied with the law as set forth in Sections 3320 and 3321, General Code of Ohio, preliminary to designating a depository, received bids from three banks, two of which were the highest, both offering the same rate of interest."

Section 3322, General Code, provides as follows:

> "'In townships containing two or more banks, such deposits shall be made in the *bank or banks* situated in the township that offer at competitive bidding the highest rate of interest on the average daily balance on such funds, which in no case shall be less than two per cent. for the full time the funds are on deposit. * * *'
>
> "Assuming that there is no inherent difference between the two banks, and the legislature not having provided specifically for such a situation, should *each* of the banks bidding the same rate of interest on the average daily balance be given a portion of the township funds; or may the trustees designate *one* of such banks at their discretion?"

Section 3320 of the General Code provides for the deposit of township funds, and is as follows:

> "The trustees of any township shall provide by resolution for the depositing of any or all moneys coming into the hands of the treasurer of the township, and the treasurer shall deposit such money in such bank, banks or depository within the county in which the township is located as the trustees may direct subject to the following provisions."

Section 3322 designates where said funds shall be deposited, and is as follows:

> "In townships containing two or more banks, such deposits shall be made in the bank or banks situated in the township that offer at competitive bidding the highest rate of interest on the average daily balance on such funds, which in no case shall be less than two per cent.

for the full time the funds are on deposit. Such bank or banks shall give a good and sufficient bond to be approved by the township trustees, for the safe custody of such funds in a sum at least equal to the amount deposited. No bank or depository shall receive a larger deposit of such funds than the amount of such bond and in no event to exceed three hundred thousand dollars. The treasurer of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such treasurer and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

In the act providing for county depositories—Section 2715 et seq., General Code—the following special provision is found which covers a situation in the county analagous to the one of which you speak in a township; this section is 2719, which provides as follows:

"If two or more banks offer the same highest rate of interest with proper sureties, securities, or both, the use of the money shall be awarded to either of them, or the commissioners may award a portion of such money to each of such banks or trust companies."

As there is no such qualifying section in the act relating to township depositories, it is my opinion that the language used in Section 3322, namely:

"A township containing two or more banks, such deposit shall be made in the * * * banks * * that offer * * the highest rate of interest * * *."

means that a portion of the deposits must be awarded to each of such banks. I assume, of course, that all other conditions necessary to qualify each bank as a depository are complied with.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

90.

INHERITANCE TAX ON ANY INTEREST IN PROPERTY—WILL OF MARY R. DANIELS—BEQUEST TO SISTER-IN-LAW.

A bequest of property to two sons as trustees to pay the income thereof to a sister-in-law of the testatrix for life, is subject to Sections 5331 *and* 5343 *of the General Code providing for an inheritance tax.*

COLUMBUS, OHIO, January 9, 1912.

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of December 11, 1911, asking my opinion as to the liability of a certain fund bequeated by the will of Mary R. Daniels for the inheritance tax under Section 5331 of the General Code. You state in your letter that the facts in this case, as stated to you in a letter received by you from the attorneys representing the executors of the will of Mary R. Daniels, are as follows:

"We represent the executors of the will of Mary R. Daniels, late

of Montgomery county, Ohio, under whose will the sum of $10,000 is given to her two sons, as trustees. The trustees are to pay the income therefrom to a sister of the late husband of the testatrix during her life, and at her death the fund is given to testatrix's children and daughter-in-law."

Section 5331 of the General Code provides as follows:

"All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the interstate laws of this state, or by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child and made a legal heir under the provisions of a statute of this state, or the lineal descendants thereof, or the lineal descendants of an adopted child, the wife or widow of a son, the husband or daughter of a decedent, shall be liable to a tax of five per cent. of its value above the sum of two hundred dollars. Seventy-five per cent of such tax shall be for the use of the state and twenty-five per cent. for the use of the county wherein it is collected. All administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid."

I also call your attention to Section 5343 of the General Code, which is as follows:

"The value of such property, subject to said tax shall be its actual market value as found by the probate court. If the state, through the prosecuting attorney of the proper county, or any person interested in the succession to the property, applies to the court, it shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purpose of this tax, and make return thereof to the court. The return may be accepted by the court in a like manner as the original inventory of the estate is accepted, and if so accepted, it shall be binding upon the person by whom this tax is to be paid, and upon the state. The fees of the appraisers shall be fixed by the probate judge and paid out of the county treasury upon the warrant of the county auditor. *In the case of an annuity or life estate, the value thereof shall be determined by the so-called actuaries' combined experience tables and five per cent. compound interest.*"

Considering these two sections, together, it seems clear that the words "any interest therein" as used in Section 5331, would cover the income bequeathed to the sister of the husband of the testatrix, above mentioned.

You will find the case of In re Estate of Henry J. F. Wolf, deceased, reported in 48 Weekly Law Bulletin, 211, exactly in point, I think; the first two paragraphs of the syllabus in this case are as follows:

"1. A bequest to a nephew of the decedent's wife or to a descendant of such nephew is not exempt from the collateral inheritance tax within the meaning of Section 2731-1 Rev. Stat.

"2. A bequest to one not a blood relative of the decedent of the income from certain securities for life, constitutes a life estate in said securities; and the amount of collateral inheritance tax due on such a bequest is determinable by the actuaries' combined experience tables and five per cent. compound interest."

Section 2731-1, Bates Statutes, as referred to in this opinion will now be found as Sections 5331 and 5332 of the General Code, Section 5331 being quoted above, and Section 2731-12, Bates Rev. Stat., referred to in the opinion, is now Section 5343 of the General Code, quoted above.

My opinion, therefore, is that the bequest made to the sister of the husband of Mrs. Daniels, by the will of Mary R. Daniels, is subject to the inheritance tax under Section 5331 of the General Code.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

93.

BOARD OF EDUCATION, TOWNSHIP—CENTRALIZATION OF SCHOOL DISTRICTS—EFFECT UPON PAYMENT OF INDEBTEDNESS OF ABOLITION OF SCHOOL DISTRICT.

In a township in which there is no township board of education and wherein a number of special school districts exist, there are no special statutory provisions for the centralization of schools. However, by means of the election provided for by Section 4743, General Code, a school district may be abandoned and the original township district from which the abandoned school district was taken, may be thereby recreated, and from this revived township district, the centralization may be completed as provided by statute.

When a special school district is abandoned, by vote of the electors or otherwise, such special school district continues to exist for the purpose of paying any and all indebtedness of such special school district, and any taxes levied to pay such indebtedness should be collected upon the property on the duplicate in such school district, even though such district is situated in two or more townships.

COLUMBUS, OHIO, December 11, 1911.

HON. E. H. PATCHIN, *Prosecuting Attorney, Geauga County, Chardon, Ohio.*

DEAR SIR:—Under favor of October 15, 1911, you ask an opinion of this department upon the following:

"In Huntsburg township in our county the following situation exists with reference to the public schools: The township is divided into a number of special districts, some of which special districts extend into other townships, and in some of them there have been bonds issued for various purposes. There is no township board of education; it is now desired in some manner to centralize the schools of this township. Section 7730 and 4726 General Code seem to be the Sections with

reference to centralization but each of them provide that there must be a petition to the township board. There being no township board in this township we wish to know what method, if any, can be used to submit this question of centralization? Second. What would be the manner of disposing of the question of bond issue when a portion of the territory is in another township?

"I believe there must be some method of submitting this question of centralization but I am equally sure that in so doing the boards of special districts that have issued bonds in conjunction with territory in other townships would not be allowed to repudiate those bonds."

As you state, Sections 4726 and 7730, General Code, provide for centralization of township schools and require action by the township board of education.

Section 4726, General Code, provides:

"A township board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of such township district, must submit such question to the vote of the qualified electors of such township district. If more votes are cast in favor of centralization than against it, at such election, such board of education shall proceed at once to the centralization of schools of the township, and, if necessary, purchase a site or sites and erect a suitable building or buildings thereon. If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not again be submitted to the electors of such township district for a period of two years."

Section 7730, General Code, provides:

"The board of education of any township school district may suspend the schools in any or all subdistricts in the township districts. Upon such suspension the board must provide for the conveyance of the pupils residing in such subdistrict or subdistricts to a public school in the township district, or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. Or, the board may abolish all the subdistricts providing conveyance is furnished to one or more central schools, the expense thereof to be paid out of the funds of the district. No subdistrict school where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast thereon were against the proposition of centralization, or when a petition has been filed thereunder and has not yet been voted upon at an election."

You will further observe that these sections provide for the centralization of schools in township school districts and no other. In the township of which you inquire there is no township school district, as the entire township is divided into special school districts. There is no provision of statute for the centralization of the schools of a special school district.

By virtue of Sections 4741 to 4744, General Code, special school districts may be abandoned and upon such abandonment the territory of such special school district will revert to the township district from which it was originally taken.

Section 4741, General Code, provides:

"When a petition is signed by not less than one-third of the electors residing within the territory constituting a special school district, praying for the abandonment or continuance of such special district, is presented to the board of education of such district, or when such board, by a majority vote of the full membership thereof, shall decide to submit the question of abandoning or continuing the special school district, the board shall fix the time of holding such election at a special or general election. The clerk of the board shall notify the deputy state supervisors of elections as herein provided in case of first election, of the date of such election and the purposes thereof, and such deputy state supervisor shall provide therefor. The clerk of the board of education shall post notices thereof in five public places within the district."

Section 4743, General Code, provides:

"The ballot shall be in the regular form but without the circle at the top, and shall have printed thereon, 'abandonment of special school district, yes;' 'abandonment of special school district, no;' 'continuance of special school district, yes,' or 'continuance of special school district, no,' as the case may be. The expense of the election shall be paid in the same manner as other school elections' expenses, and *the returns thereof shall be made to the board of education of the special school district. If more votes are cast for abandonment than against it, or against continuance than for it, such board shall certify the result to the board or boards of education of the township or townships having territory in that special district, and the territory of the special district shall thereby revert to the township school district or districts from which it was originally taken, except as hereinafter provided in case of indebtedness of the special district.* Otherwise such district shall continue to be and remain a legal special school district as theretofore constituted."

Section 4744, General Code, provides:

"The legal title of the property of a special school district in case of abandonment or failure to continue shall become vested in the board or boards of education of the township or townships in which such property is situated. The school funds of such special district shall be paid into the treasury of the township district, and if such special district is in two or more townships, such funds shall be divided between them in proportion to the total tax valuation of property in the several districts. *The abandonment of a special school district shall not be complete until the board of education of the district has provided for the payment of any indebtedness that may exist.*"

The abandonment of a special school district is submitted to a vote of the electors and the returns of such election shall be made to the school board of the special school district. If such vote is favorable to the abandonment of such special school district, the board of education of the special district must certify the result to the board of education of the township. There is no time specified in which this must be done.

However it appears that there is no township board of education to which such return or certificate can be made, nor is there any territory from which to elect or appoint such board. The abandonment of a special school district in such case,

would be in its results, the creation of a township district. After the result of the vote for abandonment was known the township district thus created could proceed to elect a board of education in the same manner as the first election in any township district is held. After such election and the qualification of the members of the board, the statute could be complied with and the abandonment of the special school district be completed.

The centralization of the schools of such township district may then be affected in the manner provided by statute. While this proceedure is more or less cumbersome, it is the only way in which the schools of a township composed entirely of special districts can be accomplished.

You further inquire in reference to the bonded indebtedness of a special school district, when such district is in two or more townships.

Section 4743, General Code, supra, provides that "the territory of the special district shall thereby revert to the township school district or districts from which it was originally taken, *except as hereinafter provided in case of indebtedness of the special district.*"

This refers to the provisions of Section 4744, General Code, the last sentence of which provides: "the abandonment of a special school district shall not be complete until the board of education of the district has provided for the payment of any indebtedness that may exist."

A proper construction of these provisions will determine what is to be done with the bonded indebtedness. If the legislature had intended that no special school district could be abandoned until all indebtedness of such district was paid, it could easily have so stated. It has provided, however, that the abandonment shall not be complete until all indebtedness has been provided for.

Section 4744, General Code, further provides that the property of a special school district so abandoned shall become vested in the board of education of the township or townships in which such property is situated. There is no provision of the statute providing for the assumption of any indebtedness by the township or townships to which such territory reverts.

The syllabus in case of State ex rel. vs. Nolliday, 9 Low. Dec. 738, reads:

> Where the legislature has made no provision as to a division of the property upon creation of a special subdistrict out of portions of other districts, the subdistrict will take none of the property and will assume none of the obligations of the old district."

The court, Bigger, J. on page 740, of the opinion, quotes from several authorities in support of his conclusion.

He quotes the syllabus of the case of City of Winona vs. School District, 40 Minn., 13, as follows:

> "If a part of a territory or a municipal corporation is separated from it by annexation to another, or by its creation into a new corporation, unless some other provision is made in the act authorizing the separation, the old corporation (it not having been abolished) remains subject to all its liabilities and retains all its property, including that which, upon the change of boundaries, happens to fall within the limits of the other corporation."

Judge Bigger, also quotes from case of Hughes vs. Ewing, 93 Cal., 414, as follows:

> "When the boundaries of a school district are changed, either to

form a new corporation out of the territory of the original or to transfer a portion of the territory to another corporation, in the absence of any provision on the subject, the old corporation will be entitled to all property and be solely liable for all the obligations, and the territory taken therefrom will not be entitled to any of the corporate property, or liable for any of the obligations of the old corporation."

In the above case of Hughes vs. Ewing, 93 Cal., 414, another syllabus provides:

"The legislature has the power to change the boundaries of a school district, and in the exercise of such power it may make such provision respecting the property and obligations of the corporation as it may deem equitable or proper, and its action is conclusive."

The legislature has absolute power as to the disposition of the property and liabilities of a special school district. They have specifically transferred the property of such special school district, upon abandonment of such district, to the township school district, and may have provided that the township should assume the indebtedness of such district, but have not done so.

It is apparent that is was the intent of the legislature, as expressed in the statutes, that the abandonment for the special district should be complete, except for the purpose of paying the indebtedness of such district. And it is my opinion that such special district should continue to exist for the purpose of levying a tax therein annually, until the indebtedness is paid. The only duty of the board of education in such district would be to levy such tax and apply it to the payment of the indebtedness. When such indebtedness is paid in full, the abandonment of such district will be complete in every respect.

This method is pursued in other states.

In case of People vs. Brewer, 66 Ill., 154, the syllabus, reads:

"When the trustees of schools re-district a township, and form the territory of a district into other districts, so that the old one ceases, if they fail to apportion its indebtedness, and lay it upon the new organizations, the old district will be continued in existence for the purpose of enforcing its indebtedness. In such a case, service upon those who were directors at the time of the change will be good service, as they will constitute a body corporate for the purpose of enabling creditors to enforce payment of their debts."

It may occur that where a special school district is in two or more townships, all the property of such special district, would revert to one township, and the part of such special school district which is situated in the township securing none of its property, would be required to pay taxes to meet any indebtedness, even though such indebtedness was made in the purchase of such property. This, however, would not change the rule.

In case of Board of School Commissioners vs. Center Township, 143 Ind., 391, the third syllabus reads:

"The annexation to a city of territory which contains a school house and lot belonging to the school township from which the territory is taken, *gives no right of action to such township against the school corporation of the city for the value of the property, or for any part of the unpaid indebtedness of the township for the purchase of the lot, or the erection of the house,* under the act of March 3, 1803, providing that the

title to the school property embraced in annexed territory shall vest in, and be conveyed to the school corporation of the city without provision of payment."

In conclusion: Where a special school district is abandoned, by vote of the electors, or otherwise, such special district continues to exist for the purpose of paying any and all indebtedness of such special school district, and any taxes levied to pay such indebtedness should be collected upon the property upon the duplicate in such school district, even though such district is situated in two or more townships.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

97.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—COUNTY COMMISSIONERS—"BURNS LAW" CERTIFICATE OF AUDITOR—"LAW VOUCHERS"—MONEYS DUE ON CONTRACT—TRANSFER OF FEE FUNDS TO COVER DEFICIT IN GENERAL FUND—OVERDRAFTS—MONEYS APPROPRIATED—FISCAL YEAR OF COUNTY COMMISSIONERS, OF COUNTY, AND OF SALARY FUND—SEMI-ANNUAL SETTLEMENTS OF COUNTY AUDITOR AND TREASURER—FUNDING INDEBTEDNESS—"VALID EXISTING AND MATURED INDEBTEDNESS."

The county commissioners of Franklin county, under the conditions existing, may not purchase or pay for supplies for county offices and for the expense of maintaining the court house, unless the auditor certifies 'that the money is in the treasury or in process of collection to the credit of the fund from which the expenditure is to be made and not appropriated to any other purposes.'

Under the same circumstances, "law vouchers" for liabilities fixed by law or by some authority other than the county commissioners and not in their nature contractual, may be paid by warrants without such certificate and stamped "not paid for want of funds."

The day upon which the county commissioners close and reopen their books, that is, the third Monday in September, marks the beginning and end of the "fiscal year" of the county commissioners.

Such fiscal year however, does not fix the fiscal year of the county to which the machinery of the Smith tax law applies. Neither does the fiscal year of the county officers' salary law, which is the ordinary calendar year, and which relates solely to funds raised by fees.

The Smith law deals primarily with county needs and their relation to taxation revenues and their expenditures, and in this connection the "'fiscal year" is established by the provision for the semi-annual settlements between the county auditor and county treasurer, for the reason that by these arrangements, the revenues collected for county purposes first become available. Therefore, March 1st, being the date when these sums first become available, such date must be considered the beginning of the "fiscal year" and appropriations provided for under Section 5649-3d must be made for that year.

Section 5660, known as the "Burns law," before the Smith law was enacted, by its own operation, through the certificate of the auditor effected an appropria-

tion to a new purpose, even of moneys not yet in the treasury. The Smith law, however, requires the money to be in the treasury and already appropriated, to its specific purpose.

The effect of the Smith law upon 5660 *was immediate as it applied to all funds to be levied under that law and therefore, when there are no taxation funds, the county auditor may not lawfully issue for the payment of funds depending on contract of the commissioners, a Burn's law certificate under the Smith law, unless there is some way of getting money into the treasury aside from the process of taxation, such as by transfer of fee funds under* 102 *O. L.* 137, *for the reason that the Smith law in this connection, governs only funds raised by taxation. When law voucher warrants have been legally issued and stamped "not paid for want of funds" they cannot be paid by the auditor from the February collection unless the commissioners have set out such purpose in the annual budget, nor can the commissioners, unless the purpose was so set out, appropriate any money for that purpose. Moneys raised other than by taxation may, however, before March* 1*st, be devoted to the payment of such vouchers.*

Under Section 5656, *General Code, the commissioners may borrow money or issue bonds to fund existing debts by extending the time but not increasing their amounts; and they may use this means to pay such outstanding warrants, legally issued and stamped "not paid for want of funds." They may not, however, "exchange" bonds for such wants.*

Where a deficit exists in the treasury caused by meeting the overdraft in the general county and judicial funds from moneys belonging to bond issue funds and undivided taxes, the commissioners may not issue bonds for the purpose of funding indebtedness until a valid, existing and matured indebtedness is established. In the case of the "undivided taxes" shortage, such a "valid, existing and matured indebtedness" is not established until settlements have been made by the various taxing districts and the amount due to each definitely determined. In the case of the bond fund shortage, this condition does not exist until the amounts due on the respective contracts or improvements are payable according to the terms.

COLUMBUS, OHIO, February 1, 1912.

HON. EDWARD C. TURNER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 25th, submitting for my opinion thereon a statement of facts existing with respect to the finances of Franklin county, and series of questions arising thereunder. The facts are as follows:

> "During the fiscal year ending September, 1911, the expenditures of Franklin county exceeded the receipts thereof by $218,000.
>
> "On December 1, 1911 overdrafts existed in seventeen different funds, amounting to more than $233,000, caused by the treasurer's paying warrants against exhausted funds out of the general balance in the treasury, consisting of the proceeds of bond sales and some undivided taxes. On the same date there was about $100,000 in the treasury that might, legally, be transferred to the general fund, thus reducing the total overdraft to about $123,000.
>
> "The county commissioners attempted to make transfers from the bond funds, above referred to, to the exhausted funds, for the purpose of wiping out the overdrafts and being able to pay warrants out of such exhausted funds. No levy had been made for the purpose of reimbursing such bond funds. Upon proceedings, brought for that purpose,

the common pleas court of Franklin county enjoined the commissioners from transferring the bond funds to the exhausted funds, thus leaving about $123,000 of the overdrafts unprovided for.

"The bulk of these overdrafts are in the general county and judicial funds. At the present time vouchers, the amounts of which are fixed by law, or by some authority other than the county commissioners authorized to fix the same—generally speaking, vouchers for the payment of claims not contractual in their nature—are being honored by warrants issued against these funds, which are being stamped "not paid for want of funds," under Section 2676 of the General Code. It is estimated that on March 1, 1912, the amount of such outstanding warrants will be approximately $75,000.

"By reason of the foregoing there will, probably, be, on March 1st, an overdraft in the general county and judicial funds combined of approximately $200,000, consisting in part of outstanding interest-bearing warrants, as aforesaid, and in part of a deficit in the treasury created, as aforesaid, by using the proceeds of bond sales and undistributed taxes to pay warrants drawn against such funds.

"In the meantime there is, of course, no money in the treasury to the credit of the general county and judicial funds.

"General Code, Section 5660, popularly known as the "Burns law," provides in effect that the commissioners shall not enter into any contract, agreement or obligation, involving the expenditure of money, or appropriate any money, unless the county auditor shall first certify that the money required for the payment of the obligation, or the appropriation, is in the treasury, to the credit of the fund from which it is to be drawn or has been levied and placed on the duplicate, and in process of collection, and not appropriated for any other purpose.

"Section 5661, General Code, provides that all contracts, agreements, obligations, orders and resolutions entered into or passed contrary to the provisions of Section 5660 shall be void.

"Section 5649-3*a*, General Code, as enacted 102 O. L. 270, being part of the Smith one per cent. law, so-called, provides in effect that, in making up their budget, the county commissioners shall set forth specifically the amount to be raised for each and every purpose allowed by law, for which it is desired to raise money for the incoming year; and Section 5649-3*d*, General Code, as enacted in the same act, provides in effect that at the beginning of each fiscal half year the commissioners shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury, and that all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriations shall be made for any purpose not set forth in the annual budget, nor for a greater amount for such purpose than the total amount fixed by the budget commission, exclusive of receipts and balances."

The following are the questions submitted:

"1. What is the fiscal year of the county under the Smith one per cent. law; i. e. what is meant by the phrase 'the incoming year,' as used therein, with reference to the county?

"2. If it be held that the fiscal year of the county begins on March 1st, how, under the facts stated, may the general expenses of the county, such as supplies for county officers, and light and heat for the

court house, all of which are contractual in their nature, be provided for and met between now and March 1, 1912, in face of the above cited statutory provisions?

"3. May the amount of the December collection for the general county and judicial funds, which will be available by March 1st and which will be less than the amount of the outstanding overdrafts in these funds, and that of the warrants being issued against said funds and stamped 'not paid for want of funds,' as aforesaid, be credited by the county auditor against such overdrafts and unpaid warrants or appropriated by the commissioners for the purpose of meeting such overdrafts and unpaid warrants?

"4. May the commissioners, for the purpose of paying the warrants issued and stamped 'not paid for want of funds,' and in the event that said warrants are not to be paid first out of the proceeds of the tax collection, borrow money and issue negotiable promissory notes or bonds under Section 5656, General Code; if neither of the suggested methods for meeting these warrants is proper how may they be taken care of?

"5. As to the deficit in the treasury, caused by meeting the overdraft in the general county and judicial funds from moneys belonging to bond issue funds and undivided taxes, may the commissioners issue bonds under Section 5656 and borrow money for the purpose of reimbursing these funds against which 'Burns law' certificates have been issued, and which will be needed for the specific purposes for which it was assessed and levied, and for the meeting of obligations of the county; if money cannot be borrowed for this purpose, how may the deficit in these funds be met?"

In connection with these questions you state that you are satisfied in your own mind as to certain collateral points. Thus, you state that it is your opinion that as a general rule, under the provisions of Section 5660, General Code, the commissioners may not purchase or pay for supplies for county offices and the expense of maintaining the court house, unless the auditor certifies that the money is in the treasury or in process of collection, to the credit of the fund from which the expenditure is to be made, and not appropriated for any other purpose.

While you do not solicit my opinion upon this question, I beg to state that, in my judgment, your ruling as to this point is correct.

You also state that you have ruled that under Section 5660, General Code, what are known as "law vouchers," the amounts of which are fixed by law or by some authority other than the county commissioners and are not contractual in their nature, may be paid or honored by the issuance of warrants without a certificate of the auditor. Without going into this question, and although you do not solicit my opinion thereon, I beg to state that in my judgment your conclusion, in this respect, is correct.

You advise me that you have also held that warrants may not be issued and stamped "not paid for want of funds," upon claims invalid because of inability to comply with Section 5660, as aforesaid; but that in cases in which the certificate of the auditor, under said section, is not necessary, as in the case of salaries fixed by law, and employes of the court house, under Section 2413, General Code, such warrants may be issued at least between the present date and March 1, 1912.

Though you do not solicit my opinion upon this question I beg leave to state that the distinction you draw in reaching this conclusion is, in my judgment, cor-

rect. The effect of the enactment of the Smith law upon Section 2676, General Code, and related sections, will, however be more fully discussed in some of your specific quotations.

You have assumed the answer to the first question, which I have stated above, to be the year beginning and ending on March 1st. Not because I think you are wrong in this assumption, but because I think the question is of some difficulty and ought to be reasoned out carefully to its conclusion, I have deemed it proper to go into this question at the outset of my investigation of the other question stated by you.

Secion 2507, General Code, provides as follows:

> "On or before the third Monday in September of each year, the county commissioners shall make to the court of common pleas of the county a detailed report of their financial transactions during the year next preceding such date. Such report shall be in writing, and itemized as to amount, to whom paid, and for what purpose."

Section 2980, General Code, provides in part as follows:

> "On the twentieth of each November such (county) officers shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies * * * and other employes of their respective offices * * * for the year beginning January first next thereafter * * *."

Section 2568, General Code, provides that:

> "The county auditor shall keep an accurate account current with the treasurer of the county * * *."

Section 2569, General Code, provides:

> "On the first business day of each month, the county auditor shall prepare in duplicate a statement of the finances of the county for the preceding month, * * * and * * * submit such statement to the commissioners * * *"

Section 2596, General Code, provides in part as follows:

> "On or before the fifteenth day of February and on or before the tenth day of August of each year, the county auditor shall attend at his office to make settlement with the treasurer of the county and ascertain the amount of taxes with which such treasurer is to stand charged. * * *"

Section 5649-3*a*, General Code, as enacted 102 O. L. 2270, and known as a part of the Smith one per cent. law, provides in part as follows:

> "On or before the first Monday in June, each year, the county commissioners of each county * * * shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed *for their wants for the incoming year* and for each month thereof."

The language above quoted and that of Section 5649-3*d*, "at the beginning of each fiscal half year the various boards mentioned in Section 5649-3*a* of this act shall make appropriations * * *," constitute the language which, in the light of the sections preceding and the other provisions of the Smith law, is to be construed in answering your first question.

I think it is reasonably clear from the provisions of the sections first above quoted, that the fiscal year of the *county commissioners* begins and ends on the third Monday in September. Then is when the commissioners are required to submit a detailed report of their financial transactions for the year. In a sense, their books are closed and reopened on this date, which is to be regarded as of importance, and the provisions as to which is clearly mandatory, in the light of Section 2509, General Code, providing a penalty of five dollars per day for delay in the making and filing of the report after the third Monday in September.

The strict language of Section 5649-3*a*, in its primary grammatical construction and meaning, would seem to indicate this fiscal year. That is to say, it is provided by that section that "the county commissioners * * * shall submit * * * an annual budget, setting forth * * * the amount of money needed for *their* wants for the incoming year." On careful examination of the whole act known as the Smith one per cent. law, however, I think it becomes apparent that the word "their," as used in this provision, is not employed in an exact sense. Without going into detail I may say that it is my opinion, from the provisions of the whole act, that it is not the needs of the *commissioners* for the incoming year that the commissioners must estimate and report to the county auditor, as therein provided, but the needs of the *county*, from the standpoint of the levy of taxes. To reach this conclusion, as I have already indicated, the whole act must be examined, and, perhaps, some violence done to the exact language of some portions of it. No other conclusion, however, is consistent with the object and purposes of the entire act.

It is not, then, the fiscal year of the county commissioners for the satisfaction of the needs of which the machinery of the Smith law must be brought into operation; it is rather the fiscal year of the county.

I may here state that, in my judgment, the phrase "incoming year," as used in Section 5649-3*a*, above quoted, and the word "year," as it occurs in Section 5649-3*d*, are synonymous; that is to say, the wants of the county are to be estimated for the incoming year and at the beginning of that incoming year the first appropriations are to be made.

I have quoted other sections of the General Code for the purpose of disclosing provisions which might indicate what is the fiscal year of the county, other than those of the Smith law itself. Thus, it appears that under the county officers' salary law the fiscal year is the calendar year. Allowances are to be made from the fee fund by the county commissioners for the calendar year, and adjustments and settlements are to be made quarterly during the calendar year; so that in a county like Franklin County, for instance, the balances of fees in excess of salaries and clerk hire, coming into the county treasury under the county salary law, are ascertained at the end of each quarter of the calendar year. I do not, however, regard the calendar year as the fiscal year for the purposes of the Smith law. The county officers' salary law deals primarily with the fees of the various county offices affected thereby and does not directly affect the subjects of taxation and of the appropriation of revenues derived from taxation. There is, therefore, no necessary connection between the fiscal year under the county officers' salary law and the fiscal year of the county for the purposes of the expenditure of revenues raised by taxation.

A somewhat more direct connection with the matter of taxation is disclosed with respect to the semi-annual tax settlements to be made by the couny auditor

and the county treasurer. While no fiscal year is mentioned in the sections providing for these settlements, yet, they must be made at regular intervals of six months and they have to do directly with moneys raised by taxation. That is to say, by virtue of these sections the money levied for county purposes upon the general county duplicate becomes available for expenditure, in the full sense of the word, on and after the date of the semi-annual settlement. The first money under a particular levy becomes so available after the February settlement, and the second half of the same levy becomes available after the August settlement.

Now, under the statutes as they existed prior to the enactment of the Smith law, these provisions respecting semi-annual settlements did not denote the existence of any fiscal year. Under Section 5660, for example, it was sufficient for the purpose of the issuance of a certificate that the money was in the treasury, that the levy for the fund had been made and was in process of collection at the time such certificate was issued. The other sections, above quoted, provided not for an annual **or** semi-annual balancing of accounts as between the treasurer and the auditor, but for monthly statements and balances. In reality, then, the auditor's accounts under the old law were not kept upon a yearly basis, but upon a monthly basis.

Now, Section 5649-3*d*, as I have already indicated, requires the ascertainment of a fiscal year for the county and not that for the county commissioners. Inasmuch as the county auditor keeps all the accounts of the county, draws all the warrants, and has in his office the books which show the balances to the credit of all funds of the county, it would seem appropriate to search for the fiscal year, if it had any existence prior to the enactment of the Smith law, in the provisions respecting the conduct of his office. As already pointed out, however, the statutes do not disclose the existence of any such fiscal year in the auditor's office, as applied to the accounts of the whole county.

But while there was no fiscal year of the county under the statutes as they existed prior to the enactment of the Smith one per cent. law, there were annual and semi-annual periods at which the amount of undistributed taxes with which the county was to be credited and which the treasurer credited or ascertained, namely: the semi-annual tax settlements. Now, consideration of the primary purpose of the Smith law, as evidenced by all the provisions of the act, rather than as expressed in any one clause or phrase thereof, leads to the conclusion that it deals, broadly speaking, with the production of public revenues by taxation and the expenditure thereof. So, while it deals, and necessarily deals, with the appropriation and expenditure of all the revenues of a taxing district, including those arising from sources other than taxation, yet, the primary purpose being as above stated, the appropriation periods mentioned in Section 5649-3*d* must necessarily have some relation to the periods at which the proceeds of taxation become available to the taxing district. For this reason, I had occasion to hold that, as to a municipal corporation, the fiscal year of which was positively fixed by statute that Section 5649-3*d* did not become operative until the beginning of the fiscal year for the needs of which taxes had been levied through the agency of the budget commission, as provided in other sections of the Smith law.

As suggested, the case of the county differs from that of the city, because there is no one fiscal year applicable to all the departments of the county government existing under statutes adopted prior to the Smith law. Yet, it is manifestly the intention of the Smith law that the commissioners, in preparing their budget, fix in their minds the needs of every department of the county government for some certain year, therein designated as "the incoming year." This year could not be one year for the commissioners, another for the sheriff, another for the auditor, another for the infirmary directors, and so on; but it must be one year, the same for all the offices.

Section 5649-3d provides that appropriations shall be made from moneys known to be in the treasury and that all expenditures within the following six months shall be made from and within such appropriations and balances. Having held in the case of the municipal corporation that this section became effective as to each taxing district, at the beginning of the year for which the first taxes received under the Smith law were levied, I am constrained, now, to hold that, as to the county, this section will become effective at least as soon as the proceeds of the December tax collection, the first under the Smith law, become available to the county, and a balance is struck on the books of the county auditor showing the amount in the several funds subject to appropriation.

This would be March 1, 1912, that being the date of the first monthly adjustment and balancing of accounts by the auditor and the treasurer succeeding the first semi-annual tax settlement under the Smith law. The year, then, for which taxes must be deemed to have been levied by the county commissioners, subject to the approval of the budget commission, is the year beginning and ending March 1st, and the semi-annual appropriation periods would be March 1st and October 1st.

It follows, therefore, that you have correctly assumed that "the incoming year" of which the Smith law speaks is the year beginning and ending on March 1st. You will pardon me, I am sure, for going into this matter so much in detail, but the question appeared doubtful to me, and of such general interest that I felt justified in giving it my attention. The difficulty upon this point arises from the fact that the Smith law is silent as to a matter of vital importance, which fact necessitates the supplying of a deficiency in legislation by a necessary implication.

Your second question relates to miscellaneous expenses of the county, for the making of which the commissioners or some other officer would have to enter into contracts, or otherwise exercise discretionary power, so as to bring the transaction within the rule of Section 5660, General Code. You ask whether or not the commissioners, or such other officers, may lawfully incur any such expenses until the appropriation is made on March 1st. Section 5660 provides in part as follows:

> "The county commissioners of a county * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor * * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose * * *."

Section 5661 provides in effect that all contracts, agreements or obligations etc., entered into contrary to the provisions of Section 5660 shall be void.

As you state, there are numerous exceptions to the general rule of this statute, some of them expressly made in other statutes and some of them arising by implication, from consideration of the manifest intention of the statute, such as appropriations for salaries fixed by law, etc. The question arising here is as to whether the adoption of the Smith law, and especially Section 5649-3*d* thereof, has any practical effect on the above section insofar as it authorizes the certificate of which it speaks to be issued if the money required "has been levied and placed on the duplicate and in process of collection, and not appropriated for any other purpose."

A very little thought will convince, I think, that the Smith law does have a positive effect upon this provision. It is further provided by Section 5660 that "the sum so certified shall not thereafter be considered unappropriated until the

county * * *is fully discharged from the contract * * *." In other words, the issuance of a Burns law certifificate under Section 5660, as it existed prior to the enactment of the Smith law, was itself an appropriation from a fund in the treasury, and even from a fund to come into the treasury in pursuance of a levy made on the duplicate. This is in direct conflict with the fundamental idea of Section 5649-3*d*, which is that the funds produced by taxation shall be appropriated and divided into appropriation accounts at the beginning of each half yearly period by the commissioners.

Section 5649-3*d* is, as I have already pointed out, borrowed, so to speak, from the municipal code, with some very important original features of its own. It corresponds in and supplants Section 3797, General Code, which was Section 43 of the Municipal Code, passed in 1902. There was in force at the time of the enactment of the Municipal Code a section, now Section 3806, General Code, which corresponds to Section 5660, General Code; this section was known as Section 2699, Revised Statutes, and was re-enacted as Section 45, Municipal Code. So that it will be observed that ever since 1902, cities have been operating under what may be termed this double check upon public expenditures—the requirement that the proceeds of taxation known as the "fund" be first appropriated by council to a general purpose, coupled with the further requirement that when so appropriated they may be further appropriated to a specific purpose by the issuance of the auditor's certificate.

It would seem that the question which has arisen under Sections 5660 and 5649-3*d*, as to the county, ought to have arisen under Sections 3797 and 3806, as to the city, in 1902, or at the time when the Municipal Code was adopted. Strangely enough, however, I do not find any reported decision, either of a court of Nisi Prius, or of any higher court on this question. Upon careful study, however, I have reached the conclusion that the phrase "not appropriated for any other purpose," as used both in Section 3806 and Section 5660, General Code, really means "and appropriated for the general purpose for which the expenditure is to be made." In other words, I am of the opinion that the word "appropriated," as used in Section 3806, as enacted as a part of the Municipal Code, Section 45, could not mean the same as it has heretofore meant as used in the parallel clause of Section 5660; nor could it mean the same thing as is meant by the same word as used in Section 3797 and in Section 5649-3*d*. Put in still another way, it is my opinion that the effect of the certificate of the auditor, under Section 3806, is not to appropriate from a fund but to set aside from an appropriation account.

There is this differense between Section 3806 and Section 5660; the former does not contain the language now under consideration, namely: that a certificate may be filed if the money is levied on the duplicate and in process of collection. This language was left out of Section 3806 when it was enacted as Section 45, Municipal Code, although included in statutes previously in force, such as Section 2699-1, Revised Statutes, applicable to Cleveland and Columbus, for the very obvious reason that it was incompatible with the scheme of finance embodied in Section 3797, General Code, Section 43, Municipal Code.

In short, I am satisfied that it is impossible to regard the certificate of the auditor as having the same appropriating effect as the appropriation of council, speaking with reference to the sections of the Municipal Code which seems to have served as models for Section 5649-3*d*, General Code. I have thus reached the conclusion under the latter section appropriations must first be made before any money is available for expenditure, and that as a consequence thereof the certificate of the auditor, to be issued under Section 5660, General Code, can no longer be issued until the money has been not only brought into the treasury but also appropriated by the commissioners, in the case of the county.

As tending to put the matter still more clearly I could say that in my judgment the word "fund," as used in Section 5660, General Code, is to be regarded as modified by the enactment of Section 5649-3d so as to mean "appropriation account." So that the auditor must certify not only that the money is in the treasury to the credit of the fund but that it is in the treasury to the credit of the appropriations account within the fund from which it is to be drawn.

From all the foregoing, I think it follows that so much of Section 5660 as provides that the certificate may be issued by the auditor when the money needed for the expenditure has been levied and is in process of collection is inconsistent with Section 5649-3*d*, requiring semi-annual appropriations for all the objects for which the county has to provide. This being the case, that portion of Section 5660 is, in my judgment, repealed.

Having reached this conclusion it becomes necessary further to inquire when this repeal became, or is to become, effective. I have already stated that Section 5649-3d did not in a sense become effective upon the enactment of the Smith law. Thus, as to municipal corporations, it did not govern the second semi-annual appropriation for the year 1911, although that appropriation had to be made after the Smith law took effect as a whole, but its effect was postponed until it could operate upon and with respect to an appropriation of moneys raised under the Smith law.

In discussing the first question raised by your letter, as to the identity of the fiscal year for the county, I have stated in a general way that the first duty of the county commissioners to appropriate under Section 5649-3*d* will arise on March 1, 1918. Is, then, the repealing effect of Section 5649-3*d* upon Section 5660, General Code, as above defined, postponed until that date? I think not. My reason for holding that the county commissioners need not appropriate for the first time under the Smith law until March 1, 1912, was, as above stated, that the Smith law deals with the expenditure of moneys levied in a certain way, namely; through the agency of the budget commission. This reason may be applied to the solution of the present question as well. It leads to the promulgation of the following principle, namely: all moneys raised within the maximum limitations of the Smith law by levies subject to the approval of the budget commission are to be expended as provided in that act and after appropriation by the proper authorities.

Upon this reasoning, then, the repealing or amending effect of Section 5649-3*d* upon Section 5660 was immediate. Moneys levied through the agency of the budget commission could not, therefore, for the reasons above pointed out, be anticipated while still unappropriated.

From all the foregoing it follows that the county auditor may not lawfully issue a Burns law certificate against moneys levied in 1911 and now in progress of collection, but which have not been and will not be appropriated until March 1, 1912.

Inasmuch as the auditor cannot lawfully issue this certificate it necessarily follows, from Section 5661, that no contract, agreement or other obligation involving the expenditure of moneys, can be lawfully entered into by the county commissioners or any other county officer until March 1, 1912, unless there is some way of getting money into the treasury, aside from the process of taxation. I have searched the statutes, and find that county commissioners have no power to borrow money to meet the ordinary current expenses of the county. Save and excepting certain emergencies, other than the one with which Franklin county is confronted, and certain specific improvements, the power of the commissioners in this respect is limited to the funding or refunding of existing valid indebtedness. It occurs to me, however, that on January 1, 1912 there must have been money in the various fee funds of the county, subject to transfer under authority of Section 2985, General Code, as amended 192 Ohio Laws, 137, which provides in part that,

"The county commissioners may at any time transfer from the fee fund of any office any amount thereof in excess of that necessary to pay the compensation of the deputies * * * or employes * * * in said office, to the general county fund or to any fund from which transfers have heretofore been made to any of such fee funds, provided, that when any transfer of moneys has heretofore been made from any such fee fund the fund from which such transfers have been made shall be fully re-imbursed before any transfers may be made to the general county fund. Such transfers may be made upon authority herein provided, any law to the contrary notwithstanding. * * *"

In a county of the size of Franklin county, this section should enable the commissioners to raise a considerable sum of money. I am, of course, entirely unfamiliar with the facts but it would seem to me that the sum so rendered available ought to be almost sufficient to supply the commissioners with funds to buy supplies for county officers and meet other miscellaneous expenses for a period of two months.

Such moneys are not subject to the rule above laid down, or, more properly speaking, will not be subject thereto until after March 1, 1912. This is for the reason already twice stated, that the Smith law relates primarily to the disposition of moneys raised by taxation. After March 1, 1912, such balances may not be directly expended without appropriation, because of that provision of Section 5649-3d which is to the effect that "all expenditures within the following six months shall be made from and within such appropriations and balances thereof." Until such appropriations are made, however, these and any other revenues, produced otherwise than by taxation on the general 1911 duplicate, may be regarded as in the treasury for the purpose of the issuance of Burns law certificates.

There are, perhaps, other instances similar to this, of moneys coming into the treasury prior to March 1, 1912, to the credit of the general revenue fund, or to be transferred thereto from sources other than taxation on the general duplicate. All such moneys may, in my opinion, until March 1, 1912, be regarded as in the treasury subject to expenditure and the issuance of Burns law certificates therefor.

Aside from these possible expedients, I know of no way to provide for the general expenses of the county, such as those mentioned in your second question, between now and March 1, 1912. I trust that the means pointed out by me may be made available by the county commissioners, and that they will produce sufficient funds for the purposes of the county.

Your third question is as to whether or not the outstanding overdrafts and unpaid warrants must be charged by the county auditor against the December collection for the general county and judicial funds, when available after the February settlement; and further as to whether or not appropriations may be made from the general county and judicial funds by the county commissioners, on and after March 1, for the purpose of taking up such overdrafts and unpaid warrants.

This question involves the effect of the Smith law, and in particular, of the sections above quoted and discussed, upon Sections 2676 and 2677, General Code, which are as follows:

"When a warrant is presented to the county treasurer for payment, and is not paid, for want of money belonging to the particular fund on which it is drawn, the treasurer shall indorse the warrant, 'Not paid for want of funds,' with the date of its presentation, and sign his name

thereto. Such warrant shall thereafter bear interest at the rate of six per cent. per annum. A memorandum of all such warrants shall be kept by the treasurer in a book for that purpose."

"Section 2677. As soon as sufficient funds are in the treasury of the county to redeem the warrants drawn thereon, and on which interest is accruing, the treasurer shall give notice * * * that he is ready to redeem such warrants * * *"

Much of the discussion in which I have indulged myself in dealing with your second question is applicable to the solution of this question. I have already pointed out that moneys arising from taxes levied under the Smith law are no longer available for expenditure of any kind until they have been appropriated. The question at once arises as to whether or not the issuance of a warrant by the auditor is, in itself, an "expenditure" within the meaning of Section 5649-3*d*, or as to whether, on the other hand, there is no "expenditure" until the warrant is honored. This question involves the fundamental one as to whether or not the two sections above quoted are impliedly repealed by the Smith law.

It is not necessary to answer this somewhat difficult question in connection with the precise query now under discussion. There is no question in my mind but that up to March 1, 1912, warrants may lawfully be issued by the auditor, and stamped "Not paid for want of funds" by the treasurer. In other words, whatever be the effect of the Smith law upon Section 2675, it will be postponed until that date.

As to Section 2676, however, in so far as it relates to unpaid warrants now outstanding, it cannot be regarded as impliedly repealed. So, to hold would violate the constitutional limitation as to the impairment of the obligation of contracts. Yet, Section 5649-3*d*, undoubtedly, has a modifying effect on this section; and, in my opinion, this effect may best be defined by paraphrasing Section 2677 as follows:

"As soon as sufficient funds are in the treasury of the county and *appropriated* to redeem the warrants drawn thereon, and on which interest is accruing, the treasurer shall give notice."

Adopting this interpretation of Sections 2676 and 2677, General Code, it is apparent that the auditor may not, as soon as he receives notice of the amount of taxes with which the treasurer is charged at the February settlement, credit any portion thereof against the outstanding interest-bearing warrants of which you speak.

Nor can the commissioners, under the facts submitted by you, lawfully appropriate for this purpose. The purpose of meeting outstanding warrants is a different one from that providing for the needs of the county for the incoming year, or rather the first half thereof. In this, the reasoning which you submit in your opinion is, in my judgment, absolutely correct. It would have been competent for the commissioners to include in their annual budget an estimate of a sum sufficient to pay outstanding warrants, and then to appropriate from the proceeds of taxes levied for that purpose an amount from which such outstanding warrants might have been redeemed. Section 5649-3*d*, however, in providing that "no appropriations shall be made for any purpose not set forth in the annual budget," prevents the commissioners from appropriating any money whatever at any time during this year for the purpose of taking up outstanding interest-bearing warrants.

I might add here, a fact which has some bearing upon your second question,

as well as upon the one now under consideration. Moneys made available by transfers from the fee funds to the general county and judicial funds would be first subject to the payment of outstanding warrants; yet, before the treasurer can give the notice specified in Section 2677, there must be sufficient funds in the treasury to meet all the outstanding warrants by proper action, which might be styled "manipulation," yet, which would be perfectly legitimate and within the law; the commissioners might see to it that the amount transferred from the fee funds to the general county and judicial funds at any one time would be less than the amount of outstanding warrants; the treasurer would not, then, be bound to publish his notice and subject the warrants to redemption; and the auditor would be at liberty, as aforesaid, to issue his Burns law certificate against such moneys.

It follows from what I have said, of course, that outstanding warrants may not be taken up on March 1st, either by the county auditor or through appropriations made by the commissioners. The same is, in my judgment, true of the deficit in the treasury, caused by using the proceeds of bond issues and undivided taxes to pay warrants drawn on the general county and judicial funds. The situation here is peculiar, and I shall comment upon it more at length subsequently. However, inasmuch as the purpose of a levy under the Smith law for a certain fund is, as above pointed out, in the absence of express language in the budget to the contrary, presumed to be provision for the needs of the fund for the incoming year; inasmuch as no appropriation can be made for any purpose not set forth in the annual budget; and inasmuch, finally, as the moneys actually withdrawn from the treasury did not belong to the general county and judicial funds at all, but to another fund or funds, for which no provision whatever has been made in the annual budget, I am clearly of the opinion that neither is it the duty of the auditor to credit any part of the February collection for taxes against the overdraft or deficiency in the treasury; nor is it within the power of the county commissioners to appropriate any such moneys for that purpose.

Possibly, revenues from sources other than taxation, coming into the treasury, prior to March 1, 1912, ought to be first devoted to the supply of this deficiency. I shall more fully discuss this question in answering your fifth query. I point it out at this time inasmuch as I have already stated that such funds are available for expenditures for ordinary county purposes between the first of January and the first of March.

You next submit the question as to whether or not the commissioners may lawfully issue the bonds of the county for the purpose of funding the indebtedness represented by the outstanding warrants stamped, "Not paid for want of funds," and bearing interest at the rate of six per cent., and, having sold said bonds, so apply the proceeds of such sale. My attention is called, in this connection, to the case of Commissioners vs. State, 78 O. S. 287. The first branch of the syllabus of that case is as follows:

> "County commissioners are authorized by Section 2834*a*, Revised Statutes (now Section 5656, General Code), to issue new bonds and to *exchange* them for outstanding bonds, but they are not authorized to exchange them for the promissory notes or other evidences of the debt of the county."

The statement of the case shows that the commissioners were endeavoring to issue the bonds of the county under the section named, and to exchange them for promissory notes signed by the county commissioners. That is to say, the bonds were not to be sold at public sale, subject to the restrictions and safeguards surrounding such a proceeding, but were simply to be exchanged. It is made clear

in the opinion that the vice in the transaction which the court held invalid, consisted of the exchange rather than the issue of the bonds. In this connection the court, per Summers, J., uses the following language (page 304):

> "However, it is not necessary to determine whether the statute confers power to give negotiable promissory notes, for if the word 'bonds' is used to designate a security different from a negotiable promissory note then the authority to issue new bonds and to exchange them for outstanding bonds does not include power to issue and exchange bonds for negotiable promissory notes or evidences of indebtedness other than bonds. There is a reason why such an exchange should be limited to bonds. Section 22*b*, Revised Statutes, enacted in 1883, provides that all bonds issued by boards of county commissioners shall be sold to the highest bidder after being advertised, and it may well be that in such case the legislature supposed it would be in the interest of the public to permit new bonds to be issued, bearing a less rate of interest, and to be exchanged for the outstanding bonds. Moreover, if the power to exchange is not limited to such an indebtedness, for which bonds had been advertised and sold, then the last amendment added nothing to the section, for it already conferred power to fund, refund or extend."

The statute, Section 5656, General Code, provides as follows:

> "The trustees of a township, the board of education of a school district and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

This is not the portion of the statute which was under review in Commissioners vs. State. The portion thereof which the court construed is found in present Section 5657, General Code.

I am of the opinion that under Section 5656, General Code, as above quoted, the commissioners may borrow money or issue the bonds of the county as they see fit, and with the proceeds of the loan, thus effected, take up the outstanding warrants of which you speak. If the commissioners determine to issue bonds, however, they may not lawfully exchange them for the outstanding warrants.

In answering your fifth question I deem it advisable to restate and analyze the facts under which it has arisen.

Prior to the enactment of the Smith law, so-called, as I have already pointed out, there was really no fiscal year for the county. The various funds in the county treasury were continuous. The laws of the state applicable to the expenditure of public funds, and in particular Sections 5699, 2443, 5654, 2296, et seq., 2571, 2675, and perhaps other similar sections, required, in general, that the proceeds of a levy be used for the purpose for which the levy was made, and that without a transfer of funds, temporary or permanent, money levied for a specific purpose might not be lawfully expended from the treasury of the county for any other purpose. Yet, the apparent rigidity of these statutes was not perfectly real; thus, it was permissible for warrants to be issued on a class of claims due from

the county, regardless of whether or not there was money in the fund; it was also permissible for obligations to be incurred before the money to meet them was actually in the treasury, under Section 5660, above discussed. That section permitted, as I have already pointed out, contracts to be entered into and auditors' certificates to be issued therefor, when the money to meet the obligation so created was "levied and placed on the duplicate and in process of collection, and not appropriated for any other purpose." Now, the commissioners' levies were made at their March and June sessions, under the old laws, and as soon as the levy was made, apparently under Section 5660, the money might be regarded as available for the purpose of the incurring of obligations.

Under statutes like these, therefore, but precisely in what manner I am not informed by your letter, the fiscal officers of Franklin county—and I imagine of practically all the counties in the state—had formed the custom of anticipating revenues to a considerable extent. That is to say, so long as moneys were regarded as in a "fund" available for expenditure as soon as they were levied on the duplicate and, thus, in process of collection, it was by no means a surprising thing that, through the occurrence of unexpected contingencies and otherwise, the affairs of a county could be placed upon a purely credit basis. This state of affairs, not chargeable to any one board of commissioners, county auditor or county treasurer, but rather to the law itself and to the accumulated exigencies of a number of years, presented, as a matter of course, many possibilities of error and evil; it is itself the reason for the enactment of Section 5649-3*d*, which has perhaps given rise to the difficulty with which the county is now confronted. One of the evils thus arising seems to have been that revealed under a state of facts, of which the following is a hypothetical outline:

In a given year the expenses of a county, aside from the contracts entered into by its managing board, and payable from its treasury without any allowance or approval, greatly exceed the amount of money levied for the year by its levying authorities. This might at any time, under the confused jumble of statutes under which counties formerly operated, occur without the fault of the levying authorities, and because of causes quite beyond their ability to foresee at the time of making the levy. Naturally enough, as the year approached its close the commissioners would include in the levy for the incoming year, an increased amount for the funds from which such unusual expenditures had been made. These funds would be in process of collection before the second semi-annual tax settlement; being in process of collection, the county officials would regard them as virtually in the treasury, the word "fund" being to them merely a bookkeeping term. They would then feel at liberty to anticipate the levy which had been made and to spend the money, or part of it at least, under such levy, before it was ever in the county treasury in cash. This object being impossible of direct accomplishment, it would be indirectly effected by spending moneys in the general treasury balance which would not be needed until after the next semi-annual settlement. Fiscal officers would, doubtless, feel justified in doing such things, inasmuch as, under ordinary circumstances, their acts would never be called in question, and inasmuch, further, as in this way the business of the county might go along smoothly and without interruption; all of its bills be met when due; the payment of interest might be avoided, and nobody injured thereby.

I suspect that the hypothetical case which I have assumed is virtually that of Franklin county. I am led so to believe by statements which seem to have been agreed upon between counsel in the case in which you succeeded in enjoining the transfer of funds for the purpose of relieving the overdrafts of which we are now speaking, as evidenced by the decision of the court and the briefs filed on both sides. Thus, it seems that the unexpected expenditures in Franklin county

were those occasioned by the quadrennial appraisement, bills for which were payable directly out of the county treasury without allowance of the county commissioners, except in certain cases; and that in addition to these unexpected expenditures the commissioners, in pursuance of an ambitious program of road improvement, had adopted what might almost be termed a policy of anticipating revenue, entirely proper under the statutes as they then stood. It seemed that the auditor and treasurer fell into the precise practice which I have imagined in the hypothetical case above stated, of regarding the "funds" of the county, merely, as bookkeeping accounts, and of paying any and all warrants out of any money in the general balance of the treasury. Indeed, there is no evidence that in so doing these officers did not follow the established custom, which was, perhaps, one advantageous to the county under the then existing law.

Whether or not the practice of thus paying warrants out of the general treasury balances, so long as there was money in the fund, levied and in process of collection, to meet them, was legal or subjected the officers participating in it to any technical penalty, is a question not necessary to be considered in this connection. Suffice it here to say only, that *the county was not pecuniarily injured thereby.*

Now, in June, 1911, the Smith one per cent. law became effective. I have already defined the operation and effect of that law with respect to Section 5660, General Code, in so far as the latter section allowed expenditures to be made in anticipation of the collection of revenue. It will follow, I think, from what I said in discussing this precise question, that the tax limitation law of 1911 had precisely the same effect upon all such statutes. In other words, its essential purpose, in so far as it pertains to the expenditure of public moneys, is, broadly speaking, to do away with the practice of anticipating revenues and to place the affairs of all taxing districts upon what is aptly known as a "cash basis."

This law went into effect immediately upon its passage. There had been, it is true, a similar law enacted the year previous, but it was well understood that this law was virtually inoperative, and, furthermore, the prior law contained no provisions whatever respecting the expenditure of public money. The fiscal officers of the county were, therefore, taken, so to speak, by surprise; they were given only six months within which to adjust their methods of administration to the revolutionary change in the law, effected by the enactment of the tax limitation act. Not realizing, perhaps, that the change was as fundamental as it is, they innocently continued their former methods of expenditure, supposing that the taxes to be available in February, 1912, could be applied to the replenishment of overdrafts made during the year 1911, as in the past, until they were checked by the vigilance of the prosecuting attorney and the interposition of the power of the court.

I have thus gone into the facts under which your fifth question arises, so that if I have misunderstood them you may correct me; so that, in other words, the basis of the opinion which I am about to express will be clearly defined, it being understood, I trust, that my opinion is upon the facts just stated.

There is, then, an overdraft in certain funds, some of them improvement funds, others of them undivided tax funds; these overdrafts cannot be taken up, as I have already stated, and provided for out of the proceeds of taxation available at the February settlement; the funds in which the overdrafts exist will be needed before the proceeds of another levy can be made available; and even then it will be impossible for Franklin county, within its new limits of taxation, to provide in a single levy for the entire amount of the overdrafts; may then, the procedure of Section 5656, General Code, be followed in order to relieve the county of this menace to its credit?

Said Section 5656, General Code, provides in part:

"The * * * commissioners of a county, for the purpose of ex-

tending the time of payment of any *indebtedness* which, *from its limits of taxation* such * * * county is unable to pay *at maturity*, may borrow money or issue the bonds thereof so as to change but not increase the indebtedness in the amounts, for the length of time, and at the rate of interest that said * * * board of commissioners deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

This section must be read in connection with Section 5658, General Code, which provides as follows:

"No indebtedness of a * * * county shall be funded * * or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such county, by a formal resolution of the commissioners thereof * * *"

The following questions must be answered, in the order of their importance, under these sections, and the facts to which they are to be applied:

1. Is there now, or will there eventually be, under the conditions above described, an existing, valid and binding obligation of Franklin county?"

In my opinion there is *now* no "existing obligation of the county," in the full sense of the term as used in the statute. In this connection I call attention to the fact that the indebtedness must have *matured* before the power of the commissioners arises. Now, there is an equitable obligation on the part of the county now in existence. Such obligation arises, upon familiar principles, whenever trust funds are diverted from their lawful custody and applied to purposes other than those to which they are dedicated. The proceeds of a sale of bonds for a specific purpose constitute a trust fund, and the county treasurer's custody of the same is that of a trustee; so, in like manner, the treasurer of a county is, with respect to funds belonging to other taxing districts and forming a part of an undivided tax fund in the county treasury, a trustee for the benefit of such other taxing districts. When, therefore, the treasurer permitted these specific moneys to be used for other purposes, though with the purpose of replacing them out of moneys which he thought would be certain to come into his possession and custody in the future, and be available for that purpose, he committed a technical breach of trust. If he had converted the money to his own use he would, of course, be accountable for the fund and its accretions after such conversion. In this case, however, he used the money for the benefit of the county; hence, the trust fund can be traced into the hands, so to speak, of a taker with notice—that is to say, the money having been expended for the benefit of the county, the county may itself be held liable as a trustee under a resulting trust. The fund having been dissipated for the uses of the county, and no longer being subject to identification, the county would be liable, at law, after the equitable remedy of the beneficiaries of the fund had failed to produce the money itself.

But it appears from the decision of Judge Bigger that the money has not been withdrawn from these funds, as such, but merely from the general treasury balance; it cannot, therefore, be definitely ascertained how much has, for instance, been withdrawn from this specific bond fund and how much has been withdrawn from this particular taxing district's interest in the undivided tax fund. The treasurer rightfully maintained a general treasury balance, commingling these moneys with the moneys of the county, and as to this procedure there can be no complaint, for that is the way in which all the funds of the county are kept. Hence, it seems to me that while there may be a technical liability there is no specific

and ascertained liability to any one municipal corporation or person. A county cannot be in debt to its own treasury, nor to a fund in its own treasury; it must be in debt to some outside party.

Now, when it is time for the county auditor and the county treasurer to settle with the treasurers and auditing officers of the several taxing districts to which the money in the undivided tax fund, above referred to, ultimately belongs, there will, doubtless, be some money in the treasury which can be identified as belonging to that fund This is because, as I understand it, the general treasury balance was not exhausted at the time the injunction of the court was issued. The treasurer may, then, pay over such moneys, either pro rata or upon any other basis, to such treasurers and auditing offices; the county treasurer will then be indebted to the taxing districts for the amount chargeable to him and not paid over. The exact amount due and owing to each taxing district from such fund, and unpaid, will then be ascertained. As I have stated, it would be, technically and primarily, the obligation and delict of the county treasurer; but the ultimate obligation will be that of the county, because the money for which the treasurer is chargeable, and which he does not produce at settlement time and pay over to the treasurers and auditing officers of the various taxing districts entitled to it, *has been expended for the use of the county;* then, and not until then, will there be, as to the undivided tax fund, an "existing obligation" of the county.

In my opinion such an obligation would be valid and binding against the county. The facts of the case are so peculiar that I have been unable to find any authority directly in point, and I know of no reason why, under circumstances of this sort, the familiar principles of equity jurisprudence should not be applied. It is perfectly clear and susceptible to proof that the county has received the benefit of these moneys, wrongfully expended from the undivided tax fund; the technical breach of trust is that of the treasurer, and perhaps of the auditor, but equity does not concern itself so much with the ascertainment of liabilities as it does with the enforcement of the trust itself. The county is, in my opinion, as aforesaid, chargeable with the trust originally charged upon the county treasurer and county auditor; and, in equity, would be held accountable for the money the benefit of which it has received.

2. Is the indebtedness matured, within the meaning of Section 5656?

The answer to this question has already been suggested; there is now no matured indebtedness, in my opinion, but there will be when the treasurer has settled with the various taxing districts.

3. Does the inability of the county to pay this indebtedness result "from its limits of taxation?"

It seems to me that the answer to this question is made clear by your statement that the county is now, by reason of the Smith law, unable to levy at any one time a sufficient amount of money to replenish this fund. This, of itself, is a sufficient reason for an affirmative answer to the question now suggested: Indeed the statement of facts, above set forth, shows that the existence of this particular overdraft, whether originally legal or illegal, and the inability of the county officers to wipe out the same, results from the enactment of the Smith law, which is itself primarily and solely a law which deals with limits of taxation. I am, therefore, of the opinion that the inability of the county to pay this indebtedness arises because of its limits of taxation.

From all the foregoing I am of the opinion that there is not now such an indebtedness of the county, which may be extended and funded under Section 5656, General Code, arising out of the overdraft in the undivided tax fund; but that, when the treasurer and auditor settle with the officers of the various taxing districts, to which the undivided taxes are due, there will be an existing, valid

and binding obligation of the county, which the county is unable to pay at maturity because of its limits of taxation and which, therefore, may be extended and funded under said section.

The case of the specific improvement funds is somewhat different. The proceeds of a bond issue are by law devoted to the accomplishment of the purpose for which the issue is made; they constitute a trust fund. But the *cestui que trust* in this case may be all the taxpayers of the county, or, perhaps, those within a given special taxing district for the purposes of the improvement, or, another view of the case, those who have petitioned for a specific improvement. In a sense, it might be said here, as was said in discussing the case of the undivided tax fund, that the general county treasury is chargeable with a resulting trust in favor of the specific improvement fund. For reasons somewhat, although not entirely similar to those advanced in discussing the case of the latter fund, and not necessary to be detailed here, I am of the opinion however, that there is not any valid, legal and existing indebtedness of the county arising out of the expenditure, for the benefit of the county, of funds derived from the sale of bonds and devoted to a specific improvement. The county does not owe the holders of the bonds; their debt is provided for. The county still owes its taxpayers, or the petitioners for the improvement, as the case may be, the obligation of proceeding with the improvement; upon this obligation it has not yet defaulted, nor, I take it, would it ever default. So that there is no indebtedness nor matured obligation arising by virtue of the relation of the county to its taxpayers generally.

The county, having sold the bonds and pledged its credit to the accomplishment of a specific purpose, is in duty bound, through its officers, to proceed, then, with the improvement. As soon as the improvement is completed, or has proceeded to the point where payments are due to contractors and others thereunder, there will be a valid, existing and binding obligation of the county, matured in favor of the contractors or other parties. Such an obligation, which the county would be unable to pay at maturity, of course, would be one subject to be funded or extended by means of the procedure provided for in Section 5656.

The foregoing is based, in part, upon the statement in your letter, which I have not heretofore quoted or referred to, that, as to these improvement funds, Burns law certificates had been issued, and contracts let thereunder, prior to "the occurrence of the overdraft." There could, therefore, be no question as to the validity of the contract made by the county, through its officers duly authorized, with the contractor for the construction of the improvement. Such a contract would impose just such a valid and enforceable obligation as I have above referred to.

Whether or not warrants might be issued in favor of contractors and others similarly situated, against these funds, and stamped "not paid for want of funds," as provided is Section 2676, General Code, is a question upon which I do not deem it necessary to pass. If this could be done there would never be any embarrassment on account of the county's being unable, at a given time, to pay the equivalent of cash to those engaged in constructing improvements under valid contracts made with it; and such warrants, so issued and stamped, could be lawfully funded, as already held by me in discussing your fourth question.

There seems to be some doubt, however, as to this question; but I have no doubt of the ability of the commissioners and the auditor to obtain money from banks of this city in order to enable them, if necessary, to meet every obligation which will arise under these improvement contracts; and upon the principal question submitted by you I am clearly of the opinion that when the obligation of the county, under such improvement contract, matures and becomes completely enforcible against the county, the county's inability to pay the same will be due

to its limits of taxation, inasmuch as the funds have been depleted under old statutes permitting, if not directly authorizing, such depletion, and for the benefit of the county; while the inability of the officers of the county to replete such funds is due entirely to the enactment of the Smith tax limitation law, and particularly to those sections defining the maximum levies for the several purposes within the county.

I wish to reiterate the statement that this expression of opinion is upon the facts as I have apprehended them from your letter. Inasmuch, however, as your letter sets forth a very clear and concise statement of the facts, leaving only a few details to my imagination, all of which are in fact supplied by the court papers with which you have furnished me, I suspect that my understanding of the facts is correct, and I trust, therefore, that the opinion which I have tried to express clearly, and to support by a statement of the reasons which have induced me to adopt it, may be of service to you in the difficulties with which you are now confronted, and to the law officers of any other counties similarly situated.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

105.

BOARD OF EDUCATION—VACANCY FILLED BY COUNTY COMMISSIONERS—TERM OF OFFICE OF NEW APPOINTEE—"UNEXPIRED TERM"—ERRONEOUS ENTRY ON JOURNAL—"NUNC PRO TUNC" ENTRY.

When under Section 7610, General Code, the commissioners have, by reason of the failure of the board of education so to do, made an appointment to fill a vacancy in the board of education, such appointment can be made only "for the unexpired term."

When the county commissioners through a mistaken understanding of their powers, have entered upon their minutes that the appointment is "until the next general election," the fact that the appointment is in reality for the unexpired term" is not affected, and a "nunc pro tunc" entry to that effect may be made upon the commissioners' journal as notice of the statutory term.

COLUMBUS, OHIO, February 7, 1912.

HON. GEORGE D. KLIEN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—In your letter of January 26th you state:

> "I desire your opinion on the following proposition. In 1910 the county commissioners were compelled to fill a vacancy in the board of education for the reason that the board of education could not agree. That appointment was made by the commissioners until the next general election, but by reason of information from the board of elections no man was nominated in 1911 for election.
>
> "The matter was then called to my attention and I advised that Section 4748 provided, that any vacancy of the school board filled either by the school board or the county commissioners should be for the unexpired term. I so advised the county commissioners and told them

that they should put on a nunc pro tunc entry, that is that the appointment made in 1910, until the next general election should be an appointment for the unexpired term.

"My opinion is questioned by certain parties in this particular township, who would, of course, desire to have order of the commissioners remain as it was before I advised them to change it. Your opinion on this subject will be greatly appreciated."

Section 4745 General Code provides:

"The term of office of members of each board of education shall begin on the first Monday in January after their election, and each such officer shall hold his office four years and until his successor is elected and qualified."

Section 4748, General Code provides:

"A vacancy in any board of education may be caused by death, non-residence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

Section 7610 General Code provides:

"If the board of education in a district fails in any year * * * to fill any vacancies in the board within the period of thirty days after such vacancy occurs, the commissioners of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any or all of such duties and acts, in the same manner *as the board of education by this title is authorized to perform them.* * * *"

It appears from the foregoing sections that the term of a member of the board of education is for four years and until his successor is elected and qualified, and that as provided in Section 4748 a vacancy shall be filled by the board "by election for the unexpired term," and that under Section 7610, for the purpose of filling a vacancy under the conditions therein stated, the commissioners of the county are authorized to fill the vacancy in the same manner as the board of education could.

In the case cited by you, the commissioners being authorized, acted and made an appointment, stating that it was until the next general election, and later, under your advice, when the matter was called to your attention, by way of nunc pro tunc entry provided that the appointment was for the unexpired term.

In the case of State ex rel. Palmer vs. Darby, 12 O. C. C. page 235, the question arose as to whether the provisions of Section 1724 Revised Statutes applied in determining whether the appointment of a councilman should be until next

annual municipal election or for the unexpired term. Judge Bentley in discussing the case, at page 239 says:

> "Under Section 1673, the regular term of councilman is two years. In case of a vacancy in the council, were it not that Section 1724 makes special provision applicable only to councilmen, it might well be held that the more general provision of Section 1713, in the chapter on 'Officers of Cities and Villages,' and which is made applicable 'unless otherwise provided in this title,' would apply; but since Section 1724 being special, and containing provisions regarding the time for which vacancies in the council may be filled, wholly different from those in Section 1713 regarding vacancies in municipal offices generally, we think it clear that notwithstanding the references to Section 1713 in Section 1693, these provisions of Section 1724 must govern in determining whether the appointment shall be 'till the next annual municipal election,' or 'for the unexpired term.' The appointment, therefore, must be for the unexpired term. We think it is not competent for the mayor to fix the term of the appointment otherwise, and his appointment of a councilman, when made with the consent of the council, is for the unexpired term of the person who, after being elected and qualified, ceases to be councilman before the expiration of the term for which he was elected. *And the misapprehension of the true tenure of the appointee, on the part of the mayor, the appointee, or others, cannot abridge the term fixed by law for his continuance in office.*"

This case was affirmed without report in the 52nd Ohio state at page 611.

I am of the opinion that it mattered not what the minutes of the commissioners' journal showed as to the term for which the appointment of a member of a board of education was made. The law fixed that as being for the unexpired term, and the appointing power could neither limit nor extend the statutory term by any entry on its records. The placing of the nunc pro tunc entry on in 1911 was ineffectual to change in any manner the term of the office, though I concur with you, that it was as well to place same on the journal as notice of the statutory term. As Judge Bentley well says the misapprehension of the true tenure of the appointee on the part of the appointing power, the appointee or others cannot abridge the term fixed by law for the continuance in office.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

106.

CORRUPT PRACTICES ACT—CANDIDATES FOR COMMON PLEAS AND CIRCUIT COURTS—STATE OFFICES—LIMITATION ON EXPENDITURES INCLUDE PRIMARY AND GENERAL ELECTIONS—PLEDGE OF DELEGATE ON BALLOT.

Considering the ordinary meaning of the term "state officers," and the functions of circuit and common pleas judges, and the wide sweep of their jurisdiction, and furthermore, the fact that the statutes providing for compensation and elections, class these officials under the head of state officers, candidates for these judicial offices should, under the corrupt practices act, Section 29, providing for "other elective state officers" be limited to a campaign expense of $2,500.00.

The amount covers the expenditures for both primary and general election.

As there is no provision of the election law which provides that, in a primary for election of delegates to a judicial convention, the name of the judge for whom the delegate will vote in the event of his election, shall have a place upon the ballot in connection with the name of said delegate and as such an arrangement is not in harmony with Section 4978 requiring the names of all candidates to be arranged on the ballots in alphabetical order, it would not be proper.

COLUMBUS, OHIO, February 8, 1912.

HON. CHARLES, KRICHBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 1st, wherein you inquire:

> "I write to ask you for your construction to Section 29 of the corrupt practices act, 102 Ohio laws, 329.
>
> "1st. What amount of money is a candidate for judge of common pleas court or circuit court entitled to expend under the statute, for nomination and election?
>
> "2nd. Does the amount of money specified include expenses for primary and general elections?
>
> "3rd. Is a candidate for judge of the common pleas court or circuit court in a political subdivision of the state including one or more counties to be classified as a state officer? The answer to this, I take it, will answer the first.
>
> "4th. In a judicial primary where delegates are elected to a judicial convention, is it proper or permitted to designate on the ballot the candidate for judge for which the delegate will stand in the event of his election?"

I will answer your first and third question together. Section 29 of the so-called corrupt practices act, 102 O. L., 329, provides:

> "The total amount expended by a candidate for a public office, voted for at an election, by the qualified electors of the state, or any political subdivision thereof, for any of the purposes specified in Section 26 of this act, for contributions to political committees, as that term is defined in Section 1 of this act, or for any purposes tending in any way, directly or indirectly, to promote or aid in securing his nomination or election, shall not exceed the amount specified herein. By a candi-

> date for governor, the sum of five thousand dollars; by a candidate for other elective state offices, the sum of two thousand five hundred dollars; by a candidate for the office of representative in congress or presidential elector, the sum of two thousand dollars; by a candidate for the office of state senator, the sum of three hundred dollars in each county of his district; by a candidate for the office of state representative, the sum of three hundred and fifty dollars; by a candidate for any other public office to be voted for by the qualified electors of a county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election, shall be five thousand or less, the sum of three hundred dollars. * * *"

A reading of the above section discloses that there is no specific provision for candidates for judge of the common pleas or circuit courts; nor is there a provision for any candidate to be elected in a district, except as specifically enumerated. The question arises whether they may be classified as state officers. I am inclined to the view that judges of the circuit and common pleas courts are *state* officers. It is a familiar rule of construction requiring no citation of authorities to establish that words either of statute or organic law are to be understood in their usual and ordinary meaning and considering the function of these courts, their manner of compensation, the wide scope of their jurisdiction, etc., I am satisfied that they come well within the definition of *state officers.*

Dillon on Municipal Corporations, 4th edition, Section 58, discussing the importance of bearing in mind the distinction between state and municipal officers, uses these words concerning state officers;

> "Officers whose duties concern the state at large or the general public, even though exercised within defined territorial limits, are state officers."

Citing People vs. Curly, 5 Colorado, 419.

I call your attention to Title VI, of Part 1 of the General Code. This title is headed "Compensation of *State* Officials" Chapter 1 of this title is headed Salaries of *State* Officers." Section 2251, being part of Chapter 1 of Title VI, provides the annual salaries of the judges of the supreme court, circuit court, as well as the common pleas court.

Attention is also called to Section 1, Article XVII, Amendment to the Constitution as adopted November 7, 1905:

> "Election for *state* and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for other elective officers shall be held on the first Tuesday after the first Monday in odd numbered years."

It will be seen that officers to be elected in even numbered years are divided into two classes of state and county officers. There can be no question but that the circuit court and the common pleas court judges, not being county officers, would come under the classification of state officers.

Having concluded that judges of the common pleas and circuit courts are *state* officers and Section 29 of the corrupt practices act fixing the limitation for other elective state officers than the governor at the sum of $2,500, it is my opinion that said sum of $2,500 is the limitation of the amount of money a

candidate for judge of the common pleas or circuit court is entitled to expend.

Answering your second question, this department has already held that the amount of money limited in Section 29 of the corrupt practices act applies to the two elections—primary and general. The language of the section is that the amount shall not be exceeded "to promote or aid in securing his nomination or election" and our construction of the statute is that the amount fixed is the limit of the amount of money that may be expended by candidates both for the nomination and the election.

Answering your fourth question, Section 4976 of the General Code provides as follows:

> "Separate tickets shall be provided for each political party entitled to participate in such primary. Such tickets shall contain the names of all persons whose names have been duly presented and not withdrawn, arranged under the designation of the office in alphabetical order, according to surnames, and bear the official signatures of the members of the board of deputy state supervisors. Such tickets shall conform, as nearly as practicable, to the form of ballot provided in this title for the use of electors in the election of public officers, except that no device or circle shall be used at the head of such tickets. On the back thereof shall be printed the words, 'official ballot' and 'primary election,' and the name of the political party for which such ballot is printed."

While Section 4976 makes provision for the names of candidates for United States senator to be placed upon a primary ballot, I have been unable to find any provision of our election laws which provides that in a primary for election of delegates to the judicial convention that the names of any judges for whom the delegates in event of their election would stand should have a place upon the ballot, as the object and aim of the primary election law is to grant to every elector the right to vote for such candidate on his party ticket as to him might seem proper, and as the provision of Section 4976 seems to require that the names of any or all persons for any particular office should be arranged under the designation of the office in alphabetical order, I am constrained to hold that it not only would not be proper, but it could not be permitted to designate on the ballot the names of the particular candidates for whom the delegates in event of his own election, would vote at the judicial convention.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

107.

TOWNSHIP CLERK—EXTRA COMPENSATION AS CLERK OF SCHOOL BOARD.

The offices of township clerk and clerk of the board of education though held by the same individual, are distinct and the board may fix its own compensation for services rendered as its clerk by the township clerk.

COLUMBUS, OHIO, February 9, 1912.,

HON. THEO. H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—In your letter of January 15th, receipt whereof is acknowledged, you ask the following question:

> "May a board of education of a township school district pay to the township clerk additional compensation for acting as clerk of the board of education?"

You cite Sections 4747, 4781 and 3308 of the General Code as bearing upon the question. The first of these sections provides for the organization of the board of education.

Section 4747, General Code, as amended 101 O. L., 138, provides that the township clerk shall be *ex officio* clerk of the board of education of the township school district. Section 3308 provides for the regular compensation of the township clerk. Section 4781 authorizes the board of education to "'fix the compensation of its clerk and treasurer."

In my opinion, the board of education may lawfully pay additional compensation to the township clerk for acting as clerk of the school district. The two offices are distinct.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

110.

PROBATE JUDGE—DUTIES AND FEES OF SHERIFF AND OTHER PERSONS FOR TAKING INSANE PERSON TO AND FROM ASYLUM.

As there is no provision of law for the issue of a warrant by the probate judge to any one but the sheriff and an assistant, in case of need, for taking of an insane person to an asylum, no one else may be authorized so to do. And also as there is no provision for removal of an insane person from the asylum by the sheriff while there is a provision for such removal by a suitable person, the fees, provided in Section 1981, *General Code, as amended, for a person other than the sheriff, deputy sheriff or assistant applies only to the removal by such person, of an insane person from an asylum.*

COLUMBUS, OHIO, February 8, 1912.

HON. F. A. SHIVELEY, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Under date of December 23rd, you requested my opinion on the following question:

"Has the probate judge any authority to direct a warrant for the conveyance of an insane patient to an asylum or state hospital, to any person other than the sheriff?"

You call my attention to Section 1959 General Code, and likewise to Section 1981 General Code, as amended May 31, 1911, 102 Ohio laws 287.

Section 1959 General Code provides as follows:

"When advised that the patient will be received the probate judge shall forthwith issue his warrant to the sheriff, commanding him forthwith to take charge of and convey such insane person to the hospital. If the probate judge is satisfied, from proof, that an assistant is necessary, he may appoint one person as such. If the insane person is a female, he shall appoint a suitable female assistant to accompany the sheriff and such insane person to the hospital."

Section 1964 of the General Code provides as follows:

"On consent and advice of the trustees, the superintendent may discharge any patient from a state hospital for the insane, when he deems such discharge proper and necessary. No patient who in the judgment of the superintendent has homicidal or suicidal propensities shall be discharged. If, in the opinion of the superintendent, the condition of the patient at the time of the discharge justifies it, he may permit him to go to his home, or leave the institution unattended."

Section 1966 General Code provides:

"In cases requiring an escort, if neither the patient nor his friends, are financially able to bear the expense of his removal, the superintendent shall give notice to the probate judge of the county of which the patient is an inhabitant, who shall forthwith issue his warrant to a suitable person, giving the friends of patient the preference, which shall read as follows: * * *"

Section 1967 General Code provides:

"Upon receipt of the warrant, the person to whom directed shall execute and return it to the probate judge, by whom it was issued, who shall ascertain and fix the allowance to the person executing the warrant, for expenses and fees, and certify them to the county auditor, who shall draw his warrant therefor on the county treasurer."

Section 1968 General Code provides:

"When the superintendent deems it for the best interest of a patient, who has no homicidal or suicidal propensities, he may permit such patient to leave the institution on a trial visit, which shall not exceed ninety days, Such patient, if necessary, may be returned at any time within such period without further legal proceedings."

Section 1969 General Code provides as follows:

"The removal of a patient on such trial visit shall be made in the manner provided for removal in case of discharge. If neither the patient nor friends are financially able to bear the expense of a necessary return from such visit, the return shall be made on the warrant of the probate judge as herein provided in case of discharged patients in like circumstances."

Section 1981 General Code prior to the amendment found in 102 Ohio laws 287 provides in part as follows:

"The probate judge shall make a complete record of all proceedings in lunacy. The taxable costs and expenses to be paid under the provisions of this chapter shall be as follows: * * * to the sheriff, *or other person other than assistant,* for taking an insane person to a state hospital, or removing one therefrom upon the warrant of the probate judge, mileage at the rate of five cents per mile, going and returning, and seventy-five cents per day for support, and mileage at the rate of three cents per mile for the railway transportation of each patient to and from the hospital, * * *."

101 Ohio laws 359.

Section 1981 General Code as amended, 102 Ohio laws 287 provides in part as follows:

"The probate judge shall make a complete record of all proceedings in lunacy. The costs and expenses, other than the fees of the probate judge and sheriff to be paid under the provisions of this chapter shall be as follows: * * * *to the person other than the sheriff, deputy sheriff or assistant,* for taking any insane person to state hospital or removing one therefrom upon the warrant of the probate judge, mileage at the rate of five cents per mile, going and returning."

There is no provision that I can find authorizing the probate judge to issue his warrant for the conveyance of an insane person to the hospital other than to the sheriff as provided in Section 1959 supra.

Under the provisions of Sections 1964 to 1969 General Code the probate judge is authorized to issue his warrant to a *suitable person* for the removal of a patient from said hospital. Prior to the amendment of Section 1981 as found in 102 Ohio laws the taxable costs and expenses of the sheriff or other person other than assistant were included, within the same provisions of the section, and such costs were both for taking an insane person to a state hospital and removing one therefrom. As, however, there is no provision of law for the taking of an insane person to a hospital by any person other than the sheriff who may be accompanied by an assistant appointed by the probate court, and as there is no provision of law for the removal of a person from a state hospital by the sheriff, but the same may be removed on warrant issued to a suitable person, I am of the opinion that so much of said Section 1981, before amendment as is above set forth, applies to the sheriff for the *taking* of an insane person to a state hospital and to the "other person" other than assistant for the *removal* therefrom, and that the words "taking any insane person to the state hospital" as found in 102 Ohio laws 287 has no application whatever; such language having been inserted by inadvertence on account of the language found in the section before amendment applying both to the sheriff and to the "other person."

I am, therefore, of the opinion that the probate court has not authority to

direct a warrant for the conveyance of an insane person to an asylum or state hospital to any person other than the sheriff, and that the fees provided in Section 1981, as now amended, for the person other than the sheriff, deputy sheriff or assistant applies only to the removal from the state hospital of an insane person.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

112.

PAVED COUNTY ROADS WITHIN AND OUTSIDE OF MUNICIPALITIES —POWERS AND DUTIES OF COUNTY COMMISSIONERS TO KEEP IN REPAIR—CONCURRENT JURISDICTION WITH MUNICIPALITIES.

Under Sections 7409, 7414 and 7422, General Code, which give a general jurisdiction to the county commissioners to repair all the improved county roads in the county, the commissioners are obligated to keep in repair the county roads outside of the municipalities which have been improved by paving.

The county commissioners, by the decisions of the courts of Ohio, have concurrent jurisdiction in the repair of so much of the county improved roads as lies within the corporate limits of municipalities.

As it is only made the duty of the county commissioners to keep in repair the improved roads, it is their duty to repair only the improved portion thereof, which comprises the necessary ditches for draining the part of the road which is improved. It would seem, however, that they might also contract for keeping in repair the entire width of the road if they so see fit.

COLUMBUS, OHIO, January 30, 1912.

Attention Mr. C. P. Grant, Assistant Prosecuting Attorney.

HON. F. J. ROCKWELL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Under date of November 23, 1911, you requested my opinion upon the following questions:

> "(1) On whom is fixed the burden of keeping in repair a county road improved by paving under Sections 6903 to 6914, inclusive, of the General Code, outside of municipalities?
>
> "(2) On whom is fixed the burden of keeping in repair a county road improved by paving under Sections 6903 to 6914, inclusive, of the General Code, inside of municipalities?
>
> "(3) In case it is held that the county commissioners shall keep in repair such improved roads, is the burden on them to keep in repair the whole road or only such part thereof as has been improved."

Section 6903, General Code, under which you state that the roads in question were paved, and I assume by the word "paved" that you mean that they have been paved with brick, applies to a county road, and, therefore, such roads would be considered as improved roads of the county.

Under the chapter entitled "Road Repairs," of the General Code, it is provided in Section 7409 that the commissioners of any county, the trustees of any township, or the board of public service of any municipality may contract with any person, firm or corporation for the repair or maintenance of any public road or street within their respective political subdivisions.

Section 7414, General Code, provides that the county commissioners may expend so much of the "state and county road improvement fund" as they deem necessary in repairing any free improved roads within their respective counties.

Section 7422, General Code, provides that the county commissioners shall cause all necessary repairs to be made for the proper maintenance of *all* improved roads in the county, and that for such purpose they may levy a tax upon the grand duplicate of the county in addition to all other levies authorized by law, and

Section 7423, General Code, provides that the proceeds of such levy shall be applied and used by the commissioners in the repair of paved, macadamized, stone and gravel roads, and for no other purpose.

The provisions of Section 7444, General Code, which provides:

> "The county commissioners shall keep in repair the portions of such roads within their respective counties, as are included within the corporate limits of a city or village in such counties, to points therein where the sidewalks have been curbed and guttered, and no further."

has been construed in the case of Railroad Company vs. Defiance, 52 O. S. 262, to refer solely to what is now Section 7443, General Code, which provides as follows:

> "All macadamized or graveled free roads, whether constructed under the general or local laws by taxation or assessment or both, or converted by purchase or otherwise from a toll road into a free road under any law, and all turnpike roads, or parts thereof, unfinished or abandoned by a turnpike company, and appropriated or accepted by the commissioners of the county, shall be kept in repair as provided hereafter in this chapter."

The supreme court having decided that such Section 7444, General Code, above quoted does not apply to other than macadamized or gravel free roads, and the road concerning which you inquire about being a road paved with brick such Section 7444 would not be applicable to the matter under consideration and will, therefore, not be further considered.

The right of the county commissioners to repair the roads in question is, therefore, to be determined by a consideration of Sections 7409, 7414 and 7422, above referred to. These sections, it appears to me, give a general jurisdiction to the county commissioners to repair all the improved roads in the county, and I am, therefore, of the opinion in answer to your first question that the county commissioners are charged with the duty of keeping such roads improved by paving outside of municipalities in repair.

Second. The county commissioners being charged generally with the duty of keeping the improved roads within their county in repair the question arises whether or not such general authority is limited in reference to county roads which lie within a municipality by the provisions of Section 3714, General Code, which provides in part:

> "* * * The council shall have the care, supervision and control

of public highways, streets, avenues * * * within the corporation, and shall cause them to be kept open, in repair and free from nuisance."

From certain language used in the case of Railroad Company vs. Defiance, 52 O. S. 262, at page 299, it would appear that it was the opinion of the supreme court in that case that whenever highways were brought within the corporate limits of a municipality they were removed from the control of the county commissioners and became subject to the control of the municipal authorities. The supreme court says:

"The highways so brought within the corporate limits of the defendant (city) were removed from the control which the county commissioners theretofore had over them, and became subject to the control, supervision and care of the municipal authorities, like other streets and highways of the corporation."

The court in that case, however, did not refer at all to the case of Lewis vs. Laylin, 46 O. S. 633, wherein it was held:

"Third syllabus:

"County commissioners have authority under the two-mile assessment pike law to improve a state, county or township road, although the improvement embraces that part, of the highway which lies within the limits of a municipal corporation"

On page 671, the court says:

"That a state or county road is not extinguished by becoming a street of a municipal corporation is clear. It retains its character of a state or county road, even as to such portions of it as may chance to fall within the limits of a municipal corporation, that may be subsequently organized; nor is this character changed because the municipal authorities call it a street and give to it a name as such, and are invested by law with its general control. Should the municipality cease to exist, the highway would at the same time cease to be a street, but it would not cease to be the state or county road which it was originally."

In this case the question was considered as to whether the general authority of the county commissioners was in any manner limited by the provisions of Section 2640 of the Revised Statutes, which is now codified as Section 3714 of the General Code, and the discussion on page 674 may well be considered in this case. The court on page 674 of said opinion says as follows:

"In the sections of the municipal code, which bear directly on the subject of street improvement, no words excluding this power of the county commissioners are found, nor are there any direct words of exclusion in Section 2640, Revised Statutes. That section reads as follows:

"'The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance.'

"But it is contended that the general power conferred on municipal corporations by this section, and the special power to improve streets

given by other sections of the municipal code, are incompatible with the existence of authority in the county commissioners to improve that portion of a state or county road which may lie within the corporate limits. If this contention is true it becomes a matter for the most careful consideration to determine which authority must yield to the other; and in that view it might be important to cast up the advantages on the one hand and the evils on the other, incident to such construction, and ascertain upon which side the balance stood; upon the theory that the legislature must be taken to have intended to promote the public welfare, and, therefore, intended that to be the law which would best accomplish it. But is there any such incompatibility? That there is some danger of a conflict of authority between the county commissioners and the municipal council, where both have power to improve the same highway, cannot be denied. That is a danger that always exists where two independent officers or bodies have a concurrent authority over the same subject; yet, in many instances, there are other considerations that override this objection, and the concurrent authority is given. This is a question of public policy, to be considered and determined by the legislature alone.

"It is true that Section 2640, in very general terms gives to municipal councils the 'care, supervision and control of all public highways * * * within the corporation.' The power conferred by this section is full and ample; but it contains no words directly excluding that conferred by the statute upon the county commissioners. If it has that effect, it amounts to a repeal of the latter statute by implication. Repeals of this kind are not favored."

Applying the same ruling as was used by the court in that case it is to be noted that there are no words in Section 3714, General Code, excluding the power of the county commissioners to improve highways within municipalities other than macadamized or gravel roads provided for in Section 7443, General Code.

In the case of State vs. Lewis, 13 Ohio Decisions 188, the second syllabus is as follows:

"Section 2640, Revised Statutes, giving municipal councils the care, supervision and control, of all public highways, does not vest that power in them absolutely, and county commissioners have the right to improve those public highways, which are part of the general system of the county, notwithstanding they happen to lie partly within the limits of a municipality, in the absence of any provision to the contrary in the statute."

The circuit court follows the ruling laid down in the case of Lewis vs. Laylin, 46 Ohio State, and quotes therefrom the language above quoted, and supplements it by the following:

"If, under this case, the county commissioners would have the right to improve those public highways which are a part of the general system of the county, though they happen to lie only partly within the limits of a municipality, it would seem, and it necessarily follows, that they would have a right and authority to improve such highways although they might and do lie entirely within the limits of any municipality, unless there was in the statute conferring the right some clause of pro-

hibition. And there is no word, as the supreme court has said, *supra*, excluding the authority conferred by the statute upon the county commissioners."

and does not follow the dictum quoted above from the case of Railroad Company vs. Defiance, 52 O. S. 262.

The circuit court in the case of the State of Ohio ex rel. Witt vs. Craig, et al., 22 C. C. 135, at page 138, seeks to distinguish the cases of Railroad Company vs. Defiance and Lewis vs. Laylin, supra, in the following manner:

"We are of opinion that the case of Lewis vs. Laylin, 46 Ohio St. 663, settles this contention in favor of the defendant. It is there held in the third provision of the syllabus: 'County commissioners have authority under the two-mile assessment pike law to improve a state, county or township road, although the improvement embraces that part of the highway which lies within the limits of a municipal corporation.'

"We find nothing in subsequent decisions, modifying or overruling the principle announced in this case. It is claimed, however, that the case of Lewis vs. Laylin is overruled or at least modified by the case of Railroad Company vs. Defiance, 52 Ohio St. 263; the first paragraph of the syllabus reads:

" 'Where part of a county road is taken into a municipal corporation by the annexation of contiguous territory, it is subject to the control and supervision of the municipal authorities, who may improve it by grading, or otherwise, at the expense of the corporation. Section 4906 of the Revised Statutes, does not apply to unimproved county roads.'

"No reference is made in this case (Railroad Company vs. Defiance) to Lewis vs. Laylin which sustains the jurisdiction of the commissioners in improving a state or county road within the limits of a municipality. The latter case sustains the jurisdiction of the municipal authorities to improve a state or county road within a municipal corporation as one of the streets of the municipality.

"The result of the two cases is simply to sustain the jurisdiction of the county commissioners and the municipal authorities over such highways."

I am, therefore, of the opinion in view of the decisions above referred to that the county commissioners and the municipal council have concurrent jurisdiction in the repair of so much of the county improved roads which lie within the corporate limits of a municipality.

Third. Your third inquiry is whether the county commissioners shall keep in repair the entire width of a county road or only such part thereof as has been improved.

As it is only made the duty of the county commissioners to keep in repair the improved roads it must necessarily mean that it is their duty to repair only the improved portion thereof, which would of course, include the necessary ditches for draining the part of the road which is improved. I do not believe that it is their duty to keep in repair a part which they have not improved. Under Section 7409, supra, which permits them to contract with any person, etc., for the repair or maintenance of any public road within their political subdivision, it would seem that they might also contract for keeping in repair the entire width of the road if they so see fit.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

115.

OFFICES INCOMPATIBLE—MEMBER OF SCHOOL BOARD AND TREASURER OF BOARD—REFUSAL OF CORPORATION TREASURER TO ACT AS TREASURER OF SCHOOL BOARD.

As the members of the school board must approve the bond of the treasurer and vote upon the question of increasing or changing the same or of requiring additional sureties thereon, the office of member of the board and treasurer of the board are incompatible and may not be held by one individual.

A treasurer of a corporation may refuse to act as treasurer of the school board without thereby affecting his position as treasurer of the corporation.

COLUMBUS, OHIO, January 29, 1912.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of the 12th inst., wherein you inquire as follows:

> "Can the treasurer of a school board be a member of such board?
> "May a person qualified as treasurer of a village refuse to qualify as treasurer of the school funds, and still hold the office of treasurer of the village?"

In reply to your first question I beg to say, Section 4763 of the General Code provides as follows:

> "In each city, village and township school district, the treasurer of the city, village and township funds, respectively, shall be the treasurer of the school funds. In each special district the board of education shall choose its own treasurer, whose term of office shall be for one year beginning on the first day of September."

Section 4734 of the General Code, as amended, 101 O. L. 264 provides as follows:

> "Before entering upon the duties of his office, each school district treasurer shall execute a bond, with sufficient sureties, in a sum not less than the amount of school funds that may come into his hands, payable to the state approved by the board of education, and conditioned for the faithful disbursement according to law of all funds which come into his hands, provided that when school moneys have been deposited under the provisions of Sections 7604-7608 inclusive, the bond shall be in such amount as the board of education may require."

Section 4765 of the General Code provides as follows:

> "Thereafter such treasurer may be required to give additional sureties on his accepted bond, or to execute a new bond with sufficient sureties to the approval of the board of education when such board deems it necessary. If he fails for ten days after service of notice in writing of such requisition, to give such bond or additional sureties, as so required the office shall be declared vacant and filled as in other cases."

The question arises, whether the two offices inquired about are incompatible.

Throop on Public Offices, Section 33, says:

"In order to render two offices incompatible there must be some such relation between them as that of master and servant. That one must have 'controlment' of the other, or that one must be charged with the duty of auditing or supervising the accounts of the other, or that one must be chosen by or have the power of removal of the other."

Mecham on Public Offices and Officers, Section 522, says:

"The force of the word, in its application to this matter is, that from the nature and relation to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other."

Dillon on municipal corporations, Section 166 (note) says:

"Incompatibility in office exists where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both."

Anderson's dictionary of law says:

"Offices are said to be incompatible and inconsistent when their being subordinate and interfering with each other induces a presumption that they cannot be both executed with impartiality and honesty."

It is apparent from the provisions contained in the above cited sections that the relation between the board of education and the treasurer of such board are such that the same person cannot be a member of the board of education and also act as its treasurer at the same time, for the reason that it would be improper from the standpoint of public policy for a member of the board of education to vote upon the approval or non-approval of his own bond as such treasurer of the board of education also when his own vote might determine the action of the board in reference to the necessity of requiring additional sureties on his own bond or in requiring a new bond as provided in Section 4765 of the General Code above quoted.

I am, therefore, of the opinion that the office of member of the board of education and the office of treasurer of the board of education are incompatible and cannot be held by the same person at the same time.

In answer to your second question I have heretofore sent you copy of opinion rendered by this department on July 31, 1911, to the bureau of inspection and supervision of public offices, which held in substance that a person who has qualified as treasurer of a village may refuse to qualify as treasurer of the school funds and still hold the office of treasurer of the village.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM:

You have quite clearly stated the law when you say: "What the treasurer of the school funds and a member's office would be incompatible, and that the same person

could not be both. You will notice that by the terms of Section 4782 which has been advanced in argument against my present belief, the clerk is not made treasurer, but the office of treasurer is dispensed with. Judge Rockel, in his school guide, has held that the same person could not hold both offices.

Rockel's School Guide 1907 Ed. Section 257, page 285.

It has also been urged to me that because the clerk can be a member of the board there is no reason why the treasurer should not be. However, the statute specifically states that the clerk may or may not be a member of the board, and in the absence of any such statute relative to the treasurer, I fail to see how he can hold both offices."

119.

DEPUTY COUNTY SEALERS OF WEIGHTS AND MEASURES—POWERS OF COUNTY COMMISSIONERS TO FIX AND PAY SALARIES—PAYMENT FROM GENERAL FUND.

Sections 2980 and 2615, General Code, entrust the county commissioners with the powers of fixing and paying the salaries of deputy sealers of weights and measures, and such salary is to be paid from the general fund.

COLUMBUS, OHIO, February 9, 1912.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Answering your communication of January 22, wherein you state:

> "Section 2622 of the General Code, as amended May 31, 1911, states:
>
> "'Each county sealer of weights and measures shall appoint by writing under his hand and seal, a deputy * * * who shall receive a salary fixed by the county commissioners, to be paid by the county, which salary shall be instead of all fees and charges otherwise allowed by law.'
>
> "Section 2615 of the General Code provides:
>
> "'By virtue of his office, the county auditor shall be county sealer of weights and measures.'
>
> "I have been asked for an opinion in regard to the fund out of which the salary of the deputy county sealer shall be paid. If the salary of the deputy is to be paid out of the auditor's fee fund, then it will be necessary for the auditor to make application to a judge of the common pleas court for an additional allowance, as the aggregate sum fixed by the county commissioners is now almost equal to the amount allowed by law.
>
> "I am informed that you have already given an opinion to the effect that the salary of the deputy shall be paid out of the general fund."

I beg to state that this department had not been called upon for an opinion in this matter previous to your request.

Section 2980 of the General Code provides that

> "On the twentieth of each November such officers (referring to the officers mentioned in Section 2978, to-wit, probate judge, auditor, treas-

urer, clerk of the court, sheriff and recorder) shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes of their respective offices * * *."

Section 2980-1 fixes the limitation of the amount of such compensation and provides how an additional allowance shall be obtained.

Section 2981 provides that the officers above named may appoint and employ the necessary deputies, etc., for their respective offices and fix their compensation, etc.

Section 2615 provides that the county auditor shall be *ex officio* county sealer of weights and measures; and Section 2622, as amended, provides that each county sealer of weights and measures shall appoint a deputy.

"* * * who shall receive a salary fixed by the county commissioners, to be paid by the county. * * *"

It is to be observed that the position of deputy sealer of weights and measures is peculiar in that the appointment is made by the county sealer, while the salary is fixed by the county commissioners. This is the sole provision regarding the compensation of the deputy sealer, and there is no express statutory provision as to the fund from which he should be paid. Section 2987, providing that the deputies, etc., of the county officers hereinbefore named shall be paid from the fee fund, has no application to the deputy sealer since he is not such a deputy or assistant as therein referred to.

Since the law makes the county commissioners the managers of county affairs and empowers them to pass upon all claims other than those fixed by law or a duly authorized tribunal, and inasmuch as the commissioners are expressly entrusted with the duty of fixing the salary of the deputy sealer of weights and measures, to be paid by the county, I can see no reason for holding otherwise than that this salary should be paid from the general fund.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

123.

INFIRMARY DIRECTORS AND COUNTY COMMISSIONERS—ALTERATION AND REPAIRS OF BUILDINGS—VOTE OF ELECTORS—LIMITATION—POWER TO TRANSFER UNEXPENDED BALANCE OF POOR FUND.

Where the joint boards of infirmary and commissioners have received from an architect an estimate of approximately $14,000.00 *for an additional building and certain alterations and repairs made necessary by the verdict of the inspector of workshops and factories, these boards may separate the estimate of the building from the estimate of the repairs in applying the limitations of Section* 5038, *General Code, governing the submission of the questions of the improvements to a vote of the electors.*

An unexpended balance in the poor fund may be applied to these purposes if not needed for any other purposes. Such balance must be paid back into the poor fund however, after the next tax settlement.

The expenditure of the $6,000.00 *is entirely within the control of the commissioners. The work of the infirmary directors in the matter is confined to the approval of the plans.*

Any of the work in the nature of ordinary repairs may be done by the infirmary directors themselves, and they may use for the purpose the funds in their hands.

COLUMBUS, OHIO, January 30, 1912.

HON. JOHN G. ROMER, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 11th, submitting for my opinion thereon the following questions:

"The joint boards of infirmary and commissioners have engaged the services of an architect to make plans and prepare specifications for an additional building, and also certain alterations and repairs as demanded by the inspector of workshops and factories, who has for the third time inspected and ordered these needed improvements. The estimate of the architect is guaranteed to be between $13,000 and $14,000 for a new building which is to be used for hospital and dormitory that will cost about $10,000, and a heating system and waterworks the balance.

"QUERY: Can the commissioners build this new building and make necessary changes and add waterworks and heating plants making in all an expenditure of about $14,000, or not to exceed $15,000, without first submitting the same to the vote of the people, since it has become necessary for the reason that the present infirmary has been condemned by the state board of inspectors of workshops and factories; and the board of visitors has also done so on account of the health and safety of the inmates.

"QUERY: The board of infirmary directors has on hand an unexpended balance of $60,000.00 which they are willing to apply to this purpose, same not being needed for other purposes—how can they expend this amount towards this improvement? Can they expend more than $1,000 of it at one time? (Sections 2296 to 2302 and 2443.)

"It is the intention to proceed at once to build a new building, also

add waterworks and sanitary closets, baths, heating system, ventilating system and such other improvements as have been requested, and if this can be done without first taking vote it will save time as well as a great expense, and by using the $6,000, surplus on hand, the commissioners would not be required to exceed the $10,000 limit. * * *"

The sections of the General Code involved in your several questions are as follows: Section 2343:

"Section 2343. When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building * * * or an addition to or alteration thereof, before entering into any contract therefor or repair thereof * * * they shall cause to be made by a competent architect or civil engineer the following; full and accurate plans * * accurate bills * * *; full and complete specifications * *; a full and accurate estimate of each item of expense and of the aggregate cost thereof. * * *

"Section 2349. If the plans, drawings, representations, bills of material and specifications of work and estimates of the cost thereof relate to the buildings, additions to, alteration of an infirmary, they shall be submitted to the commissioners and infirmary directors. If approved by a majority of them, a copy thereof shall be deposited in the office of the auditor and kept for the inspection and use of parties interested."

"Section 2443. The county commissioners may transfer an unexpended balance of any fund, raised for the purpose of erecting public buildings, remaining in the treasury, to any other fund, or to any other purpose for which money is needed by the county. If there is a fund in such treasury that has been levied and collected for a special purpose, and such fund, or a part thereof, will not be needed for such purpose until after the period fixed by law for the next payment of taxes, and any of the other funds of the county are exhausted, the commissioners may transfer such special fund, or such part thereof as is needed to such exhausted fund, and reimburse such special fund from the taxes levied for such other fund, as soon as they are collected.

"Section 2529. On the first Monday of March in each year, the board of infirmary directors shall certify to the county auditor the amount of money they will need for the support of the infirmary for the ensuing year, including all needful repairs thereof. * * *

"Section 5638, General Code, as amended 102 O. L., 447:

"The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expense of which will exceed $15,000, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $18,000, except in case of casualty, and as hereinafter provided: *or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed* $10,000; *without first submitting to the voters of the county, the question as to the policy of making such expenditure.*"

It appears from your letter that there are two enterprises contemplated by the joint board; viz.: the construction of a new building and the making of

alterations or additions to the existing building. Perhaps I might go further and state that it is also contemplated that certain repairs shall be made in the existing building as distinguished from additions or alterations. This, however, is not entirely clear from your letter.

Inasmuch as these enterprises are quite separate, I am of the opinion that Section 5638, above quoted, is to be applied with respect to the limitations therein, not to the aggregate cost of both of the enterprises, but to the separate cost of each. That is to say, if it will cost $10,000.00 to construct a new building and $4,000.00 to install certain additions and alterations to and in the existing building, then, no limitation of the section above referred to will be violated.

In my jdgment, however, it ought to be made clear that the two proceedings are separate. The minutes of the joint board should show that two contracts are to be let and two species of work undertaken, as above defined. This would not be an attempt to accomplish by indirection a result which could not be directly achieved. If the proceedings are thus conducted I am of the opinion that the plans of the joint board may lawfully be carried out without submitting the policy thereof to a vote of the electors.

In this view of the case, of course, the fact that the improvements are rendered imperative because of the condemnation of the present infirmary by the state inspector of workshops and factories and by the board of visitors is immaterial.

The foregoing comment sufficiently answers your first query.

Your second question is as to whether or not an unexpended balance of $6,000.00 in the poor fund of the county may be made available for the purpose of making the improvements and additions described by you. I find that my predecessor, Hon. U. G. Denman has held in an opinion to the prosecuting attorney of Coshocton county, found on page 544 of the annual report of the attorney general for the year 1909, that a transfer to the poor fund from another county fund may not lawfully be made under the Sections of the Revised Statutes which correspond to Section 2296 et seq., General Code, but might lawfully be made by the commissioners under the authority of what is now Section 2443, General Code, above quoted. I concur in this opinion, and I am further of the opinion that the principles thereof apply to transfers from the poor fund to another fund just as well as to transfers from other funds to the poor fund. It follows, therefore, that if the balance of $6,000, of which you speak, is not needed for other purposes, it may by proper action of the commissioners be made immediately available for expenditure in connection with these improvements, but it is to be noted that it must be paid back again to the poor fund after the next tax settlement. Hence, I question whether there is any method of making the balance in the poor fund permanently available for the purpose which you mention. I may add, on the supposition that you have not seen Mr. Denman's opinion, that the reason that Sections 2296 to 2302, inclusive, General Code, cannot be made available for this purpose is that they only apply to transfers, on the petition of public officers, of funds "'under their supervision." Inasmuch as the fund to which the transfer is to be made in the case mentioned by you is not under the supervision of the same board as is the fund from which the same is to be made, these sections do not apply.

You ask whether the infirmary directors can expend the $6,000, of which you speak, when transferred. In answer to this question I beg to state that the moneys made available for the purpose of these improvements must be expended by the county commissioners. The infirmary directors have nothing to do with the matter at all excepting to approve the plans as prescribed in the section above quoted. The contracts are to be let and the money expended by the county commissioners.

You also ask whether the infirmary directors can expend more than $1,000

of their surplus at any one time. I am unable to find any statute imposing a limitation of $1,000 upon either the commissioners or the infirmary directors, unless it be Section 2444, General Code, which clearly does not apply to a case of this sort.

I may add that if any of the contemplated work is in the nature of ordinary repairs, as distinguished from additions or alterations, this work may lawfully be done by the infirmary directors themselves, and in the doing thereof the funds in the hands of the infirmary directors may lawfully be used.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

137.

TERM OF OFFICE OF MAYOR AND MARSHAL OF VILLAGE—INCUMBENCY UNTIL SUCCESSOR IS ELECTED AND QUALIFIED.

When in November, 1911, *there was no election for the positions of mayor and marshal of a municipality, the incumbents of the positions hold over until their successors are elected and qualified.*

COLUMBUS, OHIO, February 20, 1912.

HON. HOLLIS C. JOHNSTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 2, 1912, wherein you request an opinion upon the following:

> "At the November election, 1909, a mayor and a marshal were elected for the village of Centerville, Gallia county, Ohio, but there were no municipal officers elected at all in said village at the November election, 1911."

You desire to know whether or not the mayor and marshal are still holding their respective offices.

Section 4255, General Code, provides:

> "The mayor shall be elected for a term of two years, commencing on the first day of January next after his election, and *shall serve until his successor is elected and qualified* * * *"

Section 4384, General Code, provides:

> "The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and *shall serve until his successor is elected and qualified* * * *"

These two sections of the General Code expressly continue the incumbency of the respective offices named, not only during the statutory term of two years, but until their respective successors are "elected and qualified." The mere fact that no election was held at the proper election for such officers could not, under

any circumstances, terminate the terms of the incumbents. The principle is so well settled, in this state, that there is hardly any necessity for citation of authorities; but attention is called to the following:

State, ex rel., vs. Brewster, 44 O. S. 589.
State vs. Howe, 25 O. S. 588-596.
Constitution of Ohio, Article XVII, Section 2.

Borton vs. Buck, 8 Kansas 282, holds directly:

"If the people fail to elect any officers as successors, the incumbents hold over."

So, in my mind, there is no question but that the mayor and marshal, elected for the village of Centerville in 1909, as no successors have been elected since then, are still the mayor and marshal, respectively, of said village, and fully authorized to discharge the duties of their respective offices.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

144.

COUNTY UNIMPROVED COMMON DIRT ROAD—DUTIES OF COUNTY COMMISSIONERS, OF TOWNSHIP TRUSTEES AND OF ROAD SUPERINTENDENT—EXPENSES OF COUNTY AND TOWNSHIP—NO POWER OF TOWNSHIP TO ISSUE BONDS.

In the process of the opening of a county common dirt road under Section 6861, *General Code, in pursuance of an order directed to the township trustees by the county commissioners, the expense of paying compensation and damages to property holders must be borne by the county. The cost of opening up and of construction, however, may be paid out of township funds.*

The township trustees, however, may not issue bonds or contracts for the opening of such roads and all work must be done under Section 7137, *General Code, et seq., by the road superintendent with the labor and materials at his command, and all expenses met out of the township road funds.*

Section 3295, *General Code, authorizes township trustees to issue bonds for "opening, widening or extending streets and public highways," but such power does not extend to the roads under consideration, but applies to the opening of roads where the trustees themselves take the initiative.*

COLUMBUS, OHIO, January 15, 1912.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 29th, in which you request my advice as follows:

"In this county a county road has been established as provided by Sections 6860 to 6881 of the General Code. Under Section 6881, the

county commissioners issued their order to the trustees directing that the road be opened. It will cost about fourteen thousand ($14,000.00) dollars to open the road, making it a common dirt road.

"The trustees of the township desire to issue bonds for the improvement and I desire to ask if the authority given by the General Code, Section 3295, amended in Ohio laws, Vol. 100, page 53, Sections 4 and 23 thereof, authorizes the trustees to issue bonds for such county road, and then if they are authorized to issue bonds for opening a county road as aforesaid, under what law they would proceed to let the contract therefor. General Code, Sections 7023, et seq., seems to apply in some particulars, but I cannot convince myself that those sections apply to the opening up of a new country road."

Your statement, "it will cost about fourteen thousand ($14,000.00) dollars to open the road, making it a common dirt road," is not entirely clear to me. You do not explain whether the entire fourteen thousand dollars represents the amount of the compensation and damages to the owners of adjoining property and property taken, whether it represents the cost of opening up and constructing the road without any of the expense of compensation and damages being included therein, or whether it represents the total cost of completing the road as a common dirt road, including both the compensation and damages, and the expense of opening the road.

These distinctions are of importance. I think it is quite clear from Sections 6861, et seq., General Code, that the compensation and damages awarded to property owners in the course of a proceeding to open a county road must be paid either from the county treasury or, in part at least, by the petitioners for the road. I have so held in an opinion to Hon. Fred W. Crow, prosecuting attorney of Meigs county, a copy of which I enclose herein.

It follows from this that township trustees have no authority to pay or to borrow money for the purpose of paying the compensation and damages of property owners growing out of the opening of a county road. From the same sections, and particularly from Sections 6881 and 7137 of the General Code, I think it is apparent that the expense, if any, of the actual opening or construction of the county road as distinguished from the expense growing out of the compensation or damages to property owners must be borne by the township trustees. I have so held in an opinion to Hon. Clifford Shoemaker, deputy highway commissioner, a copy of which I enclose herewith.

So much, then, of the fourteen thousand dollars, of which you speak, as represents the cost of construction and opening up merely may lawfully be paid out of township funds. This conclusion leaves open the further question as to whether or not the trustees may issue bonds for this purpose.

As pointed out in the opinion to the deputy state highway commissioner, the township trustees are not authorized to let contracts for opening county roads. All such work must be done by the road superintendents in the manner provided in Sections 7137, et seq., General Code. This of itself is a sufficient answer to one of the questions raised in your letter.

Analysis of several related sections of the General Code will show how the road superintendent must go about it to perform the services required of him by law in connection with the opening of new county roads.

By section 3372 of the General Code, the road superintendent is given express power to enter into contracts for materials necessary for ordinary repairs and for the repairs themselves in case of floods, freshets or other emergencies. This ex-

press mention of the powers to contract in these connections but strengthens the conclusion that in the opening up of county roads the superintendent may not enter into a contract for the entire work or any part thereof.

Three things, and three only, are necessary, it seems to me, to the superintendent in the opening of a road. These are (1) tools; (2) materials; and, (3) labor. The statute provides means whereby the road superintendent is to be furnished with all of these things. By Section 7164, General Code, the trustees are directed to furnish the superintendents with the necessary tools, implements and machinery for the construction, repair and maintenance of the roads. By Sections 7137 and 7168, General Code, the road superintendent is authorized to enter upon lands nearby or adjacent to the road to be opened up and to take stone, gravel, timber and other materials which he may find therein and which may be necessary for use as materials in the construction of the road. The trustees must pay for all the materials so taken from the township road fund, but may not pay out more than twenty-five dollars for any one road district. If more than this sum is incurred by the road superintendent, the owner of the land from which the material was taken must look under Section 7170 to the county commissioners for his compensation.

As to the labor necessary to open a road, the superintendent may avail himself in the first instance of the two days' labor required to be performed upon public highways by all male persons between the ages of twenty-one and fifty-five years in his district (Sections 3375, et seq., General Code). There seems also to be an inference in Section 3373, General Code, under favor of which the superintendent may himself employ laborers if he is unable to secure a sufficient number of those willing to work out their poll tax, so to speak. There is some confusion here, for by Section 3385, General Code, the township trustees are given express authority to employ day laborers and teams. The funds from which these employments are to be made in either event are to be provided for by levies made under authority of Section 5646 and of Sections 7486 to 7488, inclusive, General Code. In addition to these sources of revenue, the superintendent has at his command the sum paid him by those liable to perform road labor in commutation of such labor under Section 3376, General Code, and the fines, forfeitures and penalties collected by him under the provisions of the chapter relating to road labor. So that, if it becomes necessary to employ laborers within the road district presided over by the superintendent, either in the original construction or opening of the county road, or in the repairs of the already-established roads, ample funds would seem to be provided by the statutes above referred to for such purpose.

No other means of providing funds for the opening of a county road are afforded by the statutes of this state unless such means be found in the laws relating to the issuance of bonds by municipal corporations and township trustees, referred to by you. Indeed, it is difficult to understand why other means should be afforded. The unimproved county road provided for by the statutes is a crude thing. It consists of little more than a strip of land with a raised portion in the middle properly graded to each side and drainage ditches running parallel thereto. It would seem that in almost every case such a road might be constructed from materials found in the right of way itself, and by the use of the road labor required by law, or the sums paid in commutation thereof. The proper grading of a road or the construction of any kind of a permanent road bed such as gravel, macadam, or the like, constitutes the road an "improved road" and the procedure for constructing such a road is an entirely different thing. For these reasons, I have been unable to believe it will cost fourteen thousand dollars to construct, or rather to open, a county road without constituting it in any way an improved road. If this estimated sum is based upon the supposition that the

road, though a dirt road, will be completely graded, then I can only say that this supposition is erroneous, because there is no authority for the complete grading of a county road as a part of opening it.

Section 3295, General Code, to which you refer, authorizes township trustees and municipal councils to issue bonds for certain specified purposes, among them —"for opening, widening, and extending any street or public highway." In my opinion, this language (which is in reality found in Section 3939, G. C., as amended 102 O. L. 263, to which Section 3295 refers) is not sufficient, in the face of the provisions concerning which I have heretofore been writing, to constitute authority for the township trustees to issue bonds for the purpose of raising funds necessary to be expended in opening a county road which they have been ordered to open by the county commissioners. This section may refer to the opening of a township road by the township trustees themselves in the first instance. The duties of the trustees and the road superintendent with respect to the opening of a county road being purely ministerial in a sense, however, I am convinced that this grant of power is not intended to be made in furtherance of the discharge of such duties.

For all of the foregoing reasons, I am of the opinion that township trustees have no authority whatever to issue bonds for the purpose of providing for the expense of opening a county road, but that such expense must be provided for out of the ordinary township road fund and that the trustees may not let a contract for the purpose of opening such a road, but must assign the work to the road superintendent, who, with the aid of the road labor of which he has charge and by the use of the funds in his hands, or subject to his order in the hands of the trustees, must proceed to do the actual work of opening the road.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

150.

CONTRACTS FOR CONSTRUCTION OF COUNTY BRIDGE—NECESSITY FOR FILING OF PLANS AND SPECIFICATIONS FOR PUBLIC INSPECTION—NO EXCEPTION WHEN BRIDGE DESTROYED BY FIRE.

There is no authority for permitting an exception to Section 2353, General Code, which stipulates that contracts for the construction of county bridges costing less than $1,000, shall not be let until plans or specifications have been kept on file in the commissioners' or auditor's office for a period of fifteen days for public inspection. The procedure is not dispensed with, therefore, when a county bridge has been destroyed by fire.

COLUMBUS, OHIO, February 21, 1912.

HON. H. R. LOOMIS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 3d, requesting my opinion upon the following question:

> "When a county bridge is destroyed by flood, the estimated cost of which is $900, do the county commissioners have authority, by passing

a resolution by a unanimous vote declaring that it is an urgent necessity that this bridge be replaced at once, to contract for the bridge at private sale without posting notice of the letting for fifteen days on a bulletin board in the office of the county commissioners' or auditor's office as required by Section 2353 of the General Code?"

I also acknowledge receipt of the memorandum prepared by you stating your views thereon.

Section 2353, General Code, provides, as you state in your question, that contracts for the construction of county bridges costing less than one thousand dollars ($1,000) shall be let only after plans or specifications shall have been kept on file in the commissioners' or auditor's office for a period of fifteen days, open to public inspection, and after notice has been posted in one of these offices for the same period of time, stating the nature of the improvement, and when and where proposals for doing the work and furnishing the material will be received.

Section 2354, General Code, provides that when the cost of such an improvement is less than two hundred dollars ($200), the contract therefor can be let privately without competitive bidding.

To the rules as thus prescribed there is no express statutory exception. That is to say, there is no other or different procedure provided for in the case of any "emergency." In fact, it would seem that the replacing of a county bridge, destroyed by some casualty, does not, in law, constitute a case of urgent necessity arising from an emergency. By Section 2427, General Code, the commissioners are authorized to select a new site for the bridge when thus destroyed, and in that event they must give twenty days' notice of consideration of the question of change of site. This provision would seem to indicate that it is the intention of the legislature, as you suggest in your letter, that the permanent interests of the traveling public and of the tax payers of the county are to be preferred to the avoidance of temporary inconvenience.

The cases cited by you, State ex rel. vs. Commissioners, 14 O. D., 228, and State ex rel. vs. Ashland County, Id. 568, while not on the exact point, are highly instructive. Particularly is this true of the first of these two cases, wherein it was held that the provisions of what are now Section 5643 and 5644, General Code, applicable to the levy of a tax for the replacement of a county bridge which has become unfit for public travel, are not to be construed as relieving the commissioners from any of the provisions which govern the letting of contracts for such work. The sections referred to are the only ones in the General Code, so far as I am able to ascertain, which provide any special procedure in the case of the existence of "an emergency" with respect to a county bridge. As suggested, they have nothing whatever to do with the letting of contracts for the construction of such bridge, but only apply to the necessity of submitting the polity of constructing such bridge by general tax to the electors.

While, therefore, the fact that the cost of the improvement is under one thousand dollars, relieves the commissioners of the duty to follow all of the statutory requirements for the letting of contracts exceeding that amount and of the duty to submit the question of the policy of building the bridge to a vote of the electors, as in the case of bridges exceeding eighteen thousand dollars in cost, I do not find that the existence of facts such as those stated in your letter would justify the commissioners in dispensing with fifteen days' notice and publication provided for in the section cited by you.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

153.

PROBATE JUDGE—FEES FOR PUBLISHING NOTICES OF APPOINTMENT AND FILING OF ACCOUNTS DO NOT INCLUDE PRINTER'S BILL—ESTATE LESS THAN $200—ACCOUNT NECESSARY—FEE OF PHYSICIANS IN INSANITY HEARINGS, WHEN PERSON NOT FOUND INSANE.

In the appointment of an administrator, executor or assignee, for which the probate judge is to charge and collect $5.50 *"for all services," such fee does not include the printer's bill for the publication of notice of appointment, though it does include all services rendered by the court in arranging for said notice and having it printed.*

Also under Section 1601, *General Code, the fee of* $4.50 *allowed the probate judge for filing each account, does not include the printer's bill for the publishing of notice of the account.*

The same principle applies to the limitation of the probate judge fees to ten dollars against estates of less than $200, *which shall not include the printer's bill for notice of appointment.*

Accounts shall be filed and notices published of the same in estates of less than $200 *as in other cases.*

Under Section 1981, *General Code, "physicians designated by the court to make examination and certificate shall be allowed the fee of* $5.00 *therein provided together with witness fees, regardless of whether or not the party is adjudicated insane.*

COLUMBUS, OHIO, February 20, 1912.

HON. JAMES J. WEADOCK, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 27, 1911, in which you request my opinion concerning matters contained in a letter addressed to you, under date of November 21, 1911, by the probate judge of Allen county, Ohio, which letter is as follows:

> "As the legal adviser of the offices of Allen county, Ohio, I wish your opinion on the following matters arising in my office:
>
> "1st. In the appointment of an administrator, executor or assignee, for which the probate judge is to charge and collect $5.50, does the $5.50 cover the charges for publishing the notice of appointment, as required by Section 10712, Laws of Ohio, Vol. 102, at page 202?
>
> "In the charges for filing an account of $4.50, does that include the printer's fee for publishing the notice of the hearing of said account?
>
> "In the administration of an estate of less than $200, in which the probate fees are not to exceed $10, is the probate judge required to have a notice of the appointment published and pay the printer out of the $10? And will an account be required or a statement in lieu of an account?
>
> "Section 1981, as found in Session Laws, Vol. 102, page 287, says: 'To each of the two physicians designated by the court to make examination and certificate, five dollars and witness fees as allowed in the court of common pleas.'
>
> "In case the party, against whom an affidavit is filed, is found by the court to be not insane, are the physicians, who are not required by the

court to make a certificate, entitled to the same fee of $5, as if the party is found insane and the physicians ordered by the court to make a certificate?

Replying to the first question contained in said letter, Section 1601, General Code, as amended in 102 O. L. 281, provides that:

> "The fees enumerated in this section shall be charged and collected by the probate judge *and shall be in full for all services rendered in the respective* proceedings: For appointment of administrator, executor, guardian for minor, except guardian *ad litem*, assignee or trustee, five dollars and fifty cents * * * for each amount four dollars and fifty cents; * * *"
>
> "Provided, however, that in estates the assets of which do not exceed two hundred dollars in value the total fees of the probate judge chargeable against such estate shall not exceed ten dollars."

Section 10712, General Code, provides as follows:

> "Within one month after bond has been given by the executor or administrator, for the discharge of his trust, the probate judge shall cause notice of the appointment to be published in some newspaper of general circulation in the county, in which the letters were issued, for three consecutive weeks."

You inquire: Does the $5.50 cover the charges for publication of the notice of appointment, as required by Section 10712, of the Laws of Ohio, Vol. 102, page 202?

You will note that the *fee* of $5.50, under Section 1601, G. C., as amended, is in full for *all services rendered* in connection with the appointment of a guardian, administrator, executor, etc. Section 10712, as amended, 102 O. L. 202, requires the probate judge to cause a notice of the appointment of administrator, guardian or executor, to be published in some newspaper of general circulation in the county; and the service in preparing this notice and causing it to be published in a newspaper is covered by the fee of $5.50; but the printer's fee for publishing this notice is a charge against the estate, in addition to the fee of $5.50, and the administrator, executor or guardian is required to pay it as part of the costs, in addition to the fees allowed the probate judge under Section 1601, General Code, as it is, in no sense, a fee of the probate judge and is, therefore, not covered by the limitation in Section 1601, General Code.

Replying to your second inquiry, Section 1601, just quoted, provides that the probate judge shall receive a fee of $4.50 for filing each account. Applying the same reasoning as in answering your first inquiry I am of the opinion that the fee for the publishing of the notice of the account, in some newspaper of general circulation in the county, is not to be included in the $4.50, allowed the probate judge as fees for filing his account, but is to be charged against the estate as costs, in addition to the amount allowed the probate judge.

Replying to your third inquiry, I am of the opinion that the limitation of ten dollars, fees for the probate judge, chargeable against an estate of less than $200, does not include the printer's fee for the publication of notice of appointment, but in this case, as well as the two previous cases, the probate judge's fees and the printer's fees should be kept separate and distinct; and the limitation of amounts applies only to the probate judge, as to the fees he may charge for services rendered; and that the cost of printing notices is, in this case, as well as in the other two cases, an additional charge against the estate.

You inquire further, whether, when the assets of an estate do not exceed $200, and the fee of the probate judge is limited to $10, an account is required, or if a statement in lieu of an account is sufficient.

If an administrator, guardian or assignee collects and disburses any money, even though the amount is under two hundred dollars, he should file an account and publish notice of the filing of the same, just as is required in larger estates.

The probate judge, in his letter to you, says:

> "Section 1981, as found in Session Laws, Vol. 102, at page 287, says: 'To each of the two physicians designated by the court to make examination and certificate, five dollars and witness fees as allowed in the court of common pleas.'
>
> "In the case the party, against whom an affidavit is filed, is found by the court to be not insane, are the physicians who are not required by the court to make a certificate entitled to the same fee of five dollars, as if the party is found insane and the physicians ordered by the court to make a certificate?"

Section 1981, as amended, 102 O. L. 287, provides that each of the two physicians, designated by the court to make examination and certificate, shall receive five dollars and witness fees as allowed in the court of common pleas; and witnesses shall receive the same fees as are allowed in the court of common pleas.

It is my opinion that the fee of five dollars, provided for the two physicians who testify in the probate court in lunacy cases, is in the nature of a fee for an expert witness, and the amount to be paid in a given case will not depend upon the findings of the court as to the sanity or insanity of the party examined. The examination of a party, claimed to be insane, although the party is discharged, requires the same qualification of the witnesses, requires the same amount of work, to make the examination, as in the case where the judgment of the court is that he is insane. The certificate of insanity is a mere formal matter and the fee of five dollars is not paid to the physicians, testifying under Section 1981, for the certificate, but is paid to them for making the medical examination.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

155.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW APPLIED TO TOWNSHIPS—LONGWORTH ACT—SMITH LAW LIMITATIONS GENERALIZED—SINKING FUND LEVIES—LEVIES TO RETIRE BONDS AUTHORIZED BY ELECTORS.

Under the Smith one per cent. law 1st., interest and sinking fund levies, for the purpose of discharging indebtedness created after June 1, 1911, *by vote of the people are not to be included within the taxes which must be limited to ten mills on the duplicate of the taxing district for all purposes as required by Section* 5649-2 *and* 5649-3.

2nd. Such levies are not included within the limitations of five, three and two mills respectively, provided for by Section 5649-3*a.*

3rd. Such levies are to be regarded as a part of the gross or aggregate levy which may not exceed that of the year 1910 *in the taxing district.*

4th. Such levies are to be included within the all inclusive levy of fifteen mills, beyond which, even for interest and sinking fund, no taxing district may go.

Section 3295 *known as the Longworth act, intends to refer to and adopt as to townships, the same general provisions with reference to issue of bonds as those which apply to municipal corporations in Section* 3939 *General Code. Therefore, where a township is obliged by reason of limits of taxation to issue bonds upon submission to and approval by vote of the people, a levy for the retirement of such bonds, would be a levy for interest and sinking fund purposes, to provide for the extinguishment of a debt created after passage of the Smith one per cent. law by vote of the electors and such levy would be within the fifteen mill limitation and also within that measured by the aggregate amount levied in the district in* 1910, *but outside all other limitations of the Smith law.*

COLUMBUS, OHIO, February 28, 1912.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 24th, calling attention to a question which you intended to ask in your previous letter of December 9th, and which was not covered by the opinion to Hon. Custer Snyder, copy of which was sent to you in supposed compliance with the request of that letter.

I also acknowledge receipt of your letter of February 9th, explaining a misunderstanding that had arisen in my mind concerning the exact question which you ask.

That question is as follows:

> "What is the joint effect of the Smith one per cent. law, so-called, and the Longworth act, so-called, as applicable to townships?"

The Smith law is found in 102 O. L. 266, and its essential provisions are embodied in Sections 5649-2 and 5649-5*b*, inclusive, thereof.

The following general observation will suffice as to the nature and purpose of the Smith law, in connection with your question:

1. Interest and sinking fund levies, for the purpose of discharging indebtedness created after June 1, 1911 by a vote of the people, are not to be included within the taxes which must be limited to ten mills on the duplicate of the taxing district for all purposes, as required by Sections 5649-2 and 5649-3.

2. Such levies are not included within the limitations of five, three and

two mills respectively, provided for by Section 5649-3*a* (State ex rel. vs. Sanzenbacher, supreme court, unreported).

3. Such levies are to be regarded as a part of the gross or aggregate levy which may not exceed that of the year 1910 in the taxing district. (Sections 5649-2 and 5649-3.)

4. Such levies are to be included within the all-inclusive maximum levy of fifteen mills, beyond which, even for interest and sinking fund, no taxing district may go. (Section 5649-5*b*.)

The Longworth act, so-called, insofar as it applies to townships, is embodied in the following sections:

> "Section 3295. The trustees of any township may issue and sell bonds in such amounts and denominations, for such periods of time and at such rate of interest, not to exceed six per cent., in such manner as is provided by law for the sale of bonds by such township, for any of the purposes authorized by law for the sale of bonds by a municipal corporation for specific purposes, when not less than two of such trustees, by an affirmative vote, by resolution deem it necessary, and the provisions of law applicable to municipal corporations in the issue and sale of bonds for specific purposes, the limitations thereon, and for the submission thereof to the voters, shall extend and apply to the trustees of townships."

Section 3939, as amended 102 O. L. 262 (this section is so lengthy that I shall not quote it in full) provides that the council of a municipal corporation may, by following a certain proceeding, issue bonds for some twenty-seven specific purposes.

The remaining sections of the act, therein designated as Sections 3940 et seq., provide certain limitations upon the amount of indebtedness that may be thus created in any one year without a vote of the electors, and the amount that may be outstanding at any time, with and without a vote of the electors.

(Section 3939, General Code, was also amended on the same day by the act found in 102 O. L. 153. Whether this act supersedes Section 1 of 102 O. L. 262, or not, is a doubtful question which it is not necessary here to determine.)

It is obvious, I think, at least it will become so upon examination of the pre-existing statutes, that the intention of the legislature is that Section 3295 shall refer to and adopt, as to townships, the general provisions of Sections 3939 et seq., as they relate to municipal corporations.

I am, therefore, of the opinion that townships now have the same powers, subject to the same limitations, as are set forth with respect to municipal corporations in Sections 3939 et seq., as amended and supplanted by the act above referred to.

Now, I think it is perfectly obvious that in case the limits of indebtedness of a township or municipality require that an issue of bonds for a specific purpose shall be submitted to a vote of the people, and such issue is so submitted and receives the approval of the electors, a levy for its retirement would be a levy for interest and sinking fund purposes to provide for the extinguishment of a debt created after the passage of the Smith law by vote of the electors.

I am, therefore, of the opinion that bonds so issued must be discharged by levies made, as aforesaid, within the fifteen mill limitation of the Smith law, and also within that measured by the gross amount of taxes levied in the district in the year 1910, but outside of the other limitations of the Smith law.

That is to say, levies under that which you appropriately call the "specific purpose statute" may not be made in excess of all of the limitations of the Smith law, but only in excess of those specifically referred to.

I trust that the foregoing sufficiently answers the question which you have in mind.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

160.

PRIMARY NOT A "REGULAR ELECTION" FOR PURPOSE OF VOTE ON QUESTION OF ESTABLISHING CHILDREN'S HOME.

The phrase "at the next regular election," in Section 3070, General Code, providing for a vote upon the establishing of children's home, cannot refer to "primary election," as such an intention would be both inconsistent with the purpose of the statute and not applicable to conditions existing when the act was passed.

COLUMBUS, OHIO, February 27, 1912.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Your letter of the 15th is received wherein you state:

> "On behalf of the county commissioners, I request your opinion with reference to the possibility of a children's home bond election being held at the primaries. The statute provides that the election should be held at a regular election. Is the primary such a regular election, in your opinion?"

Section 3070 General Code provides how a vote shall be submitted for the establishment of a children's home and for the issuance of county bonds to provide funds therefor, stating that the question shall be submitted *"at the next regular election."*

"The word 'regular' means conformable to an established rule, or principle and the exact literal signification of the phrase 'next general election,' is the next election held conformable to an established rule or law." State vs Cobb, 2 Kansas, 32-34.

At the time of the enactment of this statute (the later amendments not changing it materially) when the phrase "next regular election" was used, there was no primary election day fixed by statute where-at all political parties voted for their respective candidates. True, there was a sort of a primary election law under which the political parties, fixing the date at will, and in almost every instance each party having a different election day, could vote for their respective party nominations, but there was no regular primary election day fixed by law as now.

Then again, the requirement of the present primary election law only applies to "voluntary political parties or associations, which at the next preceding general election polled in the state or any district, county or subdivision thereof, or municipality, at least ten per cent., of the entire vote cast;" (Sec. 4949 G. C.) and as the object of the legislature in providing for the submission of the question of the issuance of bonds must have been to obtain an expression of the whole of the entire electorate at the election where-at every voter of the county would be eligible to vote, it is readily perceived that this could not always be had at a primary election, limited as it is to partisan voters.

The right of the independent voters and of the Socialist or other party voters

whose party may not have received the required percentage at the next preceding election to have his vote recorded for or against the bond issue must be jealously preserved.

I am, therefore, of the opinion that the primary election is not such an election as is included in the phrase "regular election" contained in Section 3077 General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

161.

TOWNSHIP TRUSTEES—POWER TO BORROW MONEY AND ISSUE BONDS—RUNNING EXPENSES—SPECIAL PURPOSES.

The township trustees have no authority to issue bonds or otherwise borrow money, in anticipation of general revenues except for special purposes specified in the statutes.

COLUMBUS, OHIO, February 28, 1912.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 12th, requesting my opinion upon the following question:

> "May the township trustees make a temporary loan in anticipation of taxes to be levied and collected?"

I am unable to find statutory authority for any such loan excepting for certain specific purposes, such as the purchase of a hearse (Section 3287, General Code). That is to say, I find no general authority to issue bonds in anticipation of the general tax levy for ordinary and usual purposes. Municipal corporations have this power, but it does not exist unless specifically granted, and I do not find that it has been granted to township trustees.

You refer me to Sections 3295 and 3939 of the General Code. I have, in part, discussed the joint effect of these two sections, in an opinion to you of even date herewith. I need only add to comments therein made that the authority of township trustees, under Section 3295 and Section 3939, which is adopted by reference in Section 3295, is limited to the issuance of bonds for certain specific purposes—for the making of certain specified improvements.

The trustees have no authority, under these sections to issue bonds, or otherwise to borrow money, for the purpose of anticipating the general revenues of the township and carrying on its ordinary business.

If your question relates to borrowing money for a specific purpose, it follows, of course, that trustees do have the power so to do under the sections last above cited.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

162.

CORRUPT PRACTICE ACT—EXPENDITURES OF CANDIDATES—LIMITATION INCLUDES BOTH NOMINATIONS AND ELECTIONS.

The remedial parts of the corrupt practice act should be liberally construed with a view to determining the intent of the legislature and to serving the purposes of the act.

Under these principles, the amount stated in Section 5175-29, *General Code, to be expended by a candidate for office intends a limitation upon the sum total of his expenses, both for the purpose of the nomination and of the election.*

COLUMBUS, OHIO, February 27, 1912.

HON. JAMES W. GALBRAITH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I am in receipt of your communication of February 16th, wherein you state:

> "I have been requested for an opinion by candidates of this county in reference to construction of the corrupt practices act, General Code, Sections 5175, et seq., and particularly as to the limitation of the amount of expenditure allowed to candidates in subsection 29 thereof, the main question being, would a successful candidate for the nomination have to consider, as an item of the total expense authorized at election the expense incurred in securing the nomination and by that, necessarily, reduce the amount authorized to be expended in his race for election."

Your recollection is correct. The newspapers had an account of a ruling made by me on this identical question, but as it was a verbal opinion, in response to a verbal inquiry which demanded an immediate answer, I will be pleased now to give a written opinion to you in the matter.

Section 5175-29 provides:

> "The total amount expended by a candidate for a public office, voted for at an election, by the qualified electors of the state, or any political subdivision thereof, for any of the purposes specified in Section 26 of this act, for contributions to political committees, as that term is defined in Section 1 of this act, or for any purpose tending in any way, directly or indirectly, to promote or aid in securing his nomination for election, shall not exceed the amount specified herein: By a candidate for governor, the sum of five thousand dollars; by a candidate for other elective state office, the sum of two thousand five hundred dollars; by a candidate for the office of representative in congress or presidential elector, the sum of two thousand dollars; by a candidate for the office of state senator, the sum of three hundred dollars in each county of his district; by a candidate for the office of state representative, the sum of three hundred and fifty dollars; by a candidate for any other public office to be voted for by the qualified electors of a county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election, shall be five thousand or less, the sum of three hundred dollars. If the total number of votes cast therein at such last preceding state election be in excess of five thousand, the sum of five dollars for each one hundred in

excess of such number may be added to the amounts above specified. Any candidate for a public office who shall expend for the purposes above mentioned an amount in excess of the amounts herein specified, shall be guilty of corrupt practices."

As far as your inquiry is concerned, this section can be read:

"The *total* amount expended by a candidate * * for any purpose tending in any way, directly or indirectly, to promote or aid in securing his nomination *or* election shall not exceed * * *"

The corrupt practices act, of which the above is a part is in a great measure what is known as remedial legislation, having added thereto certain penal sections.

The last legislature in enacting this law merely responded to the insistent demands of the people that some remedy be provided to stop the widespread corruption that had become incident to our election and was fast destroying the honest expression of the will of the people. Delegates were regarded as mere trading stock in the hands of the political manipulators; offices in many jurisdictions went to the highest bidders.

A law made to change such conditions should receive a liberal construction in order that the legislative intent might be accomplished. That is, the remedial sections should be liberally construed even if certain other sections are penal. In Commissioners vs. Shaleen, 215 Pa. 595, Mr. Justice Stewart says:

"That part of the act we are considering calls for a liberal construction; it is not penal but beneficial and remedial and is to be construed to give effect to the legislative intent. 'There is no impropriety in putting a strict construction on a penal clause and a liberal construction on a remedial clause in the same act of Parliament.'"

What, then, was the legislative intent in the enactment of the remedial clause of this section? Was it not to fix the *total* amount to be expended for the candidates for office, an amount beyond which no one could go for any of the permissible purposes to obtain the office sought? If there were a fixed amount to be expended for the nomination and another fixed amount for the election, would not the legislature have expressly said so? And, again, it is a well known rule that the amount expended for an election is greater than for a primary—the occasions and necessities for expenditure are more frequent—the field is wider, for in a party primary the party is confined to the electorate of his party, whereas, in the election the appeal is to combine the vote of all parties.

If the legislature did not intend to include what would be termed the "nomination" as well as the "election" expenses in the paragraph quoted, I believe the limitation for nomination expenditures would have been much less than those for the election, yet in this act but one total amount is fixed.

It is true the paragraph reads: "In securing his nomination *or* election," yet, it does not need the use of the rule that "or" may be read "and" where the sense requires, to perceive that the real legislative intent was to fix the maximum expenditure for all and everything in relation to the election to the office, including expenses incurred in securing the nomination.

By reason of the foregoing, it is my opinion that the *total amount* limited to be expended by a candidate for office under provision of Section 29 of the corrupt

practices act (General Code, 5075-29) is, as far as the successful candidate is concerned, the sum total of his expenses both in securing his nomination as well as his election.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

163.

SHERIFF'S FEES—ALLOWANCE FROM COUNTY TREASURY FOR LOST FEES IN CRIMINAL CASES.

Under original Section 2846, General Code, and the more certainly so since the amendment thereof, the sheriff is entitled to receive personally, in addition to his salary, an allowance from the county treasury for his legal fees for services in criminal cases where the state fails to convict and in misdemeanor cases where the defendant proves insolvent. Such allowances shall not exceed three hundred dollars.

COLUMBUS, OHIO, February 29, 1912.

HON. EDWARD C. TURNER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your favor of January 18th received. You enclosed a copy of your opinion, addressed to Hon. Fred M. Sayre, auditor of Franklin county, construing Section 2846, General Code, and which reads as follows:

"In re quarterly allowance to sheriff for services in criminal cases."

"My attention has been called to a new law on this subject, Section 2846 of the General Code, found at page 287, 102 O. L., the part applicable reading as follows:

" 'Upon the certificate of the clerk and the allowance of the county commissioners, the sheriff shall receive from the county treasurer, in addition to his salary, his legal fees for services in criminal cases wherein the state fails to convict and in misdemeanors upon conviction where the defendant proves insolvent, but not more than three hundred dollars shall be allowed for the services rendered in any one year.'

"The sheriff in a statement to me said that he considered this to be a personal allowance to himself, but I am not of that opinion. Section 2983, being a part of the Canfield law under which Section 2846 was enacted and found at page 290 of the General Code, provides:

" 'At the end of each quarter each officer shall pay into the county treasury on the warrant of the county auditor all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during such quarter for his official services, which money shall be kept in separate funds by the county treasurer and credited to the funds from which they were received, for the sole use of the treasury of the county in which such officers are elected, and shall be held as public moneys belonging to such county and accounted for and paid over as provided in Division III, fees and salaries, Chapter 11.'

"I am of the further opinion that before the commissioners can make this allowance, the sheriff should present an itemized voucher to the

clerk showing that at least the maximum allowance in fees has been earned, and the clerk would have to issue his certificate that the same was correct.

"On account of the claims of the sheriff, I have submitted this matter to the attorney general."

You request my opinion as to whether your construction of Section 2846, General Code, is right or wrong.

Section 2846, General Code, provides as follows:

"Upon the certificate of the clerk and the allowance of the county commissioners, the sheriff shall receive from the county treasurer, in addition to his salary, his legal fees for services in criminal cases wherein the state fails to convict and in misdemeanors upon conviction where the defendant proves insolvent, but not more than three hundred dollars shall be allowed for the services rendered in any one year of his term."

Section 2846, General Code, was formerly Section 1231, Revised Statutes, and prior to amendment provided as follows:

"In each county the court of common pleas shall make an allowance of not more than three hundred dollars in each year for the sheriff for services in criminal cases, where the state fails to convict, or the defendants prove insolvent, and for other services not particularly provided for. Such allowance shall be paid from the county treasury."

Section 1231, Revised Statutes, was enacted in 1876 and is found in 73 Ohio Laws, page 127.

The Canfield law was passed January 1, 1907, and is found in Volume 98, Ohio Laws, page 96, et seq. Section 6 thereof, which is now Section 2983, General Code, provided:

"Each of the officers named herein shall at the end of each quarter, pay into the county treasury on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during said quarter, for his official services, which moneys shall be kept in separate funds by the county treasurer, and credited to the office from which the same has been returned."

Section 18 of the Canfield law, Revised Statutes, Section 1296-28, provided:

"And said salary shall be in lieu of all fees, costs, penalties, percentages, allowances and all other perquisites of any kind which any of the officials herein named may now collect and receive, provided, however, that in no case shall such annual salary payable to any of the officers aforesaid exceed the sum of $6,000."

But Section 1296-33 in the Canfield law expressly excepted from the operation of said law the provisions of Section 1231, Revised Statutes of Ohio, now Section 2846, General Code. Section 1296-33, is as follows:

"That all acts or parts of acts inconsistent herewith be and the same are hereby repealed. Provided further that this act shall not affect the provisions of Section 1231 of the Revised Statutes of Ohio."

Section 1296-33 of the Revised Statutes, was carried into the General Code, and is now Section 2998, General Code, which section provides as follows:

"Nothing in this chapter shall affect the power of the court of common pleas in each county to make an allowance of not to exceed three hundred dollars each year to the sheriff for services in criminal cases where the state fails to convict or the defendant proves insolvent and for other services not particularly provided for by law."

It was plainly the intention of the legislature, in the enactment of the Canfield law, to except from the provisions thereof the allowance made by the court of common pleas under favor of Section 1231, General Code, which is now Section 2846, General Code; and it would have been my holding, under Sections 2846 and 2998 of the General Code, prior to the amendment of Section 2846, that the allowance made by the court of common pleas, under authority of Section 2846, General Code, should be paid to the sheriff in addition to his regular salary; but the amendment of said Section 2846, General Code, found in 102 O. L. 287, *expressly* authorizes the amount allowed by the commissioners for "lost costs" to be paid to the sheriff *in addition to his salary*. Prior to the amendment of this last named section, the court of common pleas was authorized to make an allowance of not more than three hundred dollars for services in criminal cases where the state failed to convict or the defendant proved insolvent, and for other services not particularly provided for. This allowance was made in a lump sum, generally fixed prior to the rendering of the services and not dependent upon the amount of services. There was no way provided to determine the amount to be allowed by the court, it being left to the sound discretion of the court as to the amount, within three hundred dollars, to be allowed.

The amendment of this section makes it clear that the amount to be allowed to the sheriff is to be in addition to his salary, and further fixes a method whereby the amount to be allowed is to be accurately determined, namely: the *fees* earned by the *sheriff* in the classes of cases mentioned in said Section 2846. As the law now stands, the clerk of the court of common pleas certifies the amount of fees for services of the sheriff in cases where the state fails to convict, or where the defendant proves insolvent, to the county commissioners, and if the amount thereof in any one year is under three hundred dollars the sheriff is allowed the amount earned; if it exceeds three hundred dollars he is allowed three hundred dollars, and the amount thus allowed is to be paid to the sheriff in addition to his salary and does not go into the sheriff's fee fund.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM:

Since writing this opinion I have learned that my predecessor, Hon. U. G. Denman, held that, under Section 2846, General Code, prior to the amendment, the sheriff was entitled to the amount allowed by the court of common pleas under authority of said Section 2846, in addition to his salary, in which opinion I heartily concur.

164.

CRIMINAL PROCEEDING BEFORE JUSTICE OF THE PEACE—CRUELTY TO CHILDREN—PAYMENT OF COST OF JURY TRIAL BY COUNTY.

In criminal proceedings under Section 12970, General Code, for abuse to children, before a justice of the peace, when the defendant is acquitted after a jury trial, the justice of the peace shall certify the cost bill to the county auditor, who after examination, and correction, if necessary, shall draw his warrant for the same on the county treasury.

COLUMBUS, OHIO, February 29, 1912.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Your favor of February 2, 1912, is received, in which you ask an opinion upon the following:

> "V. T., a minor, 13 years of age, filed an affidavit in Justice E. G. A.'s court, justice of the peace of T. township, this county, charging G. B. J. with cruelty and unlawfully punishing him, the said V. T., under Section 12970 of the G. C. A jury trial was had and the jury found G. B. J. not guilty. The jury was drawn by the clerk of the court as provided for in Section 12987. The cost bill was then certified to the county auditor for payment according to Section 12988.
>
> "The auditor of our county then requests me for an opinion as to whether said costs should be paid by the county. I told him that Section 12988 was very plain, and that I would not give a written opinion and assume the responsibility that he by Section 12988 must assume.
>
> "This case was not prosecuted by the humane society for which purpose these sections are a part of a special act for offenses against minors and when the auditor observed that I would not give him a written opinion he raised that question which put me in doubt.
>
> "The question in brief is this, should the county pay the cost bill in this case when it was not prosecuted by the humane society and costs were not secured."

You state that the charges filed were for the violation of Section 12970, General Code, which provides:

> "Whoever, having the control of or being the parent or guardian of a child under the age of sixteen years, wilfully abandons such child, or tortures, torments, or cruelly or unlawfully punishes it, or wilfully, unlawfully or negligently fails to furnish it necessary and proper food, clothing or shelter, shall be fined not less than ten dollars nor more than two hundred dollars or imprisoned not more than six months, or both.

A justice of the peace has jurisdiction to try such case by virtue of Section 13423, General Code, which provides:

> "Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to:
>
> "1.
>
> "2. The prevention of cruelty to animals and children;
>
> "3. The abandonment, non-support or ill-treatment of a child by its parent;
>
> "4. The abandonment or ill-treatment of a child under sixteen years of age by its guardian;"

You state that a jury was drawn to try the defendant by virtue of Section 12987, General Code, which provides:

> "On complaint before a mayor, justice of the peace or police judge of a second or further violation of the laws relating to the compulsory education or employment of minors, if a trial by jury is not waived, a jury shall be chosen and proceedings had therein as provided by law in cases of a violation of the law for the prevention of cruelty to animals and children."

This section does not cover the offense defined in Section 12970, General Code, for which the accused was tried.

However, a justice of the peace could proceed by virtue of the provisions of Section 13432, General Code, which provides:

> "In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him."

Section 13433, General Code, then authorizes the clerk of the court of common pleas to draw the jury.

Section 12988, General Code, provides for the payment of costs, as follows:

> "No person or officer instituting proceedings under the next fourteen preceding sections shall be required to file or give security for costs. If a defendant is acquitted or discharged, or if convicted and committed to jail in default of payment of fine and costs, the justice, mayor, police judge or probate judge before whom such case was brought shall certify such costs to the county auditor, who shall examine the amount and, if necessary, correct it and issue his warrant to the county treasurer in favor of the respective persons to whom such costs are due for the amount due to each."

By virtue of this section security for costs cannot be required upon an affidavit charging an offense against Section 12970, General Code.

The defendant in this case was acquitted. It was the duty then of the justice of the peace to certify the cost bill to the county auditor. The county auditor is then required to examine and correct the same, if necessary and issue his warrant to the county treasurer in favor of the person entitled to such costs. The statute does not require that such proceedings shall be instituted by the humane society in order to make the county liable for the costs.

It is my conclusion that the legal costs in the proceedings had should be paid from the county treasury.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

167.

TAXES AND TAXATION—ROAD IMPROVEMENTS—SMITH ONE PER CENT. LAW—LIMITATIONS—COUNTY AND TOWNSHIP LEVIES—CONSTITUTIONALITY OF ASSESSING PROPERTY HOLDERS WITHIN ONE MILE.

Levies mentioned in Section 6956-14, *General Code, to be made for the payment of the township and county's proportions, respectively, or the costs of the road improvement therein provided for, are not a special assessment, a levy for road taxes that may be worked out by tax payers, nor a levy in a special district created for road improvements within the meaning of Section* 5649-3a, *General Code, and are therefore to be treated as other levies for county and township purposes and subject, under the Smith law, to revision by the budget commission. Such levies are, therefore, within the ten and fifteen mill limitations and the county's portion is within the three mill limitation applicable to counties.*

The levy for the township's portion while not a levy made by the township trustees and though levied by the county commissioners, is not a uniform levy for the county, but one solely for township purposes, and, therefore, such levy is to be included within the two mill limitation of Section 5649-3a *for township purposes.*

The fact that the owners of real estate laying and being within one mile of such improvement "may be assessed according to benefit for the same" is not an assumption by the legislature of powers beyond its constitutional authority.

COLUMBUS, OHIO, February 21, 1912.

HON. CHEEVER W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 8th, in which you request my opinion upon the following questions:

> "First. Are the levies mentioned in said Section 6956-14, that may be made for the payment of the township's proportion and the county's proportion of the costs of the road improvement provided for in the related sections considered as a general tax, a special assessment, or a levy and assessment in a special district created for road improvement, or where is it to be classed in the ten mill tax law?

"Second. Are said levies included in the ten mill limit? If not, are they included in the fifteen mill limit?

"Third. If said levies are included in the ten mill limit, is the county's share or proportion of said costs to be included in the three mill maximum levy that may be made by the county commissioners?

"Fourth. Since the township trustees have nothing to do with the making of the levy of the township's share, is the township's proportion of the costs to be included in the two mill maximum limit that may be made by the township trustees, or is it to be included in the three mill limit that may be made for county purposes by said commissioners? See Section 5649-3*a*, G. C."

I also acknowledge receipt of your letter of February 17, stating your views on the questions thus submitted, and submitting two additional questions under the same general act, as follows:

"Fifth. May there be a special assessment according to benefits placed on all the real estate in the municipal corporation of Cadiz, within one mile of the beginning point of said road improvement?

"Sixth. If I am right in my opinion as to question five, then is said new road improvement law constitutional?"

I have already passed upon some of the questions you submit. In an opinion to Hon. Custer Snyder, solicitor of the city of Lorain, I held that neither the county nor the township levies mentioned in Section 6956-14, General Code, is a special assessment, a levy for road taxes that may be worked out by the taxpayers, or a levy in a special district created for road improvements, within the meaning of Section 5649-3*a*, 102 O. L., 271.

I reached the conclusion, therefore, in that opinion, that these levies are to be treated as other levies for county and township purposes under the Smith law. That is to say, they are required to be submitted to the budget commission along with the other needs of the county and township, and are subject to the revision of the budget commission for the purpose of enforcing the several limitations of the Smith law.

I therefore held in the opinion in question that levies under Section 6956-14, General Code, are included in the ten-mill limitation and in the fifteen-mill limitation of the act of 1911. I also held that the levy for the county's portion of the cost of an improvement under the act of which Section 6956-14 is a part is within the three-mill limitation of Section 5649-3*a* of the Smith law. I did not, however, pass upon the question as to whether the levy for the township's portion under Section 6956-14 was to be regarded as a county levy or a township levy—that is, was to be counted in ascertaining whether or not the three-mill limitation, or the two-mill limitation of Section 5649-3*a* had been reached. Upon careful consideration of this question, which is directly raised in your letter, I am of the opinion that, while the question is quite doubtful, the levy for the township's portion must be regarded as within the two-mill limitation. Strictly speaking, this levy is not accurately described by either of the phrases used in defining the limitations now under consideration. Thus, it is not a levy "by township for township purposes," because it is made by the county commissioners. On the other hand, it is not a levy "by a county for county purposes," because it is made for the purpose of meeting an obligation of the township. Having regard to the intent and purpose of the entire Smith act, I am clearly of the opinion that the levy under consideration must be regarded as within one or the other of these two limitations. It becomes neces-

sary, therefore, in construing Section 5649-3*a*, to disregard the strict and exact meaning of some of its words, and to give weight to the controlling purpose of the legislature as evidenced by the entire act.

Yet the precise words of the section are not without some weight. Thus while the township limitation is upon "levies by a township for township purposes," yet it is to be observed that the limitation is not solely upon levies made by the *township trustees.* It would seem that the legislature has carefully avoided designating the exact officers authorized to make the levies referred to in the phrases and clauses of Section 5649-3a, now under discussion. Thus, the three-mill limitation is not upon the maximum amount that may be levied by the *county commissioners,* but upon that which may be levied by the "county," thus recognizing the fact that at the time this law was passed there were county levies other than those made by the county commissioners, as the levy for the poor fund, made by the infirmary directors. So, also, the school district limitation is not upon levies made by the board of education alone; thus is implicitly recognized the possibility of such levy being made by the county commissioners in case the board of education would fail to act.

It therefore follows: that it is not necessary, in order to constitute a particular levy, a levy "by a township for township purposes" within the meaning of Section 5649-3*a*, such levy should be made by the township trustees.

I have already pointed out that the purpose for which the levy on the duplicate of townships through which the road runs is made under Section 6956-14, is to provide for the township's proportion of the cost of the improvement. The statutes involved are as follows:

> "Section 5856-10, (101 O. L. 251). * * * the cost and expense of said improvement * * shall be apportioned by the commissioners as follows: Not less than thirty-five per cent, nor more than fifty per cent. thereof shall be paid out of the proceeds of any levy or levies upon the grand duplicate of all the taxable property of the county, or out of any fund available therefor as provided in Section 6956-14, of this act; and the balance, which shall not be less than twenty per cent. (20%) nor more than thirty per cent. (30%) thereof shall be assessed upon and collected from the owners of real estate lying and being within one mile from either side, end or terminus of the improvement and assessed according to benefits derived from the improvement as determined by the commissioners. Such assessment shall be in addition to all other assessments authorized by law notwithstanding any limitations upon the aggregate amount of assessments on such property.
>
> "Section 6956-14. The said proportion of the cost and expense of said improvement to be paid by the county shall be paid out of the state and county road improvement fund or out of any road, road improvement or road repair fund of the county available therefor. If there are not sufficient funds available therefor, then for the purpose of providing by taxation funds for the payment of the county's proportion of the cost and expense of all the improvements made under the provisions of this act, the county commissioners are hereby authorized to levy upon all the taxable property of the county a tax or taxes not exceeding in the aggregate in any one year the sum of one mill upon each dollar of the valuation of the taxable property in the county. Said levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force. For the purpose of providing by taxation funds for the payment of said proportion of the cost and expense of all improvements made under the provisions of this act to be paid by the township or townships in which such

road improvement may be situated in whole or in part, the county commissioners are hereby authorized to levy upon all the taxable property of any township or townships in which such road improvement is situated, in whole or in part, a tax not exceeding ten mills in any one year upon each dollar of the valuation of taxable property in such township or townships. Said levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force."

It will thus be seen that the law itself makes the township, as a taxing district, responsible for such portion for the cost of the improvement as within the limits of Section 6956-10, the commissioners may allot to it. I think it follows, therefore, that the purpose of the levy made by the commissioners on the duplicate of the township is a township purpose and not a county purpose.

This conclusion is a strengthened, I think, by the fact that if this purpose be regarded as a county one, then the actual limitation upon the amount or rate which might be levied for county purposes would not be uniform throughout the county. This, I think, is violative of the essential purpose and intent embodied in Section 5649-3*a*. In other words, having regard to such intent, I am of the opinion that no levy is "a levy by a county for county purposes," which is not made by a uniform rate upon all the taxable property in the county, perhaps subject to certain exceptions. At any rate, I am convinced, that a levy, though made by the county commissioners, if restricted to certain taxing districts within the county, is not a levy "by a county for county purposes," within the meaning of Section 5649-3*a*.

For all these reasons, then, I am of the opinion that a levy for the township's portion of the cost of a road improvement under Section 6956-1 et seq., General Code, is to be included within the two-mill limitation prescribed by Section 5649-3*a*. This holding does not impose any hardship upon the township. It is not true, as you seem to suppose, that the commissioners, by making such levy, may impair the particular power of the township trustees to levy for general township purposes. The practical operation of the law in this respect would be as follows: The township trustees would submit their estimates of needs, regardless of the action of the commissioners; the commissioners would submit their estimates of needs under Section 6956-14, as applied to the township. The budget commission would then be charged with the duty of ascertaining whether or not the sum of both of these estimates would require a levy on the township duplicate in excess of two mills. If that should prove to be the case, it would be their duty then to reduce some of the estimates for township needs. The commission would be at liberty to reduce the estimate made by the commissioners. Nothing in the road improvement act under consideration requires that the levy made by the commissioners under Section 6956-14 shall be made in the exact proportion that the cost and expenses of the improvement is to be divided under 6956-10. That is to say, if the township's limit of taxation does not permit a levy sufficiently large to provide for its proportion in the same number of years as in which the counties' proportion may be provided for, then, and nevertheless, the commissioners may continue to levy under Section 6956-14, against the township duplicate, until sufficient taxes to meet its share of the improvement have been raised. And if, by the continual revisions by the budget commission, made from year to year, the fiscal arrangement made by the commissioners, and in particular those for the retirement of the bond issue under Section 6956-15, are interfered with, the commissioners have ample power to refund the bonds under Section 5656, General Code, and to adjust the counties' debts to such varying limitations of taxation.

The foregoing comments sufficiently answer each of your first four questions. Your fifth question is as to whether or not a special assessment according to the bene-

fits may be placed upon all the real estate in a municipal corporation which is within one mile of a terminus of a road improvement under the sections already considered. At the outset it may be observed as to this question that the limitations of the Smith law are not called into question thereby at all. That act does not in any way apply to assessments especially levied upon benefited property to provide for any part of the cost of a public improvement.

By Section 6956-10, General Code, above quoted, it is provided that a part of the total cost of the improvement shall be assessed upon and collected from "the owners of real estate lying and being within one mile from either side, end or terminus of the improvement and assessed according to benefits derived from the improvement as determined by the county commissioners." Section 6956-2, General Code, a part of the same act, provides in part, that:

> "In locating such road and road improvements within the territorial limits of any municipality, the county commissioners shall be confined to the platted streets of such municipality."

On the other hand, Section 6956-4 provides in part that,

> "In determining the majority of the petitioners necessary to give the commissioners jurisdiction * * the following persons shall not be counted, viz.: such resident land owners whose only real estate within the territorial bounds of said road, is located in a municipality. * * *"

The provision last above quoted is not sufficient, in my judgment, to indicate that the intention of the legislature was that owners of property located in a municipal corporation should not be assessed according to the benefits conferred upon such property by the construction of the improvement, if such property is within the territorial limits of the road. The legislature, on the other hand, clearly did intend that all property within such limits should be assessed according to the benefits conferred upon it by the improvement, and that such improvement might be made within the territorial limits of a municipal corporation.

It follows, therefore, I think, that owners of property located within a municipal corporation which is itself within the territorial limits of a road improved under these sections are subject to assessment according to the benefits conferred by the improvement.

Your sixth question is somewhat closely related to the one just considered. You question whether, the intention of the general assembly being as I have just held it to be, the act under consideration is constitutional. I know of no reason why it should not be considered so. The mere fact that owners of real property situated within the municipality are not to be counted in ascertaining a majority of petitioners is immaterial. No constitutional limitation commands the legislature to require that a majority of the owners of property to be benefited or assessed by an improvement shall join in petitioning for it. It would have been competent, therefore, for the legislature to provide that the commissioners should have jurisdiction to improve and assess a part of the cost of the improvement upon all within the bounds of the road upon petition of a very few of the interested owners, say, five or more, as is the case under the two-mile assessment pike law, so-called, (Section 7325, General Code) nor is the fact that owners of property situated within a municipal corporation. are subject to assessments made by authorities of the corporation themselves material. The power to lay out and improve a county road through a corporation is well established in this state, and it is held that it is in no sense incompatible with the power of the municipal authorities to assess for improvements made by the municipality. Lewis vs. Laylin,

46 O. S. 663, and cases there cited. The county commissioners while vested with some discretion in the matter, are without power to assess property within the bounds of the road beyond the amount of benefit conferred upon it by the improvement. This limitation is sufficient to preserve the consitutional rights of any owner of municipal property. The fact that such owner has already been assessed for municipal improvements and that the greater part of the benefit of the improvement will be conferred upon rural property rather than upon property within the limits of the corporation, are both facts which must be taken into consideration by the county commissioners in determining the benefits to be conferred upon such municipal property.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

168.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LEVIES FOR SPECIFIC PURPOSES—LIMITATIONS—LIBRARY PURPOSES.

There is only one limitation in the Smith law upon levies for "specific purposes" such as one for library purposes and that is found in Section 5649-3 *which provides that the rate for such purpose shall not exceed such rate as when levied upon all property of the district in* 1911 *would not exceed the amount which might have been levied for such purpose in* 1910.

By the second paragraph of Section 5649-3 *this limitation may be exceeded, if for another purpose a less amount is levied than was levied for such other purpose in* 1910.

COLUMBUS, OHIO, February 23, 1912.

HON. T. T. COURTRIGHT, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 6th requesting my opinion upon the following facts:

> "The total tax valuation of Violet township, and the village of Pickerington, for year 1911, was over three million dollars. The total amount levied for library purposes last year was $325.00 *and under the Smith one per cent. tax law it would seem that no larger amount may be levied for the year* 1912.
>
> "Under Section 3407 G. C., one-half of one mill may be levied for library purposes such as is covered by the Carnegie letter, which would be more than would be required on the part of Violet township and Pickerington, to procure this free library.
>
> "The rate of taxation for the village of Pickerington for the year 1911, is ten mills, which can be reduced the coming year owing to liquidation of certain indebtedness.
>
> "The tax rate for Violet township, for the year 1911, is 8.5 mills and the township can levy the extra amount required to comply with the proposition of Mr. Carnegie and still be below the limit. This can be done by both village and township and it occurs to me that being able to do this and the further fact that the citizens of both are in favor of the

proposal, the township and village should not lose this offer of a library building because of the fact that less than $1,000.00, was levied in 1910.

"Under Section 3403, G. C., the trustees of the township if proper steps were taken, might levy one mill for library purposes, but I am not advised at this time whether the citizens of the township have availed themselves of the provisions of that section.

"But in view of the fact that about one-third of one mill will be all that will be required on the part of the township and village, to secure the benefits of a free public library, I believe the taxing authorities should be permitted to make such levy, irrespective of the amount levied last year."

The italicized portion of your statement of facts is an incorrect statement of of the law. The amount of tax levied for a specific purpose or by a specific subdivision in the taxing district in the year 1910, for the year 1911, does not constitute a limitation upon the amount which might have been levied in the year 1911 for the year 1912 for the same purpose or by the same subdivision or taxing district or in and for any year thereafter. The limitation made by the 1910 tax is defined in Section 5649-2 of the Smith law, so-called, 102 O. L. 268 is as follows:

"* * * the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village school district or other taxing district, for the year 1911, and any year thereafter, including * * * levies for state, county, township, municipal, school and all other purposes, shall not in any year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein * * * for all purposes in the year 1910."

It is apparent, therefore, that the total amount of taxes levied for all purposes, state, county, township, village school district, etc., in Violet township and in the village of Pickerington on the 1910 duplicate limits the total amount for these combined purposes which might have been levied in the year 1911, on which, plus 6%, may be levied in the year 1912. It is not that the amount of the levy for library purposes made by either of these subdivisions is a limitation upon the amount that might have been levied in 1911 or may be levied in 1912 for that purpose. There is only one limitation in the Smith law upon levies for specific purposes and that is found in the first paragraph of Section 5649-3 which provides:

"The maximum rate of taxation in any taxing district for any purpose, as now fixed, shall be and is hereby changed so that such maximum rate, as levied on the total valuation of all taxable property in the district for the year 1911 and any year thereafter would produce no greater amount of taxes."

It will be observed that the language last above quoted constitutes, not the amount actually levied in the year 1910, but the amount that might have lawfully been levied in that year, the limitation upon the amount that might have been levied in 1911 or in any year thereafter. There the one mill limitation of Section 3403 and the one-half mill limitation of Section 3404 are no longer applicable. In their stead however appear the amount that would have been produced by a

levy of one mill, for example, upon the duplicate of the township in 1910 as the measure of the power of the township to levy for these specific purposes in the year 1911 or in any year thereafter.

The same observation would apply, of course, to the provisions of Section 4019, General Code, under favor of which the council of any city (and in all probability any village) might levy and collect a tax not to exceed one mill on each dollar of taxable valuation, and pay it to a private corporation or association maintaining and furnishing a public library, etc. In short, every limitation provided by law as it existed before the Smith law was enacted upon the rate of taxation for a specific purpose has been changed so that now the limitation is upon the amount which would have been produced by multiplying that rate by the total valuation of taxing of the taxing district as shown on the 1910 duplicate.

From your letter I take it that none of the other limitations of the Smith law would be called in question in any way by the effort to conform to the requirements of the donor of the proposed library building. That is to say, the amount which it is desired to raise would not cause in all probability the aggregate levy to exceed the aggregate amount levied in the year 1910 or the rate of 10 mills or that of 15 mills prescribed by Section 5649-5*b*. I trust I have made it plain, however, that the taxing authorities may not make the levy they contemplate if it exceeds, not the amount levied last year, but the amount which might lawfully have been levied on the 1910 duplicate. It is to be observed, however, that under favor of the second paragraph of Section 5649-3, which I shall not quote, the limitation fixed in the first paragraph above defined may be exceeded if "a less amount of tax for a particular purpose (other than the purpose in question) than was levied for such purpose in the year 1910" is at the same time levied. That is to say, if in the year 1910 the sum of $500 was levied say for general township purposes, and in the year 1911 the sum of only $400 was levied for that purpose, then, providing none of the other limitations of the Smith law are involved, the trustees may, so to speak, use the $100 thus made available for library purposes. Whether or not this provision may be employed so as to exceed the old limitation in mills is a very doubtful question upon which I do not pass.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

180.

PROSECUTING ATTORNEY—EXPENSES, ALLOWANCE FOR—PAYMENT OF EXCESS BY PROSECUTOR CANNOT BE REIMBURSED—PAYMENT OF BILLS OF PRECEDING YEAR FROM NEXT YEAR'S ALLOWANCE.

By the amendment to Section 3004, *General Code, the prosecutor is limited in his expenses to an allowance equal to one-half his salary. He cannot in any one year exceed this amount, and if he pays such excess out of his own pocket for official and warranted expenses, he cannot be reimbursed for the same.*

Where legitimate bills of the past year are due at the time covered by the allowance for the next year, such bills may be paid out of the allowance for the ensuing year except when such a practice would saddle upon a successor the burden of expenses incurred by the preceding prosecuting attorney.

COLUMBUS, OHIO, March 6, 1912.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have your letter of January 19, 1912, which is as follows:

"I would like to have your opinion interpreting the act of the legislature as found on page 74 of the 102 Ohio Laws. This law provides for an additional allowance to prosecuting attorneys in addition to that provided by Section 2914, General Code.

"Shortly after the passage of the law I gave bond as required and drew from the county treasury the proportionate amount for the balance of the year as provided by said law. During the balance of the year 1911, I was compelled to use $22.70 more than the amount of money I received. This was owing to the extraordinary and unusual condition of affairs that existed here. I also employed secret service officers during the month of December, and employed an expert to assist me in going over books, vouchers, etc. I intend to use some of the allowance for the year 1912 as provided under this act in payment of these items.

"Now the question is,

" 'Can I use the money I received under this law for the 1912 in payment of the expert and secret service officers, and the over-drawn amount from 1911?'

"I have filed my account with the county auditor showing that I had used $22.70 more than I received for 1911, and have given a new bond in an amount equal to my yearly salary, and have drawn from the county treasury the sum of $1,185. I owe for the secret service officers and expert assistance."

I am also in receipt of your letter of January 29, 1912, in which you inform me more fully as to the extraordinary condition which made it necessary for you to incur the expenses above mentioned, and from the account which you give me there can be no doubt but that it was your duty to incur these expenses, and that it was greatly to the interest of the pubilc that you did so.

Section 3004 of the General Code, as it stood prior to the last amendment, was as follows:

"In addition to his salary, each prosecuting attorney shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties, or in furtherance of justice, which expense account shall be itemized and duly vertified, and if found correct, shall be allowed by the county commissioners and paid monthly from the general fund of the county."

Under this section, as it stood, undoubtedly, you could have been reimbursed for all of these expenses by the county commissioners, and under the circumstances detailed in your letter there can be no question but that the allowance would have been made; but the legislature, by the amendment to Section 3004, changed the method of providing for experts of this kind, and instead of authorizing the commissioners to allow the prosecuting attorney his reasonable and necessary expenses, incurred in the performance of his official duties, or in furtherance of justice, monthly, without any limit as to the same, placed the matter entirely in the hands of the prosecuting attorney by virtually making him an allowance equal to one-half of his salary, to be expended at his discretion for the purposes provided in the act, the prosecuting attorney to annually account for his expenditure of said sum and to pay the balance, if any remain at the end of the year, into the county treasury. This Section, 3004, as amended 102 O. L. 74, is as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by Section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

"Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.

"The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

Construing this section, it is my opinion that it is in the nature of a definite and fixed allowance, dependent only upon the amount of the prosecutor's salary, the allowance to equal one-half thereof. There is no provision of the statute for increasing it, and, therefore, as it is an annual allowance, which expires at the end of the year, any balance remaining to be paid into the treasury, it must be assumed that the legislature intended the prosecuting attorney not to exceed the amount of this allowance.

As to the sum of $22.70, therefore, which you expended in excess of your allowance for the year 1911, my opinion is that there is no way in which you can be reimbursed for the same, the amount allowed you being fixed and there being no way in which an increased allowance could be made. When you paid this amount after your fund was exhausted, you must be held to have assumed the liability yourself, and while it seems unjust, I am of the opinion that you cannot be reimbursed for the same.

As to the amount still due secret service officers and experts employed by you to assist in going over the books, vouchers, etc., of county officials under investigation, which amount is due for service rendered in 1911 but has not yet been paid, it is my opinion that you can legally pay the same out of the allowance made to you for the year 1912. It seems to me that the situation is the same as if, those services being of a continuing nature, the accounts had not been presented to you before the first Monday of January, 1912, at which time you were required to pay any balance remaining in your hands into the treasury. Suppose, for instance, you had had a balance remaining in your hands, more than sufficient to pay these bills, and you knew that the bills were outstanding and unpaid but had not been presented to you and you did not know the exact amount of the same; under the law, you would, nevertheless, have had to pay said balance

into the county treasury, and the situation would be the same as it is now. I think, therefore, that these bills can be paid out of your allowance for 1912. But, as before indicated in this opinion, there is no way of increasing your allowance and you will have to administer your office so that the expenses for 1912, including the amounts paid for services rendered in 1911, will not exceed your total allowance.

I do not wish it understood by this opinion that one prosecutor would have the right to incur bills during the last year of his term which would be a charge upon his successor, which would have to be paid out of the allowance to the successor in the succeeding year, as, in my opinion, this could not be done. In your case, as the expenses were incurred by you as prosecutor, legitimately, and as your imperative duty and the interest of your county required that you should incur them, I think it only proper that the same should be paid out of your allowance for this year.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

189.

MUNICIPAL CORPORATIONS—BANKS AND BANKING—MUNICIPAL DEPOSITORY—PRIVATE BANK OWNED BY INDIVIDUAL—PAID IN CAPITAL STOCK.

A private bank owned by an individual has no "paid in capital stock" and therefore cannot be made a public depository of a municipality under Section 7004 General Code.

COLUMBUS, OHIO, March 8, 1912.

HON. ARTHUR VAN EPP, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I am in receipt of your favor of February 15, 1912, requesting my opinion as follows:

> "Mr. J. H. Firestone, of Spencer, Ohio, for a number of years past has operated a private bank at that place, called The Farmers' Savings Bank, of which he is the sole owner and proprietor, but which does not seem to have any capital stock, at least the amount invested is unknown, and his responsibility seems to be unknown, other than that he owns generally quite a large amount of property and is engaged in a number of different kinds of business.
>
> "Sometime ago the board of education of Spencer township selected this bank as depository for school funds, and the question now arises, can this bank properly qualify?"

Section 7604 General Code authorizes the board of education to provide by resolution for the deposit of any or all moneys coming into the hands of the treasurer. This section is as follows:

> "The board of education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of its

treasurer. But no bank shall receive a deposit larger than the amount of its paid in capital stock, and in no event to exceed three hundred thousand dollars."

I call your special attention to the first clause of the last sentence of this section, viz., "that no bank shall receive a deposit larger than the amount of its *paid in capital stock.*"

Under the facts as detailed in your letter I am unable to conceive how the amount of the paid in capital stock of the bank to which you refer could be ascertained; and it is my opinion that this bank being owned solely by one man, and not being incorporated cannot be considered as having any capital stock; and for this reason my opinion is that it cannot properly be designated as a depository for the school funds.

I enclose herewith a copy of an opinion rendered by me on April 29, 1911, to Hon. J. R. Stillings, prosecuting attorney, Kenton, Ohio, which refers to this subject and which goes to the extreme limit in allowing unincorporated banks to be designated as depositories. Were it not for the decision referred to in my said opinion to Mr. Stillings I would have been forced to hold that the words "paid in capital stock" must necessarily refer to an incorporated bank, and that the legislature intended that deposits of school funds should only be made in banks which were subject to the supervision and inspection of either state or federal officials.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

195.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—POWER OF COUNTY COMMISSIONERS TO FUND INDEBTEDNESS—EXHAUSTION OF GENERAL FUND A CONDITION PRECEDENT—PAYMENT OF OVERDRAFTS FROM GENERAL FUND IN FRANKLIN COUNTY.

The power of the county commissioners to issue bonds for the purpose of funding existing indebtedness does not exist until all moneys in the general fund which may be devoted to the purposes of paying such indebtedness have become exhausted.

COLUMBUS, OHIO, March 12, 1912.

HON. H. S. BALLARD, *Assistant Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 2nd, which I quote in full:

"In your opinion of February 1st, with regard to the financial condition of Franklin county, Ohio, on page 36 with reference to the repayment of overdrafts in certain county funds, you suggest that the county commissioners and the auditor obtain money from banks of the city in order to enable them to meet the obligations arising under improvement contracts, and that bonds may then be issued by the

commissioners to pay such notes. As I interpret your opinion, the test of the commissioners' power to issue bonds depends upon the maturity of the indebtedness.

"I am informed by the auditor that the total amount of overdrafts will be in the neighborhood of $100,000.00. While the payments by which these overdrafts were occasioned were made from the general balances in the treasury, there was at the time when such overdrafts were created in the treasury the sum of about $100,000.00 to the credit of the tax omission fund and delinquent personal tax fund. Both of these funds should now be distributed to the taxing districts entitled to receive same, and if it could be considered that the overdrafts above mentioned were paid entirely out of these two funds, we would have a matured indebtedness in the full amount of the overdrafts, and bonds could therefore be issued by the county commissioners to raise funds to meet such indebtedness. I should like to have your opinion upon this matter."

You have correctly interpreted that portion of my prior opinion to your department, to which you refer. Section 5656, General Code, which I quoted in that opinion, does not contain language like that found in Section 3916, the corresponding provision with respect to the power of a municipal council. That language, found in Section 3916, and omitted from Section 5656, is,

"* * * or when it appears to the council for the best interest of the corporation."

Sections like Section 5656 must be given a strict construction, and as I see it, there is no escape from the conclusion that the power of the commissioners under that section does not exist until the debt has matured.

When I first considered the question submitted in the second paragraph of your letter, I was of the opinion that the procedure outlined by you would be proper. On more mature consideration, however, I have reached the opposite conclusion. As I understand the facts, there was an actual cash balance in the treasury of the county, as of the 1st of March and prior to the semi-annual distribution in amount considerably less than $100,000.00. The amounts required to be distributed to the several taxing districts from the tax omission fund and the delinquent personal tax fund are now due and payable, and in the aggregate they exceed the sum of money in the treasury as aforesaid. I understand that your question is as to whether or not the total amount of the county's obligation to the several taxing districts can now be funded, leaving the tax balance, not needed for any other purpose, available for the payment of obligations not now due. In other words, the query is as to whether the entire overdrafts may be considered as being in the tax omission fund and the delinquent personal tax fund, notwithstanding the fact that there is now money in the treasury which could be distributed to those entitled to participate in these funds.

As I have already suggested, my ultimate conclusion has been in the negative on this question. The general treasury balance is unidentified as to funds—that is to say, it is merely money, and belongs to no specified fund excepting that it is separated into moneys received from the 1911 levy and those received prior thereto. Stated more accurately I should perhaps say that this general balance might belong to any one or more of several different funds. That being the case I am of the opinion that the treasurer and the auditor have no authority to appropriate such money to any particular fund or funds. The money lies in the depository, subject to the check of the treasurer. The treasurer must issue the check upon the

warrant of the auditor, drawn on any one of these funds, so long as there is money in the depository to the credit of the checking account, in excess of the proceeds of the 1911 levy and the appropriation made or to be made as of March 1st.

As the different obligations of the county becomes due then, it is the duty of the auditor to issue his warrant thereon, and the duty of the treasurer to honor such warrants, so long as he has money for that purpose. That being the case, it follows that it is now the duty of the auditor, in the course of the distribution of these two funds already mentioned, to issue warrants against the treasury; and it is the duty of the treasurer to honor such warrants as they are issued. The duty of the auditor and that of the treasurer, of course, ceases when the general balance in the treasury in the credit of funds therein prior to March 1st or the semi-annual distribution becomes exhausted. Until that time, however, these two duties exist, irrespective of the fund on which a particular warrant is to be drawn. Stated succinctly, it is a case of "first come, first served."

I am, therefore, of the opinion that it is the duty of the auditor to issue distribution warrants, and of the treasurer to pay such warrants, until the moneys in the old general balance are exhausted. Then the commissioners may borrow money or issue bonds for the purpose of providing funds wherewith to complete the distribution. Then the other obligations of the county must be met in like manner as they mature.

The course suggested in my former opinion, that is, the issuance of notes of the county, and their retirement out of the proceeds of bonds duly advertised and sold, would seem to obviate any practical difficulties that might be encountered.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

201.

BOARD OF EDUCATION—BOND ISSUE FOR IMPROVEMENT OF SCHOOL BUILDING—VOTE OF ELECTORS—PROCEDURE UNDER 7629 IMPOSSIBLE AFTER PROCEDURE UNDER 7625.

The board of education submitted to the electors the question of a bond issue, the amount of which, in addition to the amount certified to the auditor, would prove sufficient to improve a certain school building in accordance with an order of the inspector of workshops and factories, but by reason of the reduction of the estimate by the budget commission, the board was unable to proceed with the improvement.

In order to supply the deficiency, the board twice submitted the issue of bonds to the electors, under Section 7625 and received a negative vote in each instance. Held:

That action once having been taken under Section 7625, General Code, recourse could not be had to Section 7629, General Code, for the same purpose, and that the board was without remedy.

COLUMBUS, OHIO, February 29, 1912.

HON. N. CRAIG MCBRIDE, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 24th, enclosing a letter addressed to you by the president of the village board of education

in your county, and requesting my opinion upon the facts therein stated. The facts which give rise to this question are as follows, as disclosed by the letter of the president:

> "Before the Smith one per cent. law went into effect the board of education certified a levy at a rate in excess of the rate authorized by that law to the county auditor; at or about the same time the said board, proceeding under Section 7625, General Code, submitted to the electors of the district the question of issuing bonds for an amount which, together with the proceeds of the local levy as made, was estimated to be sufficient to provide for the improvement of a certain school building which has been ordered improved by the inspector of workshops and factories; the proposed bond issue was approved by the electors.
>
> "The enactment of the Smith law had the effect of reducing the amount of money available as the fruits of taxation to the board of education; in consequence of this state of affairs the total amount at the command of the board for the purpose of making the needed improvements is quite insufficient therefor. In order to supply the deficiency, the board of education has twice submitted the issue of bonds to the electors under Section 7625 since October, 1911, when it became apparent that there would be a deficiency, but on both occasions the result of the referendum has been unfavorable."

The question thus presented is as to whether there is any way in which money can be raised to supply the deficiency thus created.

In my previous opinion of October 3rd, addressed to you I advised you that no emergency tax levy could be made for this purpose under the Smith law. Not at that time having accurate knowledge of the fact I advised recourse to Section 7629, General Code. I am of the opinion, however, that this section is not available. Section 7625, General Code provides as follows:

> "When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a school house or houses, to complete a partially built school house, to enlarge, repair or furnish a school house, or to do any or all of such things, that the funds at its disposal *or that can be raised under the provisions of Sections seventy-six hundred and twenty-nine, and seventy-six hundred and thirty, are not sufficient to* accomplish the purpose and that a bond issue is necessary, the board shall make an estimate of the probable amount of money required for such purpose or purposes and at a general election or special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

It thus appears that the procedure under Section 7625 cannot be followed unless that authorized by Section 7629 is not productive of enough revenue to accomplish the purpose for which the bonds are to be issued. Although the question is not free from doubt I am of the opinion that after action has once been taken under Section 7625 action under Section 7629 cannot thereafter be taken for the same purpose. Putting it in another way when a board of education has sought and received the approval of the electors upon an issue of bonds for the purpose of improving or constructing school property it cannot thereafter issue other

bonds without the approval of the electors for the same purpose. The case of this board of education is a hard one as it results from failure to anticipate the action of the general assembly and not from failure to comply with the law or to exercise reasonable care in administering the fiscal affairs of the district. However, I do not see that it differs from what it would have been if the electors had refused to approve a larger bond issue if originally asked for. There are, or course, instances under the existing statutes in which the orders of the chief inspector of workshops and factories cannot be enforced unless the electors of the school district consent to borrowing money sufficient to carry them out. The people have expressed their judgment as to the amount of money they desire to borrow for the purpose of making the improvement in a very decisive manner. In my judgment the officers concerned, both state and district, will have to conform their arrangments to the popular verdict.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

203.

CITY SOLICITOR—TERM OF OFFICE UNTIL SUCCESSOR "ELECTED" AND QUALIFIED—POWERS OF APPOINTMENT BY MAYOR.

As a general proposition of law, a person who, under statute, holds until his successor is elected and qualified, does not lose his office by the mere failure of a successor to qualify. Furthermore, as the statute providing for the city solicitor expressly stipulates for the holding of the office until his successor is "elected" and qualified, a vacancy will not be created in that office by the failure of an elected official to qualify and a successor "appointed," but the incumbent will hold over until an "elected" successor has qualified.

COLUMBUS, OHIO, March 14, 1912.

HON. CHARLES F. RIBBLE, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 9th, submitting for my opinion thereon the following facts:

> "In November, 1909, 'T' was elected city solicitor of the city of Zanesville; on January 1, 1910, he assumed the duties of the office, having duly qualified therefor. In November, 1911, 'L' was elected city solicitor for the city of Zanesville for the term of two years beginning January 1, 1912. 'L' received notice, both from the auditor and from the board of state supervisors of elections, of the result of the election, but without filing bond or taking the oath of office within ten days from and after the receipt of either of these notices, died.
>
> "'T' claims the right to continue in office during the entire term for which 'L' was elected. It is asserted, on the other hand, that the council, under Section 4242, General Code, has power to declare the office vacant."

Upon the facts as you state them, the following questions of law arise:

1. Is there now a vacancy in the office of city solicitor of Zanesville?

2. Has council now the authority to declare a vacancy in the office of city solicitor?

3. If the death of "L" under the circumstances mentioned created a vacancy or authorized council to create a vacancy, how may that vacancy be filled?

The following sections of the General Code must be considered in answering these questions:

> "Section 7. A person elected or appointed to an office who is required by law to give bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law.
>
> "Section 8. A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws.
>
> "Section 4303. The solicitor shall be elected for a term of two years, commencing on the first Monday of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the city."
>
> "Section 4242. The council may declare vacant the office of any person elected or appointed to an office who fails to take the required official oath or to give any bond required of him, within ten days after he has been notified of his appointment or election, or obligation to give a new or additional bond, as the case may be."
>
> "Section 4252. In the case of death, resignation, removal or disability of any officer or director in any department of a city, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed."

Sections 7 and 8 of the General Code, above quoted, do not, in my opinion, apply to municipal officers; at least, they do not apply to the case of the city solicitor, which is specifically provided for by the other sections above quoted. Inasmuch, however, as there have been decisions under Sections 7 and 8 of the General Code, or rather under the sections of the Revised Statutes corresponding to them, and under similar sections of the law, I have deemed it best to set these sections forth in full.

My attention is called to certain decisions under statutes similar to those above quoted, and under Sections 7 and 8, General Code, and their predecessor sections of the Revised Statutes. The following are examples of such decisions:

In State vs. Hopkins, 10 O. S. 509, the action was in quo warranto, on relation of one appointed to fill a vacancy in the office of county treasurer, against the prior incumbent who insisted on holding over. The vacancy to which relator had been appointed was occasioned by the death of the person elected as the successor of the defendant, which person had died before qualifying in the manner prescribed by law. For the sake of clearness, I quote the entire opinion on page 511 of the report:

> "By the Court. The county commissioners are expressly authorized by statute to appoint a county treasurer, whenever that office shall become

vacant 'by death, resignation, removal, neglect to give bond, or from any other cause.' Swan's Stat. 1017. It is further provided by statute (56 Ohio L. 105), that if the treasurer elect 'shall fail to give bond and take the oath of office, as prescribed by law, on or before the first Monday of September next his election, the office shall become vacant and shall be filled as provided by law.'

"By reason of the death of Matthias Rapp, prior to the commencement of the term for which he had been elected, there was no person on the first Monday of September, 1860, entitled to take and hold the office during the regular statutory term commencing on that day. And this want of a regular incumbent for the term occasioned by the death of a party who would otherwise have been such, constitutes, as we think, a vacancy occasioned by death, within the meaning of the statute. And were it necessary, we should hold that, under the statute last cited, the office became vacant upon the failure of Rapp to give bond and take the oath of office. True, this failure was caused by the act of God, and not by the laches of the party, but its effect upon the office is the same, whatever may have been its cause.

"This construction makes the legislative intent accord with the constitutional policy by which no person is 'eligible to the office of county treasurer for more than four years in any period of six years.' The demurrer to defendant's answer must be sustained and judgment of ouster entered against him."

I call attention to the following facts in connection with this decision: In the first place the statute under which the relator was appointed authorized the commissioners to appoint a county treasurer whenever the office should become vacant by death, etc. In that particular that case was different from that under consideration here. A mayor's power of appointment under Section 4252, General Code, seems to be restricted to vacancies arising from the death, resignation, removal, or disability of an officer. In other words, there seems to be no authority to appoint, even when a vacancy is occasioned by council's declaration of its existence, or in the case of the death of one who is merely an officer-elect. In the second place, the court in this case might have based its decision on the ground that the incumbent who was attempting to hold over had already served four consecutive years and was precluded by the constitution from continuing in office longer. The importance of this fact will become apparant on consideration of a decision in State ex rel. vs. Metcalfe, 80 O. S., 244.

In State vs. Poorman, 61 O. S., 506, the action was in mandamus to compel the county commissioners to approve the bond of one elected to the office of sheriff who had failed to file his bond within the time limited by law. No question bearing upon the issues involved in the query presented by you was considered or determined by that case.

In Davies vs. State 11 C. C., n. s., 209, the question was as to the title to office of one who had failed to qualify within the time limited by statute. No question as to the right of the prior incumbent to hold over was presented or considered by the court, which, in an elaborate opinion, discusses the effect of provisions like those of Section 7, General Code, without taking into account the various provisions like those incorporated in Section 8, General Code.

As I see it, the precise question suggested—as to the joint meaning of provisions like those incorporated in Sections 7 and 8, and in Sections 4242 and 4303, General Code—has been passed upon but once by the supreme court of Ohio, and that was in a case containing peculiar features which might distinguish it from that made by the fact upon which your question is based. I refer to the case of

State ex rel. vs. Metcalfe, already cited. The second branch of the syllabus of that case lays down a proposition of law which can be made applicable to the facts that you submit. It is as follows:

> "The death of a person elected to an office before he qualified does not create a vacancy where the constitution provides that an incumbent in an office shall hold for his term and until the election and qualification of a successor."

As I see it, this proposition of law, if of universal application, is applicable to the facts which you state. That is to say, the mere fact that the provision as to holding over until the qualification of a successor, relied upon in the Metcalfe case, was a constitutional one does not make the case different from what it would have been had it been a statutory provision of the same character. A sufficient reason for so holding appears in the fact that statutes like Section 8 of the General Code are based upon well-understood principles of public policy. These principles are discussed in the opinion of State vs. Metcalfe and in Mechem on Public Officers. In other words, it is the policy of the law that there shall not be a vacancy in an office so long as there is someone to take the office, and even where statutes do not provide that officers shall continue in office until their successors are elected and qualified, it is sometimes held that they have the right to do so. For this reason, then, Section 4303 is of controlling importance, as against any statute or statutes respecting the existence of a vacancy in the office of city solicitor.

But it is not necessary to rely upon State vs. Metcalfe or upon the general principle last above referred to, in order to reach the conclusion that, on the facts you submit, there is neither a vacancy in the office of city solicitor, nor can council declare a vacancy to exist. Having regard to the exact language of the above quoted sections of the General Code, it appears that it is the solicitor's right to serve for a term of two years and "until his successor is *elected* and qualified." It is clearly the intention of this section that the solicitor, an elective officer, shall only, except in case of death, resignation, and the like, be displaced by a person who has himself received the vote of the electors. Such provisions are not to be regarded as merely accidental and full weight will be given to every word therein. (People vs. Lord 9th Mich., 227) cited in Mechem on Public Officers, Section 402.

I am, therefore, clearly of the opinion that so long as "T," the incumbent in the office of the city solicitor of Zanesville, continues willing and physically able to discharge the duties of that office, and remains qualified therefor, he cannot be supplanted therein, save by another person who has been *elected* to the office of city solicitor.

That being the case, I am of the opinion that this particular provision is sufficient to take the case out of the operation of general statutes like Section 4242. It is a well-understood rule, of course, that where a particular statute is inconsistent with a general one, it will be regarded as an exception to the latter. So I believe the law to be, that while Section 4242 prescribes a rule of action with respect to municipal officers generally, it does not apply to the case of a city solicitor, when the prior incumbent, by holding over, could make impossible the occurrence of an actual vacancy, as distinguished from the vacancy which might exist by decree of council.

Still another reason for the holding which I have suggested is found in the peculiar language of Section 4252 of the General Code, upon which I have already commented. Closely examining this section it appears that even if council might declare a vacancy in the office of city solicitor under the circumstances detailed in your question, there would be no authority for any officer to appoint to fill this vacancy. Accordingly, under Section 4303, even if that section be not construed

as aforesaid, the incumbent would have the right to hold over, so as not to interrupt the public business and to offend against the rule of public policy above referred to.

In passing, I might be permitted to remark, that the case of State ex rel. vs. Hopkins is discussed and the true meaning of the decision therein pointed out on page 270 of the opinion in the case of State ex rel. vs. Metcalfe, supra. Other decisions are referred to in that opinion all of which might be examined with profit in connection with your question. I forbear, however, for the sake of brevity from quoting them or even citing them here. The plain meaning of the language used in the statutes under consideration renders more exhaustive treatment of the subject unnecessary.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

204.

BOARD OF EDUCATION—TRANSFER OF FUNDS—TUITION FUND TO BUILDING FUND—POWERS OF BOARD AND COMMON PLEAS COURT.

As the tuition fund is in the nature of a trust fund, for the benefit of each individual youth in the state, transfers from said fund, in the treasury of a school district to a building fund cannot be made except under provision and conditions provided for in Section 5655 General Code for the purpose of reducing tax levy estimates at the annual meeting of the board.

The common pleas court has powers, under Sections 2296-2302, General Code, to permit transfers "when no injury will result therefrom" but in view of the peculiar nature of the tuition fund, such action would be a rare possibility.

COLUMBUS, OHIO, February 23, 1912.

HON. I. H. BLYTHE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 1st, requesting my opinion upon the following questions:

> "Under Sections 5654 and 5655, G. C., can the board of education of a township school district, at any time, transfer $842.00, or any other sum, from the tuition fund in the treasury of the school district to the building fund, and use it for building a school house in one of the sub-districts of said school district, when, if said money is transferred there will not be enough money in the tuition fund to pay the teachers for the following eight months of school year?
>
> "Also, could the above sum be transferred if no part of the $842.00 was a surplus of the proceeds of a special tax or the proceeds of a loan for a special purpose; but all of said money so transferred came from the usual sources from which the tuition fund is derived?"

I also acknowledge receipt of your letter of February 17th, enclosing memorandum prepared by you, setting forth your views on the questions you have submitted.

The following sections of the General Code are applicable to the solution of your questions:

> "Section 5654. When there is in the treasury of any city, village, county, township or school district, a surplus of the proceeds of a special tax, or of the proceeds of a loan for a special purpose, which is not needed for the purpose for which the tax was levied, or the loan made, it may be transferred to the general fund by an order of the proper authorities entered on their minutes."

This section, under the facts you state, cannot authorize the transfer of which you speak. The sections which I will hereinafter cite will show that the tuition fund cannot considered as the proceeds of a special tax; certainly it is not the proceeds of a loan for a special purpose:

> "Section 5655. When there is in the treasury of such civil division, as provided in the next preceding section, at the annual meeting or meetings otherwise provided by law at which the annual tax levy is to be considered and adopted, a surplus not exceeding one thousand dollars in any one established fund or division of the funds, which is not needed for the purpose for which the fund was created, the money appropriated, or the tax levied, before such annual tax levy is made, it may be considered as unappropriated and may be re-apportioned and transferred, by an order as is provided in such section, to another existing fund for which a tax is to be or would otherwise be levied. The sum which it would be necessary to raise by taxation for any purpose, if no such re-apportionment was made, shall thereupon be reduced to the extent of the transfer thus made. This section shall not authorize such re-apportionments or any transfer of funds at any other time than the meeting aforesaid to determine the tax levy nor authorize transfers at any one such meeting of over three thousand dollars in the aggregate, nor that the amount which may be lawfully raised by taxation for any purpose may be increased by such transfer."

This section, in my opinion, constitutes sufficient authority for a transfer for any surplus in the tuition fund, made at the annual meeting fixed by law at the time for consideration and determination of the annual tax rate. A transfer cannot be made at any other time, and then only when the money to be transferred positively is not needed for the purpose for which it was levied. Under your statement of facts it is perhaps unnecessary to determine whether the sections now under consideration would ever authorize a transfer of a part of a tuition fund or not; it being true, as you state, that the transfer desired to be made by the board of education you mention will result in depleting the tuition fund to a point at which it would be insufficient to pay teachers for eight months of school as required by law, this fact is alone sufficient to support the conclusion that transfers may not be made under authority of this section; also it does not appear in your letter that the proposed transfer is to be made at the annual meeting.

> "Constitution—Article VI, Section II: The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state, * * *."

In pursuance of this section of the constitution, the following legislation has been enacted:

"Section 7575, (General Code, as amended 102 O. L., 266). For the purpose of affording the advantages of a free education to all the youth of the state, there shall be levied annually a tax of three hundred and thirty-five thousandths of one mill on the grand list of the taxable property of the state, to be collected as are the other taxes and the proceeds of which shall constitute 'the state common school fund,' * * *.

"Section 7582. The auditor of state shall apportion the state common school fund to the several counties of the state semi-annually, upon the basis of the enumeration of youth therein, as shown by the latest abstract of enumeration transmitted to him by the state commissioner of common schools. * * *

"Section 7586. Each board of education, annually, at a regular or special meeting held between the third Monday in April and the first Monday in June, shall fix the rate of taxation necessary to be levied for all school purposes, after the state funds are exhausted.

"Section 7587. Such levy shall be divided by the board of education into four funds: First, tuition fund; second, building fund; third, contingent fund; fourth, bonds, interest and sinking fund. A separate levy must be made for each fund."

"Section 7595. No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not sufficient money to pay its teachers forty dollars per month for eight months of the year, after the board of education of such district has made the maximum legal school levy, three-fourths of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up for the deficienoy.

"Section 7600. After each annual settlement with the county treasurer, each county auditor shall immediately apportion the school funds for his county. The state common school fund must be apportioned in proportion to the enumeration of youth in each of the several school districts within the county, except if an enumeration of the youth of any district has not been taken and returned for any year, such district shall not be entitled to receive any portion of such fund. The local school tax collected from the several districts must be paid to the districts from which it was collected. Money received from the state on account of interest on the common school fund shall be apportioned to the school districts and parts of districts within the terriory designated by the auditor of state as entitled thereto, in proportion to the enumeration of youth therein. *All other money in the county treasury for the support of common schools, not otherwise appropriated by law shall be apportioned annually in the same manner as the state common school fund.*

"Section 7603. The certificate of apportionment furnished by the county auditor to the treasurer and clerk of each school district must exhibit the amount of money received by each district from the state, the amount received from any special tax levy made for a particular purpose, and the amount received from local taxation of a general nature. *The amount received from the state common school fund and the common school fund shall be designated the 'tuition fund' and be appropriated only for the payment of superintendents and teachers.*

> Funds received from special levies must be designated in accordance with the purpose for which the special levy was made and be paid out only for such purpose, *except that, when a balance remains in such fund after all expenses incident to the purpose for which it was raised have been paid, such balance will become a part of the contingent fund and the board of education shall make such transfer by resolution. Funds received from the local levy for general purposes must be designated so as to correspond to the particular purpose for which the levy was made.* Moneys coming from sources not enumerated herein shall be placed in the contingent fund."

The section last above quoted tends to throw some doubt on the powers to transfer from the tuition fund to the contingent fund even under Section 5655, General Code, above quoted and the conditions therein stated. However, as I have already indicated, this question is not of importance here.

> "Section 7644. Each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof. Every elementary school so established shall continue not less than thirty-two nor more than forty weeks in each school year. All the elementary schools within the same school district shall be so continued."

The liberal quotations of statute which I have made, makes it unnecessary, I think, for me elaborately to discuss the questions submitted by you. On the face of these statutes, it is, I think, apparent that the tuition fund is in the nature of a trust fund, the purpose of which is to afford to each individual youth of school age in the state the benefits of a common school education which consists of approximately eight months of school. One of the elements of this equality of opportunity so guaranteed is that competent teachers, adequately compensated, shall be employed during the period of eight months.

There is no authority on the part of the board to transfer the tuition fund, save under Section 5655, General Code, and the condition therein enumerated. The common pleas court has authority under Sections 2296 to 2302, inclusive, General Code, to transfer funds "when no injury will result therefrom." In view of the peculiar nature of the tuition fund, I question whether the common pleas court would exercise its authority under these sections to transfer from that fund.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

214.

PROSECUTING ATTORNEY—POWER TO HIRE AND PAY CLERICAL ASSISTANT—FUND FOR EXPENSES IN "OFFICIAL DUTIES" AND "FURTHERANCE OF JUSTICE."

When no allowance has been made for a county detective under provision of Section 1541, *General Code, and no allowance made for assistants, clerks and stenographers under Sections* 2914 *and* 2915, *General Code, a prosecuting attorney may hire and pay a man to give assistance in looking up testimony, finding witnesses, etc., and have the expense thereby incurred, paid upon his order, out of the fund provided in Section* 3004, *General Code, for expenses incurred by him "in the performance of his official duties and in the furtherance of justice."*

COLUMBUS, OHIO, March 21, 1912.

HON. PHIL B. SMYTHE, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I am in receipt of your inquiry of March 15th, which is as follows:

> "Licking county has no county detective; the prosecuting attorney has no assistant, clerk or stenographer.
>
> "The county has a large criminal docket, as large as some of the larger counties of the state; it is necessary that the prosecuting attorney have some help in looking up testimony, finding witnesses, etc.
>
> "Can I, as prosecuting attorney, hire and pay a man to do this work out of the fund provided for in Section 3004, G. C. (102 O. L. p. 74)?"

Section 3004 of the General Code provides as follows:

> "There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by Section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.
>
> "Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him, received in his official capacity. Such bond with the approval of such court of of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.
>
> "The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands un-

expended, forthwith pay the same into the county treasury. Provided, that as to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

This section places a sum equal in amount to one-half of his salary at the disposal of the prosecuting attorney, to be expended by him, as will be noted by the language of the section, for "expenses incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for."

From your letter, there has been no provision made for a county detective, which could properly be made under Section 1541, General Code (97 O. L. 308), and no allowance for assistants, clerks or stenographers, which should be made under Section 2914 and Section 2915, General Code. It seems to me that whatever expenses may be necessarily incurred by you, for the payment of services necessary in the performance of your official duties or in the furtherance of justice, should be paid out of the fund provided by Section 3004. As stated before, this fund is placed entirely at your disposal and is to be paid out upon your order, and you are to account for the same on or before the first Monday of January in each year, as provided by said section.

Before anything can be paid under this section, of course, it is necessary that you give the bond provided by the section.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

215.

TRANSFER OF FUNDS—UNEXPENDED BALANCE IN POOR FUND CONSISTING OF PROCEEDS OF TAX UPON TRAFFIC IN INTOXICATING LIQUORS MAY BE TRANSFERRED TO ANY OTHER FUND OF COUNTY.

COLUMBUS, OHIO, March 19, 1912.

HON. JOHN G. ROMER, *Prosecuting Attorney, Celina, Ohio.*

MY DEAR SIR:—On looking over the files of opinions in this office recently rendered, I find one to you in which I expressed the opinion generally that an unexpended balance in the poor fund of the county might not be transferred to a building fund. It occurs to me that I may have inadvertently misled you in this particular. If the unexpended balance in the poor fund consists, as I presume it does consist, of the proceeds of the tax upon the business of trafficking in intoxicating liquors, then such balance may, under authority of Section 5669 of the General Code, be transferred by the county commissioners to any other fund of the county.

I make this statement in the hope that it does not come too late to be of benefit to you, and for the purpose also of correcting my own records.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

218.

BOARD OF HEALTH IN VILLAGE—ORDINANCE RE-ESTABLISHING BOARD NOT NECESSARY UNDER THE CODE—CONFIRMATION BY COUNCIL OF APPOINTMENT BY MAYOR, VALID.

When council passed an ordinance in 1888 *establishing a board of health, under Section* 187, *Municipal Code, there was no necessity to re-establish said board upon the codification of the aforesaid section, and council's procedure since that date in confirming appointments made by the mayor to membership on that board in accordance with the law as it is embodied at the present time, in Section* 4404, *General Code, is correct and valid.*

COLUMBUS, OHIO, March 21, 1912.

HON. JOHN WOOLEY, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 20, 1912, in which you make the following statement:

> "I am submitting to you the following facts upon which I kindly request your official opinion as soon as convenient:
>
> "An ordinance was passed by the council of the village of Nelsonville, Athens county, Ohio, in the year 1888, which was in conformity to a law reported in 66 Ohio Laws. No ordinance creating a board of health has been passed since said date of 1888. From 1888 until 1904, the council appointed members of the board of health. From 1904 until the present time the mayor has appointed members of the board of health, which appointments have been confirmed by the council. But no ordinance establishing a board of health either as provided for in Section 4404, General Code of Ohio, or as provided for in Section 187 of an act passed April 25, 1904, 97 O. L. 460, has been passed by council."

You desire my opinion as to whether in view of the facts as stated above it is necessary for council to now establish, or re-establish a board of health.

The portion of Section 187 of the Municipal Code to which you refer, which is pertinent to your inquiry, is as follows:

> "The council of each city and village shall establish a board of health; such board shall be composed of five members to be appointed by the mayor and confirmed by the council who shall serve without compensation and a majority of whom shall constitute a quorum; provided, that whenever the council of any city shall declare by ordinance that it will be for the best interests of said city that has board of public service act as a board of health for the city, then upon the passage of said ordinance the board of public service of said city shall be the duly authorized board of health thereof and shall have all the powers and perform all the duties prescribed by law for boards of health; and the mayor shall be the president by virtue of his office. * * *"

This section of the Municipal code, 97 O. L. 460 (Sec. 1536-723 R. S.) was expressly repealed by Section 13767 of the General Code, (see page 2933, Vol. 3 of the official edition of the General Code) and was codified and re-enacted as Sections 4404 and 4405 of the General Code.

Said Section 4404 is as follows, and as far as the question raised by you is concerned, is the same as said Section 187:

> "The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

From this section it appears that the board of health to which you refer, having been appointed by the mayor and confirmed by council, had been duly appointed as required by law, and the only question, therefore, is whether, after the passage of Section 4404 of the General Code it was necessary for the council of this municipality to pass an ordinance establishing a board of health. You state in your letter that an ordinance was passed by the council of said city in the year 1888 which was in conformity to the act found in 66 O. L., page 200, being Section 303, etc., of the Municipal Code passed in 1868. The first section of this act providing for the board of health (Section 303), 66 O. L. 200 is as follows.

> "Whenever the council of any city or incorporated village shall establish a board of health, such board shall be composed of the mayor, who shall be president by virtue of his office, and six members, to be appointed by the council, who shall serve without compensation, and a majority of whom shall be a quorum."

The language of this original act is very similar to the language now found in Section 4404, and from your letter the board of health has thus been established in said city as provided for by law, and having been so established, and being in existence at the time of the passage of Section 4404, it seems to me that no further ordinance was necessary. In other words, that in cities or villages where boards of health had been established in conformity to law it would be unnecessary to again establish such boards by ordinance. Really the only change in this respect was as to the manner of appointment of the members, and from your letter these appointments have been made in conformity to the law as it now stands, and as it stood when the appointments were made.

In the case cited by you, Smith vs. Lynch, Treas., 29 O. S. 261, Judge Welch in speaking of the act under which the board of health to which you refer was established, says:

> "The statute (66 Ohio L. 200) creates the office. It authorizes the council to 'establish' the board, and to fill it by appointment. True, until the council act in the premises, it is a mere potentiality in their hands, yet it is none the less an office, known to the law, and provided for by law. Where council assumed to establish the board under the law, and to appoint its members there is no good reason why an irregularity or illegality in the act of establishing the office, any more than an irregularity or illegality in the appointment of the officers, should be held as rendering the acts of the officers void, and themselves mere tres-

passers. The reasons—the considerations of public policy—which exist in one case exist equally in the other. It is enough that the office is one provided for by law, and that the parties have the color of appointment, assume to be and act as such officers, and that they are accepted and acknowledged by the public as such to the exclusion of all others. Such was the case here. There was both the color and the fact of office."

As stated above, the members of this board of health have undoubtedly been appointed as provided by law. The office to which they were appointed is one provided for by law, and the board of health has been established in this city since 1888 and has been in continuous existence, and the law providing for its establishment has always been in continuous existence for when one law was repealed another immediately went into effect.

It is my opinion, therefore, that the appointments are legal; that as this board is already in existence and has been since its first establishment, it is unnecessary to pass an ordinance re-establishing it.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General

219.

BOARD OF EDUCATION—POWER TO SUSPEND PUPILS FOR HANGING TEACHERS IN EFFIGY AND TO LIFT SUSPENSION UPON SIGNING OF AN APOLOGY.

By virtue of Section 4750, *General Code, the board of education may pass rules and regulations for the government of its pupils, and the right of the board to suspend pupils for violation of such rules, subject to the restrictions of Section* 7685, *General Code.*

When, therefore, a pupil has partaken in a proceeding in which a teacher was hung in effigy, the board may suspend such pupil by a two-thirds vote, for a reasonable time not exceeding the limit of the current school year, after permitting the parent or guardian of the offender to be heard.

The board may further offer to lift said suspension upon the signing of an apology by the culprit.

The board has no control over other than pupils or employes.

COLUMBUS, OHIO, March 30, 1912.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Your favor of March 13, 1912, is received, in which you state as follows:

"Mr. E. R. Stilson, who will present this letter to you, is the president of the board of education for the New London village district. I am enclosing herewith carbon copy of a letter received by me from the board of education of this district, the same having been presented to me by Mr. Stilson and the clerk of the board, Mr. Runyan.

"I am desirous of having your opinion upon it, and I desire herewith to give you, very briefly, my opinion, which I propose to send to the board."

From the letter of Mr. Stilson enclosed it appears that on or about February 28, 1912, one of the lady teachers of the high school had some difficulty with one of the pupils, whereupon the pupil was sent to the superintendent, the pupil then leaving school. On the night of February 28th, an effigy was hung from the flag staff on the high school premises, representing a woman, with a placard attached bearing the last name of the teacher in question. Some of the young men who hung the effigy admit that it was intended to refer to such teacher. The effigy was hung by pupils of the school, the pupil with whom the first difficulty was had, and some former graduates of the high school.

The board proposes as follows:

"Every member of the board is absolutely in accord with the plan to be followed, which is: that all participants, whether now pupils of the school or not, should be required to sign the apology hereto attached; that the same be read, together with the signatures, in the presence of the high school, the teachers and the board; that any who are now pupils and who refuse to do this, shall be suspended from attendance at school for a reasonable period.

"While the board has not taken action to determine the length of suspension, it is suggested that one month be the time limit and that, at the expiration of said month, such suspended pupil shall be allowed to presume his attendance, provided he has made up said month's school work to the satisfaction of the superintendent."

The board then submits the following inquiries for answer:

"First. Could any valid objection be raised against asking the participants to sign the attached apology. Would it incriminate them or render them liable in any way to an extent greater than their participation in the matter has already subjected them?"

"Second. Should there be any objection to its present form, how should it be revised?

"Third. In the event of any participating pupil refusing to comply with the board's order in this matter, as set forth above, have we a right to suspend him from school?

"Fourth. Having such a right of suspension, would we have the right to order his suspension for the entire two months' term of school (April and May term) provided it did not cover or embrace any part of any other school term?

"Fifth. Could we suspend for the entire April and May term of school, if it would thereby prevent a senior pupil from graduation?

"Sixth. What would be deemed a reasonable term of suspension?

"Seventh. If a temporary injunction were secured, restraining the board from carrying out an order of suspension until the case could be heard on its merits, and we were unable to get the case to trial until after the close of the year, could we prevent the graduation of a pupil involved? Also what would be our right against a pupil now a junior, during the next school year, after the final hearing, if we were successful in the injunction case?

"Eighth. What are our rights in the case of a participant who was not a pupil at the time the act was committed?"

Section 4750, General Code, grants to boards of education power to control the schools, teachers and pupils, as follows:

"The board of education shall make such rules and regulations as it deems necessary for its government and the government of its employes and the pupils of the schools. No meeting of a board of education, not provided for by its rules or by law, shall be legal, unless all the members thereof have been notified, as provided in the next section."

Section 7685, General Code, provides for the suspension or expulsion of pupils, as follows:

"No pupil shall be suspended from school by a superintendent or teacher except for such time as is necessary to convene the board of education, nor shall one be expelled except by a vote of two-thirds of such board, and after the parent or guardian of the offending pupil has been notified of the proposed expulsion, and permitted to be heard against it. No pupil shall be suspended or expelled from any school beyond the current term thereof."

The right of a board of education to suspend a pupil for just cause has been recognized by the courts.

The first and third syllabi in case of Brown vs. Cleveland board of education, 8 Ohio Dec. 378, read:

"The law has invested school authorities with the conduct of the schools and the making of rules and regulations for their proper government and management. In the exercise of these powers school boards are vested with wide discretion, and courts will not interfere except in case of plain abuse thereof.

"Such schools are, therefore, within the provisions of Section 4014, Rev. Stat. (7685 General Code), which provides for suspending and expelling pupils, and an expulsion is illegal unless made in the manner and for the reasons prescribed by said section."

In case of Sewell vs. Board of Education, 29 Ohio St. 89, the first and second syllabi read:

"Boards of education are authorized by law to adopt and enforce necessary rules and regulations for the government of the schools under their management and control.

"Where instruction in rhetoric was given in any grade or department of such schools, and one of the rules adopted by the board for the government of the pupils therein provided that if any pupil should fail to be prepared with a rhetorical exercise, at the time appointed therefor, he or she should, unless excused on account of sickness or other reasonable cause, be immediately suspended from such department: Held, that such rule was reasonable."

The management and control of the schools is placed in the hands of the board of education. This control will not be interfered with by the courts unless the rules adopted by it are unreasonable and are a plain abuse of the discretion placed in its hands. One of the essential features of a well regulated school, is the maintenance of proper discipline. An act of a pupil of a school, by which he participates in hanging a teacher thereof in effigy, if permitted to go unpunished, would be violative of all just rules of discipline. Even though the teacher may

be in the wrong, the hanging of the teacher in effigy should not go unpunished.

The act of the pupils in question was unwarranted. If the board were to permit such acts to pass unnoticed it would tend to undermine all discipline and control of the pupils, and the usefulness of the school would probably be at an end.

The board of education has demanded that each pupil who participated in the act, shall sign an apology to be read in school, or that such pupil be suspended from school such time as the board shall determine. When one performs a wrongful act by which another is injured, it is commendable in that person to acknowledge his error and to apologize and repair as far as possible the wrong done. Such an apology is often a real test of character.

In case the pupil refuses to apologize the board may suspend such pupil from school. In making such suspension the board must act in accordance with the provisions of Section 7685, General Code, supra. Such suspension shall be so long as the board of education shall conclude from all the circumstances to be reasonable, but shall not extend beyond the current school year.

What is a reasonable suspension must be determined from all the circumstances and is left to the discretion of the board of education. Such suspension may be for a definite period, or for the balance of the school year, if the circumstances warrant such suspension. In my judgment, a suspension for the remainder of this school year would not be an unreasonable suspension in this case, especially for the leaders in the affair. This, however, is left to the discretion of the board.

On behalf of the pupils it might be contended that the suspension should not be such as to prevent graduation, or a pupil's passage into the next higher grade. This is a matter to be determined by the board, after considering all the circumstances. If a pupil is prevented from graduating or from passing to the next higher grade, by reason of his suspension, he cannot blame the board of education, but must look to himself for the cause. He should have considered this phase of the situation before he committed the act which caused his suspension.

It has been urged that the right of suspension interferes with the law requiring compulsory education. The compulsory education act does not apply to high school pupils. It applies to persons between the ages of eight and fourteen years, as provided by Section 7763, General Code, and to those between fourteen and sixteen years not engaged in any regular employment, as provided in Section 7764, General Code.

The board submits the following apology which it asks the pupils who participated in the affair, to sign:

> "We the undersigned pupils and others, hereby acknowledge our participation in the disreputable act of hanging an effigy to the flag staff of the school premises, the night of February 28, 1912. Said act was not intended by us to cast reflections upon the reputation or character of the teacher, and we hereby render our sincere apology to her.
>
> "We hereby agree as pupils that no further disorderly acts or infraction of discipline shall mark our connection with the schools under penalty of exclusion therefrom; or as outsiders, that we will not again trespass upon the school premises or in any manner disturb the institution under the extreme penalty of the laws of the commonwealth."

This apology is an admission that the person signing the same participated in the hanging of the effigy. It would not render the signers liable to any greater extent than their participation in the affair has already subjected them. However, the board could not compel any pupil to sign this apology. It may, however,

make the signing of such apology a reason for lifting any suspension of such pupil from the schools. There can be no valid objection to the apology as written.

The board further inquires in reference to the effect of a temporary restraining order. That situation will have to be met when it presents itself. No restraining order has been granted and probably none will be applied for. The board of education has power to suspend the offenders for such time as they deem reasonable, and should so act, regardless of any attempt or threat to restrain them by order of court.

The board of education has no authority over those who are not pupils of the school.

The foregoing, I believe, covers all the questions asked.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

223.

TAXES AND TAXATION—INHERITANCE TAX—BEQUEST TO METHODIST CHURCH WITH CARE OF BURYING GROUND A SUBORDINATE OBJECT—"INSTITUTION OF PUBLIC CHARITY"—"EXCLUSIVELY PUBLIC PURPOSES."

A bequest of $500.00 *to the Methodist church, the income thereof to be devoted for ten years to keeping up a cemetery and after that time the principle to be applied to rebuilding said church is not a bequest to an "institution in this state for purpose only of public charity"so as to be exempt from the inheritance tax within the meaning of Section* 5332, *General Code. Such bequest may, however, be classed as one for "exclusively public purposes" within the meaning of the same statute and upon this ground is exempted from the inheritance tax provisions.*

Assuming that the burying ground is public bearing in mind that burial grounds are expressly exempted by Article XII, Section XI of the Constitution, and considering the further fact that this purpose in the legacy aforesaid, is subordinate to its primary object, the clause providing for the ten year care of the cemetery should not defeat the exemption.

COLUMBUS, OHIO, March 14, 1912.

HON. ALLEN T. WILLIAMSON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—Replying to your letter of sometime since respecting the exemption of a certain legacy from the inheritance tax I beg, in the first place, to apologize for the delay which has ensued in answering the same. To the unusual pressure of business in this office, which is responsible for much delay in answering correspondence, must be added in this case, as a cause for my tardiness, the illness of counsel to whom the question was referred.

The specific question is as to the taxability under the inheritance tax law of the following legacy:

> "I give, devise and bequeath to the _____ Methodist church, of * * *, five hundred dollars ($500.00) to be expended as follows: The interest of said $500.00 for the first ten years after my death to be ap-

plied to repair and keep in condition the cemetery at _____; at the end of said ten years the principal of said sum to be applied in rebuilding said * * church * * *, or in repairing the same as it may be then or thereafter needed for said purpose."

The following exemptions are created under the collateral inheritance tax law:

"Section 5332, General Code. The provisions of the next preceding section shall not apply to property * * * embraced in a bequest, devise, transfer or conveyance * * * to or for the use of * * * public institutions of learning, or to or for the use of an institution in this state for purpose only of public charity or other exclusively public purposes. * * *"

Analyzing this language it appears at once that the institution which is the taker of the gift or devise need not be itself an "institution of purely public charity" as the phrase is used elsewhere in the taxation laws, and in the Constitution, Article 12, Section 2. It must be, however, an institution "in this state," and this was the point decided in Humphreys vs. State, 70 O. S. 67. The institutions concerned in that case, being various missionary branches of the General Assembly of the Presbyterian church in America, where more clearly institutions of a charitable nature than a local church society would be because the avowed purpose of each one of the societies was the dissemination of the Christian gospel among the needy and the ignorant. It was in connection with this phase of the work of these societies that Judge Price, delivering the opinion of the court, used the following language:

"It may be admitted that theirs are works of charity in the broad sense, that the up-lifting of men, women and children to the standard of life taught in the Scriptures is indeed a work of charity, the greatest of the three christian graces."

However, in the case of Watterson vs. Halliday, 77 O. S. 150 the question was as to whether or not the Roman Catholic church is an "institution of purely public charity" within the meaning of the statutes defining the exemptions from the general property tax. The following language is used in the opinion by Price, J.:

"Like the word 'exclusively' as used in preceding clauses of said Section 2732, the word purely expresses a kindred limitation, or rather exclusion, in that it means free from mixture or combination, and, as applied in the present connection, the charity must be unalloyed with other purposes and objects. But the Catholic church to which the parsonages or priests' houses belong, is not an institution of purely public charity. It teaches and practices charity; but that is not its whole mission in the world. Its character is defined by the third and fourth findings made by the circuit court. There it is said: 'The Roman Catholic church is an institution which has for its chief and primary object and purpose the teachings and extending of its recognized form of religious belief and worship in all parts of the world, and was founded to continue the work of Christ on earth, and to teach, govern, sanctify and save all men.

"'Charity is included in its teachings, purposes and practices, as subordinate to its spiritual teaching and purpose, but is an essential part of its general scheme of church work. * * *'

"So, it seems that, instead of the church to which the residence of the priest belongs being an 'institution of purely public charity,' it is

> a religious institution primarily, and its charity is subordinate to its spiritual teachings, and consequently the exemption claimed is not authorized by the sixth clause of the section."

Of course this language was used in another connection but the reasoning is clearly applicable to the statute under consideration. The word in Article 12, Section 2 and in the statutes enacted in pursuance thereof was "purely;" that in Section 5332, General Code, is "only" and the word "exclusively" is also used. I cannot discern any difference between the word "purely" on the one side and the words "only" and "exclusively" on the other.

So, again, while the statute under review in the Watterson vs. Halliday case, *supra,* determined the exemption by the nature of the institution to which the property belonged, and the statute in the case you present determines the exemption by the nature of the use to which the legacy is to be put, this distinction is also immaterial and the reasoning in Watterson vs. Halliday applies as well to the one case as to the other. The gist of the matter is this: A bequest to a church society for the general purposes of the society is not a bequest for charity only, because charity is but one phase of the work of the society. So it would follow that a bequest to a church for the purpose of repairing the church edifice is not one for a charitable purpose only because the edifice is not used for the distribution of public charity, but rather for the dissemination of religion—a purpose quite distinct from that of charity as clearly pointed out in Watterson vs. Halliday. Whether or not the subordinate purpose of the bequest, viz., the up-keep of a cemetery, presumably connected with the church is charitable would depend upon the manner in which the cemetery was conducted. If it were a public cemetery in which the indigent could be interred at the expense of the society maintaining it a bequest to it for general purposes would probably be a charitable one. This, however, seems to be a subordinate purpose of the specific bequest.

I am convinced, therefore that the bequest is not exempt as one "for purpose only of public charity." This raises the further question as to whether or not it is exempt as for the use of an instiution in this state for other exclusively public purposes. The peculiar language here used renders the question somewhat difficult. If, for example, the act had provided exemption for all institutions exempt under the general property tax law, as the laws of some of the other states provide, the answer would be easy. (See reference to New York and Connecticut statutes in Dos Passos on Inheritance Tax. Section 635, page 95.)

Unfortunately, however, the inheritance tax law in this particular uses an undefined term, namely, "exclusively public purposes." If a liberal construction could be given to this phrase, its lack of definition would not of itself afford special difficulties. Unfortunately again, however, all exceptions from taxation are looked upon with disfavor by the law, and the rule of strict construction is applied to them.

The exact question has not been adjudicated in Ohio, and the statutes of this state are so essentially different from those of other states, as already pointed out, that decisions from other jurisdictions are of no value. Upon careful consideration, however, I have arrived at the conclusion that the legacy mentioned in your letter is exempt from the inheritance tax. While a church building is not property belonging to an institution of purely public charity, it is a building used for a public purpose—namely, the public worship of God. I know of no Christian church which does not admit the public generally to its religious services, and I am advised that the church referred to in your letter does admit the public to its services. This being the case, the place where such services are held is a place maintained for a public purpose. Not being an institution conducted for profit to its members—that is for pecuniary profit, its purposes must be regarded as

exclusively public. It follows, upon this reasoning, that insofar as the bequest is one for the repair of the church building, it is one for "an exclusively public purpose."

As I have already stated, the public nature of the burying ground, referred to in the legacy, is perhaps a question of fact. It might be that the cemetery in question is wholly private, but if it is connected with a church, I should be inclined to suspect that this is not the case. Now, "burying grounds" are specifically exempted from general taxation under authority of Article XII, Section II of the Constitution, and the statutes passed thereunder. It seems that the framers of the Constitution of 1851 had regarded burying grounds as public institutions. While the matter is not clear in my mind, I am of the opinion for reasons just suggested, as well as because the purpose now under discussion seems to be subordinate to the principal purpose of the legacy, that the fact that the interest on the principal sum of the legacy is to be used for a time in the up-keep of the cemetery, would not defeat the exemption.

You will observe that I have discussed the question upon the theory that the word "purpose" as used in Section 5332 does not refer to the purpose for which the taking institution is formed, but to the purpose for which the bequest is made. If the other view be taken of this question, however, the conclusion above reached would be even more easily arrived at.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

224.

TAXES AND TAXATION—EXEMPTION OF SUNDAY SCHOOL AND CLUB BUILDING *OF* "ALL SAINTS PARISH"—"PUBLIC WORSHIP."

COLUMBUS, OHIO, March 15, 1912.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Your letters with reference to the exemption from taxation of certain real estate belonging to "All Saints Parish" is at hand. The statement of the vestry is:

> "We intend to hold Sunday school regularly in the building, and the club which will have its quarters there is a parish organization for the uplifting of the young men of this community in the way of physical culture, classes of different kinds and general improvement of mind and body."

In your letter you state:

> "It is my conclusion therefore that since this property is used for Sunday school purposes and for a place of meeting for the various auxiliary bodies of the church, that the use of the property is primarily for public worship and that this property, therefore, comes within the exemption of Section 5349 by just the same process of reasoning as that of any other church property which maintains club rooms, entertainment rooms in the basement of the church or elsewhere about the premises."

Your conclusion is justified, as I think, by the camp meeting case in 57 O. S., 257. That decision impresses me as it did the supreme court when it says:

> "The facts of that case, as reported by the court, are somewhat extended, while the opinion of the court is brief, as is usual in a per curiam. We think that the court in that case traveled toward the extreme liberal statutory construction, and we cannot apply its logic to the facts of the case in hand."

(Watterson vs. Halliday, 77 O. S., 181.)

The conclusion to hold this property exempt is reached with doubt as to its correctness, and with grave doubt as to what the supreme court might do if the case were presented, but in belief that the present conclusion is in full harmony with the 57th Ohio case.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

225.

TOWN HALL—ERECTION BY PRECINCT AND VILLAGE NOT AUTHORIZED.

There is no statutory authorization for the building of a town hall by the joint operation of a precinct and a village situated therein.

COLUMBUS, OHIO, March 26, 1912.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Under date of March 4, 1912, you ask an opinion of this department upon the following:

> "Section 3260, G. C., provides that a precinct may vote on and the trustees of township may erect in a precinct a town hall.
> "Section 3399, G. C., provides that a township and village may jointly erect a town hall, or public building.
> "May a precinct in which a village is situated and such village jointly erect such a building?"

Section 3260, General Code, provides:

> "The trustees shall fix the place of holding elections within their township, or of any election precinct thereof. For such purpose they may purchase or lease a house and suitable grounds, or by permanent lease or otherwise acquire a site, and erect thereon a house. If a majority of the electors of the township or a precinct thereof, voting at any general election, vote in favor thereof, the trustees may purchase a site and erect thereon a town hall for such township or precinct and levy a tax on the taxable property within such township or precinct to pay the cost thereof, which shall not exceed two thousand dollars. At least thirty days notice shall be given in at least five of the most

public places in the township or precinct, that at such election a vote will be taken for or against a tax for such purchase."

This section governs the erection of a town hall by a township or by a precinct thereof. It has no reference to a town hall or public building to be erected jointly by a township and village, or by a precinct and a village thereof.

Sections 3399, et seq., General Code, authorizes a township and a village situated in such township to jointly erect a public building.

Section 3399, General Code, provides:

"The electors of a township in which a village is situated, and the electors of such village may if both so determine, as hereinafter provided, unite in the enlargement, improvement or erection of a public building."

Section 3400, General Code, provides:

"For such purpose an application shall be made to and filed with the trustees of the township, signed by not less than twenty-five resident free-holders of such township, who are not residents of the village, and application shall also be made to and filed with the mayor of the village, signed by not less than twenty-five resident free-holders of the village."

Section 3401, General Code, provides:

"At the next general township and municipal election after such applications have been so filed, the question as to whether or not a tax shall be levied upon all the property subject to taxation in such township and village for the enlargement, improvement or erection of a public building, shall be submitted to the electors of such township and of such village. Ten days' notice that the question will be submitted to the electors, shall be given by the trustees of the township and the mayor of the village, in a newspaper of general circulation in such township and village, which notice shall state the maximum amount of money proposed to be used for such purpose, and the rate of tax proposed to be levied."

Section 3402, General Code, provides:

"If at such election two-thirds of the electors of the township and of the village voting, vote in favor of such improvement, the trustees of such township and the council of the village shall jointly take such action as is necessary to carry out such improvement."

It will be observed that to authorize a township or a precinct to erect a town hall under Section 3260, General Code, only a majority vote is required, while to authorize the township and village to jointly erect a public building a two-thirds vote of each subdivision is required.

A township as well as a village has only limited power. Each must act within the limits of its powers as prescribed by statute. The provisions of the statute herein considered cannot be made to apply to a precinct and village therein and authorize them to jointly erect a public building.

The statute, Section 3401, General Code, prescribes the question to be voted

upon. That question is whether taxes shall be levied upon "all" the property subject to taxation in such village and township, for the erection of a public building. This provision precludes the idea that a part of the township may act with the village. There is no statutory provision authorizing a precinct and a village to jointly erect a town hall or public building.

A precinct and a village situated in such precinct cannot jointly erect a town hall or public building.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

228.

OFFICES COMPATIBLE—NIGHT WATCHMAN AND MARSHAL.

The duties of a night watchman are not incompatible with those of marshal and the mayor may legally appoint a marshal to the position of night watchman subject to the confirmation of council and the appointee may receive a compensation in both capacities.

COLUMBUS, OHIO, March 26, 1912.

HON. CHARLES KRICHBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 16th, wherein you inquire:

> "In Stark county there are a great many small incorporated towns, four or five averaging fifteen hundred to two thousand inhabitants. In these municipalities they have a marshal, regularly elected under the Code, whose salary is very meager and whose duties as marshal require a very small part of his time. They are in the habit in these municipalities of making this marshal a night policeman as well, and pay for those services in addition to the salary he received for services as marshal.
>
> * * * * * * *
>
> "QUERY: Is there anything illegal in the payment of the marshal for his services as marshal and also as night watchman or night policeman under the circumstances or is there such a conflict in the two offices as that one person cannot hold and receive salary for both? * * *"

Section 4384 of the General Code, provides as follows:

> "The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

Section 4210 of the General Code, provides as follows:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

It is my opinion that the duties of night watchman are in no way incompatible with the duties of marshal in the incorporated towns which you describe in your inquiry, and, therefore, under the circumstances, I am of the further opinion that under the provisions of Section 4384 of the General Code, above quoted, the mayor can legally appoint the marshal to the position of night watchman subject to the confirmation of council, and that there is no illegality in the payment to such marshal for his services as marshal and also as night watchman such salary as may be provided by the respective village councils as authorized by the provisions of Section 4219 of the General Code, above quoted.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

231.

CORRUPT PRACTICE ACT—CANDIDATE'S OFFER AT PRIMARIES, TO PAY OWN DEPUTY HIRE, IS BRIBERY.

A candidate for office of county recorder at the primaries who makes a public announcement that he will pay his own deputy hire, is guilty of bribery within the meaning of Section 13312, *General Code, and would suffer a forfeiture of the position if elected.*

He may purge himself by retracting the statement with the same publicity with which it was made, and by totally obviating the effects of said publication, upon the minds of the voters.

COLUMBUS, OHIO, April 3, 1912.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of March 23rd, wherein you state:

"I am enclosing clipping from one of the local newspapers, and which clipping contains the political announcement of one of the candidates at the coming primary election.

"(To the Republicans of Jackson county!)

"(I will be a candidate for the office of county recorder at the coming May primaries. If elected I pledge myself to give honest service to the county and a square deal to all, also to pay my own deputy hire. Your support is solicited.—George W. Brooks.)"

"I am requested to ask your opinion as to whether the part of such announcement which states that the candidate if nominated and elected

will pay his deputy hire, is a violation of law such as would avoid his nomination and election, if he were to be successful.

"If in your opinion such statement is a violation of law, can the candidate overcome the fault, by withdrawing such announcement, or by making a different one?"

Section 13312 of the General Code, provides:

"Whoever * * * promises to give * * * money or other valuable consideration to or for an elector or other person, to induce such elector to * * * vote or refrain from voting at an election for a particular person * * * shall be fined * * * and shall forfeit the office to which he was elected at the election with reference to which such offense was committed."

Section 13324 of the General Code, provides:

"All provisions and requirements of law to preserve and protect the purity of elections, and all penalties for the violation of such laws shall apply and be enforced as to all primary elections."

Mechem on public officers, paragraph 372 lays down the proposition that:

"A contract by which the officer agrees, in consideration of his appointment or election, to surrender to the public the fees or salary of the office in whole or in part, or to receive something else in compensation than that which the law provides, is void."

Many authorities are cited by Mechem sustaining this doctrine on the ground that whether the question is viewed in a moral, political or legal aspect such practice is inconsistent with public policy, tends to corruption and diverts the attention of the voters from the merits of the candidate to the price to be paid.

Mechem at paragraph 373, announces the proposition that such a contract as is spoken of above amounts in legal effect to bribery in its largest sense and invalidates the officer's election, if procured thereby and that the officer may be removed upon quo warranto.

In the case of People ex rel. vs. Thornton 25 Hun. (N. Y.) 456, in which it was sought to oust a candidate for county judge upon the ground that prior to his election he had publicly promised the electors of the county that if he were elected he would perform the duties of his office for thirteen hundred dollars less than the amount of his salary as fixed by the statute, Judge Bockes at page 466 says:

"In view of the numerous cases both in England and in this country in which the subject of sale of office and of the bidding for office has been under discussion, we must hold such promises and pledges as were made by the defendant to the electors of the county in this case to be reprehensible in the extreme, being against public policy and in fact criminal, being no less than a form of an intended bribe to the electors to whom they were made."

Citing numerous cases.

In State ex rel. vs. Collins, 72 Mo. 13 the court says:

"A public offer by a candidate for public office to the electors to perform the duties of the office for less than the legal salary or fees invalidates his election."

The supreme court of Mass., in 20 Pick. 428, Alvord vs. Collins says:

"We cannot discover a difference in principle between a sale of an office for a valuable consideration and the disposing of it to a person who will perform the duties for the lowest compensation. The same objection lies against both."

Bonham, C. J., in State vs. Church, 5 Oregon 374 uses the following language:

"In order to constitute the rewarding or the bribing of a voter by a candidate for office, we do not think it essential that the candidate should pay the price agreed upon for such vote directly into the hands of the voter in question; but the same results would follow the payment of the purchase price to a third person, or to an association or community of persons, if so made by the direction of the voter, and for his use and benefits. A payment, under such circumstances, would be made to the agent of the voter and in contemplation of law would be a payment to him."

Mr. Jusice Lyon in the case of the State of Wis. vs Purdy, 36 Wis. 213 says:

"Promises made to the people by candidates for public office, that, if elected, they will practice a rigid economy in the expenditures of their several departments, are unobjectionable; and if the successful candidate fulfills his pledges in that behalf, he is entitled to conmendation. * * * But should such candidate propose to the voters and tax payers of the state, that if they will elect him to the office of governor he will serve the state therein gratuitously or for one-half of the salary allowed by the constitution, and pay the rent of an executive office and the expenses of fuel, stationery and other incidentals pertaining thereto, out of his own pocket, his proposition has an entirely different aspect. In one case the candidate promises that if he is elected he will regard his official oath and faithfully and honestly discharge his official duty; while in the other case he proposes to buy the office with promises to pay therefor in personal services or money, or both. * * *

"When our elections to fill public offices cease to express the free, intelligent and unbiased judgment and choice of the electors; when they shall be controlled or materially influenced by pecuniary offers made by the candidates, whether to the electors, or to the municipality (which is but the aggregation of the electors) a most vital condition of free government will be disregarded."

In view of the authorities above cited and of the further fact that the statute allows and provides for the payment of deputy hire of a county recorder out of county funds, it is my opinion that the offer published in the clipping enclosed is contrary to law and would constitute bribery under Section 13312 and in consequence work a forfeiture of the officer to which the party might be elected. As the evil to be guarded against is the corrupt influencing of the voter,

in order to now overcome the mischief done it is my opinion that the candidate should withdraw such announcement, giving to this publication the same publicity as has been given by the announcement that he would pay his own deputy hire. He should attempt in every way to obviate any chance that it might be shown against him that he received his vote by reason of such illegal inducements and promises as are contained in the printed matter. I am inclined to believe that in that way he might purge himself, although the question may always remain as to whether or not any voter was corruptly influenced by reading the first announcement and failing to have his attention called to the correction.

Yours very truly,

TIMOTHY S. HOGAN.
Attorney General.

232.

CORRUPT PRACTICE ACT—CANDIDATES AT PRIMARIES AND CONVENTIONS—DELEGATES AND ALTERNATES—NOMINATING PETITIONS—EXPENSES OF TRAVELING COMPANION OF CANDIDATE AND PROCURING OF DELEGATES TO RUN AT CONVENTION—"COMMITTEES" AND "ORGANIZATIONS" OF FRIENDS—AGENTS AND MANAGERS.

Section 4969, General Code, requires only candidates to be nominated at the direct primaries to file a nominating petition signed by two per cent. of the voters. District nominations made by a district delegate convention are not included, and candidates for such need not file said petitions.

Though Section 4969, General Code, does not specifically mention alternates, yet elsewhere, throughout the statutes, reference is made to such in connection with delegates and the statutes may be construed to permit the election of alternates, though they do not make such election necessary.

If two or more friends of a candidate act together as a body in promoting his candidacy, they constitute a "committee" or "organization," within the meaning of the corrupt practice act. Any expenditures made by them however, either acting individually or as a body, must be included and filed in an itemized statement.

The acts of committees or organizations, in promoting the candidacy of a candidate for nomination at a convention, come within the provisions of the corrupt practice act. Such candidates themselves, however, are not required by express provision to file the statement of expenditures for the promotion of his own candidacy.

The provision requiring every payment under ten dollars to be accounted for by a receipt bill applies only to payment to single persons at single times and does not relate to aggregate expenses for related purposes.

An expense by a candidate at a convention, of procuring persons to run at the primaries as delegates to such convention, is not within the permissible list of expenditures. Such candidate however, is not prohibited from paying expenses and services of persons who will be candidates for delegates at such convention in preparing, circulating and filing petitions for nominations of such delegates.

As such candidate may legally incur the expense of an agent, he may include as a part of his necessary personal expenses, sums paid for the traveling expenses of a friend or friends who accompany him while on a canvas.

Under the provisions permitting such district candidates to hire agents, he is permitted furthermore, to hire and pay a person in each county of his district, as manager therein.

COLUMBUS, OHIO, April 4, 1912.

HON. CHARLES KRICHBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I am in receipt of your communication of February 12th and 14th, wherein you state:

> "Question 1. Need a candidate to be nominated at a district convention, whether judicial or senatorial, file a petition signed by two per cent. of the party voters of the district, or is it only necessary for candidates for delegates to such a convention to file petitions signed

by two per cent. of the party voters in the delegate's ward or precinct? The practice in this county and district has been for a candidate to be nominated at a district convention, not to file such petition for himself.

"Question 2. Is it necessary to nominate delegates and alternates to a district judicial convention or delegates only? The law does not seem to provide for alternates to such a convention?

"Question 3. Does the term 'committee or organization' Section 1, corrupt practice act, apply to a conference of two or more friends of a candidate to aid or promote his election, when no organization is formed, or does this section only apply to such combination of persons as form a committee or organization for such purpose?

"Question 4. Do the provisions of the corrupt practice act apply to a candidate before a district convention? (See Sec. 2.)

"Question 5. Suppose a candidate buys postage stamps from time to time during the campaign, in amounts not exceeding $10.00 at any one time but aggregating more than $10.00, must he file a receipt for each of said purchases with his affidavit of expenditures, and if his railroad and hotel bills aggregate more than $10.00, but there is no single expenditure of that amount made to one person or company at any one time, must he file with his affidavit of expenditures such receipt for each item thereof?

"Question 6. May a candidate before a district convention have one or more persons in a county to procure persons to run at the primaries as delegates to the convention, and may he pay such parties for their services the reasonable and fair value thereof?

"Question 7. May such a candidate pay the expenses and services of persons who will be candidates for delegates to such convention, in preparing, circulating and filing petitions for nomination of such delegates?

"Question 8. May a candidate, as a part of his necessary personal expenses, pay for the transportation and hotel bills of a friend or friends who accompany him while making a canvas?

"Question 9. Does Section 26 of the corrupt practice act mean that a candidate may expend the amount allowed therein for his nomination and then expend the same amount for his election, or does the amount specified therein cover the expenditures of the candidate for both his nomination and election? For example: May a candidate for governor spend the sum of $5,000 for his nomination and an additional $5,000 for his election, or is he limited to the expenditure of the sum of $5,000 for both his nomination and election?

"Question 10. May a candidate before a district convention hire a person in each county thereof to perfect his organization and conduct his campaign, and pay such person or persons therefor?"

Section 4949 provides that:

"Candidates for member of congress and all other public elective offices, delegates provided for herein, and members of the controlling committees, of all voluntary political parties * * shall be nominated * * in accordance with the provisions of this chapter * *."

The chapter referred to is chapter 6, title 14.

Section 4952 provides that candidates for district offices, where the district contains more than one county, shall be nominated by delegate conventions.

Section 4965 provides for the nomination of certain members of the general assembly and the common pleas judges in certain counties.

Section 4969 provides as follows:

> "Nominations for places on the primary ballot shall be by nomination papers which shall be filed with the board of deputy state supervisors at least twenty days before the day for holding the primary election. Such nomination papers shall be signed by two per cent. of the party voters in the county, municipality, precinct, ward, or other political subdivision for which such nomination is to be made. The basis of percentage in each case shall be by vote of the party in such county, municipality, precinct, ward or other political subdivision, for governor at the last preceding election for state officers."

This section applies to all nominations at the primaries and to such alone. In view of the above sections and the fact that Section 4969 applies solely to such officers as are nominated at the direct primaries, there can be no question but that district nominations made by a district delegate convention are not included and such district candidate need not file a petition. It is only necessary for the delegates to the convention to have such nomination papers signed by the required two per cent. of the voters. We have only need to recall that frequently delegate conventions are driven to the nomination of a "dark horse" who, not being an avowed candidate, would have had no opportunity of securing a nomination petition. *It is my opinion that the practice in vogue in your county district is the proper one.*

QUESTION 2.

Section 4949, supra, provides, inter alia, for the nomination of "delegates provided herein," and as you state, there is no specific provision for alternates. Notwithstanding this fact, other provisions of Chapter 6 uses the term "alternate" as well as "delegate." Section 4954 speaks of when delegates and *alternates* are to be selected by a county convention, and also provides that the delegates and *alternates* shall be apportioned in a certain manner.

Section 4953 provides that the state committee shall apportion the state *delegates* and *alternates.*

Section 4956 only specifically speaks of "delegates" but the reference is to the "delegates and alternates" provided for in Section 4956. I am inclined to the view that while Section 4952 does not specifically mention the term "alternate;" it is included in the word "delegate" and the legislature by the manner it speaks of state and county delegates and *alternates* indicates it contemplated such *alternate* should be elected. Then, too, it has been the custom so long established as to practically make it a rule that alternates be chosen at the same time and place and in the same manner as delegates. The state supervisor of elections (see note in 1911 compilation of election laws, page 79), as an annotation to Section 4952, says:

> "If the call of the county committee so provides, but one set of delegates to a county convention may be elected with power to elect delegates and *alternates* to each of the senatorial, circuit judicial and common pleas judicial convention."

This was the interpretation of the election officer, even though the provision of

Section 4952 was speaking of a delegate convention the "delegate" to which had been chosen at the primary election.

I am not unmindful of the provisions of Section 4989, but I think this section only applies when no alternate is selected; when an alternate *is* elected there is no vacancy for the committee to fill and the alternate would have all the power and functions of his delegate in the latter's absence.

So, *my answer to your second question is that while it is not absolutely necessary to elect alternates to a district judicial convention, it is not only permissible, but right and legal.*

QUESTION 3.

Section 5175-1 defines "committee" or "organization." If the two or more friends of the candidate spoken of in your letter act together and as a body, even though not formally organized, they would constitute a "committee" or "organization" under the definition of the corrupt practice act; if they acted as individuals, each man making the expenditures himself, they, of course, would not constitute a committee.

But, in either event, under Section 5175-2, if they contributed, promised, received or expended any money or thing of value in connection with the election either general or primary for and on behalf of their friend they would either as a committee or as individuals be compelled to file an itemized expense account, unless as individuals they made their contribution to parties who under the law must render an account. *It is their acting together or co-operating to the common end that makes the two or more persons a committee and not any formal organization.*

QUESTION 4.

Under Section 5175-1 if the candidate, even before a district convention, works through a committee or organization, such committee or organization comes within the provisions of the corrupt practices act, since every committee or combination of two or more persons co-operating

> "To aid or take part in the election or defeat of any candidate for nomination at a primary election or *convention.*"

is expressly included.

Section 2 of the act (5175-2 of the General Code) does not to my mind seem to contemplate a candidate before a district convention under the term "candidate" as used in that section. That section requires "every candidate who is voted for at any election or primary election" to file the required statement of expenditures.

The limitation to a candidate who is voted for at an election seems to me to exclude a candidate who might be voted for at a convention. It may be that a candidate before a district convention comes within the spirit of the corrupt practices act, but I do not see how in the face of the plain language used and in view of the fact that the failure to file such itemized statement when required is made a criminal offense that such a candidate could be included.

It must be borne in mind, however, that this holding would not excuse one who happened to be a candidate and who made contributions or expenditures on behalf of a person who was to be voted for at a primary election, such as a delegate to a district convention at which such contributor might be a candidate, from being compelled to file his statement of expenditures as required by Section 5175-2; and likewise the mere fact that he was a candidate before a district convention would not place him without the provisions of Section 26 of the act (Section 5175-26 of the General Code), which section makes "any person" guilty of a corrupt practice act by reason of offending against the section.

QUESTION 5.

Section 11 of the corrupt practice act (Section 5175-11 of the General Code)

provides that "every payment required to be accounted for shall, unless the total expense payable to any person be not in excess of ten dollars, be vouched for by a receipted bill stating the particulars of expense, etc." I am of the opinion that the legislature intended in the enactment of this section to only require receipts when the expenditure at any one time to the same person amounted to over $10.00. The mere fact that the sum total of the various items, each one of which was less than ten dollars, aggregated more than $10.00 would not necessitate a receipt. Of course it would make no difference whether the expenditure spoken of was for postage stamps, railroad fare, hotel bills or any other permissible election expense.

QUESTION 6.

The only question involved in your sixth inquiry is whether or not the candidate spoken of is, under Section 26 of the corrupt practice act, a person who pays or contributes money or other valuable consideration in connection with or in respect of any election. The object of the corrupt practice act was a purification of matters pertaining to all elections, to provide against the use of money or other valuable consideration in corruptly influencing the voter in favor of or against a candidate for public office.

The expenditure of the candidate spoken of to a person or persons to procure persons to run at the primaries as delegate, to my mind, would be an expenditure in connection with and in respect of the primary election. I have already held that the enumeration under Section 26 is exhaustive of the permissible things which can be paid for as therein provided. *I do not find that matter spoken of in your sixth question in the list of permissible expenditures, and it is my opinion, therefore, that such an expenditure would be a corrupt practice.*

QUESTION 7.

The expense of preparing, circulating and filing petitions for nomination is specifically mentioned as a permissible expense in the enumeration contained in Section 26 of the corrupt practice act. As the section applies to "any person," allowing "any person" to make certain expenditures, I am inclined to the view that the fact that the person making the expenditure happens to be a candidate before a district convention would make no difference. There is no limitation of the person who pays the expense of preparing, circulating and filing the petition; it need not necessarily be the candidate whose name is on the petition, and it is my view that a district candidate would be allowed to pay such expense as far as the corrupt practice act is concerned.

QUESTION 8.

I do not believe that it was the intention of the act to prevent a person who happened to be a candidate from extending hospitalities to a personal friend or to friends who might accompany the candidate on his canvas. The section would allow the candidate to pay the expenses of such friend if he were an agent of the candidate, managing the necessary and reasonable business of the election (see Section 26), and since this would be permissible, I can see no reason for prohibiting a candidate from including as a part of his necessary personal expenses such sums as out of the goodness of his heart he felt inclined to pay for the transportation and hotel bills of a friend or friends who journeyed with him for the purpose of cheering him up when the clouds of defeat seem to threaten, or who joined with him in the smiles attended upon apparent or real success.

QUESTION 9.

In our communication to you of February 8th, we answered your 9th question, holding that the total amount expended by a candidate for public office under the provisions of Section 5175-29 of the General Code included the amount expended for all purposes at both the primary and general election.

QUESTION 10.

While Section 26 states that the services of the *"agent"* as shall be required to manage the necessary and reasonable business of the election" may be paid for at the reasonable, bona fide and customary value, further along in the section is found the provision that "the reasonable traveling expenses of * * *agents* * *" might be paid. Since there seems to be a recognition that a candidate is allowed to hire and pay a manager of his campaign, I can see no reason for holding that this only applies to a general manager, but I am inclined to the view that a district candidate may hire and pay a person in each county of his district "to manage the necessary and reasonable business of the election, "and pay therefor at the reasonable and bona fide value.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

236.

CORRUPT PRACTICE ACT—CONTRIBUTIONS BY CANDIDATES TO CLUBS AND COMMITTEES—LIMITATIONS.

A candidate for public office may pay assessments or make contributions to political committees, providing he keeps within the maximum amount allowed to be expended. If the contribution is specific, it cannot be for other than the purposes permitted by the corrupt practice act; if it is general, the committee must observe the same restrictions with regard to the purposes for which the money may be expended.

Within the same limitations, a candidate may contribute to a club or committee for the purpose of paying rent for halls, compensation of speakers, music and fireworks for public meetings and expenses of advertising same, and the usual incidental expenses.

COLUMBUS, OHIO, April 5, 1912.

HON. CHARLES KRICKBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of the 3rd inst. The matters contained in your second, fourth and fifth inquiries are fully covered in the opinion of this date sent you today and in consequence I will only take up your first and third inquiries.

First. You state that it is your conclusion that "said act, Section 29, expressly permits candidates for public office to pay assessments or make contributions to political committees, provided all expenditures of such candidate permitted by the act, do not exceed the aggregate specified in said section."

I concur in your conclusion. Section 5175-2, General Code, providing for the filing of a statement of expenditures by a candidate and by persons, committees or associations, applies as well to those who contribute money or things of value in connection with such election as to those who promise, receive or expend such money or thing of value. There is a recognition of a contribution.

Section 5175-12 provides as follows:

> "No person shall, directly or indirectly, himself or through another person, make a payment or promise of payment to any committee, association or organization, in any name except its own, nor shall such

committee or person knowingly receive a payment or promise of payment, or enter or cause the same to be entered in the accounts or records of such committee, in any other name than that of the person by whom it is made."

Section 5175-29, General Code, provides inter alia that the total amount expended by a candidate, first, for any of the purposes specified in Section 26, second, *for contributions to political committees,* and, third, for any purpose tending in any way to promote or aid in securing his nomination or election, shall not exceed the amount specified herein.

Section 5175-26, it will be noted, also speaks of one who "contributes or offers to contribute."

In view of the above sections of the corrupt practices act, I am of the opinion that a candidate for public office may pay assessments or make contributions to political committees, always, of course, keeping them within the limitations of the maximum amount allowed to be expended, and by so doing he will not violate the provisions of the corrupt practices act. It must be borne in mind, however, that the candidate may make his contribution either generally or specifically. If his contribution is general, then his duty in the matter is ended, and it is the part of the committee to see to it that they do not make any expenditure other than for the permissible purposes enumerated in said Section 5175-26. If his contribution is specific, then it must be for one of the permissible matters in Section 5175-26 above mentioned.

Second. In your third inquiry you state that your conclusion is that "the corrupt practices act permits any candidate for office to contribute to a club or committee for the purpose of paying rent for halls, compensation of speakers, music and fireworks for public meetings and expenses of advertising the same, together with the usual expenses incident to the holding of such public meetings."

I likewise concur in your opinion on this question. The same sections of the General Code spoken of in the previous inquiry apply to this question. To my mind the candidate in contributing to the club or committee for the specific purpose makes said club or committee his agent to expend the money for the specific purpose for which he gives it, and so long as the specific purpose is one of the permissible things enumerated in Section 5175-26, that he is within the law. As said section expressly states if he "directly or indirectly by himself or through any person" contributes or pays, etc., any money or other valuable consideration for any other purpose than the matters and services therein enumerated at their reasonable bona fide and customary value, such contribution, payment, etc., is declared to be corrupt practice and invalid at the election of any person guilty thereof.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General

240.

CORRUPT PRACTICE ACT—CIGARS AND TREATING IN SALOONS—CANDIDATE.

The giving away of cigars and treating in saloons or other places by or for a candidate for nomination at a primary election, if done for the purpose of promoting the candidacy, would be a violation of the corrupt practice act.

The question whether such acts are performed for the purpose of promoting the candidacy or out of a personal habit of friendship is a question of fact with the presumption, however in favor of the former purpose.

COLUMBUS, OHIO, March 18, 1912.

HON. THEO. H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Your favor of February 12, 1912, is received in which you inquire as follows:

> "A number of persons who, subject to the May primary election, are candidates for office have requested an opinion from me as to whether they would violate Section 26 of the corrupt practice act by giving away cigars and treating in saloons and other places, while they are electioneering."

You then state your conclusions and some of the reasons offered by candidates opposed to your views.

The provisions of the corrupt practice act apply to primary elections as well as to other elections.

Section 5175-2, General Code, (Section 2 corrupt practice act, 102 Ohio laws, 321), provides:

> "Every candidate who is voted for at any election or *primary election* held within this state, and every person, committee or association of persons incorporated or unincorporated, who may have contributed, promised, received or expended directly or indirectly, any money or thing of value in connection with such election, shall within ten days after such election file, as hereinafter provided, an itemized statement showing in detail all the moneys or things of value, so contributed, promised, received or expended, and all liabilities directly or indirectly incurred in connection with such election; but individuals other than candidates making only contributions, the receipts of which must be accounted for by others, need not file such statement under this section."

This section requiring itemized statements of expenses applies to all elections, including a primary election.

Section 5175-26, General Code, (Section 26 of corrupt practice act, 102 Ohio laws 327), provides:

> *"Any person is guilty of a corrupt practice if he, directly or indirectly, by himself or through any other person, in connection with, or in respect of any election, pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration, for any other purpose than the following matters and services, at* their reasonable, bona fide and customary value:

"Rents of halls and compensation of speakers, music and fireworks for public meetings, and expenses of advertising the same, together with the usual expenses incident thereto.

"The preparation, printing and publication of posters, lithographs, banners, notices and literary material, the compensation of agents to supervise and prepare articles and advertisements in the newspapers, to examine questions of public interest bearing on the election, and the report on the same; the pay of newspapers for advertisements, pictures, reading matter and additional circulation, the preparation and circulation of letters, pamphlets and literature bearing on the election.

"Rent of offices and club rooms, compensation of such clerks and agent shall be required to manage the necessary and reasonable business of the election and of attorneys at law for actual legal services rendered in connection with the election; the preparation of lists of voters and payment of necessary personal expenses by a candidate; the reasonable traveling expenses of the committeemen, agents, clerks and speakers; postage, express, telegrams and telephones; the expenses of preparing, circulating and filing petitions for nomination. No party organization or candidate shall compensate or hire in any one election precinct more than one person to prepare lists of voters. Each political party may designate one party representative in each precinct upon each registration day, and such committee may designate not more than three (3) such representatives and each candidate one representative in each voting precinct upon each election day, whose names shall be certified to by the chairman and secretary of the controlling committee of such party to the board of deputy state supervisor of elections, at least two (2) days before such registration or election day, and who may be paid for their services by such committee or candidate not in excess of five ($5.00) dollars per day each.

"Any payment, contribution or expenditure or agreement or offer to pay, contribute or expend any money or thing of value for any purpose whatsoever except as herein provided is hereby declared to be corrupt practice and invalidates the election of any person guilty thereof."

The foregoing section does not authorize an expenditure for cigars, or for treating in saloons or otherwise while a person is electioneering as a candidate for office.

This section prohibits the paying, lending or contributing of anything of value, in connection with, or in respect of any election, except for the purposes therein enumerated. The giving of a cigar or of a "drink" would be contributing something of value. If it were permissible to give one cigar, two cigars could be even, yea, a box of cigars could be given. There would be no limit, except as to the total amount that may be expended for all purposes.

The corrupt practice is the giving or contributing of something of value in connection with, or in respect of any election. A giving of cigars or treating while electioneering for office would certainly be done in respect to an election. It would be a part of the electioneering scheme.

It is urged that a person who has been in the habit of treating his friends, should not be prevented from so doing when he becomes a candidate for office. It is not the purpose of the act that a person should be compelled to change his personal habits when he becomes a candidate for office. But whether a candidate for office treats to cigars or drinks from personal habits or because he is a candidate for office would have to be determined from the facts of each particular

case. However, the two would be so connected that it would be very difficult to determine whether the treating is done from personal habit or because such person is a candidate for office. The common presumption would be that he treats because of the fact that he is a candidate, although he may habitually treat his friends. If this were held as a reason for a violation of the law, all candidates might get the habit of treating.

In order to comply not only with the letter but also with the spirit of the law, it would be well for a candidate to change his personal habit and cease treating so long as he is a candidate. When one is a candidate for office it is commonly accepted that where he treats his friends it is done for the purpose of securing their good will toward his candidacy.

It is my conclusion that the giving away of cigars and treating in saloons, or other places, by or on behalf of a candidate, for nomination at a primary election, would be a violation of the corrupt practice act.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

245.

PUBLIC OFFICIALS—INTEREST IN PUBLIC CONTRACTS—"PUBLIC OFFICE"—INSURANCE CONTRACTS WITH CONTRACTS WITH COUNTY, BY DEPUTY STATE SUPERVISOR OF ELECTIONS, ATTACHE OF SECRETARY OF STATE AND MEMBER OF COUNTY AGRICULTURAL SOCIETY.

A deputy state supervisor of elections is appointed by the secretary of state and is, therefore, a state officer and not connected with the county, within the meaning of Section 12910, *General Code, prohibiting contracts of public officials with political subdivisions, with which they are connected. Such official is a public officer, however, and comes within the prohibition of Section* 12911, *General Code, providing against the interest in public contracts of an amount over* $50.00 *unless under advertisement and bid.*

An attache of the secretary of state being an employe of a public officer, also comes within the prohibition of Section 12911, *General Code.*

A county agricultural society being purely a voluntary association which exercises no governmental control, its members are not holders of an office or trust within the meaning of Section 12911, *General Code.*

If the premium on a fire insurance policy amounts to more than $50.00, *advertisement and bids are required.*

Each policy must be let on separate contract, and should be authorized by separate resolution.

COLUMBUS, OHIO, April 4, 1912.

HON. T. T. COURTRIGHT, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Under date of February 28th you submitted the following for opinion of this office:

"Will you please advise me on Section 12910-12911 of the General Code of Ohio on the following questions:

"Can a deputy supervisor of elections who is also an insurance agent sell to the county commissioners on county property when the same is written in several policies, the premium on no policy exceeding fifty ($50.00) dollars. The aggregate, however, of the several policies exceeding fifty ($50.00) dollars?

"Would your finding equally apply to an attache of the secretary of state's office, who sells insurance to the county under the same condition, and to a secretary of the county agricultural society?"

For a general discussion of Sections 12910 and 12911, General Code, I herewith hand you copy of an opinion heretofore rendered by me to the bureau of inspection and supervision of public offices under date March 31, 1911.

By the provisions of Section 4804 the state supervisor of elections, which is the secretary of state by virtue of his office, appoints the deputy state supervisors of elections and I am of the opinion that the said deputy state supervisors of elections can in no sense be considered a county officer and would, therefore, not come within the provisions of Section 12910, General Code. He would, however, come within the provisions of Section 12911, General Code, in that he is a public officer of the state. I am also of the opinion that the attache of the secretary of state's office would likewise come within the provisions of Section 12911, in that he is the employe of the secretary of state, who is, of course, a public officer.

As the county agricultural society is purely a voluntary organization although declared by statute to be a body corporate and politic, yet I do not think that they exercise any governmental control, and therefore, that the members thereof would not in any sense be considered as holding an *office* of trust or profit under the meaning of Section 12911, and therefore, the secretary thereof would not be within the purview of said section.

In the opinion which I have herewith enclosed, I have construed the question of fire insurance in reference to the amount of such contract to relate to the premium, that is, the interest of the company and not of the agent, and that, therefore, if the premium on a policy exceeds the sum of fifty ($50.00) dollars, the contract must be let on bids duly advertised as provided by law. While I am clearly of the opinion that each insurance policy is to be considered as a separate and distinct contract between the county and the insurance company, yet as it has been decided in the case of Bellaire Goblet Company vs. The City of Findlay et al., 5 C. C., 418, that the penalty prescribed in what is now Section 12911 is equivalent to a prohibition of the act, and that, therefore, the insurance policy would be void, it would be well to have the county commissioners designate on their journal, the various insurance companies with which they desire to place the policies, in order that no question might be raised that the contract with the agent in its entirety was not severable, and, therefore, that each and every policy was void. It would further appear to me to be the better practice to have the commissioners let such contract in each particular instance by separate resolution, and if possible on separate days, so that there could be no queestion raised as to the validity of the various policies because of uniting them in one resolution or all on one day.

In suggesting the foregoing I, of course, refer to the policies which are given to the insurance agent who is a deputy state supervisor of elections and to those which are given to the attache of the secretary of state's office. It is necessary to be extremely careful in placing insurance with one who is a public officer or an employe of a public officer, to be careful that each and every contract will appear to be separate and distinct, for the reason that if they are not so separate and

distinct, the defense will be made that the amount of the contract exceeds the sum of fifty ($50.00) dollars, and therefore, as such contract was not let on bids duly advertised as provided by law, the policies are void.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(Enclosure)

ADDENDUM.

In the foregoing opinion I have not overlooked the case of The State of Ohio ex rel. Edmund G. Vail vs. W. E. Craig, as auditor of Cuyahoga county, and the Board of County Commissioners of Cuyahoga County, found in 8 N. P., 148, the syllabus of which is as follows:

> "The deputy state supervisors of elections are not officers within the legal definition of that term, and, though their jurisdiction may be coterminous with that of the county, they are not county officers, and therefore, Sec. 2866-3, R. S., does not violate Sec. 10 of the constitution."

Without undertaking to decide in this opinion the question whether a member of the board of deputy supervisors of elections is an officer or not, I deem it my duty to advise prosecuting attorneys and city solicitors in questions like the one at hand to assume that he is such officer. Notwithstanding the nisi prius opinion, I incline to the view personally that he is an officer within the contemplation of Section 12911. At any rate there is no reason why the public should take the risk when the validity of an insurance policy covering public property is drawn in question. Public officers in questions of doubt should take no risks and place policies where their validity would be without doubt.

246.

CORRUPT PRACTICE ACT—LIMITATION ON CANDIDATE'S AMOUNT OF EXPENDITURES AND POWER TO HIRE REPRESENTATIVE TO WORK AT POLLS APPLIES TO BOTH PRIMARY AND GENERAL ELECTIONS.

The maximum sum named in the corrupt practice act, which is permitted to be expended by a candidate, includes expenditures made at both primary and general elections.

Each candidate may designate one representative to work in each voting precinct upon each primary election day as well as on each general election day.

COLUMBUS, OHIO, March 28, 1912.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 1st wherein you request my opinion upon the following questions, with regard to the corrupt practice act:

> 1. Is the $300.00 the maximum sum, as in our county, permitted in the primary elections, and also in the general elections, or is it the maximum for both elections?

2. Is each candidate permitted to hire one representative to work at the polls on primary election day?

Answering your first question, I beg to state that in an opinion under date of February 8, 1912, to Charles Krichbaum, prosecuting attorney, Canton, Ohio, this department held that the limitation under the provisions of Section 26 of the corrupt practices act (Section 5175-26, General Code) as to the maximum sum to be expended by a candidate included the total amount expended at both the primary and general election. A candidate may expend up to the maximum amount at either election, at his option, but the sum total expended for both the primary and general election must not exceed the maximum amount fixed by the act.

2. A reference to paragraph two of the act spoken of (Section 5175-2, General Code) discloses that it is expressly provided, amongst other things, that each candidate voted for at "any election or primary election" must file an itemized statement, as therein required; likewise, paragraph twenty-six of the act (Section 5175-26, General Code) provides the permissible purposes for which expenditures may be made "in connection with or respect of *any* election;" and further provides that each candidate may designate one representative "in each voting precinct upon *each election day.*"

From the foregoing it is my opinion that both primary election day and general election day were contemplated.

Then, too, Section 4967, General Code, provides that all the statutory provisions relating to general elections, including the requirement that part of such election day shall be a legal holiday, shall, so far as applicable, apply to and govern primary elections.

It is my holding, therefore, that each candidate may designate one representative to work in each voting precinct upon each primary election day as well as on each general election day.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

249.

ASSESSOR—ELECTION, APPOINTMENT, AND APPROVAL OF BOND—MUNICIPAL CORPORATIONS AND TOWNSHIPS—VACANCIES—DIVISION OF PRECINCTS—DUTIES OF AUDITOR, TOWNSHIP TRUSTEES AND COUNTY COMMISSIONERS.

Assessors are not municipal officers and their compensation can in no event be fixed, nor can they be appointed to fill vacancies by the mayor or any officer of a municipality.

When such village is divided into three precincts, if these precincts were created by the board of deputy state supervisors of elections by a subdivision of an original precinct, assessors should be elected from the original precinct unless the said board has declared at the time of the subdivision that an assessor shall be elected for each precinct so subdivided in accordance with Section 4850, *General Code.*

It is the duty of the auditor to appoint and fix the bond of assessors to fill vacancies which occur only in wards or precincts of municipal corporations having no township organizations as provided in Section 3352, *General Code.*

If in the township containing a municipal corporation, the commissioners, under Section 3351, *General Code, have not constituted the territory outside of said corporation a separate district, but one assessor may be elected for the township.*

A township assessor is a township officer and his bond must be approved, except as aforesaid, with regard to the auditor, by the township trustees.

COLUMBUS, OHIO, April 5, 1912.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—Your letter of January 25th is received in which you state:

"Clinton township, of Fulton County, Ohio, is a civil township and is composed in part of the village of Wauseon, and which village is located wholly in said township.

"At the last election two assessors were elected, one by the township outside of Wauseon, and one by the electors of the village of Wauseon, the village being divided into three precincts, and all of the voters of the three precincts voted for the one assessor.

"The assessor elected in the village failed to qualify, and the Mayor, with the approval of the council, appointed an assessor for the whole village and approved his bond.

"We desire to ask you:

"(1) Is this appointee entitled to act?

"(2) Was there a vacancy in the office of a single assessor, or was there a vacancy in the office of three assessors, one for each of the precincts in the village?

"(3) Is it the duty of the auditor to appoint to the vacancy or vacancies?

"(4) Who approves the bonds of the appointee or appointees?"

The following sections of the General Code apply:

Section 3349:

"One assessor of personal property for the township shall be elected, biennially, in each township, who shall hold his office for a term of two years commencing on the first day of January next following his election. If the township is divided into two or more election precincts, one such assessor shall be so elected for each precinct in which such election is held."

Section 3350:

"Before entering upon the discharge of his duties such assessor shall give bond, payable to the state, with two or more freehold sureties approved by the trustees, in such sum as they determine, not less than one thousand dollars, and conditioned for the faithful and impartial discharge of his duties. Such bond, with his oath of office endorsed thereon, shall be deposited with the township clerk. If an assessor is appointed by the county auditor the amount of his bond, not less than one thousand dollars, may be fixed and the sureties thereon approved by the auditor, or by the trustees."

Section 3351:

"In municipal corporations, divided into wards, an assessor shall be elected in each ward. In a township composed in part of a municipal corporation, the county commissioners, by order entered on their journal, may constitute the territory outside such municipal corporation one or more assessor districts. In each ward and assessor district an assessor shall be elected, biennially, in accordance with law, and shall take the same oath, give the same bond and perform the same duties as township assessors. Nothing herein shall interfere with the duties devolving upon deputy state supervisors of elections."

Section 3352:

"If a person elected assessor in any ward or precinct of a municipal corporation not having a township organization, fails to give bond and take the oath of office for one week after his election, or in the event of removal from the ward or precinct after his election, the office shall be deemed vacant, or should there be at any time a vacancy in such office from any other cause, the county auditor shall fill such vacancy by appointing an elector of such ward or precinct to the office of assessor."

Section 3261:

"If by reason of non-acceptance, death, or removal of a person chosen to an office in any township, except trustees, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected or there is a vacancy from any other cause, the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term."

Section 4850:

"Nothing in the preceding. sections shall affect the powers or duties of boards of deputy state supervisors in reference to the division of election precincts within registration cities. The division of any election precinct within registration cities. The division of any election precinct into two or more sub-divisions, as hereinbefore provided, shall not require the election of an assessor in each such sub-division, but in

all such election precinct sub-divisions there shall be elected one assessor for each original precinct unless such supervisors at the time of the division shall order that an assessor be elected in each precinct."

There seems to be some misunderstanding as to whether or not an assessor is a township officer, but I find no difficulty in arriving at the conclusion that the assessors spoken of in your inquiries are township officers.

The sections of the Code dealing with assessors are found in "Division 2, Civil Townships, Chapter 6, Assessors," and it will be noted that no mention of assessors is found in the sections of the Code designating the executive officers of cities and villages.

In the case of State ex rel, vs. Coeller, 3rd Bulletin, 853, it is held that,

"The duties of an assessor are appropriate to the township as forming a part of the state organzation, and the officer is in that sense an officer of the township."

In the case of Lorillard vs. The town of Monroe, 11 N. Y., 392, the court said:

"It is a convenient arrangement to have the assessors chosen by the electors of the towns within which they are to perform their duties * * * * *. When chosen they are public officers, as truly as the highest official functionaries in the state. Their duties in no respect concern the strictly corporate interests of the towns, such as their common lands and their corporate personal property, or the contracts which as corporations they are permitted to make, nor are their duties limited to their effects on the towns as political bodies. The description and valuation of property for purposes of taxation, which they are required to make, for the basis upon which the state and county taxes are imposed; and although money is raised by the same arrangement to be expended within the towns, the purposes for which it is to be employed are as much public as are those for which the state and county taxes are expended."

So I conclude that assessors are not municipal officers, nor can their compensation be fixed or a vacancy be filled by the officers of a municipality, and since the mayor has attempted to appoint to fill the vacancy, he has exceeded his authority and the appointee is not legally entitled to act.

The answer to your second question depends upon the manner in which the precincts of your township were formed.

Section 3349, above quoted, provides that if the township is divided into two or more election precincts one such assessor shall be elected for each precinct.

In Chase's Statutes, page 1800, it will be found that in the long ago there was but one assessor for the county, and the county constituted the assessor district. Afterwards (39 O. L. 22) the county assessor was abolished and provision was made for one township assessor in each township. Along in 1859 (56 O. L., 188) a statute was enacted authorizing the commissioners to divide the county as well as cities therein into assessor districts not less in number than the number of townships.

An examination of Section 1448 of the Revised Statutes of 1880 shows that there was a provision that,

"One assessor for the township, or if the township is divided into

two or more election precincts, then for each precinct in which the election is held."

Said Section 1448 was amended March 31, 1906 (98 O. L., 172), omitting the office of assessor from the list of township officers, and there was no statutory provision for the election of such an officer as township assessor, although there was for the appointment of assessors in case of vacancies for any cause. This omission of any statutory provision requiring the election of an assessor continued from that time until the enactment of the Code. True, Section 2966-15, Revised Statutes, carried into the Code as Section 4850 *supra*, which is found in 88 O. L., 449, provided as it does now, that, in all election precincts provided by the deputy state supervisors there shall be elected one assessor for each original precinct, unless the supervisors shall order that an assessor shall be elected in each precinct.

While the reference herein is to original election precincts and not to townships as such, and while the section is rather declaratory of the power of the election board to order the election of an assessor in each part of the precinct so divided by said board, or in the absence of such order, that one assessor should be elected, yet in my opinion the section should be so construed as to be read in harmony with Section 3943, General Code, and it is my view of the provision of Section 3943 so read that in each precinct of a township where the precincts are the product of a subdivision made by a board of deputy state supervisors under Section 4850, General Code, that an assessor for each such precinct is only required when so ordered by the board, and that if in a given township there are two or more precincts, the product of a subdivision made by some authority other than by the board of elections, then under Section 3943 an assessor should be elected for each of such precincts. Applying this reasoning to your case, if the three precincts of the village of Wauseon and the one of that portion of the townships outside of the municipality were subdivisions of the township or parts thereof made by some authority other than the board of election, then under Section 3943 at your last election four assessors should have been elected, one for each precinct, and since as you say but one assessor was elected for the municipality and one for the outside territory, it is my view that the one elected for the outside territory was the only legal election and that there resulted a vacancy in each of the three precincts in the municipality. Of course if these three precincts of Wauseon were set off from the rest of the township by the deputy state supervisors of election, said board at the time of the subdivision failing to order the election of an assessor for each of said precincts so divided, and if further the commissioners had not under Section 3351 constituted the outside territory a separate district, then there would be but one assessor for the entire township including the municipality.

Coming now to your third question, it is my opinion that the county auditor has no duty to perform in the matter you speak of. Under the provisions of Section 3352, General Code, it is only in municipalities having no township organization, i. e., where the corporate limits of the municipality coincide with the township limits like Cincinnati, Toledo, Columbus, etc., and in consequence no township officers, as such are elected, and there being no township trustees in such case that the county auditor is, in the event of a vacancy in the office of assessor, authorized to appoint. In the case of any vacancies existing in the office of assessor in the village of Wauseon, it is the duty of your township trustees to fill same.

Answering your fourth question it is my opinion that the township assessor, being a township officer, his bond must be approved by the township trustees as

directed by Section 3350. The auditor only approves assessors' bonds when under Section 3352 he makes the appointment of such assessor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

255.

BOARD OF EDUCATION—MANDATORY TO DEPOSIT IN BANK MAKING BEST BID—INTEREST OF MEMBERS OF BOARD IN BEST BIDDING BANK NOT CRIMINAL.

Inasmuch as it is mandatory upon the board of education to place the deposits in the bank offering the highest rate of interest for the same, members of the board who are stockholders in, or officers of the bank making the best bid, are not criminally liable for making such bank the depository,

COLUMBUS, OHIO, April 5, 1912.

HON. JOHN J. WOOLLEY, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Under date of January 16th, you set forth the following state of facts:

> "The board of education of city of A. passed a resolution providing for the letting of their funds to a depository which would pay the highest rate of interest on the daily balance of the funds. Notice of the passage of this resolution was served on all of the banks of the city and request was made of these banks to bid for the funds. This request made by order of the board of education and notice of it was served by the clerk. Of the four banks served with this notice and request, but two put in bids and the highest and best bid was made by The A. National Bank which bid to pay 2.1 per cent. It now develops that L. G. W., the president of the board and C. M. C., the clerk, are both stockholders and Mr. W. is a director of said bank.
>
> "No question has been raised of any bad faith in the transaction in any way."

You desire opinion upon the above state of facts as to whether there is any criminal liability on the part of Mr. W. or Mr. C. and whether the contract made by the board with the bank is under such circumstances a valid contract.

Section 4757, General Code, provides that no member of the board (of education) shall have directly or indirectly any pecuniary interest in any contract of the board.

Section 12910, General Code, provides as follows:

> "Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is con-

nected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Section 12932, General Code, provides in part as follows:

"Whoever, being a * * * member of the board of education * * * acts in a matter in which he or she is pecuniarily interested shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months, or both."

Section 7604, General Code, as found in 101 O. L. 290, provides:

"The board of education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of its treasurer. But no bank shall receive a deposit larger than the amount of its paid in capital stock, and in no event to exceed three hundred thousand dollars."

Section 7605, General Code, as found in 101 O. L. 290, provides in part:

"In school districts containing two or more banks such deposit shall be made in the bank or banks, situated therein, that at competitive bidding offer the highest rate of interest which must be at least two per cent. for the full time funds or any part thereof are on deposit. * * * The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks * * *."

I am of the opinion that Section 12910, General Code, is not involved in this inquiry for the reason that the prohibition there is against an officer who is interested in a contract for the purchase of property, supplies or fire insurance. I do not consider that the designation of a depositary is in any sense within the provisions of said section. The question then arises as to whether or not the provisions of Section 12932 and 4757, General Code, as above set out are applicable. Prior to the amendment of Section 7604, General Code, as found in 101 O. L. 290, it was discretionary with a board of education as to whether or not it would designate a depository for the school funds, but said amendment made it mandatory upon the board to establish a depositary.

Section 7606, General Code, provides that the board shall determine by resolution provided for in Section 7605 the method by which the bids shall be received and the authority which is to receive them, but as the designation of the depositary is mandatory, and under the provisions of Section 7605, General Code, the deposits shall be made in the bank that at competitive bidding offers the highest rate of interest, it is not left to the board to determine after the bids are in which bank it will accept.

In the language of Woodmansee, J., in the case of Richardson vs. The Board of Trustees of Sycamore Township, 6 N. P. n. s. 505, at top of page 508 the board of education under the depositary act do not enter into a contract with any bank. They simply put the machinery in motion to get the highest bid, and after the bidder enters into a proper bond then the treasurer is the one who deals with the bank so selected as a depositary.

While in a sense the offer of the bank to accept the deposits and pay a certain rate of interest, and the acceptance of the bid thereof could be considered as a contract, yet as it is mandatory upon the board of education to accept the highest bid, and as it is the policy of the depositary law to have as full and extensive

competitive bidding as is possible, I do not think that the provisions of either Section 12932 or Section 4757 of the General Code are applicable to the case in question.

I, therefore, hold:

First. That there is no criminal liability on the part of Mr. W. or Mr. C. because of the fact that they were members of the board of education and likewise stockholders in the bank presenting the highest bid for the deposit, and

Second. That the awarding of the deposits by the board to the bank, being the highest bidder is a valid contract.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

264.

TAXES AND TAXATION—EXEMPTIONS—INSTITUTION OF PUBLIC CHARITY—LIMA BUSINESS WOMEN'S CLUB

The business women's club of Lima is an institution of public charity only and the real estate of said club is exempt from taxation. The mere fact that a small fee is exacted for active membership is immaterial.

COLUMBUS, OHIO, April 1, 1912.

HON. JAMES J. WEADOCK, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 27th, submitting for my opinion thereon the following question:

> "The business women's club of Lima, Ohio, is a corporation organized under the laws of this state, not for profit, for the following purpose:
>
> "To promote the spiritual, mental, moral and physical welfare of the women of Lima, Ohio, and to accomplish the above purposes may acquire, own and hold by lease, purchase or gift all necessary real estate and personal property."
>
> "The club maintains a club house in the city of Lima in which are a gymnasium, rest room, a library, etc., for the use of members of the club. The club is designed for the use and uplift of the working girls of the city of Lima. The full active membership of the club is accorded to any woman over fourteen years of age of good moral character. Such active membership, however, does not accord class privileges which have to do with the educational and physical work of the club. An additional fee, small in amount, is charged for membership with class privileges. There are other memberships which may be obtained by the payment of different small fees.
>
> "The membership of the club is not restricted further than above noted. The proceeds of the membership fees are used for the maintenance of the club house and in the educational, physical and religious activities thereof.
>
> *"Is the real estate of this club exempt from taxation?"*

I need not cite the statute which exempts from taxation property belonging to institutions of public charity only, nor the constitutional provision under authority of which this statute has been enacted. In my opinion the Lima business

women's club is "an institution of public charity only" within the meaning of these provisions. The mere fact that a small fee is exacted as a condition precedent to active membership is immaterial in this connection. (Library Association vs. Pelton, 36 O. S., 253.) The declared object and purpose of the organization is certainly a charitable one, and the manner in which that object is being carried out under the by-laws of the club, a copy of which you have furnished me, is entirely consistent with the charitable nature of the object itself.

I am, therefore, of the opinion that the real estate belonging to the business women's club of Lima is exempt from taxation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

268.

BOARD OF EDUCATION—PREMIUM AND ACCRUED INTEREST ON BOND ISSUES—SINKING FUND—CHANGE OF PLANS AND SPECIFICATIONS AFTER BIDS RECEIVED — CERTIFICATE OF MONEYS IN TREASURY BY CLERK BEFORE EXPENDITURE BY BOARD.

Inasmuch as the statutes do not prescribe otherwise, when a board of education sells bonds, the premium and accrued interest must, in accordance with the general rule that all accretions follow a trust fund, be credited to the fund for the purpose of which the bonds were sold.

It is the object of the statutes to maintain a fair competition in the letting of bids, and when a board of education has received bids for the construction of a building, alterations may not be made in the plans and specifications, and the bids let, accommodated, by deductions or increases, to the changes made in the plans and specifications.

The board of education may not expend any moneys derived by it from an issue of bonds, unless the clerk shall first certify that the money is in the treasury and not appropriated to any other purpose. Said board may, therefore, not enter into a contract for the construction of a building, the money for which is furnished by additional bonds, before the funds arising from such issue are in the treasury of the district.

COLUMBUS, OHIO, April 9, 1912.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 28th, requesting my opinion upon the following questions:

"1. When a board of education sells its bonds, what disposition as between the sinking fund and the improvement fund should be made of the premium and accrued interest?

"2. After the board of education has advertised for and received bids for the construction of a building, may changes be made in the plans and specifications and the contract let for the doing of the work under the altered plans and specifications with appropriate deductions or additions or both in the items of the bids submitted?

"3. May a contract be entered into by a board of education for

the construction of a building, the money for which is furnished by additional bonds, before the funds arising from such issue are in the treasury of the district?"

In connection with your inquiries, I have given careful consideration to the statement of your opinion thereon as set forth in your letter and to the two opinions of Messrs. Hosea & Knight, attorneys at law, Cincinnati, Ohio, who represent architects interested in the specific case which gives rise to these questions.

You point out, in discussing the first question which you submit, that the municipal code, Section 3932 specifically provides that the premiums and accrued interest arising from an issue of bonds by a municipal corporation must be credited to the sinking fund, and that Sections 7625, etc., General Code, which provide for the sale of bonds by a board of education, contain no such provision. You reason correctly, I think, that such a comparison of similar statutes affords ground for the conclusion that premiums and accrued interest arising from the sale of bonds by a board of education are not to be credited to the sinking fund. Other considerations point to the same conclusion. Thus the provisions relating to the establishment of a sinking fund by a school district and the creation of a board of commissioners of the sinking fund are equally silent as to the disposition of premiums and accrued interest arising from the sale of bonds. Again, it is a general principle that the accretions of a trust fund follow and belong to the fund itself. Upon this principle the premiums and accrued interest arising from the sale of bonds issued by a board of education would, in the absence of statutes to the contrary, follow the principal, of the fund and be subject to the same uses and purposes. But both yourself and the other counsel who have examined this question have overlooked an express provision of statute relating in part at least to this very matter. I refer to Section 2295, which is a general provision governing the sale of bonds by county commissioners, boards of education and commissioners of free turnpikes. It provides in part as follows:

"All moneys from both principal and premiums on the sale of such bonds, shall be credited to the fund on account of which the bonds are issued and sold."

This provision is, of course, decisive of your first question so far as it relates to the disposition of the premium, and strongly supports the conclusion which you have correctly reached as to the disposition of the accrued interest.

Your second question involves primarily a consideration of Section 7623, General Code. That section, which is of great length, prescribes in considerable detail the procedure which shall be followed by a board of education in entering into a contract for the making of any improvement or repair under its supervision. I quote only a portion of it:

"4. Each bid must contain the name of every person interested therein, and shall be accompanied by a sufficient guarantee of some disinterested person, that if the bid be accepted, a contract will be entered into, and the performance of it properly secured.

"5. When both labor and materials are embraced in the work bid for, each must be separately stated in the bid, with the price thereof.

"6. None but the lowest responsible bid shall be accepted. The board in its discretion may reject all the bills, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate.

"7. Any part of a bid which is lower than the same part of any

other bid, shall be accepted, whether the residue of the bid is higher or not; and if it is higher, such residue must be rejected.

"8. The contract must be between the board of education and the bidders. The board shall pay the contract price for the work, when it is completed, in cash, and may pay monthly estimates as the work progresses.

"9. When two or more bids are equal, in the whole, or in any part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders."

None of these sections authorize the acceptance of any bid or part of a bid which is not submitted with respect to the plans and specifications offered to other bidders and subject to competition.

Sections 2362 and 2364, inclusive, General Code, which are applicable only to buildings to be constructed at a cost of less than $10,000, are of interest in this connection, and provide in part as follows:

Section 2362.

"An officer, board or other authority of * * a * * * school * * * district * * * required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment or business entering into the improvement."

Section 2363.

"When more than one trade or kind of mechanical labor, employment or business is required no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required of the bids for the whole or for two or more kinds of work or materials are lower than the separate bids therefor in the aggregate."

Section 2364.

"The contract for doing the work belonging to each separate trade or kind of mechanical labor, employment or business or for the furnishing of materials therefor, or both, shall be awarded by such officer, board or other authority in its discretion, to the lowest and best separate bidder therefor, and shall be made directly with him or them in the manner and upon the terms, conditions and limitations as to giving bond with security and otherwise as prescribed by law, unless it is let as a whole, or to bidders for more than one kind of work or materials. * *"

It is scarcely necessary for me to comment upon the obvious purpose of statutes like those above quoted. Competition in bidding is the thing aimed at and the interests of the taxpayers are intended to be safeguarded thereby. In order that competition may be secured, it is necessary, of course, that all who bid upon the entire job or any portion thereof shall base their bids upon the same plans and specifications. Especially would this be true in the case of a lump bid for the entire work. One general contractor may be in a position to do a certain part of the work much more cheaply to himself than any other bidder, and that particular item may be relatively of greater consequence in his bid than in that of one of his competitors. It would not, therefore, be fair to other bidders nor to the tax-paying public of the district to permit a bidder to amend his bid by omitting certain

items as other bidders, if invited to bid upon the entire work with these items omitted might have submitted aggregate bids much less than that of the favored bidder.

For these reasons it has been held by courts of nisi prius under these very sections that it is unlawful for a board of education to award a contract for the building of a school house to a bidder who has been permitted to change his bid by the omission of various items. (McAlexander vs. School District, 7 N. P. n. s., 590); and that an item may not be added to the work by a change of plans and specifications for any reason whatever (McGreevey vs. Board of Education, 20 C. C., 114; Mueller vs. Board of Education, 11 N. P. n. s., 113). In the case last cited it is held that the addition of items of the work resulting in what are commonly called "extras" necessitates inviting new bids if the amount of the additional charge exceeds the limitations prescribed in the first part of Section 7623, and at least the making of a separate and distinct contract for such "extras."

With the reasoning of these decisions I heartily agree, and advise you accordingly that in my opinion it is not lawful for a board of education to permit a bidder, though he be the lowest responsible bidder on the entire work, to change his bid in any way after its submission, nor to change the plans and specifications after opening bids so as to eliminate some features of the work or add new ones. In case the plans and specifications are changed so as to eliminate a part of the work, no bid can be accepted, but new bids must be invited; in case of additions to the plans and specifications, the bid which has been made may be accepted, but the additions must be made under separate contract which, if the expense thereof exceeds fifteen hundred dollars in city districts or five hundred dollars in other districts, must be let at competitive bidding.

To say that contracts, such as those with which we are now dealing, are "unlawful," is not, of course, to hold that if no one objects and the work is done and paid for, the money can be recovered from the contractor for the use of the district. The payment of money to a contractor under such circumstances, however, or the letting of a contract in the first instance could, in my opinion, be successfully enjoined by any taxpayer of the district. Competing bidders would probably not have the right to invoke the powers of a court of equity in their behalf.

The thing sought to be done by the board of education, and which I have held to be unlawful, is specifically authorized as to the director of public service of a municipal corporation. This, however, but makes it clear that without such specific provision of law the authority to enter into supplemental contracts because of alterations in the principal contract made subsequent to the letting thereof does not exist. In a case like that which you submit to me, however, a director of public service would have no authority to enter into a contract in the manner which you describe, as I understand you to say that the proposed alterations are to be made before the contract is let for the purpose of bringing the entire contract price within the amount of the funds available for the construction of the building.

Answering your third question, I beg to state that Sections 5660 and 5661, General Code, provide as follows:

Section 5660.

> "The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation of expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has

been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Section 5661.

"All contracts, agreements or obligations, and orders or resolutions entered into or passed contrary to the provisions of the next preceding section, shall be void, but such section shall not apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of boards of education."

The above cited case of McAlexander vs. School District affords an instance of a judicial construction of these sections. It is there held that these sections apply to the expenditure of the proceeds of a bond issue made by the board of education as in reason and logic they seem to apply. There is a line of decisions under the corresponding sections of the municipal code to the general effect that the requirement that the certificate that the money is in the treasury and not appropriated for any other purpose be made before the contract is entered into does not apply to contracts not to be discharged out of moneys raised by taxation. These decisions were rendered in cases involving the expenditure of moneys raised by issue of bonds to be met by special assessment, water rentals and the like. In the case now under consideration, however, the bonds which have been issued and sold must be paid out of the proceeds of levies on the general duplicate of the school district. The reasoning in the cases referred to, which for brevity I shall not cite or comment on further, is therefore not applicable here.

I am of the opinion then, that the board of education may not expend any moneys derived by it from an issue of bonds nor enter into any contract involving the expenditure of such money for specific improvements unless the clerk of the district shall first certify that the money is in the treasury of the district and not appropriated for any other purpose.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

269.

INFIRMARY BUILDING—POWERS OF COUNTY COMMISSIONERS WHEN CONDEMNED BY INSPECTOR OF WORKSHOPS AND FACTORIES—SPECIAL ELECTION FOR ERECTION OF COUNTY BUILDING MAY BE HELD AT PRIMARIES.

When the infirmary directors are required, by reason of an order of the chief inspector of workshops and factories, to discontinue the use of the infirmary building, the county commissioners, under authorization of Sections 2434 *and* 2419, *General Code, may provide by lease of buildings, for the care of inmates pending the repair or rebuilding of the present infirmary building.*

The question of the construction of a county building must be submitted at a special election. Such election may, however, be held on the same date as the primaries by observing caution with respect to the different hours for which the polls must be kept open upon each of these elections.

COLUMBUS, OHIO, April 11, 1912.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 4th, requesting my opinion upon the following questions:

> "1. The infirmary directors of Guernsey county have been notified by the chief inspector of workshops and factories to discontinue the use of the infirmary buildings after the first day of May on account of the unsafe and unsanitary condition thereof. Pending the construction of a new infirmary building or of temporary infirmary buildings as provided in Section 2437, General Code, or the making of repairs on the infirmary buildings in order to comply with the order of the inspector of workshops and factories, what arrangement may be made for the care of the inmates of the infirmary and by whom should it be effected?
>
> "2. May the question as to the policy of building a county building be submitted to the electors at an election held on the day of the partisan primaries and at the same polling places?"

Answering your first question I beg to state that there are certain statutes which provide for the care of the poor in counties in which there is no county infirmary. These sections, which I do not quote, do not, in my opinion, apply here.

Under the circumstances stated by you, Guernsey county would not be a county which does not provide a county infirmary, but merely one in which the infirmary provided is unfit for use, so long as the commissioners of the county intend to replace the existing infirmary building with others which may be used or to improve or repair these existing in such manner as to make them available for use.

Without quoting any of the sections of the chapter of the General Code relating to the powers and duties of the infirmary directors suffice it to say that none of them authorize those officers to take any action whatever looking to providing a place for the infirmary. Their sole duty is to manage and conduct the infirmary when provided for them by the commissioners. In my opinion ample authority is found in Section 2434, as amended in 102 O. L. 55, for the accomplishment of the objects stated in your first question. That section provides in part as follows:

> "* * * for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house * * * county infirmary * * * or other necessary buildings * * * the commissioners may borrow * * * money * * *."

While there is no direct grant of power here, I am of the opinion that this section, together with the broad authority conferred upon the commissioners under Section 2419, General Code, is sufficient to empower the commissioners to proceed in the manner stated in Section 3424 to obtain the temporary use of any buildings available for the purpose of housing the inmates of the infirmary, pending the rebuilding or repair of the present infirmary. Said Section 2419 provides in part as follows:

> "A court house * * * and an infirmary shall be provided by the commissioners when in their judgment they or any of them are needed * * *."

The power of the commissioners is not limited to the purchase of a building or to the construction thereof, and these statutes ought to be liberally construed so as to provide for emergencies such as that with which the commissioners of Guernsey county are now confronted.

It is my opinion, therefore, that under the circumstances mentioned by you the county commissioners may lawfully provide by lease of any buildings in the county a place for the county infirmary pending the repair or rebuilding of the present infirmary or the construction of a temporary building.

Answering your second question I beg to state that Section 5639-1, General Code, as enacted 102 O. L. 447, provides that the election upon the policy of rebuilding a public county building "shall be held at the regular place for voting in such county, and shall be conducted, canvassed and certified in the same manner, except as otherwise provided by law as for the election of county officers."

It is further provided in said section that the date of said election shall be fixed by the county commissioners and certified to the board of deputy state supervisors of elections. There seems to be no question, therefore, that the election is a special one and not governed by Section 4840, General Code, which provides as follows:

> "Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation of such election."

I find that my predecessor, Hon. U. G. Denman, rendered an opinion to the effect that a special election upon the subject of issuing bonds for the construction of a school building might lawfully be submitted at the date of the primaries, although many inconveniences of such a proceeding were pointed out by him. In his reasoning I concur in spite of the additional point which you suggest in your letter, and which does not appear to have been considered by Mr. Denman. That point is as follows:

Section 5056 provides in effect that the polls at a general election shall be open from 5:30 in the morning until 6 in the afternoon, while Section 4967 provides that in primary elections the polls shall be open from 5:30 in the morning

until 5:30 in the afternoon. Inasmuch as the laws pertaining to the election of county officers apply, insofar as they are appropriate, to the election at which the question of the policy of rebuilding a county building is submitted, the polls at such election must be kept open until six o'clock.

This point furnishes practical difficulty but does not in my opinion impair the power of the county to fix the date for holding the primaries as the date of the special election. It may be obviated by closing the ballot boxes of the primary election at 5:30 and holding the polls open for an additional half hour for the purpose of receiving ballots cast upon the question submitted. If care is exercised the legality of neither election need be impaired by holding both at the same time and in the same polling place with the services of the same election officials.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

271.

BOARD OF EDUCATION—STATE AID—FUNDING INDEBTEDNESS—SMITH ONE PER CENT. LAW INTEREST AND SINKING FUND LEVIES—GROVER HILL SCHOOL DISTRICT.

The financial difficulties of the Grover Hill school district board of education may be assisted by the powers to fund indebtedness and the state aid provisions with reference to the common school fund.

Interest and sinking fund levies for the purpose of providing for bonded indebtedness created prior to the Smith law are not within the five mill limitation of that law.

COLUMBUS, OHIO, March 18, 1912.

HON. W. F. CORBETT, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 4th enclosing a letter addressed to you by the clerk of the board of education of Grover Hill school district. The facts on which my opinion is invited, as disclosed by the letter of the clerk of the board of education, are as follows:

> "The total duplicate of the school district is $542,890.00. The maximum school levy for local purposes prescribed by Section 5649-3*a* being five mills the amount of revenue available for such purpose on this duplicate is $2,714.00. The tuition fund of the district is subject to fixed charges of $265.00 a month and if school is kept open for eight months as required by law the total obligations chargeable against this fund amount to $2,120.00.
>
> "There is outstanding a bonded indebtedness created by vote of the people under which the district is obliged to pay interest in the amount of $975.00 per annum. There is also outstanding an obligation $500.00, the exact nature of which is not disclosed, but it appears to be a charge upon the contingent fund of the district.
>
> "The amount of money in the various funds on February 17, 1912, with the school year approximately half over, is as follows: Tuition

fund $255.00; contingent fund $80.23; building fund $26.27. $600.00 of the tuition fund has been drawn in advance of the tax settlement.

Query. How can the financial affairs of the district be managed during the present fiscal year?"

I am not informed as to how the total levy of $2,714.00 is for tuition fund, but assuming that three-fourths thereof was for that purpose that being the proportion in which the district is required to levy in order to qualify for state aid, I ascertain by computation that the proceeds of the tuition fund levy at the semi-annual settlement are in excess of one thousand dollars leaving a balance of $400.00 still payable to this fund for the purpose of operating the schools until the first of March; and a like amount of $1,000.00 approximately would be available at the August settlement for the purpose of operating the schools during the latter half of the present school year. I realize that it is inconvenient that the proceeds of taxation are not paid over until that portion of the year for which they are intended has elapsed. That results, however, from the fact that the school commences on September 1st, while the first tax collection for that year does not take place until the following December. The only way to correct this difficulty would be to amend the law which establishes the school year so as to permit funds to be levied and appropriated under the Smith law for and as of the year beginning March 1st. As it is, however, the districts will have to do like Grover Hill has done, viz., collect advancements from the undivided tax fund in order to continue to operate; yet it must always be recognized that at the end of the fiscal year enough money will have been produced by taxation to meet every charge in this fund.

I suspect, however, that I have been unwarranted in supposing that three-fourths of the total levy was made for tuition fund purposes. The needs of the district for this fund are not sufficiently great to require such a levy. The above figures do not take into account the proceeds of the distribution of the state common school fund, and I am not advised as to the amount which this district will receive from that distribution, but would suppose it to be sufficient to enable the board to levy less than three-fourths of the maximum for tuition fund purposes. This would be the case if the amount received from the state considerably exceeded $120.00.

In discussing the tuition fund I am at a disadvantage and my advice to you is really of not much value because I have not sufficient facts upon which to base a conclusion. In order to advise you fully I should have to know how much of the total levy of $2,714.00 was for tuition fund purposes.

As to the payment of the interest on the bonds I beg to advise that the supreme court in State ex rel. vs. Sanzenbacher, 84 O. S. (unreported) had before it the exact question here presented. It was decided in that case that interest and sinking fund levies for the purpose of providing for bonded indebtedness created prior to the passage of the Smith law are not within the internal limitation of five mills prescribed by Section 5649-3a although such levies are within the limitation measured by the 1910 tax and that of fifteen mills prescribed by Section 5649-5*d* of the Smith law. These limitations, however, are applicable to all taxing authorities levying within the sale territory, so that the burden thereof, so to speak, must be shared by the village, the township and the county as well as borne by the school district itself. However, the total levy of five mills need not include such interest and sinking fund levies and the $975.00 may in future years be taken care of outside of the five mill levy if needs of the other taxing districts permit.

So far as the current year is concerned if the school district is unable to meet its interest charges as they become due because of the action of the budget commission then, in my opinion, the board of education has ample power under Section 5656,

General Code, to fund such indebtedness by the issuance of funding bonds or by the issuance of mere certificates of indebtedness so as to distribute the burden thereof over a greater number of years and make the limitation of the Smith law less onerous in a single year.

The foregoing procedure might also be adopted as to the $500.00 of indebtedness against the contingent fund spoken of in the clerk's letter. That is to say, while this indebtedness must be discharged out of the five mill levy and is not exempt therefrom like the interest levy above referred to unless created prior to June 2, 1911, yet if it was properly created and constitutes a valid indebtedness of the district it may be funded under Section 5656 above cited. However, I suspect that this indebtedness of $500.00 may not be a proper charge, as I do not understand that the board of education has power to incur indebtedness of a contractual nature under Section 5660, General Code, unless there is money in the treasury to pay the same when due. If the indebtedness is not a proper one and does not constitute a valid outstanding obligation of the district then it cannot be funded under Section 5656, and if the board of education in good morals desires to discharge such indebtedness it must do so out of its current revenues.

The figures given by the clerk as above set forth do not mean anything to me for the reason that he writes before the semi-annual settlement. In order to be able to intelligently appreciate the exact situation of this district it would be necessary for me to have before me the amount of money in the several funds on March 1st, the amount of obligations outstanding at that time and the nature of each such obligation. Upon such information as I have, however, I am unable to see that Crover Hill school district is in great financial difficulty, taking into account the fact that the distribution of the state common school fund ought to increase the tuition fund, and the further fact that if the levy for that fund is as large as I suppose it to be it ought itself meet practically all of the obligations against it for the current year, although such obligations will accrue before the money to meet them is available. Furthermore, permit me to call attention to the fact that if the levy of this school district has been properly made, the district is qualified for state aid in case there is a deficiency in the tuition fund; also to the fact that the salaries of teachers and other employes of boards of education are not subject to the limitations of Section 5660, General Code, and accordingly, even if the money is not available in a given year to pay the salaries of teachers and other employes such salaries constitute the valid, legal indebtedness of the district which may be funded under Section 5656 and distributed over a period of time sufficiently great to permit these obligations being taken up without seriously depleting the current revenue in any given year.

As I have heretofore remarked in this opinion, I am unable to reach any specific conclusion for the reason that I have not sufficient facts before me, but rather than to delay matters by writing for further facts, however, I have made the foregoing suggestions in the hope that by the use of them you may be able to advise the district fully in the matter.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

274.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—TUBERCULOSIS HOSPITAL—THREE MILL LIMITATIONS—COUNTY COMMISSIONERS LIMITED TO ISSUE IN ANTICIPATION OF SINGLE LEVY.

Inasmuch as the purchase or construction of a tuberculosis hospital is excepted from the provisions requiring a vote of electors, levies made under Section 3141, *General Code, for the purpose of discharging an indebtedness, created after June* 1, 1911, *for the purpose of such a hospital, are within the three mill limitation of the Smith Law.*

The commissioners are limited to such an issue under Section 3141, *General Code, as may be made in anticipation of a single levy.*

COLUMBUS, OHIO, April 1, 1912.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 9th, submitting for my opinion thereon the following question:

> "Would a levy made by the county commissioners to pay the interest and principal of bonds issued for the purpose of constructing a county tuberculosis hospital be subject to the limitation of three mills prescribed by Section 5649-3*a*, General Code, a part of the so-called 'Smith One Per Cent. Tax Law?"

The limitations of Section 5649-3a, as construed by the supreme court in the case of State ex rel. vs. Senzenbacher, unreported, are exclusive of the same sinking fund levies as are, by Section 5649-2 and Section 5649-3 of the same act, excluded from the operation of the ten mill limitation and that measured by the amount of taxes raised in the taxing district in the year 1910. Such excepted levies, in so far as you are interested therein, are those for interest and sinking fund purposes made necessary by indebtedness created prior to the passage of the act, or thereafter, by a vote of the people.

By Section 3140, the policy of building a county tuberculosis hospital need not be submitted to the electors for approval regardless of the cost of the building. This constitutes an exception to the rule applicable to the construction of other county buildings, and the acquisition of sites therefor.

By Section 3141 of the General Code, the county commissioners are given authority to issue bonds in anticipation of a single levy of taxes. I might here remark that this authority is to be distinguished from that to borrow money generally, and to provide for the payment of the same by creating a sinking fund, etc. I have heretofore held, in an opinion to the prosecuting attorney of Montgomery county, that all that may be anticipated under Section 3141 is a single levy. Even if this view be not correct, however, the authority to issue bonds under Section 3141, General Code, is not one which is dependent upon the vote of the electors.

I think that it is very clear, therefore, that levies under Section 3141, General Code, for the purpose of discharging indebtedness created after June 2, 1911, by the purchase or construction of a tuberculosis hospital must be made within the three-mill limitation of Section 5649-3a. I feel called upon to advise you in addition that the commissioners have no authority to issue bonds and to provide a sinking fund for the retirement thereof under Section 3141, but are limited to such an issue as may be made in anticipation of a single levy.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

276.

INTEREST OF PUBLIC OFFICIAL IN PUBLIC EXPENDITURES—PUBLIC SAFETY DIRECTOR AS MEMBER OF FIRM OF ATTORNEYS RETAINED BY PUBLIC SERVICE CORPORATIONS IN CITY.

There is no statutory prohibition and no legal objection against permitting an attorney who is retained by large railroad and other corporations of the city to hold the office of safety director of that city, so long as said official, or the firm of attorneys to which he belongs, is not actively engaged in prosecuting or defending a claim in behalf of said corporations against the city.

COLUMBUS, OHIO, April 2, 1912.

HON. EMETT C. SAYLES, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 25th, in which you request my opinion as follows:

> "The safety director in the city of _____ is a member of a firm of attorneys who represent one railroad passing through that city, one large corporation known as The _____ Company, which has vast manufacturing interests in that city, and which firm also represents, as attorneys at law, The _____ Railroad Company.
>
> "Certain tax payers desire me to inquire of you whether or not the safety director of said city is eligible to hold that office while representing the interests herein named."

I know of no provision of statute or principal of common law which would prevent the person to whom your letter refers from holding the position of director of public safety while retaining his connection with the public service and other corporations described by you. It is unlawful for an officer of the city to have any interest, direct or indirect, in the expenditure of any city money or in any of the contracts of the city; to this effect several statutes might be cited, all of which are based upon well established common law principles; none of them are applicable here, however, because the mere permanent retaining of a firm of attorneys does not vest the firm, or any of its members, with any pecuniary or other interest, either direct or indirect, in the affairs of its client, at least within the meaning of such statute. Of course, it would not be proper or legal for the person in question to continue his membership in the firm if the firm should actively represent one of its clients in prosecuting a claim against the city, or resisting one prosecuted against it by the city. This is not by virtue of any statute but because of the common law principles above referred to. However, I do not understand from your letter that any such matters, are pending at the present time, in which the firm in question has been retained as active counsel.

I am unable to refer you to any authorities in support of the conclusion I have reached but desire to point out that no text writer on the subject of public or municipal officers regards such facts as you have set forth as a disqualification for office; nor is there any reported decision, of which I am aware, to such an effect. In the absence of statute, therefore, and, as already pointed out, none of the statutes of this state are applicable, there is nothing to prevent a member of a firm of attorneys which represents large corporate interests in a city from serving as the director of public safety of that city.

The foregoing, you will understand, is my legal opinion and is not intended as an expression of my views as to the propriety of a lawyer undertaking to serve the city under circumstances like those detailed by you.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

277.

BLIND COMMISSION—ALLOWANCE OF SUPPLIES BY COUNTY COMMISSIONERS—MANDAMUS.

Claims in behalf of the blind commission for office furniture and filing cases, cannot be paid from county funds except upon the allowance of the county commissioners.

Should the commissioners refuse to make any allowance at all, however, they may be compelled to exercise a fair discretion in the authorization of such expenditures.

COLUMBUS, OHIO, March 29, 1912.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 16th, submitting for my opinion thereon the following question:

> "Is the blind commission entitled to be supplied by the county commissioners with office furniture and filing cases?"

The only section of the General Code under authority of which the commissioners furnish the supplies for county offices is Section 2419, General Code, which provides in part as follows:

> "A court house, jail, offices for county officers, and an infirmary, shall be provided by the commissioners when, in their judgment, they, any of them, are needed. * * *"

Furniture is indirectly referred to in Section 2415, General Code, which provides as follows:

> "The board may authorize the county auditor to contract for the making of such repairs or improvements on the public buildings, public grounds, or furniture, as it deems proper, but in no instance at an expense exceeding fifty dollars."

As a matter of fact the county commissioners are the board of general powers. and in a sense are the county itself. For this reason statutes have been liberally construed and it has been the uniform, and, I think, proper ruling that county commissioners are authorized to furnish county officers with all things necessary for the performance of their duties, on the theory that such furnishings are claims against the county. (State ex rel. vs. McConnell, 28 O. S. 589.)

Section 2460, General Code, which prescribes the manner of payment of claims against the county, is as follows:

> "No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. * * *"

It is my opinion that the consent of the county commissioners is necessary

in order to authorize the creation of a claim against the county, and if a county officer should undertake to incur such an indebtedness it would be his own personal obligation unless the commissioners should allow it. This would be true of any county officer, including the auditor and the treasurer, as well as of the blind commission.

It follows, therefore, that the blind commission may not require the county commissioners to furnish any specific supplies or furniture to it, although, in my judgment, it might, in case the commissioners would refuse to act at all upon a claim for furniture bought by it, or to authorize the purchase of such furniture, by mandamus compel the commissioners fairly to exercise their discretion in the matter.

I do not understand that the blind commission is on a different footing from the regular officers of the county in this respect. To be sure, there is some doubt as to whether the members of this commission are county officers; if they are county officers, then, the law under which they are operating is unconstitutional because it does not provide for their election by the people. If they are not county officers, however, they are, nevertheless, such agents of the county for the accomplishment of a county purpose, as to entitle them to the same degree of support from the commissioners as the officers of the county are entitled to, subject always to the judgment of the commissioners themselves.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

284.

POLICE OFFICER—REIMBURSEMENT BY CITY FOR ATTORNEY'S FEES AND OTHER EXPENSES IN DEFENSE OF FALSE IMPRISONMENT SUIT—DEFENSE BY CITY SOLICITOR.

Inasmuch as the ordinance has not been passed by council accompanied by a certification of the clerk to the effect that moneys were in the treasury, there rests no express obligation upon the council to reimburse a police officer for expenses incurred including attorney's fees in the defense of a suit for false imprisonment brought by reason of an arrest properly made in his official capacity.

As the city itself is not involved in the litigation, there is no implied obligation to reimburse said officer, and, furthermore, when the city solicitor himself defends such suits, it would be inconsistent to further allow him compensation from said officer in addition to his salary, and nevertheless make a reimbursement from the city treasury to said police officer.

COLUMBUS, OHIO, April 13, 1912.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—The delay in answering your request, relative to the legality of the village of Milford meeting the expenses incident to the defending of damage suits filed against one George Randall, a policeman of that village, was due to the fact that the letter containing your original request indicated that our views on the subject coincided, and that the conclusion to which we had come was the only one possible under the circumstances.

However, that you may be able to place the matter properly before the village council, I still explain in detail the reasons for my conclusion.

The question presented is:

> "Can a village council, in the state of Ohio, indemnify a police officer for expenses, including attorney fees, incurred by such officer in defending a damage suit for false imprisonment; such suit arising out of an arrest made by such officer in his official capacity, under the direction of the mayor of the municipality?"

If the village is to indemnify an officer under the above circumstances, then, this duty so to indemnify must depend upon some obligation of the village, either express or implied.

There is not, under the facts stated, and in law could not be, any express obligation.

Section 4224 of the General Code provides as follows:

> "The action of council shall be by ordinance or resolution, and on the passage of such ordinance or resolution the vote shall be taken by 'yeas' and 'nays' and entered upon the journal, but this shall not apply to the ordering of an election, or direction by council to any board or officer to furnish council with information as to the affairs of any department or office. No by-law, ordinance or resolution of a general or permanent nature, or granting a franchise, or creating a right, or involving the expenditure of money, or the levying of a tax, or for the purchase, lease, sale, or transfer of property, shall be passed, unless it has been fully and distinctly read on three different days, and with respect to any such by-law, ordinance or resolution, there shall be no authority to dispense with this rule, except by a three-fourths vote of all members elected thereto, taken by yeas and nays, on each by-law, resolution or ordinance and entered on the journal. No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto."

Section 3806, General Code, provides:

> "No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

Under these sections the village council could only have acted, in providing for the assuming of the expenses of these damage suits, by an ordinance or resolution, which was not done; and further, provision could have been made for the meeting of the expenses only when the clerk had certified to the council that the money required to meet such contract, agreement or obligation, was in the treasury and unappropriated.

The question then arises as to an implied obligation, and in this connection I may state that there is no such obligation, either in law or by statute.

First, there is no obligation in law. While some of the decisions would seem to indicate that an implied obligation to indemnify a village police officer might arise in a case of this kind, an examination of these decisions will disclose the fact that almost invariably the cases in which such indemnity was made are cases in which the municipality itself would have been subject to suit.

> "Where, however, the disbursement was made (to wit: expenses incurred by an officer of a municipal corporation) in the rendition of a service in which the officer or individual alone is directly and beneficially interested, and which cannot be considered as a duty resting upon the corporation to perform, the right or power of reimbursement does not exist, for this would be equivalent to the appropriation or use of public money for private purposes."
>
> Abbott Municipal Corporations, Volume 2, Section 697, page 1652.

> "Where a municipal corporation has no interest in the event of a suit, or in the question involved in the case, and the judgment therein can in no way affect the corporate rights or corporate property, it cannot assume the defense of the suit, or appropriate its money to pay the judgment therein; and warrants or orders for the payment of money, based upon such a consideration are void.
>
> Dillon on Municipal Corporations, fifth edition, Vol. 1, Section 307, and cases cited in note.

> "The general doctrine of the law, touching personal liability for torts, applies to a policeman, and the municipality may not indemnify him of fines derived from violations of an ordinance, for damages recovered against him for enforcing it."
>
> 28 Cyc., page 102, Section 3.

There is no obligation by statute; on the contrary, there is, by implication, an express inhibition by statute against the reimbursing of a village officer for expenses incurred in a suit of this kind.

Section 4220 of the General Code provides:

> "When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

This section provides for the employment of a village solicitor in any case in which the necessity arises for the services of an attorney in any department of the village.

Under Section 3809 the requisites of Section 3806, as to the filing of the certificate of the village clerk as to the necessary money being in the treasury to meet any obligation or contract, incurred by the village, are expressly made not to apply to the contract made or obligation assumed by the village in providing for such village solicitor; but as to any other attorney Section 3806 applies. State ex rel. vs. Noble, 9 N. P. n. s., 618; Eaton vs. Hyde Park, 6 O. N. P., 257.

"If the scheme of municipal government provides a corporation counsel or city attorney or other legal officer for the municipality, whose duty it is to appear on behalf of the municipality in all suits by or against the corporation, and to conduct all the law business of the corporation, the municipality is deprived of its power to employ another attorney to take the place of and perform the duties which naturally belong to its law officer."

Dillon on Municipal Corporations, fifth edition, volume 2, page 1244.

Summarizing, I may state that there is no question of any express assuming of the expense of defending the damage suits against the police officer in this case, and there could be none implied; first, because the village was in no way involved; second, because, from your letter, it is apparent that there was no necessity for the employment of private counsel, for the reason that you yourself appeared as village solicitor in defending these damage suits, and third, because a village solicitor had been provided by the village council for the purpose of conducting whatever litigation might arise, involving the village itself, or any of its departments.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

295.

BOARD OF EDUCATION—BOXWELL GRADUATES—LIABILITY OF RESIDENCE BOARD OF EDUCATION FOR TUITION OF PUPILS ATTENDING HIGH SCHOOLS IN ADJOINING TOWNSHIP—NECESSITY FOR WRITTEN NOTICE TO BOARD.

When Boxwell graduates, resident in a special school district which has no high school, attend a high school in an adjoining township, the board of education of the district in which said pupils reside is not liable for the tuition of said pupils to the board of education maintaining the high school, unless the former board received five days' notice from said pupils of their intention to attend said high school as provided in Section 7750, General Code.

COLUMBUS, OHIO, April 15, 1912.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Under date of January 25th, you submit the following facts:

"Two pupils graduated under the Boxwell law in Rome township, Lawrence county, Ohio, prior to the beginning of the school year of 1910 and 1911, and their parents moved with said pupils to Delta special school district in the fall of 1910, which school district has no high school. Said Boxwell graduates attended a high school having a course of two years in the village of Coal Grove, Ohio, in an adjoining township for six months in 1910-1911 school year and have been and are now still attending said village high school. The clerk of the board of the Coal Grove high school has presented a bill to the board of education

of the Delta special school district for six months tuition for 1910-1911, and for eight months 1911-1912.

"The board of education of Delta special school district have no high school or contract with any high school for tuition of Boxwell graduates. Said Boxwell graduates gave no notice in writing or otherwise to the board of education of Delta special school district of their intention to attend the Coal Grove high school as required by Section 7750 of the General Code of Ohio. The question of residence of the Boxwell graduates is in Delta special school district without question."

You then ask:

"Can the Coal Grove board of education compel the Delta board of education to pay the tuition for the two Boxwell graduates attending the Coal Grove village high school?"

Section 7747 of the General Code provides:

"The tuition of pupils holding diplomas and residing in township or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the mouth. An attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other non-resident pupils."

Section 7750 of the General Code provides:

"A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

You state in your inquiry that the board of education of Delta special school district has no high school, nor has it contracted with any board of education for the schooling of its Boxwell graduates. You further state that the legal school residence of the two pupils in question is in the Delta special school district.

Under the provisions of Section 7747, General Code, supra, said school district is charged with the payment of the tuition of its Boxwell-Patterson graduates.

Section 7750, General Code, supra, however, provides that if the board of education not having a high school does not provide a high school for its Boxwell-Patterson graduates a school which said graduates may attend can be selected by the pupils holding diplomas *provided* due notice in writing is given to the clerk of the board of the name of the school to be attended and the date the

attendance is to begin, such notice to be filed not less than five days previous to the beginning of the attendance.

As the pupils in the case in question failed to give due notice in writing of the school they would attend as provided in Section 7750, General Code, I am of the opinion that the board of education of such special school district is not required to pay the tuition of such pupils, it being a condition precedent to a liability being fixed on the board for their tuition that such due notice be given in accordance with said Section 7750, General Code.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

298.

CORRUPT PRACTICE ACT—PERSON FILING NO NOMINATION PAPERS WHOSE NAME IS FILLED IN AT PRIMARY IS A "CANDIDATE" AND MUST FILE STATEMENT AS CONDITION PRECEDENT TO RECEIVING CERTIFICATE OF ELECTION.

When, in a primary, petitions for nominations to certain county offices are not filed and the voters are permitted to fill in the name of their candidate on a blank ballot, the parties whose names are thus filled in are candidates within the intention of the corrupt practice act and as such, they are required to file statements, under Section 5175-2, *General Code, whether they have made expenditures with respect to the election or not.*

Unless such statements are filed, a certificate of election may not be issued to such a candidate if elected.

COLUMBUS, OHIO, April 23, 1912.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—In your communication of April 4th, you state, in substance, that it has been the practice in your country, for many years, for the minority party not to file petitions of nomination for candidates for several county offices, permitting the voters of such party to make selection of their candidate by writing in the name of some person for the place. You term the person so voted for "an involuntary candidate" and ask, first whether such person, who does not file a petition for nomination but is voted for by the electors of any party, is compelled to file a statement of expenditures, whether he has expended anything or not; and, second, you state that the board of elections desires to know whether, if such person so voted for receives the nomination of his party for the office must file his expense account before his name may be printed upon the ballot.

By the "ballot" I take it you mean the official ballot at the next general election.

Section 5175-2, General Code, provides:

> "Every candidate who is voted for at any election or primary election, held within this state, and every person * * * who may have * * * expended * * * any money or thing of value in connection with such election, shall within ten days after such election file, etc."

The Century dictionary defines "candidate" as,

> "A person who seeks or is put forward by others for an office or honor."

Webster defines "candidate" as,

> "One who seeks or aspires to some office or privilege or who offers himself for the same, or one who is selected or thought of for an office or for preferment by those who have power to elect or appoint."

If the person is a candidate, it makes no difference whether his name is printed on the ballot or not—he aspires to or seeks or is put forward for the office. It matters not whether he actively engages in a campaign on his own behalf or has others do the work incident thereto, or whether he acquiesces in the labors of his friends on his behalf; being a candidate voted for, he would come within the provisions of Section 2 of the corrupt practices act, and if he made an expenditure there would be no question but that he would have to file an itemized statement, as required by law. And too, if he were a candidate, as above defined, and did not contribute, promise or expend anything in connection with the election, I am still inclined to the belief that he would be compelled to file a statement showing that fact.

This is apparent from a proper reading of Section 2 of the corrupt practices act, keeping in mind the purposes for which the act was enacted. "Every candidate who is voted for at any election" is brought within the purview of the statute; and while, if Section 2 were read by itself, it might be contended that only such candidates as had incurred expense were meant, read in connection with other sections, I have concluded that all candidates must file a statement, showing either their itemized expenditures or the fact that they had spent nothing.

Section 5175-8 provides that a certificate of election shall not issue until "any person required by this act to file a statement" has done so. The election board would be without anything at all upon which to base a judgment as to whether a required statement had been filed, unless all of the candidates who were entitled to certificate should file statements showing either that they had spent nothing or an itemized statement of such amounts as they had expended.

If the legislature had intended that all candidates not expending anything should be excused from filing a statement it could have very easily and plainly have said so. As I interpret the corrupt practices act, the candidate is called upon for some affirmative act, and if he has spent nothing he must so certify, providing he comes within the definition of a candidate as hereinbefore set forth.

Section 22 of the corrupt practices act reads as follows:

> "Failure to file a statement or filing a materially false or incomplete statement shall be prima facie evidence of wilfull intent to defeat the statute."

While it is true that this is merely a rule of evidence it is indicative of the extreme desire, on the part of the legislature, to provide in every manner against the evils that were sought to be remedied. The corrupt practices act should receive a liberal construction, to the end that it may accomplish the purpose for which it was enacted. The candidate who spends nothing for his election certainly should not hesitate to file a statement to that effect; I do not believe that he will be the one to make complaint; the slight inconvenience of preparing and filing a statement will prove a trivial mater, while his contribution to good citizen-

ship, in complying with the spirit of the law, will be ample recompense.

It should be borne in mind also that even if the person voted for did not come within the definition of a candidate, still, if he should contribute, expend or promise anything of value in connection with the election he would have to file an itemized expense account under Section 5175-2, as "any person" so expending, etc., is included therein, as well as a candidate.

Answering your second question, Section 5175-8 provides that,

> "No board, officer or officers authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any person required by this act to file a statement or statements until such statement or statements have been so made, verified and filed by such persons as provided by this act. * * *"

It is readily apparent that the board cannot take into consideration the fact as to whether or not one has filed an expense account, in determining what name shall be printed upon the official ballot. This section does not go so far, nor do I know of any provision of law that does. It is only when that time comes when the board is called upon to issue a commission or certificate of election, either after the primary or the general election, that they are called upon to determine whether the law has been complied with by the filing of an expense account.

Trusting that this fully answers your inquiries, I am

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

311.

PUBLICATIONS "WEEKLY"—SEMI-WEEKLY NEWSPAPERS.

When the law requires publications to be made "weekly" it is not necessary that said publication be made on the same day of each week. It is sufficient that said publication be made on any day within the period from Sunday to Saturday, which period constitutes the ordinary meaning of the term "week" as intended by these statutes.

COLUMBUS, OHIO, April 22, 1912.

HON. JAMES F. BELL, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Under date of February 7th you stated that in your county you have newspapers published semi-weekly; that is to say, on Tuesday and Friday of each week. You wish to know whether advertisement in such semi-weekly newspaper should be published each time on the same day of the week in instances where the law requires legal advertisements to be published "weekly" for a certain time as in Sections 2294 and 2353 of the General Code.

Section 2294, General Code, provides that all bonds issued by the board of county commissioners * * * shall be sold to the highest bidder after being advertised three times, weekly, in a newspaper having general circulation in the county where the bonds are issued.

Section 2353, General Code, in relation to the giving of the notice of the time and place where sealed proposals will be received for performing labor and furnish-

ing material in the erection of buildings, bridges, etc., by the county commissioners provides that "the notice shall be published *weekly* for four consecutive weeks."

The question to be determined is as to the meaning of the term "week."

Judge McLean in the case of Ronkendorff vs. Taylor's Lessee 4, Peters 345, at page 361 says:

> "The words of the law are 'once a week.' Does this limit the publication to a particular day of the week? If the notice be published on Monday, is it fatal to omit the publication until the Tuesday week succeeding? The object of the notice is as well answered by such a publication as if it had been made on the following Monday.
>
> "A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction the notice in this case must be held sufficient. It was published Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still the publication on Saturday was within the week succeeding the notice of the sixth.
>
> "It would be a most rigid construction of the act of congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of the week. If published once a week for three months, the law is complied with and its object effectuated."

In the case of Steinle vs. Bell, 12, Abbott's Practice (N. Y. n. s.) 171, part of the syllabus is as follows:

> "A week is a definite period of time, commencing on Sunday and ending on Saturday; and under the rule requiring service by publication to be made, by publication 'not less than once a week for six weeks,' the notice need not be published on the same day in each week, but may be on any day in each week during the six weeks. Seven days' interval between publications is not essential"

In the case of Currens vs. Blocher, appellant, 21 Pennsylvania superior court 30, the first paragraph of the syllabus is as follows:

> "Under the provisions of the 63d section of the act of June 16, 1836, P. L. 772, as amended by the act of July 2, 1895, P. L. 420, requiring that notice of a sheriff's sale of real estate shall be given by advertisement in two newspapers, 'once a week during three successive weeks previous to the sale,' a 'week' is a common calendar week extending from Sunday to Saturday, inclusive, and is not a mere period of seven days regardless of the day of beginning."

See Medland vs. Linton, 60 Neb., 249.
Bentley vs. Shingler, 111 Ga., 780.

While the exact question has not been passed upon in the state of Ohio, yet from the rulings made by the supreme court it would appear that such court followed the definition of "week" as laid down in 4 Peters supra.

The court in the case of Wilson et ux vs. Scott et al., 29 O. S. 636 on page 641, referring to legal advertisement of time and place of sale on execution, states the following:

"Although weekly newspapers are usually published on the same day of the week, there is no law requiring that it must be so. Hence, where the advertisement is made in a weekly paper, it is not essential that it appears in numbers published on the same day of each week. It is sufficient if it be published in each number for five consecutive weeks, provided the first number be published for at least thirty days before the day of sale."

In the case of Lemert vs. Clarke, 1 O. C. C., 569, the second syllabus is as follows:

"Where an advertisement of a judicial sale is published in a semi-weekly newspaper, it is not necessary that each insertion should be on the same day of the week."

On page 571 the court says:

"There seems to be nothing in Section 5393, or in any other which we can find, requiring the advertisement to be made on the same day of the week in the semi-weekly edition of any paper; but without deciding, for it is not necessary to do so in this case, we might say that probably such a publication would fall within the rule laid down in Hagerman vs. Loan Association, 25 O. S. 186, and Wilson vs. Scott, 29 O. S. 636, if the first publication was 30 days prior to the sale, it would be sufficient."

By reason of the foregoing, I am of the opinion that the local advertisement provided for in Sections 2294 and 2353 of the General Code supra, is not required to appear each time on the same day of the week, and in the question submitted by you it is sufficient if the advertisement is published in the newspaper in question alternately on Tuesday of some weeks and Friday of the other weeks.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

314.

CORRUPT PRACTICE ACT—NO LIMITATION TO AMOUNT OF EXPENDITURES OF A FRIEND OF A CANDIDATE—LIMITED NUMBER OF REPRESENTATIVES IN VOTING PRECINCTS.

Provided he spends only for the purposes specified in Section 5175-26, *General Code, there is no limit to the amount which may be expended by a friend of a candidate.*

As purposes enumerated in the corrupt practice act for which expenditures may be made are exclusive, a friend of a candidate may not employ and pay for more representatives at the voting precincts than are permitted in Section 5175-26, *General Code.*

COLUMBUS, OHIO, April 24, 1912.

HON. LEWIS P. METZGER, *Prosecuting Attorney, Salem, Ohio.*

DEAR SIR:—In your communication of April 19th, you submit for an opinion the following question:

"First—Is there any limit to the amount that can be expended by a friend of a candidate provided he expends the same for the purposes in Sections 5175-26, Section 26?

"Second—Would it be permissible for a friend of a candidate to employ and pay for one or more persons either in the voting precinct or outside of the precincts to look after the interests of a candidate without violating the corrupt practice act?"

The corrupt practice act was primarily intended to render the conduct of elections purer and less corrupt. The persons most interested in the election, to wit, the candidates were often the fountain-heads of the corruption owing to the lavish and widespread use of money to secure their election. The act pays most attention to and provides against certain acts done by the candidates. Section 2 requires every candidate, as also a person or committee, to file an itemized expense account, but there is an express exception as to the individuals other than the candidates making money contributions, the receipt of which would be accounted for by the others. Section 4 allows an individual other than a candidate, who expends money on behalf of his candidate for the permitted purpose to make an accounting to his candidate, who must then include it in the candidate's expense account. So the greater portion of the act is taken up with making certain things corrupt practices, but particularly applying to candidates.

There is no limitation of the amount allowed to be expended in connection with or in respect of any election, except the limitation found in Section 29 of the act (5175-29, General Code), which section provides:

"The total amount expended by a *candidate* for a public office voted for at an election * * * shall not exceed the amount specified herein. * * *"

There is no limitation found for either individuals, committee or associations of persons—their limitation is in the character of the expenditure as provided by Section 26 of the act and not any limitation on the amount.

I am of the opinion, therefore, that there is no limitation on the amount that can be expended by a friend of a candidate in connection with any election, but that such friend must keep within the restricted enumeration of the matters and things for which money or other things of value may be expended in connection with the election, and must file an itemized statement of his expenditures either with the proper legal authorities, or under Section 4 of the act, with the candidate himself, who shall include it in his itemized statement.

Answering your second question, I will say that Section 26 is not limited in its application to the candidate voted for. The section enumerates a list of matters and services for which compensation may be made at the reasonable, bona fide and customary value, and provides that "Any person is guilty of a corrupt practice" if he pays, lends or contributes or offers or promises to pay, lend or contribute any money or other value consideration for any other purpose than those enumerated. This department has already held that the enumeration contained in Section 5175-26 is exclusive and exhaustive, that expenditures cannot be made legally for any other matters or things than therein expressly provided or by fair implication contained therein. There is no express provision for a friend of a candidate to employ or pay for one or more persons either in the voting precinct or outside of the precinct to look after the interests of the candidate.

True, in Section 5175-26 there appears the following:

"Each political party may designate one party representative in each precinct upon each registration day, and such committee may designate not more than three (3) such representatives and each candidate one representative in each voting precinct upon each election day * * * who may be paid for their services by such committee or candidate. * * *"

This permission to the committee and to the candidate is the only one mentioned and under familiar rules of construction, such expression would exclude all others. It is only the candidate himself, or the committee, who can employ representatives as provided in the law. If one friend would be permitted to employ and pay a representative, then a dozen or a hundred could do the same thing and the entire electorate of a district might be debauched as of old under the guise of being paid for acting as representatives for the candidate.

I am, therefore, of the opinion that under the corrupt practice act a friend of the candidate could not employ and pay one or more persons to look after the candidate's interest at the various voting precincts.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

315.

BOARD OF EDUCATION—LIABILITY FOR TUITION OF PUPILS ATTENDING OUTSIDE DISTRICT—EFFECT OF NOTICE TO RESIDENT BOARD.

As no contract is necessary to charge one board of education with the tuition of its resident pupils for attendance at school in another district, the notice provided for in Section 7735, General Code, is intended, not to establish a right, but to fix the time from which said liability for tuition shall accrue.

COLUMBUS, OHIO, April 22, 1912.

HON. R. H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Under date of February 8th, you state that you would like my opinion relative to the interpretation of Section 7735, General Code, as to whether or not the tuition that can be recovered from a township or municipality wherein the pupil resides dates from the date of notice provided for in Section 7735 or does the tuition date from the time the pupil commences to attend school but not payable until after notice is given.

Section 7735, General Code, provides:

"When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer high school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside, to such attendance."

You will note that under the provisions of said section the board of education of the district in which the pupil resides must pay the tuition of such pupil without any agreement. In other words, that no contract is necessary, but that a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district wherein the pupils reside.

While it is true that the statute says "shall not *collect* tuition for such attendance" yet from a reading of the entire section and the fact that it does not require any agreement or consent from the board of education of the district in which the pupil resides, I am of the opinion that the liability to pay for such attendance will not attach until the notice provided for in the section has been given. I do not believe that the section means that the notice merely establishes a right to collect for tuition of pupils who have attended prior to the giving of such notice as it would seem to me that the object of the notice, since no contract is necessary, is to fix the time when the obligation for the tuition commences.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

321.

CORRUPT PRACTICE ACT—POWER OF CANDIDATE TO DESIGNATE REPRESENTATIVES IN VOTING PRECINCTS IN PRIMARIES.

Under the corrupt practice act, a candidate at the May primary may designate one representative in each voting precinct whose name shall be certified and who shall be compensated as provided in Section 5175-26, *General Code.*

COLUMBUS, OHIO, April 26, 1912.

HON. CHARLES, H. DUNCAN, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—I am in receipt of your communication of April 24th, asking for construction upon a part of Section 26 of the corrupt practices act, passed by the last legislature. The part referred to is in the fourth paragraph of Section 5175-26, General Code, and provides:

> "Any person is guilty of a corrupt practice if he, directly or indirectly, by himself or through any other person, in connection with, or in respect of any election, pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration, for any other purpose than the following matters and services, at their reasonable, bona fide and customary value:
>
> * * * * * * * * * * * * *
>
> "* * * Each political party may designate one party representative in each precinct upon each registration day, and such committee may designate not more than three (3) such representatives and each candidate one representative in each voting precinct upon each election day, whose names shall be certified to by the chairman and secretary of the controlling committee of such party to the board of deputy state supervisors of elections, at least two (2) days before such registration or election day, and who may be paid for their services by such committee or candidate not in excess of five ($5.00) dollars per day each."

You desire to know whether or not the above provision authorizes a candidate for nomination at the primary election to have one paid representative in each voting precinct upon the day of the primary election, and compensate him as therein provided.

While the so-called corrupt practices act is somewhat loosely drawn, and in some places may seem ambiguous, still, if the act is viewed from its four corners, so to speak, and the mischiefs sought to be remedied are kept in mind, it is not difficult to arrive at a correct construction.

Section 5175-1 of the General Code, defining "committee," uses the following significant language:

> "The term 'committee' * * * as hereinafter used, shall include every committee or combination of two or more persons co-operating * * * to aid or take part in the election or defeat of any candidate for nomination at a primary election or convention, including all proceedings prior to such primary election, or of any candidate for any office, whether public or not, to be voted for at a primary election * * *."

Section 5175-2, General Code, provides that every candidate who is voted for at any election or primary election and who expends, directly or indirectly, any money or things of value in connection with such election, shall file an itemized statement showing in detail such expenditures.

It is evident, therefore, that committees, as well as candidates, taking part in the primary election, were intended to be within the provisions of the act.

In Section 5175-26, supra, "any election" must be read in its usual and popular sense. The legislature certainly had in mind that primary, special, regular and general elections might be holden; and their use of the words "any election" must be understood to comprehend all kinds of elections, at least all kinds in vogue at the time of the enactment. It is like the use of the term "any person" in said section; other sections specify committees, candidates, associations and persons, but when it came to defining what should constitute the guilt of a corrupt practice under the act, so far as the use of money or other valuable consideration was concerned, use was made of the all comprehensive words "any person," a general term, including all persons whosoever would do the things specified.

Conceding, then, that the corrupt practices act applies to primary elections—and this must be done in view of the language of the various sections, and the object and purpose of the law—let us consider the wording of that part of Section 5175-26, referring to the designating by candidates and committees of representatives at the polling places. The political committee and the candidate are allowed to designate representatives at each polling place "upon *each* election day." The statutes pertaining to elections speak of special, regular, primary and general elections, and their various meanings are all well understood; certainly the legislature knew this fact and had they so desired they could have limited the right of candidates and committees, in appointing representatives, to any of these various election days, but they employed them upon "each" election day to designate these persons. To my mind it could not be made broader that the power applies as well to each and every election day, as above mentioned, as it does to the November election. The permitted expenditure is to allow a representative at the polling place—it is a recognition that to that extent the meeting of the expense incident thereto would not constitute a corruption of the voters. The limitation to one representative was evidently to avoid the consequent corruption attendant upon the laying down of the bars and the general permission to designate as many representatives as the candidate or committee might desire.

The legislative intent was to purify all elections. One set of drastic rules was laid down, applicable to nominations as well as to elections, and it was expressly defined what expenditures would be permitted "in connection with or in respect of *any* election."

I therefore conclude that your inquiry can be answered in but one way, to-wit: that under the corrupt practices act a candidate at the May primary may designate one representative in each voting precinct, whose name shall be certified and who shall be compensated as provided in Section 5175-26.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

323.

CORRUPT PRACTICE ACT—TIME WHEN PERSON BECOMES A "CANDIDATE"—NO RIGHT OF VOTERS TO AFFILIATE OR VOTE WITH OTHER PARTY—RIGHT TO SUPPORT CANDIDATE OF OTHER PARTY.

It is the intention of the corrupt practice act to have every item of expenditure made in connection with the candidacy, be filed, and for this purpose, the term of a party's candidacy commences as soon as the intent to be a candidate is evidenced, directly or indirectly by any overt act or contribution, receipt or expenditure of money or anything of value in connection with such election.

Under penalty of criminal action, a voter at the primary may not vote any ticket other than that of the party with which he is affiliated, nor participate in the nomination of a candidate of a party other than that to which he belongs.

This, however, will not prohibit one party from endorsing or supporting a person who is also voted for upon another party's ticket. Such a person, however, runs individually on each party ticket and his vote on one ticket may not be counted in connection with his vote on another ticket.

COLUMBUS, OHIO, April 26, 1912.

HON. JOHN G. ROMER, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of April 11th, in which you inquire concerning certain election matters, as follows, to wit:

> "1. When does a person become a candidate under the corrupt practices act; at the time he announces his candidacy or at the time he files his petition?
>
> "2. Can a voter at the primary vote any ticket other than that of the party with which he is affiliated, or participate in the nomination of any candidate other than that of the party to which he belongs?"

Your first inquiry raises a novel and interesting question, and though, at first blush, it seems difficult of solution because, pursued in its various ramifications, different times and dates would mark the actual candidacy of almost every individual candidate, still, I believe a rule can be evolved by which each case can be readily worked out and a correct conclusion easily reached.

Section 2 of the corrupt practices act, Section 5175-2, General Code, provides:

"Every candidate who is voted for at any election or primary election held within this state * * * who may have contributed, promised, received or expended, directly or indirectly, any money or thing of value, in connection with such election, shall * * * file * * * an itemized statement * * *."

Candidates who are voted for at an election, as we all well know, are of various kinds and degrees; we have the active and the inactive candidates, the man who is always in the hands of his friends, the standing candidate, whose lightning rod is ever up and ready for business; we have the receptive candidate, the man who thinks he is a candidate, as well as the one whom every one, other than himself, knows to be a candidate. In this great state of Ohio it probably is a far more difficult question to answer as to when a man is not a candidate than as to when he is.

Webster defines a candidate as,

"1. One who seeks or aspires to some office or privilege, or who offers himself for the same.

"2. One who is selected or thought of for an office or for preferment by those who have the power to elect or appoint."

The Century Dictionary defines a candidate as,

"A person who seeks or is put forward by others for an office or honor."

The word "candidate" derived from the Latin term "candidatus," literally means "white-robed," because, in ancient Rome, a person who sought office arrayed himself in a glittering white robe. I sadly fear, in these later and progressive days, when "mud slinging" seems so popular and plays so important a part in our campaigns, such a robe would not long retain its pristine spotlessness.

As used in Section 2 of the corrupt practices act, the word "candidate" is to be understood in its ordinary popular meaning, and the legislature evidently intended, in this enactment, to include any one who sought or offered himself, or was put forward for some office or privilege and was voted for at any election.

A man need not be nominated, to be a candidate, for, even under the preciseness of the new primary act, the voter may cast his vote for one not regularly nominated and whose name does not appear on the printed ballot; and such a person may be actively a candidate for the place, or honestly put forward by his friend with his consent. So it would not do to say that a man is not a candidate until he is nominated. Again, under our primary system, a man may seek and aspire to or be put forward for an office long before his petition is filed; an active canvass is often necessary to obtain the necessary signature to a nomination paper, and expenditures are not unusual in such case. So it cannot be held that a person is not a candidate while he is doing the preliminary work leading up to his nomination, for he certainly might come well within the definition of seeking or offering himself for the place.

In nearly every case the real act of becoming a candidate, in the very first instance, is one of intention, the conclusion of the mental process of the person concerned; one aspires to the office and as yet there may be no outward manifestation of this act of the mind; a man may be a candidate none the less, and yet, not have issued in stentorian tones a *pronuncia mento* that his "hat is is the ring." But as to others than himself it does take some outward expression, some overt act, to make known the fact of the candidacy.

A candidate, to come within the corrupt practices act, of course, must be one who is voted for at an election, and then he is required, within the statutory time, to file a statement that he has not contributed, promised, received or expended any money or thing of value in connection with the election at which he is voted for (and in that event it would matter not, so far as the corrupt practices act was concerned, when he actually became a candidate, for he would not be called upon to render an itemized statement, but would only have to state the fact that he had made no contribution, promise, expenditure, etc.) or, on the other hand, if he had contributed, promised, received or expended any money or other thing of value in connection with such election, he would be compelled to file an itemized statement of such contribution, etc., as provided in Section 2 of the act. In the latter event it would become necessary for him to determine just when he became a candidate, so as to include every item of contribution, etc., that the law comprehended.

It is my opinion that as soon as the intent of his candidacy is evidenced, directly or indirectly, by some overt act of contribution, promise, receipt or expenditure of money or other thing of value, in connection with such election, account must be taken and kept; and it matters not how long previous to the election such expenditure, etc., occurred, so long as it was in connection with such election.

That this must have been the intent of the law maker is made apparent when we consider that under our law one may be a candidate to be voted for at the primary, when a petition must be filed at least thirty days prior to the primary, or one may be a candidate by a nomination petition, which must be filed, generally, thirty days before the general election; if the filing of the petition for the primary or the filing of the nomination paper would fix the time, then, two persons running, say, for "judge," would have quite a different period of time to cover in their itemized statements; the one time would be fixed by the filing of a petition thirty days before the primary, while the other would be determined by the filing thirty days before the regular election. Thus, the plain intent of the statute would be violated, namely, to have an account of every item of expenditure and receipt in connection with the candidacy, for the expenditures, receipts, etc., might all be made long before the time for filing. And further, one person seeking to get his name on the ballot by nomination paper would not be required to include in his statement of expenditures any items made and incurred between the date of the filing of the other party's petition for nomination and the date of the filing of his own nomination paper, although the expenses might be identical in character and amount.

Answering your second inquiry, as to whether the voters of one party can vote in the primary of any other party than that with which they are affiliated, Section 4980 provides:

> "At such election only legally qualified electors or such as will be legally qualified electors at the next ensuing general election may vote and all such electors may vote only in the election precinct where they reside, and it shall be the duty of the challengers and of the judges, and the right of any elector, whenever there is reason to doubt the legality of any vote that may be offered, to interpose a challenge. The cause of a challenge shall be: That the person challenged has received or been promised some valuable reward or consideration for his vote; that he has not previously affiliated with the party whose ticket he now desires to vote. Affiliation shall be determined by the vote of the elector making application to vote, at the last general election held in even numbered years."

Section 4981 provides that any challenged person shall make oath before one of the judges, inter alia, as to his party allegiance.

Section 4982 authorizes the judges, under the circumstances stated therein, to reject his vote.

Section 13326 provides:

> "Whoever casts a ballot at a primary election after objection has been made and sustained to his vote, shall be fined not less than fifty dollars nor more than two hundred dollars or imprisoned not less than ten days nor more than sixty days or both."

Section 13327 provides:

> "Whoever votes at a primary election, not having voted at the last general election, held in an even numbered year, with the political party with which he desires, or offers, to vote at such primary election, unless he is a first voter, or did not vote at such general election, shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned in the penitentiary for one year, or both."

Consideration of the above statutes manifestly shows that only persons qualified, as therein provided, can vote at their respective party primaries; and, as far as party qualification is concerned, that is determined as provided in Section 4980, supra, by the "vote of the elector making application to vote at the last general election held in even numbered years." If a person presents himself and falsely claims to be of a different party than that to which he really belongs, and votes, then he is amenable to the penalties prescribed in the above sections; they are the penal provisions which prohibit the voters of one party from voting or participating in the primaries of another party than the one with which they are affiliated, and the provisions of these sections should be vigorously enforced. It is never permissible for the voters of one party to vote in the primary of the other, to the end that they might dictate and control the nominees of a party with which they have no affiliation, as determined by law.

I do not, however, desire to be understood as holding that a voter of one party, voting at his own primary, may not write in and thus vote for a person who is either a member of or a candidate of another political party.

Section 4993, General Code, provides:

> "* * * when the nomination of a candidate of one party is endorsed by another it shall be done at the time and in the manner provided for original nominations."

The state supervisor of elections has held that in primary elections "the voter may write in a blank space or substitute for any name on his party ballot the name of another person." Section 4995, supra, authorizes a candidate to run on more than one ticket for a particular office, providing he is nominated therefor "at the time and in the manner provided for original nominations." Therefore, if the party voters of a political party so see fit they may write in the name of a candidate of another party as a candidate on their own ticket for a particular office, and if he receives the highest number of votes cast by the electors on that ticket for that office he is the nominee of their own party for the particular office, and the fact that he is also a candidate on another ticket would make no difference.

Of course, this vote on the party ticket of which he is not a party member, can in no way interfere with or be counted in connection with the candidate's vote on his own party ticket; it is just as if he were another and different individual.

This must be permitted under the law; otherwise, a candidate of one party could not be endorsed by another party as is now allowed by the terms of Section 4995.

I trust this fully answers the inquiries contained in your letter.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

326.

STATE AID FOR HIGHWAYS—APPORTIONMENT OF FUND BY COUNTY COMMISSIONERS, TO TOWNSHIPS AND ROAD DISTRICTS—CONTROL OF FUNDS BY COUNTY COMMISSIONERS ACTING AS TURNPIKE DIRECTORS.

The state funds to be paid to the counties as provided in Section 1218, *General Code, should be apportioned to the townships and road districts by the county commissioners as therein provided. After said apportionment is made, the amounts should be expended by the county commissioners acting as a board of turnpike directors, under Section* 7445, *General Code.*

COLUMBUS, OHIO, April 1, 1912.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Under date of January 27, 1912, you request me to re-consider a question involved in the opinion of my predecessor to the effect that money apportioned to counties under the state highway law as provided by Section 1218 of the General Code, should be spent by county commissioners acting as a board of turnpike directors under Section 7445 of the General Code.

Pursuant to this request have investigated the opinion to which you refer, and from a consideration of the statutes applicable to the subject of road repair it is my conclusion that the opinion of my predecessor was correct.

The statutes governing the repair of improved roads are found in chapter 11 of title 4, being Sections 7407 to 7463, inclusive, of the General Code.

Section 7422 provides:

> "The county commissioners shall cause all necessary repairs to be made for the proper maintenance of all improved roads in the county. For such purpose they may levy a tax upon the grand duplicate of the county, not exceeding three-tenths of one mill in any one year upon each dollar of the valuation of taxable property in such county. Such levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force. (99 vs. 360 4919-1.)"

Section 7445 provides:

> "In each county, the county commissioners are constituted a board of turnpike directors, in which the management and control of all such roads therein shall be exclusively vested. (R. S. Sec. 4896.)"

Original Section 31 of the state highway law, quoted by you, became Section 1218 of the General Code. The same reads as follows:

> "If permanent roads of not less than standard width have been constructed prior to the establishment of the state highway department and the materials thereof are gravel, brick, telford, macadam or material of like quality, the county commissioners may make application to the state highway commissioners on or before January first of each year, for the amount of state funds apportioned to such county. Thereupon the amount so apportioned shall be paid to the county treasurer, if the county commissioners of such county have levied or will levy a tax on the duplicate of the county sufficient to equal the amount so appropriated. Such appropriation and levy shall become a part of the pike repair fund of the townships, and be apportioned to the townships or road districts of not less than one township each in proportion to the amount of the fund collected by such levy in each township or road district. Township trustees or other authorities having charge thereof shall apply such funds to the repair of improved roads in the same manner as other pike repair funds are applied, but the material used therefor shall be equal to the material used in the original construction of such road. (99 vs. 318 31.)"

It will be noted that the foregoing section specifically states that *"township trustees or other authorities having charge thereof,"* shall apply such fund to the repair of improved roads in the same manner as other pike repair funds are applied. The phrase "having charge thereof" must refer to the board vested with the legal authority of repairing improved roads. I am unable to find that township trustees are vested with such authority.

Section 7422 expressly provides that, "the county commissioners shall cause all necessary repairs to be made for the proper maintenance of *all* improved roads in the county." This provision, it seems to me, is so specific as to exclude the holding that township trustees have jurisdiction over the repair of improved roads. The apparent grant of such jurisdiction in Section 1218 is inconsistent with the general scheme of legislation on the subject of road repairs, and must be held to be mere surplusage, since it is negative by the positive provisions of Sections 7422 and 7445, supra.

I am, therefore, of the opinion that the county commissioners should apportion the funds referred to in Section 1218 to the townships and road districts in the manner therein provided, and that said funds, after the apportionment is made, should be expended by the county commissioners acting as a board of turnpike directors, under Section 7445, supra.

Your communication of January 30th, discloses that the fund sought to be distributed accumulated prior to January 1, 1911, and it is therefore unnecessary to enter into a discussion of the effect of the changes made in the highway law by the last General Assembly.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

334.

BOARD OF EDUCATION—CREATION OF VILLAGE SCHOOL DISTRICT BY ATTAINMENT OF $100,000 TAX VALUATION—ORGANIZATION OF VILLAGE DISTRICT BOARD— DUTIES OF OLD TOWNSHIP BOARD—DIVISION OF FUNDS AND DISPOSITION OF SCHOOL BUILDING—EFFECT OF TOWNSHIP ELECTION.

By vitrue of Section 4681, *General Code, when a village attains a tax valuation of one hundred thousand dollars, it constitutes a village school district. When such village attains that valuation in* 1911 *it must, however, remain a part of the township school district under the jurisdiction of the township board of education until the members of the village district elected in November* 1913 *can be properly organized.*

When, therefore, in 1912 *said township board engineered an election for the issuance of* $20,000 *worth of bonds for the erection of a high school building within the village, in which election, the electors of the entire township voted; held: that the situation has so changed that the board would be justified in declining to act upon the bond issue regardless of the results of the election.*

Under Section 4696, *General Code, the funds and indebtedness of the township school district should be equitably apportioned between the township and village district as therein provided.*

The statutes do not provide specifically for the disposition of the school building situated in the village but the decisions endorse the reasonability of permitting the newly created district to take title to school property within its limits and which was designed for its use, and such is to be deemed the policy of the law.

COLUMBUS, OHIO, April 18, 1912.

HON. JAMES F. BELL, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Your favor of March 13, 1912, is received, in which you make the following inquiries:

> "At the time Section 3888 of the R S. of Ohio was amended on April 2, 1906, 98 O. L., page 217 (now Sections 4681 and 4682 of the G. C.), the village of South Solon, in Madison county, Ohio, was, and had been for a long time before, to wit, since about the year 1870, an incorporated village. But the tax duplicate of said village at the time of the passage of said act (April 2, 1906) was less than $100,000, and there was no territory attached to said village for school purposes; that is, the village was located in and regarded as part of, one of the sub-districts of the township school district of Stokes township, no election or proceeding ever being had to organize it as a village school district, and it has never been treated or recognized at any time as a village school district neither before nor since said amendment.
>
> "Under the new appraisement, as appears on the tax duplicate of 1911, the tax valuation of the property in said village was increased so that it now exceeds $100,000 (to wit, $149,010).
>
> "In the year 1880, a school building was built by the township school district in the sub-district in which the village of South Solon was situated but just outside the corporate limits of said village, and sometime afterward, to wit, about the year 1900, the corporation

boundary of said village was extended so that it included said school building. Said school building has ever since, and still is, being used as such in said sub-district, and this building and the school building in each of the other sub-districts of the township, were all built by the township from funds raised by taxation on the whole township including the village. The board of education of said township is now composed of one member who resides within said village and four members who reside in the township outside of the village.

"According to proceedings had by said board of education an election was held on February 28, 1912, on the question of issuing bonds in the sum of $20,000 for the purpose of erecting and equipping a new township high school building to be located within said village. The voters of the whole township and village participated in said election, and in the village precinct a majority of the voters were in favor of the bond issue, while in the township precinct outside the village a majority of the votes were against the bond issue; and of the whole vote of both village and township together, a majority were in favor of the bond issue.

Questions:

"1. When the tax valuation of said village of South Solon was increased on the tax duplicate in 1911, so as to exceed $100,000, did the village, by such increase in tax valuation and by force of the statute, then and thereby, become a village school district?

"2. Did the bond issue fail or carry?

"3. To whom does the old school building situated in the village belong? To the village district, or the township district, or both?

"4. Has the village any title, right or property interest in the other school buildings in the township outside the village?

"5. Should the township board of education as it is now constituted go on with the schools as they have been until a village school board can be organized and make a levy and raise the money to carry on a school therein?

"6. Or should the member residing in the village be considered disqualified and his place declared vacant and filled by other members appointing some one residing in the township outside the village?

"7. What will the people residing within the village do about sending their children to school until the village board is organized and the village school instituted?

"8. If a special election is held under Section 4710 of the G. C., must it be postponed until the day of the state election next November, or until the municipal election in November of 1913? Or if it can be held at any time, who has the authority to call such an election and require the board of deputy state supervisors to prepare ballots, etc., for same?

"9. Said township board of education has a considerable sum of money in its building fund, which was to have been applied on said proposed new building, and also has money in the other school funds for current school purposes. What share, if any, of these funds now in said township board would the village board be entitled to receive?"

Your first question involves a construction of Section 4681, General Code, which provides:

> "Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars, shall constitute a village school district"

This statute was construed in case of Buckman vs. State, 81 Ohio St., 171, wherein it is held:

> "By force of the provisions of Section 3888, Revised Statutes, as amended April 2, 1906, and in effect April 16, 1906 (98 O. L., 217), each incorporated village then existing—April 16, 1906—or since created, 'together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars,' constitutes and is a village school district, no vote of the electors of such village being necessary to the creation or establishment of such district."

On page 178, Crew, C. J., says:

> "It doubtless being within the contemplation of the law-making body that an incorporated village with a tax duplicate of not less than one hundred thousand dollars, could well provide for the proper support and maintenance of its schools, and should therefore, in every instance constitute and be a village school district, ————————."

This decision leaves no alternative. When an incorporated village has a tax duplicate of not less than one hundred thousand dollars it shall constitute a village school district.

The village of South Solon, by the tax duplicate of 1911, had a tax valuation in excess of one hundred thousand dollars, and thereupon became a village school district by virtue of Section 4681, General Code. The village had such tax valuation on the day preceding the second Monday in April, although the amount of the tax duplicate was not known for some time later.

The statutes do not provide when the actual transfer from the township school district to the village school district shall take place. Nor does the decision in 81 Ohio St., 171, supra, cover this point.

Shall it be on the second Monday in April when the tax duplicate has reached the required amount, or shall it be when the tax valuation is actually ascertained; or shall it be postponed until the new village school district has been legally organized by the election of a board of education?

The statutes are silent upon this question. There is here presented a transition of certain territory from a township school district to a separate and new school district to be known as a village school district. The two districts have the same general purpose, to wit, to provide for public education, although carried on under separate organizations.

When a city becomes a village or vice versa, by reason of change in population, the statute, Section 4686, General Code, provides that such school district shall thereby be changed from a city to a village school district or from a village to a city school district, but authorizes the old organization to continue to act for

the new district, until the new officers can be elected at the next annual election for school board members. The same provision is made for the government of a city which becomes a village, or vice versa.

There is no provision of statute which authorizes the holding of a special election, for the election of the members of a board of education for a village school district, when such village school district comes into existence by reason of its increase in tax valuation which requires it under Section 4681, General Code, to become a village school district. In the absence of such provision no special election could be held for such purpose, even at the general election in the even numbered years. Such members can only be elected in the odd numbered years.

Section 4710, General Code, to which you refer, does not apply to the present situation. This section provides:

> "In villages hereafter created, a board of education shall be elected as provided in the preceding section. If such election is a special election, the members elected shall serve for the term indicated in such section from the first Monday in January after the last preceding election for members of the board of education, and the board shall organize on the second Monday after the special election.

This section applies to newly created villages and not to a village which has been organized for some time, but which is created into a village school district by operation of the statute.

It is therefore impossible for the village school district to organize and carry on its work of education until it can elect the members of the board of education in November, 1913.

If it is held that the village became a village school district the instant it reached the proper tax valuation, or at the time such valuation was ascertained, and that thereupon the township board of education had no further jurisdiction over such village, then this situation is presented. The village of South Solon would be without educational facilities at least until January 1, 1914, when it could properly organize its board of education.

This village, as well as other villages similarly situated, would be denied rights and privileges enjoyed by the remainder of the state. Did the legislature intend such a result by its enactment? There is no specific provision in the statute which says that at the instant a village shall reach the required tax valuation, it shall, ipso facto, become a village school district, regardless of the fact that it is not, and could not, be prepared to take care of the public education of its children.

Article VI, Section 2, of the constitution of Ohio, provides:

> "The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."

This provision imposes upon the legislature the duty to "secure a thorough and efficient system of common schools throughout the state." It is not to be presumed that the legislature has failed in this duty.

Section 4679, General Code, provides:

> "The school districts of the state shall be styled, respectively, city school districts, village school districts, township school districts and special school districts."

Section 4683, General Code, provides:

"Each civil township, together with the territory attached to it for school purposes, and excluding the territory within its established limits detached for school purposes, shall constitute a township school district."

Section 4684, General Code, provides:

"Any school district, other than a city, village or township school district, and any school district organized under the provisions of chapter five of this title, shall constitute a special school district."

These provisions, in connection with the provisions concerning village and city school districts, were intended to cover and do cover all the territory of the state. The legislature has expressed the intention that all parts of the state shall be under one or the other of these school districts and has provided for the organization of the several districts.

Formerly the establishment of a village school district was based upon its population and not upon its tax duplicate. These provisions were passed upon in case of Cist vs. State, 21 Ohio St., 339, in which it is held:

"In considering questions arising under the school legislation of the state, such construction should be placed upon its various enactments, and the several provisions thereof, as will give harmony to our educational system, and secure, as far as practicable, its equal benefits, and the reasonable facilities for their enjoyment, to every locality.

"Every portion of territory within the state, not included in any of the separate school districts specified in the sixty-seventh section of "an act to provide for the reorganization, supervision and maintenance of common schools," passed March 14, 1853, is a constituent part of some sub-school district, and subject to the jurisdiction of the proper township board of education, as established by the first section of said act, unless it shall have been legally withdrawn therefrom; and no portion thereof will be deemed to have been so withdrawn, until it shall become included within the limits of some separate school district organized by the actual election or appointment of a separate board of education.

"When an incorporated village is formed within, or to include a material part of a sub-school district, no portion thereof is, by reason of such incorporation, withdrawn from the school jurisdiction of the township, but the whole continues to be a sub-school district, until the actual election or appointment of a separate school board; and the portion of the sub-school district not included within the limits of such incorporated village is 'territory annexed thereto for school purposes,' within the meaning of the statute of March 14, 1853, 'to provide for the reorganization, supervision and maintenance of common schools.'"

On page 348, West, J., says:

"The thirty-second section would seem to be peremptory, and withdraw from the jurisdiction of the township every incorporated village with the territory annexed, upon the instant it attained three hundred inhabitants, without regard to whether it takes steps to affect a separate organization or not. But this cannot have been intended, for section one

excludes from the school jurisdiction of township boards not every incorporated village with the territory annexed, nor every such village upon its acquiring three hundred inhabitants, but every such village shall 'elect or appoint a board of education.'"

This case can be distinguished from the statute now under consideration on account of the exception contained in the statute therein considered, which stated:

"That nothing in this act shall be so construed as to give to the township boards of education, or to the local directors of sub-districts, jurisdiction over any territory in the township included within any city or incorporated village, with the territory thereto annexed for school purposes, which shall elect or appoint a board of education, as hereinafter provided."

The court, however, gives certain reasons for its opinion which are applicable to the question now to be answered.

On page 348, the court further says:

"But would its attainment of three hundred inhabitants, on the day or week following the time for electing a board, withdraw it instantly from the school privileges and jurisdiction of the township? It could not effect an organization until the next year. It would, therefore, be left without, and powerless to avail itself of, school benefits for an entire year. This could not have been intended. The first section plainly implies the contrary, and that it shall continue under township jurisdiction until a separate organization be effected, notwithstanding it shall have sooner acquired three hundred inhabitants.

In order to hold that the village became a village school district the instant it had the required tax valuation, and was thereupon withdrawn from the jurisdiction of the township school district, the intent of the legislature to that effect must be clearly and specifically expressed. No such intent appears.

It is my conclusion that the village became a village school district at the time it reached the required tax valuation, but that it remains a part of the township school district and is under the jurisdiction of the township board of education until the village school district can be properly organized after the election in November, 1913.

Your next inquiry is as to the bond issue. In my opinion it is not necessary to decide whether this bond issue carried or not. The course to pursue in either event would be the same. If the bond issue did not pass, nothing could be done with the bonds, and if it carried nothing should be done with them.

In order to carry out the purpose for which the bonds were to be issued, it is necessary for the board of education to perform certain acts. A site must be purchased; a contract for the erection of the building must be entered into; the bonds must be executed and sold, etc. None of these things have been done.

The conditions have so changed since the bond issue was voted upon, that it is reasonable to presume that it would not have passed if the true situation had been known. The school building was to be erected for the township district and to be located in the village, which is soon to be detached from the township district.

While elected officials should carry out the expressed will of the voters, yet the conditions in this case have so changed that they would be justified in declin-

ing to act upon the bond issue, and take no steps to carry it into effect. They could hardly proceed without doing one or the other of the districts an injustice.

Your next inquiry involves the division of the school property and of the funds in the hands of the township board of education.

Section 4690, General Code, provides:

> "When territory is annexed to a city or village, such territory thereby becomes a part of the city or village school district, and the legal title to school property in such territory for school purposes shall remain vested in the board of education of the school district from which such territory was detached, until such time as may be agreed upon by the several boards of education when such property may be transferred by warranty deed. In case of disagreement between such boards of education, like proceedings shall be had by application to the probate court as are provided by law in case of the transfer of property from one school district to another.

Section 4696, General Code, provides:

> "When territory is so transferred from one school district to another, the equitable division of funds or indebtedness shall be determined upon at the time of the transfer. When territory is transferred from one district to another by proceedings in the probate court or by the annexation of territory to a city or village, the proper division of funds in the treasury, or in process of collection, of the board of education of school district from which the territory is detached, shall, upon application to the probate court of the county in which such territory is situated by either board of education interested, be determined and ordered by such court. If such board of education is indebted, such indebtedness, together with the proper amount of money to be paid to such board by the board of education of the school district to which the territory is transferred, annexed, or *of the district created,* shall be in like manner determined and ordered by the court."

Section 4690, General Code, applies to territory which is annexed to a city or village. In the present situation there is no annexation of territory. It is the creation, by operation of law, of a new school district and a detaching of territory from another school district.

Section 4696, General Code, provides that when territory is so transferred the equitable division of funds or indebtedness shall be determined upon at the time of the transfer. The section further on refers to "the district created." This section is found in the same chapter as Section 4681, General Code, which makes this village a village school district. Section 4692, General Code, provides for the transfer of territory by mutual consent of the boards of education, and Section 4693, General Code, provides for transfer upon petition.

The words "so transferred" as used in Section 4696, General Code, are not, in my opinion, confined to the transfers of territory provided for in Sections 4692 and 4693, but apply as well to the transfer of territory by operation of Section 4681, when a new village school district is created. The use of the words in Section 4696, "or the district created," confirm me in this view of the statute. In the present situation the territory in South Solon is transferred, by operation of law, from the township school district to the village school district. It is my conclusion that Section 4696, General Code, governs in such a case, and that the funds

and indebtedness of the township school district should be equitably apportioned between the township and village districts as therein provided. This division should be made when the separation actually takes place.

There is no provision of statute covering the school building. The question arises if the word "funds" as used in Section 4696, supra, is broad enough to include the school buildings.

In case of Bierce vs. Bierce, 41 Ohio St., Granger, C. J., defines "fund" at page 254:

> "The word 'fund' savors of personalty; it means something that can be invested and reinvested."

It is my conclusion that the word "funds" as used in Section 4696, General Code, does not include real property.

The second syllabus in case of Board of Education vs. Board of Education, 46 Ohio St., 595, reads:

> "Public school property, real or personal, that has been appropriated and set apart by a township board of education for the purpose of a public school of a higher grade than primary, for the benefit of the youth of the whole township, does not pass to or vest in the board of education of a separate school district that may be afterwards organized out of the territory within which the property happens to be situated, although the property falls within the letter of Section 3972, Rev. Stats., which is the section of the school law relating to the subject."

Section 3972, Rev. Stat., under consideration in this case, provided, as set forth on page 597:

> "All property, real or personal, which has heretofore vested in and is now held by any board of education, or the council of any municipal corporation, for the use of public or common schools in any district, is hereby vested in the board of education provided for in this title, having under this title jursidiction and control of the schools in such district."

This section was amended in 97 Ohio Laws 354, and the amended section was not carried into the General Code, but the section was specifically repealed. I do not find any similar provisions in the General Code.

On page 599, of 46 Ohio St., 595, supra, Bradbury, J., says:

> "This result could be brought about if the general language of Section 3972 cannot be restrained by construction. That they should take with them and hold in their new and independent state, all the public school property which was in their territory and had before been used by them alone, is entirely reasonable. The other portions of sub-districts of the township had no practical interest in or beneficial use of it before the separation. Each remaining sub-district had similar property in its limits, subject to its particular use, and therefore suffered no injury by the transfer of the title and control to the same persons, though differently organized, who had before enjoyed its sole use."

In case of State ex rel. vs. Holliday, 9 Low. Dec., 738, it is held:

> "Where the legislature has made no provision as to a division of the property upon creation of a special sub-district out of portions of other districts, the sub-district will take none of the property and will assume none of the obligations of the old district."

The court, Bigger, J., on page 740, of the opinion, quotes from several authorities in support of his conclusion. In this case the question arose as to the right to tax land, which had been detached from a school district, for the payment of a bonded indebtedness created before the detachment became effective or was voted upon. There was no question as to the title of any property.

The court quotes from City of Winona vs. School District No. 8, Winona township, 40 Minn., 13, in which it is held that the old district retains all its property, including that which falls within the new district; and also Hughes vs. Ewing, which holds that the old district retains all its property.

He also quotes from Board of Education vs. Board of Education, 30 W. Va., 424, in which it was held:

> "Upon the division of an old public corporation and the creation of a new one out of a part of its inhabitants and territory, the legislature may provide for an equitable apportionment or division of the corporate property and impose upon the new corporation, or upon the people and territory thus disannexed, the obligations to pay an equitable portion of the corporate debts.
>
> "Where the legislature does not prescribe any regulation for the apportionment of the property or that the new corporation shall pay any portion of the debt of the old, the old corporation will hold all the corporate property within its new limits and be entitled to all the debts due the old corporation and be responsible for all the debts of the corporation existing before and at the time of the division. *And the new corporation will hold all the corporate property falling within its boundaries, to which the old corporation will have no claim.*

Niblack, J., on pages 67 and 68 of Towle, trustee, vs. Brown, 110 Ind., states the rule:

> "In the absence of express legislation, or some constitutional provisions on the subject, the general rule is, that on the division of a township or other municipal corporation, into two separate townships, or corporations, each is entitled to hold in severalty the public property which falls within its territorial limits. 1 Dillon Munic. Corp., Sec. 188 3d Ed.; North Hemstead, 2 Wend. 109; School Township of Allen vs. School Town. of Macy, 109 Ind., 559.
>
> "But as to money, choses in action, or other kindred property, in existence at the time of the division, the rule is not so well defined. In the absence of an express provision as to that class of property, the respective claims of the two corporations become a matter of equity jurisdiction, and must be adjusted upon equitable principles."

At pages 850 and 851 of 35th Cyc., it is said:

> "In applying this general rule some cases have gone to the extent of holding that school houses and other property, even though be-

yond the limits of the old district after its alteration, are still the property of such district; but this has been denied in a number of cases and the prevailing doctrine seems to be otherwise."

Where the statute does not provide for the division of property upon the creation of a new school district, the courts do not agree as to which district shall be entitled to the property.

As stated in 46 Ohio St., 595, supra, it is entirely reasonable that a sub-district which is formed into a special or separate district should take the title to school property within its limits and which was designed for its use. While the statute therein construed and upon which this reasoning is based, has been repealed by the legislature in adopting the General Code, there is sufficient ground for believing that this is the policy of the state of Ohio, and that it should be applied to the case at bar.

The school property situated in South Solon was designed for the use of the village. The other sub-districts are also provided with school houses. All of these have been secured by taxation upon the whole township. It would be equitable and reasonable that when one of such sub-districts is formed into a separate school district, it should take title to a school house within its territory and which was built for the use of such sub-district, and that it should relinquish all right to the school houses in the other sub-districts which were designed for the use of such sub-districts. This would especially apply to a district which is created by operation of law as in the present situation.

It is my conclusion that the title to the school house in South Solon will vest in the new village school district, and that it will have no title or right to other school houses.

The several questions which you have submitted may be answered as follows:

First—A village becomes a village school district, by operation of law, when it has a tax valuation of not less than one hundred thousand dollars.

Second—No action should be taken to issue or sell the bonds or to do anything in connection therewith.

Third—The old school building situated in the new village district will belong to the village school district.

Fourth—The village school district will have no title or right in or to the school buildings in the township outside the village.

Fifth—The township board of education should continue to exercise jurisdiction over the village and provide for its schools until such time as the new village school district can be organized, which will be January 1, 1914.

Sixth—The member of the board of education residing in the village is not disqualified to hold his position, and can hold it until the new district is organized.

Seventh—The people of the village will continue to send their children to the schools provided by the township board of education.

Eighth—Section 4710, General Code, does not authorize a special election in the present case.

Ninth—The funds on hand, or to be collected, at the time the new village school district is legally organized should be equitably distributed as provided in Section 4696, General Code. If the two boards of education cannot agree upon such distribution, the probate court has jurisdiction. All the circumstances and facts must be taken into consideration in making the apportionment.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

338.

OFFICES INCOMPATIBLE—COUNTY INFIRMARY DIRECTOR AND TOWNSHIP TRUSTEE.

The duties of the offices of county infirmary director and those of township trustee are sufficiently in conflict to come within the common law rule of incompatibility and therefore, these offices may not be held by the same individual.

COLUMBUS, OHIO, May 13, 1912.

HON. J. GUY O'DONNELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I have at hand your communication in which you recently submitted for the attention of this department an inquiry with reference to the ability in law of an individual to hold contemporaneously the offices of county infirmary director and civil township trustee.

As there is no express statutory direction or inhibition, the common law rule of compatibility of public offices must apply.

Section 2544, General Code, provides as follows:

> "In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the infirmary directors, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the directors are satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution or otherwise, and thereupon the liability of the township shall cease. The infirmary directors shall not be liable for any relief furnished, or expenses incurred by the township trustees."

In an opinion rendered by this department to Holland C. Webster, under date of March 31, 1911, it was held on page 5 thereof, as follows:

> "It is my opinion that the infirmary director have some discretion in determining whether the person seeking relief is a 'county charge' as distinguished from a 'township or municipal charge,' that is, whether temporary relief which must be furnished by the trustees or directors of public safety will be sufficient, or the person will require more than temporary relief. In the event the infirmary directors are satisfied that he should become a county charge, and the relief should be of a permanent nature, then they shall provide for him in the county infirmary or otherwise."

And on page 4, of the same opinion, it was held:

> "The township trustees and the director of public safety are required under Section 3476 to furnish all *temporary* outside relief, and the infirmary directors are not authorized to expend money for such purposes."

It being the case, therefore, that the infirmary directors are the final judges in the cases to which this section applies, of the question whether the parties shall receive the obligatory temporary relief at the hands of the township trustees or whether they shall receive the permanent relief at the hands of the infirmary directors, I am of the legal opinion that in this respect, at least, the infirmary directors exercise a degree of superiority over the township trustees, and their duties in this respect are sufficiently in conflict with those of the township trustees to justify the deduction that the holding of both positions by a single individual would contravene public policy and therefore, come within the common law rule of incompatibility.

Section 3492, General Code, makes provision for contracts by mutual agreement between the infirmary directors and the township trustees for medical relief and medicine for persons coming under their respective charge. As the interests of each board in this relation are necessarily at variance, and furthermore, as an individual acting as a member of both of these boards would in this connection, be placed in a situation requiring him to agree or contract with himself, this statute presents a second instance of the incompatibility of the two offices.

I believe that these considerations sufficiently answer your inquiry, and I am therefore, of the opinion that the two offices of township trustee and county infirmary director may not be held at one and the same time by a single individual.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

339.

"IMPROVED ROADS"—ROAD AND HIGHWAYS—FUND FOR MAINTENANCE OF.

The phrase, "improved roads" as employed in Section 7422, General Code, providing for the raising and disposal of a fund for the purpose of maintaining such roads, refers to the "paved, macadamized, stone and gravel roads" mentioned in Section 7423, General Code, and to such roads as are mentioned in Section 7443, General Code, as well as to all roads constructed from any material recognized by the laws of Ohio as proper for road building.

COLUMBUS, OHIO, April 5, 1912.

HON. WILLIAM VINCENT CAMPBELL, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Your letter of February 26, 1911, propounds the following question:

> " I have been requested to ask you for a definition of the phrase 'improved roads,' as used in Section 7422, of the General Code."

Section 7422 of the General Code is as follows:

> "The county commissioners shall cause all necessary repairs to be made for the proper maintenance of all improved roads in the county. For such purpose they may levy a tax upon the grand duplicate of the county, not exceeding three-tenths of one mill in any one year upon each

dollar of the valuation of taxable property in such county. Such levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies not in force. (99 vs. 360 4919-1.)"

The phrase "improved roads" has not been defined by any statute or decision in this state, so far as a careful research has disclosed.

Your attention is directed to Section 7423 of the Code in which the following language is used:

"The proceeds of such levy shall be applied and used by the commissioners in the repair of paved, macadamized, stone and gravel roads, and for no other purpose. (99 vs. 360 4919-1.)"

Section 7443 provides:

"All macadamized or graveled free roads, whether constructed under the general or local laws by taxation or assessment or both, or converted by purchase or otherwise from a toll road into a free road under any law, and all turnpike roads, or parts thereof, unfinished or abandoned by a turnpike company, and appropriated or accepted by the commissioners of the county, shall be kept in repair as provided hereafter in this chapter. (R. S. Sec. 4876.)"

It is my opinion, therefore, that the words "improved roads," as used in Section 7422, refer to the roads mentioned in Section 7443 and such roads as were originally constructed from the various classes of materials prescribed by Section 7423 or any other materials recognized by the laws of Ohio as proper for road building.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

340.

FEES AND COSTS—CLERK OF COURTS MAY NOT TAX WHEN DEFENDANT IN DIVORCE CASE PAYS ALIMONY DIRECT TO PLAINTIFF INSTEAD OF TO CLERK IN ACCORDANCE WITH THE JOURNAL ENTRY.

Where, in a judgment for divorce and alimony, the journal entry called for the payment of the alimony to the clerk of courts in behalf of the plaintiff, and the amount is paid contrary to the entry, directly to the plaintiff; the proper action would be a motion to modify the entry or to retax costs; and the clerk of courts, from the language of Section 2901, General Code, not having actually disbursed the money, would not be permitted to tax costs for the same.

COLUMBUS, OHIO, May 1, 1912.

HON. HENRY HART, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—In your letter of March 7th, you request my opinion upon the following statement of facts as given by you:

"In a suit for divorce and alimony, the wife obtained a divorce from her husband and the court awarded her $1,300.00 in alimony, '$1,000.00 of which is to be paid to the clerk of the court within twenty days from the date of the decree for the use and benefit of the wife, the plaintiff in the action; the balance, $300.00, is to be paid to the clerk of the court for the use and benefit of the wife, plaintiff in said action, within one year from date of decree.' The journal entry was drawn and O. K.'ed by the attorneys on both sides and placed upon the journal of the clerk's records. Within the twenty days from the date of the decree the parties and the attorneys in the action got together and instead of the defendant paying the money to the clerk of the court, he paid it directly to the attorney for the plaintiff, and a receipt was given by the plaintiff to the defendant for the amount paid, 1,000.00. In the journal entry it is provided that the defendant pay the costs of the action, and the clerk of the court is now insisting that the attorney for the plaintiff receipt upon the cash-book in his office for the sum of $1,000.00, and that he be allowed his commission as provided in the statute, to-wit, the sum of one per cent. of $1,000.00, making $10.00.

"Upon the above stated facts, under Section 2091 of the General Code as amended May 31, 1911, under this clause, 'for receiving and disbursing money other than costs and fees paid to such clerks in pursuance of an order of court, or on judgments, and which has not been collected by sheriff or other proper officer on order or execution to be taxed against the party charged with the payment of such money, the commission of one per centum on all exceeding one thousand dollars.' Is the clerk entitled to his per centum or not?"

As this matter has arisen in a case pending in your court, it seems to me that it should be settled by a motion to re-tax costs, or to modify the judgment entered in the case, and is really not a proper question upon which I should be asked to render an opinion. For this reason I have been somewhat reluctant about answering the same.

The provision of the Code which must govern your question is found in a part of Section 2901, as amended in 102 O. L., 277, specifying that fees shall be charged and collected by the clerk. That particular provision is as follows:

"For receiving and dispursing moneys, other than costs and fees, paid to such clerks in pursuance of an order of court, or on judgments, and which have not been collected by the sheriff or other proper officer on order of execution, to be taxed against the party charged with the payment of such money, a commission of one per centum on the first one thousand dollars and one-fourth of one per centum on all exceeding one thousand dollars?"

It would seem, from the language used by the legislature, that in order to entitle the clerk to the per centum named, the money must be received and disbursed by the clerk, and therefore until the money is actually paid to the clerk he would not be entitled to a fee receiving and disbursing the same.

It occurs to me that under the facts detailed by you, and in view of the order named by the court, the only proper way in which this judgment could be satisfied of record would be by having the money paid and accounted for in

accordance with the order made by the court, but, as stated in the first part of my opinion, it seems to me that this matter should be settled by the court itself either on a motion to re-tax the costs or to modify the entry.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

342.

CORRUPT PRACTICE ACT—FILLING IN OF CANDIDATE'S NAME ON BALLOT AT PRIMARY—ENDORSEMENT OF OPPOSITE PARTY AND COUNTING OF VOTES—SEPARATE CANDIDATES.

Section 4995, General Code, provides that a candidate of one party may be endorsed by another providing it is done at the time and in the manner fixed for original nominations, and as the original nominations are now made at the primaries, it is permissible to so endorse a candidate of an opposite party by merely filling in his name on the ballot.

When a candidate is so entered, however, upon the ticket of both parties, he runs as a separate candidate upon either ticket and the votes from each party must be counted separately as for separate candidacies.

COLUMBUS, OHIO, May 3, 1912.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of the 1st inst., in which you state:

> "I wish your official opinion at the earliest date possible as to whether or not it is proper and legal for the members of the precinct election boards to consider and count the votes written on the ticket, where there is no candidate for a political party that has filed his petition, a name and vote of the candidate who is of opposite politics, and running as a candidate on an opposite ticket.
>
> "For example: John Jones is a candidate for prosecuting attorney by petition on the Republican ticket of Lawrence county, Ohio, for nomination, the Democrats of Lawrence county have no candidate for prosecuting attorney, a person who votes and calls for a Democratic ticket writes the name of a Republican candidate on the Democratic ballot in the Republican primaries. Can and is it legal for the members of the separate election boards to count and consider this vote for John Jones in considering his majority or votes on the Republican tally sheet and poll books?"

Attention is called to the following sections of the General Code, which have application to the matter concerning which you inquire:

> "Section 5025. * * * If upon a ticket there is no candidate or candidates for a designated office a blank space equal to the space that would be occupied by such name or names, if they were printed thereon, with the blank spaces herein provided for, shall be left."

Section 5071 provides:

"If there was no nomination for a particular office by a political party, or if by inadvertence, or otherwise, the name of a candidate regularly nominated by such party is omitted from the ballot, and the electors desires to vote for some one to fill such office, he may do so by writing the name of the person for whom he desires to vote in the space underneath the heading or designation of such office, and make a cross mark in the circle at the head of the ticket, in which case the ballot shall be counted for the entire ticket, as though the name substituted had been originally printed thereon."

Section 4967 provides:

"* * * All statutory provisions relating to general elections * * * shall, so far as applicable, apply to and govern primary elections."

Section 4995 provides:

"When no nominations were made originally for a particular office, it shall be unlawful for any committee appointed for the purpose of filling vacancies to name a candidate of another political party for such office or to so name a candidate nominated by petition. When the nomination of a candidate of one party is endorsed by another, it shall be done at the time and in the manner provided for original nominations."

The state supervisor of elections has held that in primary elections "the voter may write in a blank space or substitute for any name on his party ballot the name of another person." (Compilation of Election Laws, 1912, page 87, note under Section 4976.)

From consideration of the above statutes and the ruling of the state supervisor of elections, there can be no question but that it is the duty of the board of elections, in the event a political party fails to nominate for a particular office, to leave a blank space on the party ballot for that office, with the heading or designation of the particular office above said space. It is also evident, from a consideration of Section 4995, that the legislature contemplated that one political party might endorse and have printed on their party ballot the name of a candidate of the other political party, so long as this was done at the same time and in the same manner provided for original nominations. As the original nominations are now by primary election, it is permissible to do this at the primary; and it is my opinion that a person who calls for a Democratic ticket and finds that his party has not nominated any candidate for prosecuting attorney may write in the name of the Republican candidate on his ticket, and thus vote for the Republican candidate on the Democrat ticket; but the votes of the Republican candidate on the Democrat ticket, for the particular office, must not be added to or counted with his votes on his party ticket. He is running, when so voted for, on the Democrat ticket as the Democratic candidate, and if the canvassing board finds that he has received the most votes, for the particular office, on the Democrat ticket, then, he would be declared the nominee of the Democrat primary. It is as if he were another and a different individual, being voted for on the two tickets, and his votes on the one ticket cannot be considered in any way with his votes on the other. It could be possible, of course, since, as far as his being a candidate on the Republican ticket is concerned, only those votes cast for him on the

Republican primary ballot could be counted, to be defeated as the Republican candidate, and, if he receives the most votes on the Democratic ticket, be successful as the Democratic candidate.

So, answering your question, the candidate, John Jones, should be credited as the candidate on the Republican ticket for prosecuting attorney with all of the votes received upon the Republican primary ballot, and then, if it is found that he has been voted for on the Democratic ticket, he should be credited as the Democratic candidate for prosecuting attorney with all the votes that he received upon the Democratic primary ballot; but his votes received on the Democratic primary ballot cannot be considered or counted with his votes on the Republican primary ballot.

I trust that this fully answers your inquiry.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

343.

CORRUPT PRACTICE ACT—FILLING IN OF CANDIDATE'S NAME AT PRIMARIES—FILLING OF VACANCY.

When a political party has failed to file nomination papers for an office, the board of elections, in accordance with Section 5025, *General Code, should leave blank spaces in the primary ballots, wherein voters of the party may fill in the names of any person and said person may be nominated in this manner.*

Section 5010, *General Code, provides for the filling of a vacancy when a nominee dies, withdraws, declines to run or when the certificate of nomination is insufficient or imperfect. Such a vacancy however, would have to be filled within the time prescribed for original nominations.*

COLUMBUS, OHIO, May 3, 1912.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 27th, wherein you state:

> "A political party in this county filed no nomination papers for either of the offices of recorder, sheriff and treasurer of the county, and filed nomination papers for but two of the three candidates for county commissioners. What would be the effect if some elector, or several electors of the political party so failing to file nomination papers, should write the name of an elector of that party, for the said office of recorder, sheriff, treasurer and 3rd commissioner?
>
> "Would the party voted for be entitled to have his name printed on the ballot as a candidate for said office at the November election? In other words, can the vacancy be filled that way?
>
> "I refer you to Section 5010 of the General Code, and as amended in 102*d* Ohio Laws at page 417."

Section 5025, General Code, provides:

"* * * If upon a ticket there is no candidate or candidates for a designated office, a blank space, equal to the space that would be occupied by such name or names if they were printed thereon with the blank spaces herein provided for, shall be left."

Section 5071 of the General Code provides:

"If there was no nomination for a particular office by a political party, or if by inadvertence, or otherwise, the name of a candidate regularly nominated by such party is omitted from the ballot, and the elector desires to vote for someone to fill such office, he may do so by writing the name of the person for whom he desires to vote in the space underneath the heading or designation of such office, and make a cross mark in the circle at the head of the ticket, in which case the ballot shall be counted for the entire ticket, as though the name substituted had been originally printed thereon."

These sections are not parts of the primary act but, as you know, Section 4967 provides:

"* * * All statutory provisions relating to general elections * * * shall, so far as applicable, apply to and govern primary elections."

I am, therefore, of the opinion that the deputy state supervisor of elections, in preparing the primary ballot, should leave the blank spaces provided for under Section 5025, and that the voter is authorized to write in the name of any person for whom he desires to vote, in the space so left, and under the heading or designation of the office for which the political party has made no nomination; and that the board of elections, when it canvasses the result of the primaries and finds that a certain person, whose name has been written in and voted for, has received the highest number of votes for the particular office, is authorized to place the name of the person, so found nominated, upon the official ballot as the candidate of the political party thus nominating him. This is not the filling of a vacancy; it is original nomination.

I note you refer to Section 5010, General Code, as amended in 102 O. L. 417. The amendment merely changed the time when the certificate should be filed, and the section only provides for a vacancy where a person has been regularly nominated as provided by law and should "die, withdraw or decline the nomination, or if a certificate of nomination is insufficient or imperfect." Without quoting the entire section, I would call your attention to the fact that in that event there would be a real vacancy, and even that vacancy would have to be filled within the time prescribed for original nominations.

Trusting that this fully answers your inquiry I am,

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

344.

CORRUPT PRACTICE ACT—CONTRIBUTIONS BY CANDIDATES TO CHURCHES AND CHARITABLE ORGANIZATIONS—SALE OF TICKETS AND SOLICITATION OF PICTURES AND BIOGRAPHICAL SKETCHES.

Contributions of any sums made to a solicitor for a church or religious association, by a candidate in connection with or with respect to an election, are not within the permitted expenditure of the corrupt practice act.

The practice also of sending tickets to candidates and to office holders seeking re-election, with the extended option to either buy or return the same, and the practice of soliciting pictures, biographical sketches, and names of candidates for their insertion in pamphlets and publications, issued by such charitable or other organizations when such solicitations are made with a view to the candidacy, are all violations of the corrupt practices act.

HON. J. GUY O'DONNELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—In your communication of April 29th, you ask my opinion upon the following matter, relating to what is known as the corrupt practices act, to-wit:

> "Would a contribution of any sum made to a solicitor for a church by a person who is now a candidate for nomination at the coming primary election be a violation of said act?"

You, of course, are familiar with the provisions of the act in question, and especially with Section 2 (Sec. 5175-2, General Code), which provides that,

> "Every candidate who is voted for at any election or primary election held within this state * * * who may have contributed, promised, received or expended, directly or indirectly, any money or thing of value in connection with such election, shall within ten days after such election file, as hereinafter provided, an itemized statement, showing in detail all the moneys or things of value, so contributed, etc."

You are also aware that Section 26 of the act (Sec. 5175-26, General Code) provides what the guilt of a corrupt practice shall be and enumerates the matters and things for which, at their reasonable bona fide and customary value, a person, in connection with or in respect of any election may pay, lend or contribute or offer or promise to pay, lend or contribute any money or other thing of valuable consideration.

Your question cannot be categorically answered, each particular case must be judged by the facts surrounding it. Section 26 of the act enumerates, as aforesaid, the matters and things for which, at the reasonable, bona fide and customary value, a person *in connection with or in respect of any election may pay, lend or contribute or offer to pay, lend or contribute.*

No contribution may lawfully be made to a solicitor for any church by a person who is now a candidate for nomination at the coming primary election, or at any election, provided that the contribution is made directly or indirectly *in connection with or in respect of the election.* In other words, is there a connection between the contribution and the candidacy? If there is, the contributor is guilty of a corrupt practice and is subject to all of its consequences; if there is not, he is not so subject.

While your question does not call upon me to answer at further length because such answer involves the application of facts, yet I deem it not without the scope of my authority, in view of the great practical importance of the matter, to further discuss the subject.

It is well known that churches, organizations of various kinds and collective bodies through their representatives have been and are accustomed to solicit candidates for office for contributions in one form or another. A pernicious practice has become established of writing to men in public office who are known to be candidates and asking for contributions. Generally no reference is made to the election, but the request comes from organizations in locations where the candidate in many instances has not even an acquaintance, and, too, where there is no community of interests between the candidate and the organization making the request in respect for which the solicitation is made. It suggests itself quickly to the ordinary mind that this is a solicitation *in respect of and in connection with the election.*

Another practice that has become quite generally known (and one aside from the matter of election), and one that is very reprehensible is that of sending tickets to the offices of public officials with the request that the price of the tickets be forwarded to the solicitor, or return the tickets. True, such solicitors usually advise that the ticktes may be returned without any fear of incurring displeasure. These tickets often, yes, I may say usually come from places and quarters that would not think of asking for a contribution from the public officers were they not candidates. The purposes of the solicitors are usually good, and the contributions for noble objects, but none the less, the practice is a direct violation of the Kimble corrupt practices act. Such solicitors are in the direct category of soliciting a bribe from a candidate the price of the bribe being the good will that brings about a vote or votes. This practice does not fall short of the reprehensible, but effective, title of "hold up," and the solicitor would deserve to be placed in the category of one seeking to seduce a public official if it were not that he may be entitled to the charitable term of "thoughtless."

Aside from the fact that contributing under such circumstances is a violation of the law, the time of the public official is taken up with a consideration of the communication in reference thereto and the return of the tickets.

Again, many organizations seek subscriptions from public officials who are known to be candidates, and from candidates who are not public officials, and in return insert their names and pictures and biographical sketches in a publication made in connection with some exercise, the candidate not making the contribution as an advertisement or newspaper article in connection with his candidacy, but purely to avoid incurring the displeasure of the solicitor. This, too, is inhibited because the contribution is not made with reference to Section 26 of the Kimble corrupt practices act. It is not the purpose of the law to prohibit any man, whether a candidate, public official or otherwise, from making contributions to religious, charitable and other purposes, but the surrounding facts will usually determine whether such contributions are so made. Contributions for all these purposes along such lines as on the face of them denote they are not referable to candidacies or elections constitute no violation of the law. The law is not in the road of organizations or collective bodies or assemblages or of churches, and these latter should be extremely careful not to get into the road of the law.

The test to be applied as to whether the corrupt practices act is violated is this, does the solicitor know that the candidate is a candidate, or does the candidate give with the knowledge that the solicitor knows that he is a candidate; and is he giving because such contribution may affect his election either in the way of bringing him votes or preventing the loss of votes. If the contribution is with such knowledge on the part of the donor and donee, the act is violated; if the

contribution is solicited only for proper purposes and was given bona fide because of these purposes, and without reference to the election, there is no violation of the act, even thought votes may be influenced one way or the other.

I appreciate the extreme delicacy of this subject, and I do not mean to leave the impression that any great per cent. of the subjects herein referred to indulge in it, but I do not hesitate to say that the small percentage who do are doing more than their share to violate our election laws. Ordinarily the bribe giver is the mover and hunts the bribe taker; his wrongdoing originates with himself, but organizations that reach out of their usual territory or solicit a candidate whom under other circumstances they would not approach, are by their solicitations tempting the candidate to violate the law, and in many instances to make contributions needed by his family.

When any candidate for public office makes a contribution for any purpose other than those stated in Section 26 of the act, there is no presumption that it is not a violation of the act, and the facts may be such as to raise the presumption that it is a violation of the act.

No hard and fast rules can be laid down on the subject. The facts in each case will usually indicate on their face whether or not the contribution is made in connection with or in respect of the election, and it will not do to say that because contribution is to be used for a religious, charitable or fraternal purpose that therefore it is without the letter and spirit of the Kimble corrupt practices act. In fact, the very delicacy of the subject, and that the contribution is to be used for the charitable and religious purpose makes the offense, if the contribution is solicited, referable to the election, all the more grievous.

I am of the opinion that when organizations and societies realize that these practices are contrary to the law, they will readily and cheerfully discontinue them.

Very respectfully yours,

TIMOTHY S. HOGAN,

Attorney General.

353.

BURIAL OF POOR—EFFECT OF NOTICE OF DEATH BY TOWNSHIP TRUSTEES TO INFIRMARY DIRECTORS.

Under Section 3495, General Code, the township trustees may notify and thereby cause the infirmary directors to take charge of the burial of persons coming under these sections.

The trustees may not themselves bury said person however, and then cause the infirmary directors to pay for the same.

COLUMBUS, OHIO, April 30, 1912.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your letter of March 4th, wherein you inquire as follows, concerning Section 3495 General Code:

> "The local township trustees, after the death of a person coming under this section, contracted with an undertaker for the burial of such dead person. Before such burial they secured the bill from the

undertaker and presented it to the infirmary directors for payment. Is this such a compliance with the section as would require payment by the infirmary directors?

"My construction of the section would be that all the trustees could do would be to notify the infirmary directors, permitting them to make all arrangements with undertaker, as to price, etc. And if the trustees would go ahead and act to the extent of employing an undertaker and contracting with him, the infirmary directors could not be held, even though notified before the actual burial. Not being sure of this construction, I write for your opinion."

In reply thereto I desire to say that Section 3495 of the General Code provides as follows:

"When information is given to the trustees of a township or proper officer of a municipal corporation, that the dead body of a person, having a legal settlement in the county, or whose legal settlement is not in the state or is unknown, and not the inmate of a penal, reformatory, benevolent or charitable institution, has been found in such township or corporation and is not claimed by any person for private interment at his own expense or delivered for the purpose of medical or surgical study or dissection in accordance with law, they shall cause it to be buried at the expense of the township or corporation, but, if such trustees or officers notify the infirmary directors, such directors shall cause the body to be buried at the expense of the county."

It is my opinion that the said section means the burial of such shall be by the trustees of the township unless the trustees of such township notify the infirmary directors when it becomes the duty of said infirmary directors to bury such dead at the expense of the county. In other words, if the township trustees desire such burial to be made at the expense of the county, it is their duty to notify the county infirmary directors to take charge of such burial as provided in said Section 3495 of the General Code, as above quoted. Therefore, in accordance with the foregoing and answering your question specifically if the trustees contract with an undertaker for the burial of such dead as are mentioned in said Section 3495 of the General Code, above quoted and then present the undertaker's bill to the infirmary directors for payment, it is my conclusion that this is not such compliance with said section as would warrant payment by the county infirmary directors or the county trustees.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

354.

EXPENSES OF PROSECUTING ATTORNEYS—ONLY BILLS "NOT OTHERWISE PROVIDED FOR," PAYABLE FROM FUND FOR EXPENSES INCURRED IN OFFICIAL DUTIES AND IN FURTHERANCE OF JUSTICE—EXTRADITION OF CRIMINALS.

Under Section 3004, General Code, only such bills incurred by the prosecuting attorney in the furtherance of justice, or in the performance of his official duties, may be paid upon the order of the prosecution, as are "not otherwise provided for." Bills incurred therefore in the extradition of criminals which are provided for under Sections 2491 and 3015, General Code, may not be paid under Section 3004, General Code.

COLUMBUS, OHIO, May 1, 1912.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—In your letter of March 9, 1912, you request my opinion as follows:

"I wish your opinion on the construction of Section 3004, General Code, as amended in 102 O. L., page 74, as to whether or not the expenses of the office of prosecutor, such as stationery, telephone rent and tolls, extradition of criminals, etc., should be paid under this section direct by order of the prosecuting attorney, after having given bond as required by the above section."

Section 2914 of the General Code is as follows:

"On or before the first Monday in January, of each year in each county, the judge of the court of common pleas, or if there be more than one judge, the judges of such court, in joint session, may fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office."

Section 3004 of the General Code is as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by Section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

"Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him, received

in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.

"The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

The language of Section 3004 specified that the allowance made under its authority is in addition to that provided by Section 2914, and that it is for the purpose of providing for the expenses which may be incurred by the prosecuting attorney in the performance of his official duties and in the furtherance of justice, *not otherwise provided for.* Therefore the test as to the purpose for which this allowance can be expended is, first whether the expenditure is necessary in the performance of the official duties of the prosecutor and in the furtherance of justice; and, second, whether it is otherwise provided for. If there is any other provision made by law for the payment of the expense, then, I take it that it cannot be paid out of this fund, and that this fund can only be used to pay for expenses incurred by the prosecutor in the performance of his official duties and in furtherance of justice for which no provision is made, for instance, it seems to me that the expenses incurred in the extradition of criminals could not be paid from this allowance for the reason that this expense is provided for by Section 2491 and Section 3015 of the General Code; but if in the extradition of criminals it was necessary for the prosecutor to incur some expense that is not covered by either Section 2491 or Section 3015 of the General Code, then that portion of the expense could be paid from the allowance made by Section 3004. That section itself provides that the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as that order designates, upon the order of the prosecuting attorney and for the amount specified in the order. This provision, of course, obviates the necessity of an allowance by the county commissioners for payments made from this fund.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

356.

MILEAGE—JURORS ENTITLED TO MILEAGE ONLY FOR DAY OF SUMMONS.

Under Section 3008, General Code, and by authority of the construction of that statute in the case of Burton vs. Wagoner et al., in the circuit court of Hamilton county, jurors, both grand and petit are entitled to mileage from their place of residence to the county seat, only for the day of summons.

COLUMBUS, OHIO, May 9, 1912.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Your favor of April 15th, received. You inquire:

> "Is a juror, both grand and petit, entitled to mileage from his place of residence to the county seat each day of his service, or is he entitled to but the first day?"

You state in your letter that this question was decided by the court of common pleas of Summit county in an action brought in madamus against the clerk of court to compel him to allow mileage to each juror each day of his service, Judge Doyle deciding that they were entitled to mileage for each day of service.

This same question was before the circuit court of Hamilton county, Ohio, in the case of state of Ohio, on relation of George Burton vs. Charles Wagoner, clerk of the courts, Charles Roth, county treasurer, and Charles C. Richards, county auditor. This was an action in mandamus and it was held that the relator was not entitled to a writ of mandamus and not entitled to mileage except for the first day's attendance.

I am informed by the state bureau of accounting that the Hamilton county ruling is being generally followed, over the state.

Your question involves the construction of Section 3008 of the General Code, which provides as follows:

> "Each grand or petit juror drawn from the jury box pursuant to law, each juror selected by the court as talesman as provided by law, and each talesman, shall receive two dollars for each day of service, and if not a talesman, five cents each mile from his place of residence to the county seat. Such compensation shall be certified by the clerk of the court and paid by the county treasurer on the warrant of the county auditor."

It is evidently contemplated by this section that jurors, when once summoned, shall remain continuously in attendance upon the court, the statute plainly authorizing but one payment of mileage. If it had been intended that jurors should be allowed mileage for each day of service the statute would have expressly said so.

On the authority of the case of Burton vs. Wagoner, et al., I hold that jurors, both grand and petit, are entitled to mileage from their places of residence to the county seat on the day they are summoned and are not entitled to mileage for each day of service.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

358.

COST BILL—NO PAYMENT BY STATE WHEN SENTENCE OF PERSON CONVICTED FOR FELONY IS SUSPENDED, AND SAID PERSON IS RETAINED UNDER JUDGE INSTEAD OF COMPLYING WITH PROBATION LAWS—CERTIFICATION OF COST BILL BY WARDEN OF PENITENTIARY.

When a judge suspends the sentence of a person convicted and sentenced to a term in the penitentiary or reformatory and retains such person under the jurisdiction of the court instead of placing him under the jurisdiction of the penitentiary or reformatory, such judge is acting contrary to the provisions of the so-called probation laws set out in Sections 13706—13715, *General Code.*

Such a person is not therefore, properly under the supervision of the state of Ohio as was intended by Section 13726, *General Code, providing for the payment of the cost bill by the state upon certification of the warden of the penitentiary when the sheriff has returned the execution "no goods, etc., formed whereon to levy." The cost bills in such cases therefore cannot be paid by the state.*

COLUMBUS, OHIO, May 9, 1912.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 11, 1912, enclosing a communication received by you from the clerk of courts of your county, which reads in part as follows:

> "* * * it has been the custom of some of our judges, after conviction of a criminal in this court, *to suspend execution of sentence and retain the prisoner under the jurisdiction of the judge rather than place him under the jurisdiction of the penitentiary or reformatory.* We find many cases where this has been done and the costs have not been paid. J. A. Leonard, superintendent of the Ohio State Reformatory, holds that he cannot certify as to the costs for the prisoner is never under the jurisdiction of his institution. The same thing is true as to the warden of the penitentiary."

and requesting my opinion as to whether or not Cuyahoga county is entitled to be paid the costs in criminal cases out of the state treasury where the facts are as stated in the letter from your county clerk to you.

In reply I desire to say that Sections 13723, 13724, 13725, 13726 and 13727 of the General Code cover the proposition of costs in criminal cases under sentences for felony, and I direct your attention especially to Section 13726, which provides:

> "When the clerk certifies on the cost bill that execution was issued according to the provisions of this chapter, and returned by the sheriff 'No goods, chattels, lands or tenements, found whereon to levy,' the warden of the penitentiary shall allow so much of the cost bill and charges for transportation as is correct, and certify such allowance, which shall be paid by the state."

Under the above quoted section the state, beyond any doubt, must reimburse the respective counties of the state for costs in criminal cases where the criminal has been convicted and sentenced to imprisonment for a felony, when the cost

bill is properly certified to as required by said section. But the question raised for determination by the clerk of courts in his letter to you is as to whether or not the state must pay the costs in criminal cases where the sentence has been suspended by the judge imposing it without placing the criminal under the jurisdiction of the penitentiary or state reformatory.

There can be no question as to the authority of a court, in a criminal case, to suspend the execution of the sentence, in whole or in part, for any crime of which the criminal has been convicted or to which he has plead guilty, unless otherwise provided by statute; that having been decided in the case of Webber vs. State, 58 O. S., 616. But I take it, from the clerk's letter to you, that the judges of the criminal court in your county have been suspending execution of sentence and retaining the prisoner under the jurisdiction of the judge, rather than placing him under the jurisdiction of the penitentiary or reformatory, under the provisions of what is known as the probation laws, Sections 13706 to 13715, inclusive, General Code. Section 13706 of the General Code provides:

> "In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, * * * and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence and place the defendant on probation in the manner provided by law."

Section 13709 provides:

> "When it is the judgment of the court that the defendant be placed upon probation and under the supervision of the penitentiary or the reformatory, the clerk of such court shall forthwith make a full copy of the judgment of the court, with the order for the suspension of the execution of sentence thereunder and the reasons therefor, and certify them to the warden of the penitentiary or to the superintendent of the reformatory, to which the court would have committed the defendant but for the suspension of sentence."

Section 13710 provides:

> "Upon entry in the records of the court of the order for the probation provided for in the next preceding section, the defendant shall be released from custody of the court as soon as the requirements and conditions required by the board of managers have been properly and fully met."

It will be seen from a reading of the sections last above quoted that the court has certain duties to perform, also the clerk of courts, and, as provided by Section 13710, that the defendant shall be released from custody of the court as soon as the requirements and conditions required by the board of managers (now the board of administration, successor to the respective boards) have been properly and fully met.

The Ohio Board of Administration has adopted probation rules under the provisions of said law, to be complied with as therein provided, and I am of the opinion that no criminal is properly released on probation unless there has been a strict compliance with the rules adopted by the board and the sections above quoted, and unless the prisoner has been properly certified to the warden of the penitentiary or the superintendent of the Ohio state reformatory, as provided by said laws.

While the probation laws vest the court with the power to suspend the sentence, at the same time the prisoner placed upon probation is under the supervision of the penitentiary or reformatory, under such requirements and conditions as have been adopted by the board of administration, in control of the respective institutions; and unless the prisoner, whose sentence is suspended, has complied with the requirements he has never been properly under the supervision of either of the respective institutions named, and the state of Ohio, therefore, should not be held for the costs, and, further, the warden of the penitentiary and the superintendent of the Ohio state reformatory would be without legal authority or right to certify or issue certificate to the auditor of state for the payment of the costs, under the circumstances related by the clerk of courts in his letter to you. No prisoner whose sentence has been suspended under circumstances like those stated by your county clerk could be said to have passed into either the actual or legal custody of either of said institutions; and it was evidently the intention of the legislature, in providing that the state should pay the costs in criminal cases, where the criminal had plead guilty or been found guilty of a felony, that the prisoner should be in the custody of the state of Ohio and under the control of the institution to which he would have been conveyed had not the sentence been suspended.

For the reasons above set forth, I am of the opinion that the warden of the Ohio penitentiary and the superintendent of the Ohio state reformatory may legally and properly refuse to issue certificate to the auditor of state for the payment of the costs in criminal cases under the circumstances above referred to; and I am further of the opinion that in order to entitle your county to be reimbursed from the state treasury for costs in criminal cases under said circumstances, the defendant must be properly placed in the custody of the respective institutions and have complied with all the rules of probation adopted by the state board of administration.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

360.

CEMETERIES—TOWNSHIP—TOWNSHIP TRUSTEES HAVE CONTROL OF AND MAY NOT SELL LOTS FOR CONSTRUCTION OF A COMMUNITY MAUSOLEUM.

As the statutes provide that the entire control of township cemeteries shall be vested in the township trustees, and as power to convey lots therein are restricted solely to conveyance to families and individuals, the trustees may not sell lots in said cemetery to a private company for the purpose of constructing therein a community mausoleum.

COLUMBUS, OHIO, April 30, 1912.

HON. F. R. HOGUE, *Prosecuting Attorney, Ashtabula County, Jefferson, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 18, 1912, in which

you ask my opinion as to whether the trustees, having title, control and possession, under the law, of lands for the purpose of a township cemetery for the burial of the dead of said township, can sell lots therein "upon which to be constructed a community mausoleum."

I desire to say that the matter depends upon the power conferred on said trustees, relative to such cemeteries, as enumerated by the statutes of Ohio.

The powers, duties and privileges of township trustees, in relation to such cemeteries is provided for in Sections 3441 to 3475, inclusive, of the General Code.

Unless such authority is expressed or fairly implied, within the above sections, the right so to do does not exist.

Let us examine the written law on the subject; for there we must find authority, if any, for the contemplated act of the trustees. The right to acquire lands by purchase or condemnation is given; also to levy tax for purchase, improvement and maintenance. A vote is required by the people in a proper case. Other safeguarding provisions are made by this chapter relative to the acquisition of lands for such purposes.

Section 3447, G. C., provides:

> "The trustees may have such cemetery laid out in lots, avenues and paths, number the lots and have a suitable plat thereof made, which shall be carefully kept by the township clerk. They may make and enforce all needful rules and regulations for its division into lots, and the allotment thereof to families or individuals, and for the care, supervision and improvement thereof. Suitable provision shall be made therein for persons whose burial is at the expense of the township."

Section 3448, G. C., provides:

> "Upon application the township trustees shall sell at a reasonable price such number of lots as the public wants demand for burial purposes. Upon complying with the terms of sale, purchasers of lots shall be entitled to receive a deed or deeds therefor which the trustees shall execute, and which shall be recorded by the township clerk in a book for that purpose * * * *. Upon application of a head of a family living in the township, the trustees shall make and deliver to such applicant a deed for a suitable lot for the burial of his or her family without charge, if in the opinion of the trustees, by reason of the circumstances of such family, payment therefor would be oppressive."

Section 3451 provides that the title, right of possession and control in all public graveyards and burial grounds which have been set apart and dedicated as public graveyards or burial grounds shall severally be vested in the trustees of the township where located.

The law also provides for the levying of taxes and the issuing of bonds for the maintenance and improvemnt of such cemeteries. Trustees are required to keep them in good repair. There is a penalty provided for the failure to perform their duties regarding such cemeteries.

The control, supervision, rules and regulations as to the use of any grounds for burial purposes shall be under the exclusive control of the township trustees in such cemeteries as the one spoken of in this case.

The statute also provides that trustees can make rules and regulations relative to the care and maintenance and preservation of the different lots making up the cemetery.

The question then arises whether the selling of a right to a lot or lots, such as is contemplated by the interrogatory in this case, would not be doing indirectly what could not be done directly—the trustees thereby depriving themselves of the sole authority given to anyone by law.

Nowhere does it appear in the statutes governing township cemeteries that anyone else than the trustees have any rights therein as to general control over any part thereof.

To grant to an association the right to erect a mausoleum for the burial of dead on lots owned by said association at prices which may be fixed by said association, and at a profit derived by it, is beyond the powers of the trustees.

Individuals could erect structures of their own for the purpose of interring their own dead, under proper limitations; the trustees could possibly do so themselves, retaining absolute control thereof; vaults for the reception of bodies temporarily could be maintained, but to convey lots to such associations, as the one referred to, for permanent use for the public generally, is not authorized by law.

I concede that modern requirements and public demands, in the light of the age in which we are living, would make such an arrangement a matter of public satisfaction; but the trustees cannot part with control of the rights of burial and of jurisdiction of the property held in trust to a private concern, and thus have within their cemetery a concern independent of them. However convenient, commendable and desirable this might be, no relief can be had along that line until the legislature has enlarged the statute on that subject.

All these sections clearly show that the trustees are exclusively vested with the title and control of all township cemeteries; and that such cemeteries and *all the lots there* are exclusively under the control of said trustees for the use of those to whom they are allotted—which the statute says, Section 3447, shall be "to families or individuals."

Therefore, I am of the opinion that the right of township trustees to permit any such arrangement, as the law now stands, is without authority.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

369.

SHEEP—ALLOWANCE OF DAMAGE CAUSED BY DOGS WORRYING FLOCK—DISCRETION OF TOWNSHIP TRUSTEES AND COUNTY COMMISSIONERS.

The allowance of damages for injuries to sheep by a dog, under Sections 5840—5846, *General Code, rests in the discretion of the township trustees and county commissioners, under the procedure therein provided, and this discretion extends to damage caused by worry or fright to said sheep, though there exists no visible physical disorder.*

COLUMBUS, OHIO, May 7, 1912.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of April 20th, which is as follows:

> "It has always been the custom in this county for the county commissioners to pay sheep claims, under Section 5840 of the General Code, as follows:

Damage for sheep killed_____ $----
For sheep injured_____ ----
For injury to flock being worried_____ $0 50 per head.

The last board of state examiners have said in their report that the last payment of damages to flock for being worried by dogs is not lawful. The commissioners have always, as I have said, paid something for damages to the flock, but never more than 50 cents per head. What is your ruling on this? We have a lot of such claims pending."

In brief your question is whether or not under the statutes an allowance will be made for such damage to sheep as may occur by reason of worry or fright, which is caused by the ravages of dogs among the flock. The difficulty refers to a mere nervous, or, if the term may be used, a mental debility caused to the animal by fright or shock. This result is not evidenced by any visible physical disorder, but I am informed that almost inevitably the effect is such a grave debilitation as to seriously retard the growth and impair the general usefulness of the animal, and very frequently, indeed, to cause the death of the animal within a shorter or longer period of time.

The following sections of the statutes are applicable:

"Section 5840. A person damaged by the killing or injuring of sheep by a dog, may present a detailed account of the injury done, with damages claimed therefor, verified by affidavit at a regular meeting of the trustees of the township wherein the damage or injury occurred and within six months thereafter. Such account shall state the kind, grade, quality and value of the sheep so killed and the nature and the amount of the injury, and present the testimony of at least two freeholders where the injury was done, who viewed the results of the killing or injuring and can testify as to the number, kind and grade, and who may give their opinion as to the quality and value thereof."

"Section 5841. The person owning such sheep or having charge thereof must make it appear that such injury was not caused in whole or in part by an animal kept or harbored by him, or by an employe or tenant of the owner upon such owner's premises, and that he does not know whose animal committed the injury, or if known and such amount reduced to judgment, it could not be collected on execution.

"Section 5842. The township trustees shall receive any other information or testimony that will enable them to determine the value of the sheep so killed or injured.

"Section 5844. *The township trustees shall hear such claims in the order of their filing and may allow them, or such parts thereof as the testimony shows to be right and just.* They shall endorse the amount allowed and transmit them with the testimony so taken and the fees due witnesses over their official signatures to the county commissioners in care of the county auditor, who shall enter upon the book to be kept for that purpose in their order, each claim so received.

"Section 5845. The witness, as provided in the next preceding chapter, not exceeding four, shall be allowed fifty cents each and mileage as in other cases. The trustees may administer an oath or affirmation to a claimant or witness. If the sheep killed or injured are in the care

of an employe or tenant of the owner thereof, the affidavit provided in section fifty-eight hundred and forty may be made by such employe or tenant, whose testimony may be received in regard to all matters relating thereto which said owner would be competent to testify.

"Section 5846. *The county commissioners, at the next regular meeting, shall examine such claims and may hear additional testimony or receive additional affidavits in regard to the claims and may allow the amount determined by the township trustee, or part thereof, or any amount in addition thereto that they find to be correct and just,* to be paid out of the fund created by the per capita tax on dogs. Such claims as are allowed in whole or in part, shall be paid only at the June session of such commissioners; and, if such fund is insufficient to pay the claims in full, they shall be paid pro rata. If there is not sufficient money in such fund in any year to pay the claims in full, the part thereof allowed but unpaid by reason of lack of funds, shall be paid in any year thereafter whenever there is a surplus in the fund remaining after the claims for such year have been paid in full."

Considering the broad scope of the word "injured" as it is generally defined, I have no hesitancy in concluding that as it is employed in these statutes, the allowance of damage by the commissioners for such a detriment to a flock of sheep as is the subject of your inquiry may be properly permitted, provided sufficient evidence is afforded the township trustees and the commissioners to enable them to base their judgment of the amount upon a sound and unabused discretion.

The difficulty seems to be with the ability to prove not merely the existence, but the nature of these injuries. The question of damages, however, is universally a hazy one, but that fact has never in law served as a ground for the denial of the rights of compensation for a manifest injury. The exercise of discretion upon questions of nervous ailments and the consideration of the prospects of future suffering and losses is in an unlimited measure permitted to the jury in the trial of personal injury cases. The case at hand is quite parallel, and in the exercise of the broad discretion conferred by the statutes aforesaid, first upon the trustees, and then upon the commissioners in their review of the allowance made by the trustees, I see no reason why these authorities may not, under the restrictions set forth and in due course of the procedure provided, allow such damages as the circumstances of each individual case seem to justify.

The facts set forth do not make possible any comment upon former practices. Suffice it to say that the question of allowance is placed within the broad province of the judment of the trustees and the commissioners to be formed in view of all the surrounding facts and circumstances, and if in the act of these officers there is not manifested a clear and flagrant abuse of this discretion, or non-compliance with the statutory safeguards imposed upon them, their ruling on the question as to such damages should be accepted as final.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

370.

INITIATIVE AND REFERENDUM—SUSPENSION OF EFFECT OF ORDINANCE UPON FILING OF REFERENDUM PETITION UNTIL MAJORITY VOTE OF ELECTORS IS DETERMINED.

An ordinance upon which a referendum petition has been filed, cannot become operative until it has been determined by a majority vote that the electors have adopted it.

COLUMBUS, OHIO, April 26, 1912.

HON. FRANK X. FREBIS, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Under date of January 31st, you request my opinion on Section 4227-2, General Code, concerning the question when an ordinance that has been passed by council shall become effective in the event a referendum petition is filed and election held on such ordinance and the result of said election is in favor of the ordinance as passed by council.

You call my attention to the fact that in Section 4227-1, General Code, in reference to an initiative petition it is specifically provided that the ordinance shall become valid from the date of the determination of the vote thereon, and that Section 4227-2, General Code, under paragraph two thereof states that certain ordinances shall not become effective in less than sixty days after their passage, and that said law is silent upon the question as to when an ordinance concerning which a referendum petition has been filed shall become operative. The object of the referendum petition is that the electors of the municipality shall be entitled to have caused to be submitted to them the ordinances and resolutions passed by council for their approval. In other words, it is a provision of law that the electors of the municipality shall be entitled to decide whether or not such laws shall go into operation.

Section 4227-5, General Code, states that no ordinance or other measure shall be *adopted* unless it receives an affirmative majority of the total number of lawful and effective votes cast at such election and entitled to be counted. The object of the referendum act being that the electors of the municipality shall have the privileges of adopting the law as passed by the council, it would seem to me that the law could not become operative, after the filing of the referendum petition, until it had been adopted by a majority of the electors.

I am, therefore, of the opinion that such an ordinance would not become operative for any purpose after the referendum petition had been filed until it had been determined by a majority vote that the electors had adopted it. The ordinance would be held in suspension and no rights would be acquired under it until adopted by such electors.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

374.

ROAD IMPROVEMENTS—APPORTIONMENT OF ASSESSMENTS BY TOWNSHIP TRUSTEES—TIME FOR FILING NOTICE—APPOINTMENT OF EQUALIZING BOARD—CERTIFICATION OF ASSESSMENT TO COUNTY AUDITOR.

The township trustees are given jurisdiction of apportionment of assessments for road improvements, under Sections 1208 *and* 1210, *General Code.*

By provision of these sections, when the special provisions therein contained are not applicable the provisions of Section 6907 *et seq., General Code, must govern in the hearing of complaints and allowing of damages.*

Under this principle objections to the apportionment which is made by the township trustees, must be filed with the township trustees within two weeks after the apportionment is made.

The township trustees shall appoint an equalizing board, upon the expiration of the time for filing objections.

The township trustees shall certify the assessments to the county auditor, who shall certify the same to the county treasurer, along with the times of payment which are to be fixed by him as provided in Section 1210, *General Code.*

COLUMBUS, OHIO, May 1, 1912.

HON. T. J. KREMER, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Your favor of December 14, 1911, is received, in which you make inquiry as follows:

> "I would like to have a construction on the clause,
>
> "'And an opportunity given them to be heard in the manner provided by law for the assessment of the costs and expenses in establishing county roads.'
>
> "Contained in Section 1208 and also known as Section 35, page 343 of volume 102 of the Ohio Laws. While there is an appeal from the compensation and damages allowed property owners through which a county road is established, yet there seems to be no law for the assessment of the costs and expenses of establishing a county road other than the determination by the commissioners whether they deem it of sufficient importance for them to pay it or that the petitioners pay all or a part thereof.
>
> "The law as embodied in volume 99 page 314 and following of the Ohio Laws, refers to 4633-4 and following of the Revised Statutes or 6907 and following of the General Code, but this law does not seem to refer to cost and expense of establishing county roads. If it should be construed that the law, as it now stands, refers to 6907 and following of the General Code, then would the abutting property owners objecting to the apportionment, file their objections with the county commissioners and the county commissioners appoint an equalizing board as provided by law and if so, who would certify the apportionment to the county auditor?
>
> "If the county commissioners have no jurisdiction in this matter and this law only refers to the manner in which abutting property owners can be heard, and that they must file their objections before the board of trustees appoint an equalizing board and proceed in a similar manner as the commissioners would proceed under 6907 of the General Code, then

would the trustees be compelled to give three weeks notice as provided in Section 6907 of the General Code in addition to the ten days notice which was given under Section 1208? If it should be determined that it is not necessary to give three weeks notice as just referred to, then within what time would the abutting property owners objecting, be compelled to file their objections and would the trustees appoint an equalizing board?

"In the case where the commissioners are compelled to give three weeks notice after apportionment, there is no notice given prior to the apportionment, whereas, under the law under consideration, the trustees give ten days notice prior to such apportionment.

"The matter is very important to us for the reason that the costs and expenses of the road have already been paid and the county is very anxious that it be placed on the tax duplicate and of course be placed there at once and correctly. We are confident that if it is not placed there correctly and legally, that a suit will be instituted to restrain the collection of the same. It seems to me to say the least, that the law is very indefinite and should be amended so as to be intelligible."

Section 1208, General Code, referred to by you, as amended in 102 Ohio Laws, 343, provides as follows:

"Except as otherwise provided one-fourth of the cost and expense of such improvement shall be apportioned to the township or townships in which such road is located. Of the amount so apportioned three-fifths shall be a charge upon the whole township or townships and two-fifths shall be a charge upon the property abutting on the improvement. The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of land so located. At least ten days' notice of the time and place of making such apportionment shall be given to the persons affected thereby, *and an opportunity given them to be heard in the manner provided by law for the assessment of the cost and expense of establishing county roads.* If the improvement lies in two or more townships the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township.

"When an improvement of a highway shall be made by the state in conjunction with a township or townships, thirty five per cent. of the total cost and expense thereof shall be assessed on the township or townships and fifteen per cent. of the total cost and expense thereof shall be assessed on the land abutting on such highway."

You ask for a construction of the part underscored.

You raise several questions, which may be summarized as follows:

Should the abutting property owners objecting to the apportionment, file their objections with the county commissioners or with the township trustees?

Who shall appoint an equalizing board and when shall same be appointed?

Who shall certify the apportionment to the county auditor?

What notice, or notices, are required under Section 1208, General Code?

Within what time will the abutting property owners be required to file their objections?

Section 1208, General Code, as originally passed in 99 Ohio Laws, 314, contained the following:

"* * * Upon at least ten days' notice of the time and place of such apportionment to the persons affected thereby and after such persons have an opportunity to be heard in manner and form as provided in Sections 4637-4, 4637-5, 4637-6 and 4637-7 of the Revised Statutes of Ohio * * *."

In placing this section in the General Code, the part under consideration was put in its present form.

Said Sections 4637-4, 4637-5, 4637-6 and 4637-7, Revised Statutes, were carried into the General Code as Sections 6907, 6908, 6909 and 6910, respectively. These sections provide for the apportionment of the cost and expense of establishing and improving county roads.

Section 6904, General Code, provides:

"The county commissioners may assess the damages on account of the widening, altering or *establishing* of such road, or part thereof, *and the costs and expenses of any or all of the improvement or such part of said damages,* costs and expenses as they deem equitable under the circumstances, upon the taxable property abutting upon the road or part thereof, either according to the foot frontage or according to the benefits. The commissioners shall be an assessing board for the purpose of assessing the damages, costs and expenses, as herein set forth, upon the abutting property as aforesaid."

Section 6907, General Code, provides:

"Before adopting the assessments so made, the county commissioners *shall publish notice for three consecutive weeks in a newspaper of general circulation in the county,* that such assessments have been made, and that they are on file in the office of the county commissioners for the inspection and examination of the persons interested therein."

Section 6908, General Code, provides:

"If a person objects to the assessment, he shall file his objections in writing with the board of county commissioners within two weeks after the expiration of such notice, and thereupon the board shall appoint three disinterested freeholders of the county to act as an equalizing board."

Section 6909, General Code, provides:

"Upon the day appointed by the county commissioners for that purpose, such equalizing board, after taking an oath before a proper officer honestly and impartially to discharge their duties, shall hear and determine all objections to the assessment and equalize it as they think proper. It shall report such equalized assessment to the board of county commissioners, which may confirm such report or set it aside and cause a new assessment to be made, and appoint a new equalizing board possessing like qualifications, which shall proceed in the manner herein provided."

Section 6910, General Code, provides:

> "When the assessment is confirmed by the county commissioners it shall be complete and final, but if, by any of the provisions of this subdivision of this chapter, an act or thing is required to be done by the commissioners, the concurrence of two-thirds of the commissioners shall be sufficient."

Section 1208, General Code, is in its nature a special statute governing the apportionment of the cost of the improvement upon the abutting property by the township trustees. It provides for certain specific things and then provides for a hearing of objections to the apportionment "in the manner provided by law for the assessment of the costs and expenses in establishing county roads." This manner is that which is found in the above sections.

The rule of construction where there are specific provisions and general provisions in statutes applicable to a proposition is set forth in case of Gas Company vs. Tiffin, 59 O. S., 420, by Williams, J., on page 441, as follows:

> "* * * It is a settled rule of construction, that special statutory provisions for particular cases operate as exceptions to general provisions which might otherwise include the particular cases, and such cases are covered by the special provisions."

Section 1208, General Code, is a special statute in reference to these apportionments, and it makes the manner of procedure, prescribed in Sections 6907, et seq., General Code, a general rule for hearing objections. Therefore, where Section 1208, General Code, prescribes a specific rule, such rule governs and excludes a provision upon the same subject which may be found in the general rule. In other words, said Sections 6907, et seq., General Code, govern only in such cases which are not specifically covered by Section 1208, General Code.

Said Section 1208 requires at least ten days' notice of the time and place of such apportionment. This provision governs and excludes the notice required by Section 6907, General Code.

Section 1208, General Code authorizes the township trustees to make the apportionment. If there are any objections to the apportionment the objectors have a right to be heard in the same manner as prescribed for the establishment of county roads. This section does not authorize the county commissioners to take jurisdiction, but it prescribes the manner in which the township trustees shall proceed when obections are filed.

Section 1210, General Code, prescribes that the township trustees shall certify the assessment to the county auditor as follows:

> *"The township trustees shall certify the assessment to the county auditor,* who shall place it upon the tax duplicate against the property benefited. The county treasurer shall collect such assessments in the manner as other taxes are collected, and in such payments as may be approved by the county auditor. The township trustees shall pay the portion of the cost and expense assessed to the township in the same manner as other claims are paid."

The township trustees have jurisdiction over this apportionment throughout the proceedings and when Sections 1208 and 1210, supra, do not provide the rule of procedure they must look for guidance to Sections 6907, et seq., General Code.

Sections 1208 and 1210, General Code, do not provide for the filing of objections or for the appointment of an equalizing board, and therefore the provisions of the other sections must govern.

Section 6908, General Code, provides that objections must be filed with the commissioners within two weeks after the expiration of such notice. The notice herein referred to is the notice by publication for three weeks and which is given after the apportionment is made, but before its final adoption. Notice in the case of apportionment made by the township trustees is given at least ten days before the apportionment is made.

It is the purpose of Section 1208, supra, that reasonable opportunity shall be given to file objections and to be heard upon the same. Two weeks time from the expiration of the notice as provided in Section 6908, General Code, would not be a reasonable time, as the time for filing objections, under such a ruling could not possibly exceed four days, and in fact notice could be given two weeks before the apportionment and thus opportunity for filing objections be denied. The statute has in effect provided that two weeks is a reasonable time in which such objections should be filed. The reasonable construction of this statute in reference to an apportionment by township trustees, is that within two weeks after the apportionment is made by the trustees objections must be filed, and such objections must be filed with the trustees.

Section 6908, General Code, provides that when objections are filed the commissioners shall appoint three disinterested freeholders of the county as an equalization board. This section prescribes the procedure of the trustees. It is the duty of the township trustees when apportionments are made by them and objections have been filed thereto, to appoint three disinterested freeholders of the township to act as an equalization board. The appointment of this board should be made at the expiration of the time given to file objections.

Answering your questions, my conclusions are as follows:

The objections to the apportionment made in accordance with Section 1208, General Code, should be filed with the township trustees who made the apportionment.

Such objections must be filed within two weeks after the apportionment is made.

The township trustees shall appoint an equalizing board when objections are filed and such board should be appointed upon the expiration of the time for filing objections.

The township trustees shall certify the assessment to the county auditor, who shall certify the same to the county treasurer along with the times of payment which are to be fixed by him as provided in Section 1210, General Code.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

375.

CORRUPT PRACTICE ACT—PARTY AFFILIATION AT PRIMARY DETERMINED BY VOTE AT LAST GENERAL ELECTION— VOTER CANNOT CHANGE POLITICS AT PRIMARY.

The party affiliations of a voter at the primary election are to be determined only by his vote at the last general election and a Democrat cannot vote the Republican ticket by swearing that he will support the nominee.

HON. F. L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 16th, in which you request my opinion as follows:

> "I have been asked by a number of candidates whether or not a democrat can vote in the Republican primary if he will swear to support the nominee, and I have answered that a man cannot change his politics at a primary election; if he wants to change from democrat or socialist to Republican he must do so at the general election and not at the primary. Am I correct in my holding?"

Section 4980, General Code, provides as follows:

> "At such election only qualified electors, or such as will be legally qualified electors at the next ensuing general election may vote and all such electors may vote only in the election precinct where they reside, and it shall be the duty of the challengers and of the judges, and the right of any elector, whenever there is reason to doubt the legality of any vote that may be offered, to interpose a challenge. The cause of a challenge shall be: That the person challenged has received or been promised some valuable reward or consideration for his vote; that he has not previously affiliated with the party whose ticket he now desires to vote. *Affiliation shall be determined by the vote of the elector making application to vote, at the last general election held in even numbered years.*"

Section 4981, General Code, describes the character of oath a challenged person may be required to take.

Section 4982, General Code, provides when a vote may be rejected.

As is apparent from a cursory reading of Section 4980, supra, the sole manner of determining with which political party a person is affiliated is by finding out with what political party he voted at the last general election held in even numbered years. The mere fact that a person is willing to swear to support the nominee would not qualify him to vote in the party primary of another political party than that with which he is affiliated, as determined by the rule laid down in Section 4980.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

376.

CORRUPT PRACTICE ACT—CERTIFICATION OF NAME OF REPRESENTATIVE AT POLLS TO BOARD OF ELECTIONS BY CHAIRMAN AND SECRETARY OF PARTY CONTROLLING COMMITTEE.

The name of a representative employed by a candidate in each voting precinct upon the day of the primary election must be certified, under Section 5175-26, *General Code, to the board of elections by the chairman and secretary of the controlling committee of the party, at least two days prior to the election.*

Such name must be furnished the chairman and secretary aforesaid, therefore, at some time prior to said two days, preceding the election.

COLUMBUS, OHIO, May 18, 1912.

HON. FRED W. CROW, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—I beg leave to make reply to your communication of May 8th, wherein you propound the following inquiry:

> "With reference to Section 5175-26 of the General Code of Ohio, how can a candidate legally employ one representative in each voting precinct upon the day of the primary election? To whom must the candidate certify the name of such representative, or in other words, how should such representative's name be certified and to whom certified?"

Section 5175-26 provides in part, as follows:

> "* * * Each political party may designate one party representative in each precinct upon each registration day, and such committee may designate not more than three (3) such representatives and each candidate one representative in each voting precinct upon each election day, *whose names shall be certified to by the chairman and secretary of the controlling committee of such party to the board of deputy state supervisors of elections, at least two* (2) *days before such registration or election day, and who may be paid, etc.*"

It is evident from a reading of the foregoing that the law provides that the representatives referred to shall be certified to the board of elections of the county, and that this certification shall be made by the chairman and secretary of the controlling committee of the party with which the candidate is affiliated, in the one instance, or which represents the political party in the other. While the provision of the statute is that the committee and the candidate "may designate" their respective representatives, there is no express procedure provided for the giving of the information of this fact to the controlling committee for certification; however, as knowledge must be brought home to the chairman and secretary prior to their making certificate, it is my opinion, and I am informed that it is also the opinion of the state supervisor of elections, that it devolves upon the respective candidate and committee, at some reasonable time prior to the election, to hand in the names of the representatives designated under this act to the controlling committee of their party, so that the controlling committee may be duly advised of what is desired by said candidate or committee. Since it becomes the duty of the chairman and secretary of the controlling committee to

certify to the board of deputy state supervisors of elections, at least two days before such registration or election day, these names, it is readily apparent that the time when the names should be given to the committee is some time prior to two days before the election or registration day.

No prescribed form is necessary in the handling of the names to the controlling committee; all that is required is that the committee receive a list of names with a statement that the persons thus named are the duly designated representatives of the candidate or committee, respectively.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

377.

CORRUPT PRACTICE ACT—DELEGATES TO NATIONAL AND COUNTY CONVENTIONS AND COUNTY COMMITTEEMEN—REPORTS OF EXPENDITURES—WHERE FILED—DUTIES OF COMMITTEES.

Delegates to the national convention who are elected at the primary, delegates to the county convention and county central committeemen are candidates voted for at an election, and therefore are included in the enumeration of Section 5175-1 *of the corrupt practice act, and therefore are required to file a report of expenditures as provided in Section* 5175-2, *General Code.*

Committees making expenditure in behalf of such candidates at the primaries must file reports through their treasurer by virtue of Section 5175-2, *General Code.*

By provision of Section 5175-6, *General Code, since district delegates to the national convention are elected by the voters of a sub-division in the state, greater than the county, their account of expenditures must be filed in the office of the secretary of state.*

Delegates to the county convention being elected by the voters of the county, their report of expenditures should be filed with the board of elections of the county.

Committees should file a report of expenditures made in behalf of delegates to the national convention with the secretary of state, while expenditures made in behalf of delegates to the county convention should be filed with the board of elections of the county.

Delegates to conventions are not "public officers," and their expenditures are limited as to their character but not as to their amount.

COLUMBUS, OHIO, May 18, 1912.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 6th, in which you request my opinion upon the following questions:

> "1. Are delegates to the national convention, delegates to the county convention and county central committeemen included among the candidates enumerated in Section 1 of the corrupt practices act, General Code, 5175-1, and required to file the report of expenditures required by Section 2 of said act, Section 5175-2, General Code.

"2. If a candidate for delegate to the national convention, county convention or the county central committee is not included in the act and is not required to file a statement of his receipts and disbursements, is the treasurer of the committee or organization, as described in Section 5175-1, which has been formed for the purpose of co-operating and aiding in the promotion or success of such delegates to the national convention, delegate to the county central committee, required to file the report required by the corrupt practices act?

"3. Section 6 of the act, General Code, 5175-6, provides that statements of expenditures which are required to be filed that relate to the election of candidates for offices upon propositions submitted to the electors of the entire state, or any sub-division or district thereof, greater than a county, shall be filed in the office of the secretary of state, and in all of the elections such statements shall be filed in the office of the board of deputy state supervisors of elections for the county in which such election is held. Under this section should the statement of a delegate or alternate to the national convention, if he is required to file a statement of expenditures, be filed with the secretary of state? Should the statement, if one be required to be filed by a delegate to the county convention, be filed in the office of the board of deputy state supervisors, notwithstanding the fact that delegates to the county convention are elected partially for the purpose of electing delegates to the state convention and state offices?

"4. Where the treasurer of a committee or association, as defined in Section 1 of the corrupt practices act, General Code, Section 5175-1, is paid money for the three objects of assisting in the nomination or election of the delegates to the national convention, delegates to the county convention and county central committeemen, without specifying as to its division, can such treasurer or executive committee of such organization by vote of majority apportion the amounts to be expended toward the election of the delegates to the national convention, delegates to the county convention and the county central committee, and if they are required by the corrupt practices act to make report of such expenditures, file their reports direct with the secretary of state and in the office of the board of deputy state supervisors of election of the county, showing in each report, respectively, the amounts expended for said candidates?

"5. Section 29 of the act, General Code, Section 5175-29, specifies the amount of expenditures allowed by various candidates. Delegates and alternates to the national convention, or their offices above mentioned are not specified. A presidential elector is restricted in his contribution to the sum of $2,000. Inasmuch as no mention is made of the delegates to the national convention, to what amount are they restricted in their contributions?"

Answering your first question, Section 5175-1, which I will not quote, and which is Section 1 of the so-called corrupt practices act, defines "committee" or "organization," and the mere reading of this section develops that any two or more persons, co-operating to aid or promote or defeat or take part in the election of delegates to the national convention, delegates to the county convention, or county central committeemen, would constitute a "committee" or "organization" under this section.

Section 2 of the act, Section 5175-2, General Code, provides that "every *candidate* who is voted for at any election or primary election, held within this

state, and every person, committee or association of persons * * * who may have contributed, promised, received or expended * * * any money or thing of value in connection with such election, shall * * * file * * * an itemized statement, etc." This department has already held that a "candidate who is voted for at any election or primary election" includes delegates and central committeemen who are voted for at the primary. In my opinion, delegates selected by convention are not within the terms of the provisions of the act above referred to, as they expressly apply to candidates who are voted for at an election.

So, while the district national delegates who are elected at the primary come within the purview of the act, and I suppose it is these delegates to which you refer, I do not wish to be understood as holding that the same rule applies to delegates to the national convention, chosen otherwise than at the primary.

It is, therefore, my opinion that your first question should be answered affirmatively, as far as delegates to the county convention and county central committeemen are concerned. As regards delegates to the national convention, the answer also is affirmative as to delegates voted for at the primary election.

The same reasoning applies in answering your second question, as to whether or not a candidate for delegate to the national convention, county convention or the county central committee would be required to file a statement of his receipts and disbursements. As stated before, Section 5175-2 provides that "* * * every person, committee or association of persons * * * who may have contributed, promised, received or expended * * * any money or thing of value in connection with such election shall * * * file, etc.;" and since district delegates to the national convention, to the county convention, as also county central committeemen, are voted for at the primary, a committee making an expenditure in connection with such election should be required to file a report; also, since the disbursements of a committee would have to be through its treasurer, and he must, under the law, keep the proper book or books, showing in detail all his receipts and expenditures, such treasurer would be the proper person to file the account.

Reference to Section 5175-5, requiring all statements and accounts of expenditures to be signed and verified, discloses that the verification by a committee or association can be made by "the duly appointed treasurer or president." It further provides that the statement "to the affiant's own knowledge" should be a full and true account of all contributions and the disposition thereof; and since the treasurer is required to make all disbursements, to my mind, he is the proper party to make, verify and file the statement required. Of course, in his absence or inability, the president of the committee might do so, as he is one of the officers referred to in the statute.

Answering your third question, Section 5175-6 provides:

> "Statements required to be filed by this section if they relate to the election of candidates for offices to be filled by, * * * the electors of the entire state, or any division or district thereof greater than a county, shall be filed in the office of the secretary of state; in all other elections such statements shall be filed in the office of the board of deputy state supervisors of elections for the county in which such election is held * * *"

Since the position of district delegates to the national convention is one to be filled by the electors of a sub-division or district in a state greater than a county, under the provisions of this section, his statement of expense should be filed in the office of the secretary of state. As far as delegates to the county convention are concerned, their expense statements should be filed in the office of the board

of deputy state supervisors of election of their respective counties. It is not the functions or duties of the candidate that determine where his expense account shall be filed; it is whether or not the place or office is to be filled by the electors of the state, district or county.

Answering your fourth question, I do not see how we can lay down a rule as to the method of procedure for the committee in apportioning funds in their hands for the purposes for which the money may have been contributed, and to the various localities for which it may have been intended. Suffice it to say that the committees are called upon to file their statements under the law; the proper officers of the committees must keep a detailed account of all receipts and expenditures; and it is for such officers to determine whether a particular item of expense relates to the election of a candidate for an office to be filled by the electors of the entire state or any division or district thereof greater than a county, or otherwise. If the item of expense relates to a place to be filled by the electors of the entire state, or any division or district thereof greater than a county, then, it should be included in the report filed in the office of the secretary of state; otherwise, it would be a proper charge in the report filed in the office of the board of deputy state supervisors of elections of the county.

The question of the apportionment of funds is one entirely within the control of the committee, and neither the corrupt practices act nor the primary election law seems to have given such matter any attention.

Replying to your fifth inquiry, this department has already held that only the offices enumerated in Section 5175-29 are limited in the amount that may be expended for the permitted purposes of the corrupt practices act. Delegates and alternates to the national convention are not "public offices;" they are places or positions of political preferment. They do not seem to have been considered at all when it came to restricting the amount one might expend at an election, and it is, therefore, my opinion that delegates to the national convention are not limited in the amount of their expenditures.

I do not wish to be understood, however, as holding that district delegates are not limited in the *character* of their expenditures. Section 5175-26 makes it a corrupt practice for any person, directly or indirectly, by himself or through any person, to pay, lend or contribute or offer or promise to pay, lend or contribute, any money or other valuable consideration *in connection with or in respect of any election* for any other purpose than the matters and services enumerated therein at their reasonable bona fide and customary value.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

381.

CORRUPT PRACTICE ACT—POWER OF CANDIDATE TO EMPLOY PERSON TO PASS CARDS AND SOLICIT VOTES NEAR POLLS ON ELECTION DAY.

Under Section 5175-26, General Code, by compliance with the requirements therein made, each candidate may employ a person for a compensation not to exceed $5.00 per day to stand at or near the polls on election day to distribute his cards to voters or to solicit their support.

COLUMBUS, OHIO, May 18, 1912.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 15th, in which you request my opinion as follows:

> "Referring to the Kimble corrupt practices act, I wish to submit to you the following proposition:
>
> "Has a candidate under that act, the right to employ a person to stand at or near the polls on election day and distribute his cards to the voters as they approach the polls, or verbally solicit their support for the candidate for whom he is working or do both for compensation or gratuitously?"

Under Section 5175-26, each candidate may designate one representative in each voting precinct upon each election day, whose name shall be certified to by the chairman and secretary of the controlling committee of a party to the board of deputy state supervisors of elections, at least two days before such registration or election day, and who may be paid for his services, by such candidate, not in excess of five dollars per day.

I am of the opinion that by virtue of the above section a candidate is authorized to employ a person to stand at or near the polls on election day, and distribute his cards to the voters as they approach the polls, or verbally solicit support for the candidate for whom he is working, so long as the compensation does not exceed five dollars per day, and the name of such person, acting as a representative of the candidate has been duly certified by the chairman and secretary of the controlling committee of the party to which he belongs, to the board of deputy state supervisors of elections not less than two days before the election. The candidate has no authority to designate a representative in each precinct, other than that given in the section above referred to.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

383

RESULTING TRUST—EFFECT OF ABANDONMENT OF NATIONAL GUARD ENCAMPMENT SITE TO BOARD OF TRADE AFTER THE BOARD HAD BEEN REIMBURSED BY CITY AND COUNTY FOR THE PURCHASE OF SAID SITE—CITY OF NEWARK AND LICKING COUNTY.

The board of trade, of Newark, Ohio, paid for a site upon which the state established an encampment ground for the Ohio National Guard. The city and Licking county then issued and sold bonds, the proceeds of which were employed to reimburse the board of trade. When the state abandoned said encampment, the site reverted, by provision of the original deed to the board of trade.

Held: A resulting trust was thereby effected with the board of trade as trustee and the city and county as beneficiary.

A conveyance is advised; however, from the board of trade to the city, setting out the circumstances of the acquisition of the property.

COLUMBUS, OHIO, May 15, 1912.

HON. PHILIP B. SMYTHE, *Prosecuting Attorney;* HON. RODERICK JONES, *City Solicitor, Newark, Ohio.*

GENTLEMEN:—In your letter of March 7th you make the following statement of facts and request for opinion:

> "We, Philip B. Smythe and Roderick Jones, respectively prosecuting attorney, Licking county, and city solicitor, city of Newark, submit to you, for your advice and opinion, the following state of facts:
>
> "Prior to 1892 the state appointed a commission to select a site for a permanent encampment ground for the Ohio National Guard and establish a permanent encampment ground to be afterwards located by said commission.
>
> "This was done by act of the legislature. The board of trade and other citizens of the city of Newark and Licking county thought it would be for the benefit of the city of Newark and Licking county that this camp ground should be located on a site near the city of Newark, known as the 'Octagon and Circle Forts.' After due consideration the said state commission agreed to locate said permanent encampment ground on said site on condition that the title to said site should be acquired to the state of Ohio without cost to said state. In the year 1892 the board of trade of the city and certain other persons, whose identity is not known to us, advanced sufficient money and purchased the ground agreed upon by the state commission and caused a deed for said ground to be made to the state of Ohio, with the provision therein incorporated that in case the state should cease to use said grounds for a permanent encampment ground for the national guard that the title to said property should revert to the board of trade of the city of Newark, February 19, 1892, the legislature passed an act authorizing and directing the commissioners of the county and the council of the city of Newark to sell bonds in the sum of thirteen thousand dollars, on the part of the county, and ten thousand dollars, on the part of the city, to reimburse the board of trade and such persons as had advanced said moneys for the purchase of said ground, and authorized the levy of a

special tax to pay said bonds as they matured. Said act further provided that said bonds should not be issued unless the same should be authorized by a majority vote of the electors of the city and county. Afterwards the board of county commissioners and the city council, respectively, caused an election to be held on the question of whether or not said bonds should be issued, and which election resulted in a large majority, in each case, in favor of the issuance of said bonds. Whereupon said bonds were issued and the money applied, presumably for the purposes designated in the act of the legislature. In 1905 and 1906 the state abandoned said grounds, as a permanent camp ground for the national guard, having obtained another site at Camp Perry, near Ottawa, and caused all state property which had been placed on said ground to be removed to said Camp Perry. By an act of the legislature, to be found in 99 Ohio Laws, 629, the governor was authorized and directed to convey said grounds to the board of trade of the city of Newark, which is a corporation organized under the laws of the state of Ohio, but not for profit, which was done. In 1910 said board of trade executed a lease of said grounds to the Licking County Club Company, which is also a corporation organized under the laws of Ohio. Said lease was to be for the period of twenty years, at a yearly rental of six hundred dollars, with the provision therein incorporated that said rental should be applied by said county club company in permanent improvements on said grounds, and with the further provision that, at any time, said lease might be terminated at the option of the board of trade upon the repayment to said county club company of any sums paid out for permanent improvements on said grounds. Certain citizens and taxpayers of the city and county recently commenced agitation to have the title to said grounds so altered that the same may be vested either in the city or county, or in the board of trade, as trustees, and we have been called upon by the county commissioners and the city council for our opinion in the matter.

"In addition to the fact that, so far as we can see, any theory of legal remedy on behalf of either the city or county or both, is extremely hazy, and we have felt compelled to call upon your office for advice in this matter, on account of the fact that both of us are members of both corporations whose rights are at issue, feeling that it would be better and more satisfactory to all concerned that an opinion as to the legal rights of the city and county should be given by some official who would not be under any suspicion, bias or prejudice growing out of any adverse interest in the matter."

From the above the facts which must govern this matter are as follows:

For the purpose of securing a location in Licking county and near the city of Newark, for a permanent camp ground for the Ohio National Guard, the board of trade and certain citizens of the city of Newark advanced sufficient funds to purchase a site and had the deed for said grounds made by the grantors to the state of Ohio, which deed contained the provision that in case said camp ground should be abandoned by the state, the property should revert to the board of trade of the city of Newark.

After the money had been so advanced and the deed so made, under authority from the legislature, the city of Newark and the county of Licking issued bonds in the amounts of ten thousand dollars and thirteen thousand dollars, respectively, to reimburse the board of trade of the city of Newark and the persons who had advanced the money for the purchase of said ground.

A special tax was authorized to pay said bonds as they matured, and presumably said bonds have been paid, and the money raised by the same was paid to the board of trade and to the citizens who made the initial advancement of cash necessary to purchase said real estate.

Afterwards the state abandoned said grounds, and by authority of the legislature caused a deed for said real estate to be made by the state to the board of trade of the city of Newark.

I take it that the above are all the facts that are essential to determine this question, and from them it appears that the board of trade has really no pecuniary interest in the property, nor have the citizens of Licking county, and the city of Newark, who originally advanced the money to pay for the same any interest therein, for I take it, from your letter, they have been fully reimbursed for the advancements so made by them. The property was really paid for by the city of Newark and the county of Licking, the payment being made with the proceeds of the bonds issued as above stated, and, therefore, the deed having been made to the board of trade of the city of Newark, and the board of trade as such having advanced no consideration whatever for said deed, it must be held that a trust is necessarily created for the benefit of the county of Licking and the city of Newark in the board of trade of the city of Newark, i. e. the board of trade of the city of Newark is vested with the title to said real estate as trustees for the county of Licking and the city of Newark in proportion to the amount of the purchase price of said real estate contributed by such county and city respectively.

It seems to me that this trust actually exists at the present time, and that no proceedings are necessary. However, if it is deemed necessary by anyone to have some record of this matter, a conveyance could be made by the board of trade of the city of Newark, as trustees, to some other trustee for the county and city, or to the county and city, in which conveyance a full recital could be made of all the facts as to the acquisition of this property.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

389.

CHIEF OF POLICE, MARSHAL AND CONSTABLES—"MILEAGE"—ALLOWANCE FOR TRANSPORTATION AND SUBSISTENCE OF A PRISONER—TRAVELING EXPENSES.

The term "mileage" as employed in Section 3347, General Code, is intended to cover all personal expenses incurred by a constable, and he cannot be allowed further expenses for board, railroad hire, livery hire, etc.

Under the same section, express provision is made for an allowance by the magistrate for expenses incurred in the transportation and subsistence of a prisoner. The same provisions, by virtue of Section 4581, General Code, apply to chiefs of police.

COLUMBUS, OHIO, May 22, 1912.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Your favor of May 6, 1912, is received, in which you ask an opinion upon the following:

"The question of subsistence of a chief of police, marshal and constable for themselves and their prisoner while executing and making arrest under warrant in a foreign county, query: Is the arresting officer entitled under the law for subsistence of prisoner and himself after the arrest has been made and while they are en route to the court where the affidavit was filed and the warrant issued, or is the cost of subsistence to be taken from the amount allowed him for his mileage?"

The fees of a chief of police for services in a police court are provided for in Section 4581, General Code, which provides:

"Other fees in the police court shall be the same in state cases as allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, by ordinance, prescribes, not exceeding the fees for like services in state cases."

Section 4387, General Code, applies to the fees of a marshal of a village and reads:

"In the discharge of his proper duties, he shall have like powers, be subject to like responsibilities and shall receive the same fees as sheriffs and constables in similar cases, for services actually performed by himself or his deputies and such additional compensation as the council prescribes. In no case shall he receive any fees or compensation for services rendered by any watchman or any other officer, nor shall he receive for guarding, safekeeping or conducting into the mayor's or police court any person arrested by himself or deputies or by any other officer a greater compensation than twenty cents."

Section 4534, General Code, provides for the fees of a chief of police in a mayor's court, as follows:

"In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace The chief of police shall execute and return all writs and process to him directed by the mayor, and shall by himself or deputy attend on the sittings of such court, to execute the orders and process thereof and to preserve order therein, and his jurisdiction and that of his deputies in the execution of such writs and process, and in criminal cases, and in cases of violations of ordinances of the corporation, shall be co-extensive with the county, and in civil cases shall be co-extensive with the jurisdiction of the mayor therein. The fees of the mayor in all cases, excepting those arising out of violation of ordinances, shall be the same as those allowed justices of the peace for similar services and the fees of the chief of police or his deputies in all cases, excepting those arising out of violations of ordinances shall be the same as those allowed sheriffs and constable in similar cases.

These several statutes provide that the fees shall be the same for a chief of police, and a marshal as are provided for constables and sheriffs in similar cases. In construing this provision this department has held that where the fees pre-

scribed for a constable are applicable, such fees are to be charged for services of a chief of police or a marshal, but that where a chief of police or marshal performs services, for which no fee is prescribed for a constable, such chief of police or marshal may be allowed the fee that is provided for a sheriff for similar services in like cases.

The fees allowed a constable are set forth in Section 3347, General Gode, which provides:

> "For services rendered, duly elected and qualified constables shall been entitled to receive the following fees: For service and return of copies, orders of arrest, warrant, attachment, garnishee, write of replevin, or mittimus, forty cents, each, for each person named in the writ; service and return of summons, twenty-five cents for each person named in the writ; service and return of subpoena, twenty-five cents for one person, service on each additional person named in subpoena, ten cents; service of execution on goods or body, forty cents; on all money made on execution, four per cent.; on each day's attendance before justice of the peace, or jury trial, one dollar; each day's attendance before justice of the peace on criminal trial, one dollar; on each day's attendance before justice of the peace in forcible detainer, without jury, one dollar; summoning jury, one dollar; *mileage twenty cents for the first mile, and five cents per mile for each additional mile; assistants in criminal* causes, one dollar and fifty cents per day, each; *transporting and sustaining prisoners, allowance made by the magistrate, and paid on his certificate;* serving all other writs or notices not herein named, forty cents and mileage as in other cases; copies of all writs, notices, orders, or affidavits served, twenty-five cents; summoning and swearing appraisers in case of replevin and attachment, one dollar in each case; advertising property for sale on execution, forty cents; taking bond in replevin, and all other cases, fifty cents; each day's attendance on the grand jury, two dollars."

As this section provides for the mileage of the constable and for the allowance for transporting and sustaining prisoners, it applies as well to the mileage and allowance of a chief of police and marshal in similar cases.

This section fixes the mileage of a constable at twenty cents for the first mile and five cents per mile for each additional mile.

The supreme court of Ohio has determined the meaning of mileage and the expenses for which the mileage is allowed.

In case of Richardson vs. State, 66 Ohio St., 108, the first and second syllabi read:

> "The expenses which are authorized to be paid a county commissioner, by the last clause of Section 897, of the Revised Statutes, include only his official expenses 'actually paid in the discharge of some official duty,' as distinguished from those incurred for his personal comforts and necessities. He has no valid claim against the county, or its funds, beyond the per diem compensation and mileage allowed, for any of his personal expenses.
>
> "Expenses incurred for railroad fare, livery hire, charges for the use of his own conveyance, for the feed and shoeing of horses used by him, and for his board and others of a like nature, are of a personal character, for which no valid claim can be made against the county, although they are incurred while about the business of the county."

Williams, C. J., says on page 11, of the opinion:

> "It must be conceded that the three dollars per day allowed the commissioner is the limit of his compensation for his day's work, in whatever way it may be performed in the discharge of his official duties. He cannot lawfully claim that the county is also bound to pay his board, or other personal expenses. And, the 'mileage' allowed him is intended to compensate him for expenses of his travel on official business. That is the legal meaning and import of the term."

The mileage allowed a constable or other officer is allowed him to cover his personal expenses in traveling, and includes his expense of transportation and of subsistence. The mileage covers his railroad fare, or livery hire, and board for himself.

Section 3347, General Code, contains the clause:

> "Transporting and sustaining prisoners, allowance made by the magistrate, and paid on his certificate."

By virtue of this provision the magistrate before whom the charge is heard may make an allowance to the officer for the expense in transporting and sustaining his prisoner. This allowance can only include the expense of travel and subsistence of the prisoner. The officer must defray his own personal expense from the amount allowed him for mileage.

In conclusion: A chief of police, marshal or constable cannot be allowed his personal expenses for his meals when engaged in arresting a person accused of crime, in addition to his mileage. The amount allowed him as mileage covers this item of expense.

The magistrate may make an allowance to a constable, chief of police or marshal for the expenditure caused by reason of the transportation and subsistence of a prisoner. This latter allowance is in addition to the mileage allowed the officer.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

394.

BIDS UPON COUNTY FUNDS—FAILURE OF BIDDING DEPOSITARY TO NAME SECURITY, FATAL—DEFINITENESS AS TO AMOUNT.

A bank bidding as a depositary for county funds, under Section 2716, General Code, must name its security and a general statement to the effect that reliable surety company bond will be furnished is not of sufficient definiteness.

A bid upon the inactive funds of a county, for a definite period is a sufficiently definite bid to include all said funds, if other requirements are complied with.

COLUMBUS, OHIO, May 23, 1912.

HON. HOLLIS C. JOHNSTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:— Your favor of May 21, 1912, is received in which you state as follows:

"Today the county commissioners of Gallia county received bids for the county money for a period of three years. Two questions have arisen.

"First. The Crown City Bank of Crown city, Ohio, the highest bidder, bid for $15,000.00 of the inactive funds 4.51 per cent., but did not name the name of its sureties, but did say 'said deposit to be secured by a bond of a reliable surety company or companies. The question upon this bid is, does their failing to name the sureties invalidate their bid?

" The Commercial and Savings Bank bid for the inactive deposit 4.10 per cent, not naming any amount, but intending to take the whole or any part allowed to it, but not saying so in its bid, but using the following language: 'In accordance with your legal notice, The Commercial and Savings Bank of Gallipolis, Ohio, hereby offers you 4.10 per cent. on the inactive funds of Gallia county for a period of three years, beginning June 20, 1912.' The Ohio Valley Bank bid 4 per cent. on the inactive funds and the amount of $30,000.00 is named by it, and the question comes up between the Commercial and Savings Bank and the Ohio Valley Bank whether or not the failure on the part of the Commercial and Savings Bank to name the amount desired would entitle the Ohio Valley Bank to the money."

The county depository act is found in Sections 2715, et seq., of the General Code.

Section 2716, General Code, provides:

"When the commissioners of a county provide such depositary or depositaries, they shall publish for two consecutive weeks in two newspapers of opposite politics and of general circulation in the county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next two preceding sections, which proposals shall stipulate the rate of interest, not less than two per cent. per annum on the average daily balance, on inactive deposits, and not less than one per cent. per annum on the average daily balance on active deposits, that will be paid for the use of the money of the county, as herein provided. *Each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted.*"

Section 2717, General Code, provides:

"At the hour of twelve o'clock noon on the Monday next following the last insertion of such notice, the commissioners in open session shall open the sealed proposals and award the use of such money to the bank or banks or trust companies that offer the highest rate of interest therefor on the average daily balance, *provided proper sureties, securities or both, are tendered in the proposal.*"

In making its bid the bank or trust company is required by Section 2716, supra, to give the names of the sureties or securities that it will offer the county if the money is offered it, and these must be named in its proposal or bid.

By virtue of Section 2717, General Code, the county commissioners open

the bids and award the use of the money. The money is to be awarded to the bank offering the highest rate of interest, provided "proper sureties, securities or both, are tendered in the proposal."

It is the evident purpose of the statutes that when proposals are submitted for the use of county money, they shall be complete, and that they shall be submitted in such definite terms that the county commissioners may consider them and make the awards for the use of the money from the terms of the proposals.

The provisions of Section 2717, General Code, will prevent the county commissioners from awarding the use of the money to a bank which fails to tender or name proper sureties or securities or both, in its proposal.

The proposal you submit did not name the sureties, or securities, to be tendered by the bank for the use of the money, if its proposal was accepted. It did not, therefore, comply with the provisions of the law, and the county commissioners could not award the use of the money on such proposal. The proposal was not properly submitted and could not be considered.

It might be urged that the proposal did comply with the law by naming the security. The word "securities" as used in the statutes under consideration does not refer to a bond executed by a bonding company, but refers to bonds issued by the United States, the state of Ohio, and the political subdivisions as set forth in Section 2732, General Code.

Your second question is governed by the provisions of Section 2715-1, General Code, as enacted by the last legislature, and set forth in 102 Ohio Laws at page 59.

Said Section 2715-1, General Code, provides:

> "The deposits in active depositaries, as provided for in the next preceding section shall at all times be subject to draft for the purpose of meeting the current expenses of the county. The deposits in inactive depositaries shall remain until such time as the county treasurer is obliged to withdraw a portion or all of same and place it in the active depositary or depositaries for current use. *Each bank or trust company, when submitting proposals as provided in Section 2716 for the inactive deposits shall stipulate the amount of money desired by such bank or trust company;* and when the aggregate amount placed with all the banks and trust companies, qualifying for same, in any county, does not equal the amount that may be placed into inactive depositaries the county commissioners shall, upon securing sufficient additional security from any or all of such inactive depositaries authorize the county treasurer to increase the deposits therein; or such county commissioners shall in the manner herein provided designate a bank or banks or trust companies, located outside of the county in which the county treasurer shall deposit such excess funds."

While it is true that the bank bidding shall stipulate the amount of money desired by such bank or trust company, yet, in my judgment the bid of The Commercial and Savings Bank of Gallipolis is in accordance with that requirement of the statute.

You advise that the banks bid was as follows:

> "In accordance with your legal notice, The Commercial and Savings Bank of Gallipolis, Ohio, hereby offers you 4.10 per cent. on the inactive funds of Gallia county for a period of three years, beginning June 20, 1912."

The meaning of this, in my judgment, is that the bank bids for the whole of the inactive funds. There is no uncertainty about the meaning of the bid; they are entitled to the whole of the funds. If, however, another bank should bid a higher rate for only a part of the funds the form of bid of The Commercial and Savings Bank would be sufficiently definite to entitle them to the inactive deposits not awarded to the higher bidding bank.

After all, the object of the statute is the protection of the public, and by holding the bid as legal there is no possible danger of any abuse. So long as a bid is bona fide and in substantial compliance with the statute I should always go slow to pursue any course that would deny the public the benefit of the higher rate of interest, unless in so doing a way would be opened up to abuses.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

396.

TAXES AND TAXATION—SMITH ONE PER CENT. TAX LAW—ELECTION FOR IMPROVEMENT OF TOWNSHIP AND VILLAGE ROADS BY GENERAL TAXATION—EFFECT OF TWO MILL LIMITATION UPON INDEBTEDNESS INCURRED.

Inasmuch as, in an election for the purpose of improving roads, within the township and village by general taxation, under Sections 6976-7008, *General Code, the people do not vote upon the proposition of issuing bonds, and trustees are left the discretion of dispensing with bond issues and using the proceeds of direct levies under Section* 7006, *indebtedness incurred for this purpose after June* 1, 1911, *is within the two mill limitation of the Smith one per cent. law.*

Indebtedness incurred prior to June 1, 1911, *however, are not within said limitations.*

COLUMBUS, OHIO, May 13, 1912.

HON. DON. J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I regret my inability to sooner answer your communication of May 2nd. The pressure of business in this office at the present time has made it impossible for me to comply with your request that my reply should be in your hands by May 6th.

You ask my opinion upon the following question:

> "The township of New Haven has within its limits the incorporated village of Chicago Junction. About eight years ago an election was held in this township and in the village, under the provisions of old Section 4686-1-25, for the purpose of improving the roads by general taxation within the township and village. This election was successful, and during the period up to the present time, the township trustees have issued bonds and improved the roads and there is at the present time outstanding $32,000.00 of bonds.
>
> "They desire to continue to issue bonds under this election, and the question that confronts them is whether, under old Section 4686-18-18a, the tax levy there provided for must be included within the two-mill limit of the Smith law, so-called."

The sections to which you refer by the sections numbers as given in Bates' Annotated Ohio statutes are now found in Section 6976 to Section 7018, inclusive, General Code. In quoting such parts of this act as are material in the determination of your question I shall, for convenience, use the General Code numbers, as there have been no material changes in phraseology as between the former statutes and the present sections embodied in the code. Such material portions are as follows:

"Sections 6976. The trustees of a township, when the petition of one hundred or more of the taxpayers of such township is presented to them, praying for the improvement of the public roads within such township and including a road running into or through a village or city, shall submit the question of the improvement of said roads to the qualified electors of the township at the next general election or at a special election, held after the presentation of such petition.

"Section 6977. The qualified electors of such township, at said election, shall have submitted the policy of the improvement of its public roads by general taxation. Those voting in favor of such proposition shall have on their ballot 'road improvement by general taxation—yes,' and those opposed, 'road improvement by general taxation—no.'

"Section 6982. At such election, if a majority are in favor of the policy of the improvement of the public roads of such township by general taxation, the trustees of the township shall appoint three freeholders as commissioners, who shall serve three years from and after the date of their appointment, and if vacancy occurs upon such board it shall be filled by appointment for the unexpired term by the trustees.

"Section 6985. Such commissioners shall designate and determine the established roads and streets in the township which, in their opinion, shall be improved. The commissioners shall call to their assistance a competent engineer, who shall make a correct map of the township, plainly showing the established roads and streets therein which have been by such commissioners designated for such improvement, also profiles of such roads and streets showing the grade thereof, as they then exist or have been established, which he shall turn over to the custody of the township clerk.

"Section 6987. After the report of the commissioners, and the map and the profiles have been filed with the township clerk, the township trustees, in determining which roads shall be first improved, of those designated by the commissioners, shall select those nearest the center line of such township, north and south. If, in their opinion, it is not expedient to improve all roads in all directions at one time, they shall improve the roads which in their opinion are the most traveled and used within such township.

"Section 7001. The trustees of a township in which free turnpikes have been constructed under the provisions of this subdivision of this chapter, when the petition of twenty-five per cent. or more of the taxpayers of such township, including any village therein, is presented to them praying that no further levy be made under such provisions, shall submit the question of making no further levy to the qualified electors of the township and village, at the next general election held after the presentation of the petition. The qualified electors of the township

and village at said election, shall have submitted to them the policy of making no further levy under such provisions.

"Section 7003. At such election, if a majority of the votes cast are in favor of no further levy for road improvements, the township trustees shall thereafter make no further levy under this subdivision of this chapter. If a majority of the votes cast are against no further levy, the trustees shall proceed to levy under such subdivision in a like manner as before the election.

"Section 7004. For the purpose of providing the money necessary to meet the expenses of improving such roads and streets the trustees of a township, if advisable in their opinion, may issue the bonds of the township clerk, payable at such times as they determine, not exceeding thirty years, in the sum of five hundred dollars each, bearing interest at a rate not to exceed five per cent. per annum payable semi-annually.

"Section 7006. When the trustees of such township have determined to improve a road, as herein provided, in order to provide for the payment of such improvement and to provide a fund for the redemption of bonds issued by them under the provisions of the next two preceding sections, with interest thereon, in addition to the other road taxes authorized by law, they shall levy annually upon each dollar of valuation of all taxable property of such township an amount not exceeding six mills upon each dollar of such valuation, and shall continue such levy from year to year until the roads and streets, by said commissioners designated for improvement, have been improved, as herein provided, and the bonds issued for that purpose, with interest thereon, have been paid.

"Section 7007. The trustees of such township, when the petition of one hundred or more of the taxpayers of the township, including a city village therein, is presented to them praying for an increase of tax levy for the improvement of public roads and streets of the township and city or village, shall submit the question for an increase of tax levy for the improvement of public roads and streets to the qualified electors of the township and the city or village, at the next general election or at a special election held after the presentation of such petition.

"Section 7008. The qualified electors of such township, and city or village, at said election, shall have submitted to them the policy of an increase of tax levy for the improvement of its public roads and streets by general taxation. Those voting for such proposition shall have on their ballots, 'increase of tax levy for road improvement by general taxation—yes,' and those opposed, 'increase of tax levy for road improvement by general taxation—no.'"

I need not burden this opinion with extensive quotations from the Smith one per cent. law, so-called. In the case of State ex rel. vs. Sanzenbacher, 84 O. S., unreported, it was held that the internal limitations of Section 5649-3*a* of that act do not include levies for interest and sinking fund purposes to provide for indebtedness incurred prior to June 1, 1911, or thereafter, by a vote of the people.

Under this decision I think there is no question as to such levies as are now necessary to provide for the retirement of the outstanding bonds—that is, those issued prior to June 1, 1911, under the sections above quoted. Levies for this

purpose are not within the two-mill limitation upon township levies, provided for in said Section 5649-3*a*.

As to levies for interest on and the retirement of principal of bonds issued after June 1, 1911, the sole question which is at all debatable, in my opinion, is as to whether or not such bonds issued under the sections above quoted, are to be regarded as "indebtedness incurred by a vote of the people."

On the one hand, I am clearly of the opinion that such levies are "levies by a township for township purposes" within the meaning of said Section, 5649-3*a*.

Road levies under the above sections have every characteristic of township levies, and they are not included in the catalog of levies exempted from the internal limitation by Section 5649-3*a* itself.

On the other hand, it is equally clear in my mind that the mere fact that no election was held after June 1, 1911, is not conclusive. I do not construe the decision in State ex rel. vs. Sanzenbacher as applying to indebtedness incurred by a vote of the people held or taken after June 1, 1911, but, as I have already phrased it, to indebtedness incurred after June 1, 1911, by a vote of the people, whether such vote was reported prior to that date or thereafter.

Coming now to the sole question which I deem to be involved in your letter, I beg to state that after careful consideration I have come to the conclusion that bonded indebtedness created under the sections above quoted is not "incurred by a vote of the people," as that phrase is used in the Smith law, and as the supreme court evidently intended it to be applied to the construction of Section 5649-3*a* thereof.

The only question submitted to the electors is that of the policy of improving roads by general taxation as opposed to that of improving roads by local assessment in whole or in part. The electors never approve any specific bond issue, nor does it necessarily follow that because the proposition submitted to them has carried, an indebtedness will be incurred. To be sure, the success of the proposition at the polls authorizes the trustees to incur indebtedness under the limitations of Section 7108 of the General Code, but the authority thus conferred is not direct. The people do not vote upon the proposition of issuing bonds, and the trustees might, if they saw fit, dispense with such issue of bonds. They may, if they choose, use the proceeds of the levies under Section 7006, above quoted, directly to pay for the cost of the improvement, or rather that portion of it to be carried on within any one year, instead of anticipating such levies by the issue of bonds.

For all of the above reasons, I am of the opinion that levies under the act concerning which you inquire are not levies for sinking fund and interest purposes to provide for an indebtedness incurred by a vote of the people within the meaning of the Smith one per cent. law as construed by the supreme court in the case above cited. There being no other reason for holding such levies exempt from the two-mill limitation of Section 5649-3a, I am of the opinion they are to be included therein, except, of course, as already stated, insofar as they apply to and are made for the purpose of extinguishing indebtedness incurred prior to June 1, 1911.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

397.

TEACHER—COMPENSATION BY BOARD OF EDUCATION FOR SERVICES WITHOUT CERTIFICATE—SPECIAL LEGISLATIVE ACT VALID—CONSTITUTIONAL LAW.

A special act of the legislature providing for the payment by a board of education of compensation to a teacher who performed teacher's services without a certificate as well as janitor's services at the behest of said board, is not invalid.

COLUMBUS, OHIO, May 24, 1912.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 14th, in which you inquire as follows:

> "Enclosed herewith find copies of communications from this office to the board of education of Washington township, this county, under dates of February 23, 1910, December 14, 1910 and August 19, 1911, which are self-explanatory.
>
> "You will note that the question involved is whether or not the board of education of Washington township, Lucas county, Ohio, can lawfully make payment to Miss Hattie Vermilyea of the sum of $345.00, said amount representing six months' services as teacher at $55.00 per month, and five months' services as janitress at $3.00 per month, these services covering a period of time during which Miss Vermilyea had no certificate authorizing her to teach.
>
> "I am advised that the board of education is well satisfied with the services rendered by Miss Vermilyea, and that it is ready and willing to pay the amount in question, provided an opinion is rendered them from this department or from your department, to the effect that they may lawfully do so. Permit me to say that the prosecuting attorney of this county is not inclined to interpose any objection to the payment of these services, provided that your department will approve the same. The accounting bureau, in making examination of the affairs of the township, will doubtless report the situation as one in which the board of education had no authority to make payment, unless it be that the provisions of house bill No. 352, entitled, 'An act to provide for the payment of a certain sum to Miss Hattie Vermilyea, Washington township, Lucas county, Ohio, as compensation for her services as a teacher and janitress,' as passed May 31, 1911, would authorize such payment.
>
> "If your department should be of the opinion that payment should be made to Miss Vermilyea as authorized in this act referred to, and the accounting bureau thereupon advised of such action, this department here will submit to your ruling in the matter. Kindly let us have your opinion at your earliest possible convenience."

In reply thereto I desire to say that Section 7690, General Code, provides as follows:

> "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant offi-

cers and janitors, and fix their salaries. If deemed essential for the best interests of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings, and such other employes as it deems necessary, and fix their salaries. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

I gather from the correspondence enclosed that Miss Vermilyea has taught school for many years, having a teacher's certificate, and that she was unable to take the examination for renewal of certificate on account of illness. There is considerable doubt as to the wisdom of requiring a teacher who has been licensed to teach for a period of years to continue to take an examination at stated intervals so long as she may wish to remain a teacher. This consideration, however, should not control the law, but it is a matter not to be left out of the facts in determining the question of whether or not, under all of the facts stated in your question, Miss Vermilyea should not be compensated for the time about which you inquire. It appears that she was a faithful teacher, rendered good service, and no complaint was made as to her competency.

No premium, it is true, is to be put upon the employment of any person who has not the qualifications required by law, yet the circumstances in this case disclose the good faith of the board of education. There is always some liberality to be shown in favor of one who is in any wise deficient on account of ill health. No doubt the board of education of Washington township had this in mind when it permitted Miss Vermilyea to continue teaching without a certificate, and doubtless, too, the last General Assembly acted upon this theory when it passed an act entitled:

"An act to provide for the payment of a certain sum to Miss Hattie Vermilyea, Washington township, Lucas county, Ohio, as compensation for her services as a teacher and janitress,"

found in 102 O. L., 481, and which is as follows:

"WHEREAS, Hattie Vermilyea, at the request of the board of education of Washington township, Lucas county, Ohio, and under a contract duly entered into, has taught such school during the months of February, March, April, May, June and September, 1910, without having received a certificate so to do, on account of sickness at that time, and

"WHEREAS, Miss Hattie Vermilyea at the request of such board rendered janitor services during the months of February, March, April, May and June, 1910, therefore,

Be it enacted by the General Assembly of the State of Ohio:

"SECTION 1. That the board of education in school district No. 9, of Washington township, Lucas county, Ohio, be and they are hereby authorized to pay Hattie Vermilyea out of the tuition fund under their control and not otherwise appropriated, the sum of three hundred and forty-five ($345) dollars, being the sum due her for her six months at $55.00 per month, and also due her for five months' janitor service at $3.00 per month.

"SECTION 2. Upon the order of the board of education of such

township, the clerk of such board is hereby authorized to issue his warrants, and the treasurer of such board is hereby authorized to pay such warrant in favor of such Hattie Vermilyea out of the tuition fund under the control of such board of such township and not otherwise appropriated."

This department hesitates to pronounce any act of the legislature invalid, and never does so unless the act is clearly unconstitutional, or fatally defective, and added thereto, unless the recognition of the invalid statute as a lawful one were calculated to work future injury, public justice does not require the submission of Miss Vermilyea's claim to a court, and I therefore, without any hesitation, recommend to you to advise the board of education to give her voucher.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

400.

GAMBLING DEVICE—SLOT MACHINES—EFFECT OF GIVING CHEWING GUM ON EVERY PLAY.

The operation of a slot machine where the player may receive from 5 *cents to* $2.00 *per play, is none the less the operation of a gambling device within the prohibition of Sections* 13056 *and* 13066, *General Code, when the player is given a package of gum on every play.*

COLUMBUS, OHIO, May 31, 1912.

HON. JOSEPH T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your communication of April 8th, 1912, wherein you state:

"The question that concerns a portion of this county is, How far can a slot machine go before it is run in violation of the law? A firm has a slot machine in its place of business, a 'nickel' is placed in the machine, and in return you are liable to get five-cent chips up to as high as $2.00 in the aggregate, a person receiving at least a package of chewing gum. Does the giving of the gum prevent the machine becoming a gambling device under the statutes?"

In reply thereto, I desire to say that Section 13056 of the General Code provides as follows:

"Whoever permits a game to be played for gain upon or by means of a device or machine in his house or in an outhouse, booth, arbor or erection of which he has the care or possession, shall be fined not less than fifty dollars nor more than two hundred dollars."

Section 13066 of the General Code provides as follows:

"Whoever keeps or exhibits for gain or to win or gain money or other property, a gambling table, or faro or keno bank, or a gambling

device or machine, or keeps or exhibits a billiard table for the purpose of gambling or allows it to be so used, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days, and shall give security in the sum of five hundred dollars for his good behavior for one year."

In construing the said sections the courts have held that slot machines are gambling devices, as follows:

"The plaintiff claims the sum of fifteen and seventy-five one-hundreth dollars ($15.75) for money lost and paid to defendant on account of a scheme of chance, commonly known as a slot machine * *.

"An attachment was issued under the provisions of Section 6489, Revised Statutes.

"It is claimed by the defendant, on a motion to dismiss the attachment, that the transaction upon which the action is brought is a gambling contract and therefore void and that an attachment will not lie upon such contract. * * * * *

"This leads to the inquiry whether the liability incurred in this case results from crime.

"The device used in the transaction is the cause of this action is known as a slot machine and is operated by inserting in a slot at the top a coin which finds its way into one of the several compartments at the bottom, according as it is deflected to one side or the other by pegs or other obstructions against which it may chance to strike.

"In my opinion it is clearly within the definition of a gambling machine, in Section 6934, Revised Statutes (Section 13066 of the General Code), the keeping of which for the purpose of gambling is punishable by fine and imprisonment, and is therefore a crime under the laws of this state."

(Wise vs. Martin, 5 O. D., 550. 7 Ohio, N. S., 660.)

Sixth syllabus.

"A slot machine is a 'gambling device within the meaning of Section 6933 Rev. Stat. (Section 13056 General Code) which prohibits the playing of any game whatsoever for gain by means of any 'gambling device or machine of any denomination or name.

"(Kubach vs. State, 14 O. D., 726, 1 O. N. P., n. s., 405.)"

It is my opinion that the giving of gum, whether equal to or less than the value of a nickel for each nickel placed in the slot of the machine, is not such an act or subterfuge as to take such machine from out of the operation of the statutes above quoted. As you suggest in your opinion, the nickel is put in to pay for the chance to get more than its value, which fact clearly brings such machine within what is termed a "gambling device."

There are no Ohio decisions decisive of the question as based upon the facts in your inquiry. I find upon investigation, however, that there are a number of decisions from other states which hold such machine to be a "gambling device" where the operator of the machine in every instance receives value or something of value for the money he puts into such machine and with a chance of receiving more than the value of money he so puts into such machine. I herewith quote from some of those decisions, as follows:

"A merchant who gives to a designated class of customers an opportunity to secure, by lot or chance, any article of value additional to that for which such customers have paid, violates the provisions of Section 407 of the Penal Code, which declares that 'no person shall keep, maintain, employ or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing.'

"(Meyer vs. State of Georgia, 51 L. R. A., 496.)

"In Cullinan vs. Hosmer, 100 App. Div. 148, 91 N. Y., Supp. 607, the operation of a slot machine into which any person dropping five cents became entitled by its operations to at least one five-cent cigar, and possibly to three, was held to violate the condition of an undertaking of an applicant for a liquor tax certificate that he would not 'suffer or permit any gambling to be done in the place designated,' there being absent any element of chance and resulting loss so far as the operator of the machine was concerned; but in Re Cullinan, 114 App. Div., 654, 99 N. Y. Supp. 1097, the same court announces that, upon more mature consideration of the question, and in view of a decision of the court of appeals subsequently coming to its attention, it had arrived at a different conclusion. It was there held that the maintenance in a saloon of a slot machine known as the Yale Wonder Clock, which, upon being operated, discharged disks entitling the player to 5, 10, 15 or 25 cents in trade, was a violation of a provision of the liquor tax law prohibiting gambling in a saloon. The court said:

" 'The chief element of gambling is the chance or uncertainty of the hazard. The chance may be in winning at all, or in the amount to be won or lost. In using the present machine we may assume that the player cannot lose. By far the greater majority of the checks called in trade for the precise sum deposited in the slot. If every ticket represented five cents, the machine would not be patronized. The bait or inducement is that the player may get one of the checks for a sum in excess of the nickel he ventures; and that is the vice of the scheme. If he wins more than he pays, the proprietor must lose on that discharge of the ticket. To constitute gambling it is not important who may be the loser.'

"In Meeks vs. State (Texas Crim, App.) 74 S. W., 910, it was held that evidence that defendant kept in his saloon a slot machine, which, when operated upon the insertion of a nickel or a metal check, would display poker hands, such hands winning, in proportion to their value, various numbers of cigars; that, in paying the winnings, the machine did not work automatically, but retained what was played into it, and defendant in person paid the player; that it was generally the custom to pay in trade checks unless cigars were demanded; that there was printed on a card attached to the machine a statement, 'Every 5 cents played gets one 5-cent cigar,' but that if the party lost, defendant did not pay anything unless he demanded it; and it was not the general rule of players to ask for and receive anything unless they won; that the machine would win in such a rising scale that, while it would play about even, it would lose altogether about four times out of five; that the machine was kept as a trade leader for the purpose of attracting crowds into the defendant's place of business and increasing his sales—was sufficient to sustain a conviction for exhibiting a gambling table and bank, commonly called a 'slot machine,' for the purpose of gambling.

"In State vs. Vasquez, 49 Fla., 126, 38 So., 830, it was held that a machine from which one who put in a check, costing five cents, stood a

chance of getting, in addition to a cheap cigar and a tune from a musical instrument, two or more, up to forty, additional checks that were good for five cents each in trade at the place in which the machine was placed, was a gambling apparatus which was not protected by a statute licensing 'lung testers,' striking machines, weighing machines, chewing gum stands, or automatic penny in the slot machines, or any other device of a similar nature,' especially where the state constitution expressly prohibits lotteries.

"In Lythe vs. State (Tex. Crim. App.) 100 S. W. 1160, it was held that one who, on various occasions, deposited a nickel in a contrivance known as a Yale Wonder Clock, which discharged checks entitling the player to 5, 10, 15 or 25 cents worth of merchandise, working automatically and requiring no personal supervision, was properly convicted of unlawfully betting at a gambling table and bank.

("These four last mentioned cases are taken from Lawyers' Reports Annotated, 20 New Series, 1909, pages 240 et seq.)"

Second syllabus.

"A slot machine, so operated that the operator putting into it a nickel coin receives in any event a cigar of the value of his coin, and also stands to win by chance additional cigars without further payment, is a gambling device.

"(Lang vs. Merwin, 99 Maine Reports, 486.)"

Therefore it is my conclusion under the circumstances and facts stated in your inquiry that the mere giving away of chewing gum does not prevent such machine from being a "gambling device" and that furthermore such machines come within the prohibition of the statutes of Ohio, as above quoted.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

415.

ROADS — ONE MILE TURNPIKE ASSESSMENTS — COMMISSIONERS MUST BE APPOINTED FROM JUDICIOUS FREEHOLDERS RESIDENT WITHIN BOUNDS OF ROAD.

The recent introduction by the legislature into the statutes relating to one mile asessment pikes, of language requiring the road commissioners to be selected from judicious freeholders "residing within the bounds of the road," makes clear the legislative intent that others than such freeholders cannot be appointed even when such resident freeholders do not exist.

COLUMBUS, OHIO, June 3, 1912.

HON. JOHN G. ROMER, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 6th, which is in part as follows:

"We have two petitions before the county commissioners for road

improvement under 'One Mile Assessment Pikes' under Section 7232 to 7321, General Code.

"Section 7234 provides that the county commissioners shall appoint three judicious freeholders residing within the bounds of said road, to be commissioners of said free turnpike road.

"Query: Can the commissioners appoint any other than freeholders living within the bounds of said road in case where there are not three judicious freeholders?

"In both cases there are but two resident land owners living within the bounds of said improvements, the lands being owned by persons living outside of the bounds of said limits as laid down; in one case we could have but one who could act, as the other is an invalid. The people owning lands to be assessed are in favor of proposed improvements and prefer the 'one mile assessment law' and would all agree to let the township trustees act as commissioners or any other that might be appointed. There are renters on said lands within territory, but they are not freeholders."

So far as a careful search of the digests of decisions of the courts of this state reveals, your question has not been adjudicated. A consideration of the history of this statute is therefore important in order to determine the legislative intent in its enactment. As originally enacted, March 29, 1875 (72 O. S., 93), it provided for the appointment of road commissioners to lay out and establish free turnpikes, in the following language:

"Said commissioners shall appoint three judicious freeholders of the county, to be commissioners of such free turnpike road."

This law was amended in several particulars, March 28, 1876 (73 O. L. 96), but the above quoted language was retained.

Said statute became Section 4775 of the Revised Statutes and the language thereof remained unchanged until April 16, 1900 (94 O. L., 334), when it was amended so as to read as follows:

"Thereupon the commissioners shall appoint three judicious freeholders of the county, *resident within the bounds of said road,* etc."

and the same was carried into the General Code as Section 7234, as above quoted.

The addition of the words "resident within the bounds of said road" clearly indicates, to my mind, the disapproval of the General Assembly of the method of appointment of such road commissioners previously in vogue, and the intention of that body to limit the appointment of such commissioners to freeholders, resident within the bounds of a road, rather than freeholders of the county generally, as had been the law for twenty-five years.

It is, therefore, my opinion that county commissioners, under the law as it now exists, may not legally appoint, as commissioners of said road, persons other than freeholders resident within the bounds thereof.

I am aware of the inconvenience which this holding may cause, but it is the only one I can consistently make in view of the plain provisions of said statute.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

420.

SICK, POOR—COUNTY COMMISSIONERS—FORMATION OF CORPORATION FOR PURPOSE OF LEASING ROOMS FROM PRIVATE HOSPITAL AND RECEIVING COUNTY FUNDS FOR CARE OF INDIGENT SICK—INDIRECT VIOLATION OF LAW.

An independent corporation formed for the purposes of leasing rooms from a private hospital for profit, could not constitute such a hospital as is contemplated by Sections 2502 and 2181-1, General Code, authorizing the county commissioners to make payments to charitable hospitals for the care of indigent sick and disabled.

The formation of such a corporation for these purposes would constitute an attempt to do indirectly what could not be done directly, namely: an arrangement with the private hospital for profit from which the rooms were intended to be leased.

COLUMBUS, OHIO, June 7, 1912.

HON. ALLEN T. WILLIAMSON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—Your favor of February 27, 1912, is received, in which you inquire as to certain powers of the county commissioners under Section 2502 of the General Code. The facts and inquiry are stated in your communication of March 9, 1912, as follows:

> "The Marietta Hospital Company, a private corporation, maintains for profit the Washington Hospital in the city of Marietta, Washington county, Ohio. There is, at present, no hospital in Washington county supported by public funds. The management of the Washington Hospital proposed to the commissioners of Washington county, with a view to receiving an appropriation from the county poor fund under Section 2502, General Code of Ohio, that they, co-operating with others, acting as individuals and not for the hospital company, will organize another corporation for purely charitable purposes which will maintain two or three rooms which the new corporation will rent from the Marietta Hospital Company, in which the indigent poor of the county may receive, free of charge, needed medical and surgical treatment. Such new corporation will have no sectarian connections.
>
> "Would the commissioners, under said Section 2502, be authorized to pay money to such new corporation maintaining said rooms for charitable purposes? Is the maintaining of such rooms the maintaining of a 'hospital organized or incorporated for purely charitable purposes.'"

A further inquiry has been received as to whether such arrangement can be made under Section 3138-1, General Code. This latter inquiry reads:

> "I wish to have your opinion as to whether a hospital is organized for charitable purposes within our county, under Section 3138-1, as provided in the year book of the laws of Ohio number 101, on page 166, being known as house bill number 259. Whether or not a company or organization of that character not owning, or having leased a building of their own could enter into a contract with another company, who owned and maintained a hospital for profit, for the use of two three wards or

rooms in said company's hospital building, and thereby under the above statutes maintain a charitable hospital independent from the hospital company from which they rent, and by having leased the said rooms run a charitable hospital, such as provided for in said section, and whether or not in your opinion the county commissioners would have the authority to enter into a contract with said charitable hospital, to provide means to support the same."

The plans proposed in each of the above inquiries are substantially the same and may be considered together.

Section 2502, General Code, provides:

"Except in counties containing hospitals supported by public funds, the commissioners of any county, in their discretion, may pay to a hospital organized or incorporated for purely charitable purposes, in which the indigent poor of the county may receive free of charge medical and surgical treatment, a sum not to exceed twenty-five hundred dollars each year. Such amount shall be paid from the county poor fund in equal payments on the first day of January and July, and shall be for the maintenance and support of such indigent poor and the reimbursement of such hospital for treatment thereof. Nothing herein shall authorize the payment of public funds to a sectarian institution."

Section 3138-1, General Code, provides:

"That the board of county commissioners of any county may enter into an agreement with a corporation or association, organized for charitable purposes in such county where a hospital has been established or may hereafter be established, for the sick and disabled, upon such terms and conditions as may be agreed upon between said commissioners and such corporation or association, and said commissioners shall provide for the payment for the amount agreed upon, either in one payment, or installment, or so much from year to year as the parties stipulate."

The agreements contemplated by both sections are to be made by the county commmissioners with a hospital or association organized for charitable purposes. The Marietta Hospital Company is a corporation organized for profit and is maintaining a hospital. This hospital is not maintained for charitable purposes and it is conceded that it does not meet the requirements of either Section 2502, General Code, or of Section 3138-1, thereof. An agreement could not, therefore, be entered into directly with The Marietta Hospital Company under either section.

It is proposed, in order to meet the requirements of the statutes, that a corporation be organized for charitable purposes and that the new corporation lease from the old company two or three rooms or wards wherein the indigent poor may receive medical attention and care. It is not stated whether or not this new corporation will maintain these rooms for others than the indigent poor. That fact would have no bearing upon the conclusion reached herein.

The purpose of the statutes is apparently to provide for the medical attention and care of the indigent poor of the county, in a hospital maintained for the usual purposes of a hospital.

It is necessary to ascertain the nature of the institution that is contemplated by the sections under consideration.

A hospital is defined in the second edition of Black's Law Dictionary, as follows:

> "Hospital. An institution for the reception and care of sick, wounded, infirm or aged persons; generally incorporated, and then of the class of corporations called 'eleemosynary' or 'charitable.'"

In 21 Cyc. at page 1105 a hospital is defined:

> "A hospital is an institution for the reception and care of sick, wounded, infirm or aged persons; generally incorporated, and then of the class of corporations called 'eleemosynary' for the perpetual distribution of the free alms of their founders."

In order to constitute a hospital the institution must be prepared to receive and take care of the sick, infirm or aged. It must have rooms for receiving the patients and also the means of giving them the proper attention.

The hospital or association contemplated by Sections 2502 and 3138-1 of the General Code is one which is prepared and equipped to receive and to take care of the sick and wounded. The leasing of two of three rooms or wards from a company maintaining a hospital for profit, would not, in my opinion, meet the requirements of the statutes. This would be especially true if the old hospital would furnish the care and attention to the patients.

Even though such a corporation as is proposed to be formed, should meet all the requirements of a hospital, the manner of leasing the rooms from a hospital run for profit, would preclude the county commissioners from entering into an agreement with it.

The new corporation would be the instrument that would permit the county commissioners to enter indirectly into a contract with the present hospital company. It is seen that an agreement cannot be entered into with them directly.

The money to be paid by the county commissioners to the proposed corporation would in turn be paid to the old company in the form of rental. For all intents and purposes the money may as well be paid directly to the old company, as in the end it secures the benefit of the payment. Under such an arrangement it would be very difficult to distinguish between the money received by the new company and that received by the old for rent. Such an arrangement would violate the principle of law that what cannot be done directly cannot be done indirectly.

The purpose in view is no doubt a worthy one but the statutes under consideration will not permit it to be carried out under the plans proposed.

In entering into a contract of this nature the provisions of Section 6 of Article 8 of the Ohio Constitution must be considered.

The application of this section of the constitution to Section 3138-1, General Code, was considered in an opinion given to Hon. C. A. Leist of Circleville under date of February 7, 1911. The conclusions therein reached will apply also to a contract under Section 2502, General Code. A copy of that opinion is herewith enclosed.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

425.

VILLAGE SCHOOL DISTRICT WHEN VALUATION REACHES $100,000—NO POWER TO TRANSFER TO TOWNSHIP—TOWNSHIP TERRITORY MAY BE TRANSFERRED TO VILLAGE SCHOOL DISTRICT.

Under Section 4681, *General Code, when a village obtains a valuation of* $100,000, *it becomes ipso facto a village school district and in view of this statute, any attempt to transfer the village district to the township disrict would be useless.*

Section 4681, *General Code, however, contemplates that territory of the township which is contiguous to the village, may be attached to the village school district, and there is no legal objection to making such transfers, under the procedure provided by Sections* 4692 *et seq., General Code.*

In making such transfer, however, its effect upon the right of centralization of schools should be considered.

COLUMBUS, OHIO, May 24, 1912.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Under date of May 14, 1912, you inquire as follows:

> "In Tiffin township in this county is located the small village of Ney, which prior to the last quadrennial appraisement had an assessed valuation of less than $100,000.00. The board of education of Tiffin township has always up to this time included the territory of the village of Ney within its jurisdiction but it, Ney, has now arrived at a point where it constitutes a separate village school district. The village clerk advises me that it is the sentiment of a large majority of the citizens in the district and the village that the township board should continue to look after the affairs in the village district as well as in the township outside of the village and they requested me to advise them as to the proper steps to be taken to accomplish this purpose. I have examined the law thoroughly and the only statute which in my opinion might possibly permit the transfer of the territory from the village to the township school district is Section 4693 of the General Code.
>
> "The question upon which I wish your opinion is this: Under Sections 4693-4-6 and 6 may all of the territory comprising the village school district of Ney be transferred to the Tiffin township school district thus in effect working a dissolution of the Ney village school district and placing its affairs under the jurisdiction of the township board."

Section 4681, General Code, provides when a village shall become a village school district, as follows:

> "Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars, shall constitute a village school district."

This section was construed in an opinion given to Hon. James F. Bell, of London, Ohio, on April 18, 1912, a copy of which is herewith enclosed. As held

in that opinion the village constitutes a village school district when it has the necessary tax valuation, but continues under control of the township district until the village district can be properly organized.

The village of Ney has a tax valuation of over $100,000.00 and is thereby constituted a village school district. I find no provision of statute authorizing a dissolution or discontinuance of a village school district which has a tax valuation of not less than one hundred thousand dollars.

Section 4682, General Code, governs when the tax valuation is less than $100,000.00, and reads as follows:

> "A village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than one hundred thousand dollars, shall not constitute a village school district, but the proposition to dissolve or organize such village school district shall be submitted by the board of education to the electors of such village at any general or a special election called for that purpose, and be so determined by a majority vote of such electors."

You inquire if all the territory of a village school district may be transferred to a township school district by virtue of the provisions of Sections 4693, et seq., of the General Code.

Section 4693, General Code, provides:

> "Territory may also be transferred from one school district to another as follows: A petition, signed by not less than one-half of the qualified male citizens who are electors, residing in the territory sought to be transferred and accompanied by a correct map of the territory, shall be filed with the clerks of the boards of education interested. If such boards of education fail or refuse to transfer such territory by mutual consent, as herein provided, within sixty days from the filing of the petition and map, the petitioner shall file a copy of the petition and map in the probate court of the county in which the territory is situated, or, if it be situated in two or more counties, in the probate court of the county containing the largest proportionate share of the territory to be transferred. The petitioners shall give satisfactory security for the costs in the sum of one hundred dollars, conditioned that they will pay all the costs in case the transfer is not granted."

The following sections provide for the hearing, judgment and costs, and the apportionment of funds.

What would be the result if all of the territory of a village school district should be transferred to a township school district? The village school district of Ney has not as yet been organized. It is still under the jurisdiction of the township board of education. If the territory of the village district is transferred to the township school district, you find yourself at the point where you started when the village of Ney secured a tax valuation of $100,000.00. You would have a village with a tax duplicate of $100,000.00 and yet not organized into a village school district. The provisions of Section 4681, General Code, would apply and the territory of the village would again constitute a village school district. Even though the provisions of Section 4693, General Code, would authorize the transfer of the whole territory of Ney, it would be a useless ceremony. The plain provision of Section 4681, General Code, could not thereby be defeated.

What is really wanted by the people affected is to have the schools of the village and township under the same jurisdiction.

Section 4679, General Code, enumerates the kind of school districts, as follows:

> "The school districts of the state shall be styled, respectively, city school districts, village school districts, township school districts and special school districts."

Section 4680, General Code, states what shall constitute a city school district. Sections 4681 and 4682, General Code, apply to village school districts and have already been quoted herein.

Section 4683, General Code, defines what shall constitute a township school district, as follows:

> "Each civil township, together with the territory attached to it for school purposes, and excluding the territory within its established limits detached for school purposes, shall constitute a township school district."

All other school districts are special school districts as provided in Section 4684, General Code, which reads:

> "Any school district, other than a city, village or township school district, and any school district organized under the provisions of chapter five of this title, shall constitute a special school district."

Section 4728, General Code, which is found in chapter five above referred to in Section 4684, provides for special school districts as follows:

> "A special school district may be formed of any contiguous territory, not included within the limits of a city or village, which has a total tax valuation of not less than one hundred thousand dollars."

It is apparent that the territory in the village of Ney cannot be a part of a city school district. It has also been seen that it cannot be transferred to a township school district. It cannot be formed into a special school district under Section 4728, General Code, because that section specifically excludes from its provisions territory within a city or village.

Section 4681, General Code, by which the village becomes a village school district contemplates that territory may be attached to a village school district for school purposes. The territory to be attached would have to come from territory contiguous to the village, which in this case is the township. The territory of the township school district, or part thereof could be transferred to the vilage school district.

The statute does not require a township to be or to have a township school district. The township school district takes the territory of the township which is not included in any other school district. There are townships in this state which are composed entirely of special districts, and which have no township school district. Others are co-extensive with a municipality and have no township school district.

If it is desired to have all the territory of the township under the jurisdiction of one school board, it can only be done by organizing the village school district and transfer the territory to the village school district. Section 4692, General

Code and Sections 4693 et seq., General Code, provide the means by which the transfer can be made.

Before transferring the territory, however, the right of centralization of schools of a township should be taken into consideration, and the effect that such transfer of territory would have upon the right of centralization.

Whether or not this method is practicable or desirable must be determined by those who are directly interested in the question.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

429.

ROADS—REPAIR OF COUNTY LINE ROAD—NO POWER TO PURCHASE RIGHT OF WAY AROUND SINK HOLE.

The language of Section 6901, General Code, providing for the repair of a county line road, which has become impassable by reason of a sink hole, fissure, washout or other obstruction, is clear and definite and no authority can be implied therefrom to enable the county commissioners to purchase a right of way around a sink hole, instead of filling, bridging or pontooning the same as provided by this statute.

COLUMBUS, OHIO, June 14, 1912.

HON. C. H. DUNCAN, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter, wherein you state:

> "A road established and opened upon the line between Champaign and Logan counties has become impassable by reason of a sink hole. Notice thereof in writing has been filed with the county auditors of the respective counties and the boards of county commissioners have held a meeting at the office of the Champaign county board, said county being the older of the two counties. The time for this meeting was fixed by the auditor of Champaign county who gave written notice to all of such boards, and the boards went on the line of the roads and jointly viewed the sink hole.
>
> "They have taken certain adjournments and have certain advice from competent engineers and it has been found that it will probably require several thousand dollars to fill the sink hole. It has also been determined that it would be much cheaper to purchase a right of way around the sink hole than to attempt to fill same.
>
> "You will note that Section 6901 of the General Code, which, by the way, was enacted to meet the special situation above set forth, provides only for a repair of such a road by filling, pontooning or bridging. I desire to inquire, whether, in the opinion of your office, implied authority exists under said Section 6901 in the boards of county commissioners of the two counties, to purchase a right of way around a sink hole and divide the costs and expenses of purchasing said right of way and building a roadway upon the same in equal parts between the two counties. Also as to whether such new roadway would be and remain a county line road despite the fact that it would be entirely within the confines of one county.

"I have doubted myself whether the statutes would authorize the procedure outlined in purchasing a new right of way and dividing the cost, and have refused to advise the board of commissioners of my county to enter into such a contract unless the matter first be submitted and approved by your office."

Section 6901 of the General Code, cited by you, reads as follows:

"When a road, established and opened upon a county line, becomes impassable by reason of a sink hole, fissure, washout or other obstruction, or is in need of repair from any cause, the boards of county commissioners of the respective counties, when notice thereof in writing is filed with the county auditor of the respective counties, shall meet in session at the office of the board of county commissioners of the oldest of such counties, at a time to be fixed by the auditor of such oldest county in a written notice to be by such auditor given to all of such boards, and go upon the line of said road and jointly view it and such sink holes, fissures, washouts or other obstructions as may then be thereon. They shall adjourn, from time to time, and from place to place, to meet in joint session, and, by necessary orders, proceedings and other joint action, cause such road to be repaired and restored by filling, pontooning or bridging such sink hole, fissure or washout or by filling or removing any other obstruction therein. When necessary they may direct a competent engineer to prepare specifications and estimates. (99 vs. 485—4658*a*.)"

It is well settled law in Ohio that where a statute is plain and unambiguous, whether its provisions are wise or equitable, courts have no authority, by judicial construction to read anything into or out of it.

In the case of Heck vs. The State, 44 O. S. 536, the following language is used by Judge Minshall in rendering the opinion of the court, on page 537:

"Where the language is plain and leads to no absurd results, there is no room for construction, and it is the duty of the courts to give it the effect required by the plain and ordinary signification of the words used."

Sedwick on statutory and constitutional law, 231, says:

"When the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences if evil can only be avoided by a change of the law itself, to be effected by legislation, and not judicial action. Where a law is plain and unambiguous whether it be expressed in general or limited terms the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

The language used in Section 6910 is, to my mind, clear and unambiguous, and in view of the above cited authorities, I am constrained to hold that county commissioners, under said section are wholly without authority to do anything except what is expressly permitted therein.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

430.

ROAD IMPROVEMENTS—TOWNSHIP ROAD DISTRICTS—POWER OF TRUSTEES TO GRADE, GRAVEL OR MACADAMIZE—WORK TO BE LET ON CONTRACT.

The improvements dealt with in Sections 7033 to 7052, General Code, providing for the creation of township road districts, are such road improvements only as are constructed of gravel or macadam.

The trustees are authorized by these statutes to do the necessary grading, culverting, draining or bridging in the construction these roads, as incidental only however, to the graveling or macadamizing.

All work in this connection must be let upon contract as provided by Sections 7025, 7026, 7027, 7046 and 7047, General Code, except such work as is required to be done under the supervision of the road superintendents as presented by Section 7024, General Code.

COLUMBUS, OHIO, May 29, 1912.

HON. WM. VINCENT CAMPBELL, *Prosecuting Attorney, Belmont County, St. Clairsville, Ohio.*

DEAR SIR:—Under date of March 26, 1911, you wrote as follows:

> "As you will see by the enclosed letter I have been requested to get your opinion on the improvement of roads provided for under Sections 7033, to 7052, inclusive. I have already given these same parties my opinion on the matter and am enclosing you copy of the same; the bonds provided for have already been issued, and the trouble among them seems to be as to the manner of improving; some of the trustees claiming they can do nothing but macadamize."

The letter to which you refer was addressed to you by the clerk of Washington township, Belmont county, and reads in part as follows:

> "In improving roads under Sections 7033 to 7052 of the General Code of Ohio, are the trustees required to build permanent macadam or gravel roads? Can they improve any roads by grading only? Must all work be let at contract?"

Sections 7033 to 7052 inclusive, of the General Code, constitute a subdivision of the title "township roads," entitled "township or precinct a road district," and provide the method of improving township roads when certain preliminary steps looking toward the erection of the township or part thereof into a road district have been complied with. The entire subdivision must be considered in order to determine the power of township trustees and not merely one section. The following section I deem sufficient in the solution of your question:

> "Section 7033. The board of trustees of a township, when, in their opinion, it is expedient and necessary, and for the public convenience and welfare, to improve the public ways of the township, in whole or in part, by grading, macadamizing or graveling, draining, culverting, and bridging, by resolution, may create the township into a road district for the purpose of improving the public ways therein, or any number of them. If, in the township, there is a municipal corporation or corporations, such trustees, by resolution, may erect the portion or portions

of the township not included within the corporate limits of a municipal corporation, into such road district. In like manner the trustees may erect an election precinct, or part thereof, in the township, into such road district. (94 V. 129 Section 1.)

"Section 7045. Thereupon the trustees shall determine the order and manner in which the public ways shall be improved, beginning, so far as practicable, with the main roads. In improving such public ways the macadamized or graveled portion shall be located, when practicable, so as to leave sufficient space for a dirt road at its side. The graveled or macadamized portion shall be not less than eight nor more than fourteen feet in width, and the gravel or macadam shall be not less than twelve inches in depth in the center, and eight inches in depth at each outer side. (94 V. 130 Section 6.)

"Section 7046. As the improvement of each public way is determined upon, the engineer shall divide the improvement into working sections and make a correct profile of each thereof, as it then exists, and a profile of the grades established for its improvement, and prepare specifications for, and an estimate of, the cost of each working section of such improvement, which shall be filed and recorded in the office of the clerk of the township. (94 V. 131 Section 7.)"

You will note that all of these sections as well as others in the same subdivisions refer to the *improvement* of roads and it becomes necessary to determine what is meant by an improvement as described in these statutes. It was held in an opinion recently rendered to you by this department that an improved road is one constructed from any of the various classes of material prescribed by the statutes for road building. Applying that definition to the present case I am of the opinion that an improved road would be one constructed from gravel or macadum. Section 7045 specifically provides for the location of the *graveled* or *macadamized* portion of such road, the width of the road bed and the depth of the gravel or macadam thereon, and Section 7046 provides, among other things, that the surveyor shall make a profile of the grades established for the road improvement. Grading is a mere incident of the improvement and is not of itself an improvement in the sense contemplated by the foregoing statutes. I am of the opinion that a road to be improved within the meaning of these statutes must be built of macadam or gravel but that the trustees as incident to the improvement may grade, culvert, drain or bridge the same when necessary.

In answer to the question as to whether all work must be let upon contract I call your attention to the following sections:

"Section 7046. As the improvement of each public way is determined upon, the engineer shall divide the improvement into working sections and make a correct profile of each thereof, as it then exists, and a profile of the grades established for its improvement, and prepare specifications for, and an estimate of, the costs of each working section of such improvement, which shall be filed and recorded in the office of the clerk of the township. (94 V. 131 Section 7.)

"Section 7047. The contracts for furnishing the materials and performing the labor in and about such improvement, shall be made by such sections and in like manner as provided by law for other township improvements. (94 V. 131 Section 8.)

"Section 7024. The trustees may consolidate the road districts through which such proposed road improvement passes, and direct the

superintendents thereof to work the two days' labor therein in hauling material, such as crushed stone or gravel, upon the road. Such hauling shall be under the supervision of the superintendents of the district, but must be performed in such manner as is prescribed by the trustees. (93 V. 157 Section 3.)

"Section 7025. A majority of the board of trustees shall be necessary to order such road improvement. The work of the construction and the furnishing of the material therefor shall be publicly let, excepting such work as may be done by the road superintendent of the road district as above provided. The contract for the material to be used in the construction of the road improvement, and the contracts for hauling material upon the roads, shall be let separately. (98 V. 341 Section 4.)

"Section 7026. The trustees after having given public notice of the time and place of such letting for at least two weeks, in a newspaper of general circulation in the township or county, or by hand-bills, or both, at the discretion of the board of trustees, specifying the kind and quality of material, and the part of the road upon which it is to be used, shall let the contract to the lowest bidder, who shall give bond to the acceptance of the trustees. (93 V. 158 Section 5.)

"Section 7027. The trustees may accept donations of material or labor for the benefit of any or all roads to be improved, and the road upon which the largest donation is offered shall be constructed first. The bids for the material and for the work of hauling it shall be separately stated, and the trustees may reject any or all bids. (93 V. 158 Section 5.)"

It is my conclusion, therefore, that township trustees must let all work upon contract as provided by Section 7025, 7026, 7027, 7046 and 7047 except such work as is required to be done under the supervision of the road superintendents as prescribed by Section 7024.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

435.

BURIALS—WHEN DUTY OF COUNTY TO BURY PAUPERS DYING IN BENEVOLENT OR CHARITABLE INSTITUTIONS.

Under Section 3495, General Code, there devolves upon the county the duty of burying persons dying in benevolent or charitable institutions which are situated in the county and not supported by the state, when such dead person had a legal settlement in the county, or whose legal settlement was not in the state or unknown, and when the body is not claimed for private burial or is not delivered for the purpose of medical or surgical study or dissection, in accordance with law.

COLUMBUS, OHIO, June 11, 1912.

HON. LEWIS MALLOW, *Assistant Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your favor of April 24th received. You inquire:

"When does it become the duty and obligation of the county to

make burials of persons dying in benevolent or charitable institutions which are situated within the county and not supported by the state?"

Section 3495 of the General Code provides as follows:

"When information is given to the trustees of a township or proper officer of a municipal corporation, that the dead body of a person, having a legal settlement in the county, or whose legal settlement is not in the state or is unknown, and not the inmate of a penal, reformatory, benevolent or charitable institution, has been found in such township or corporation and is not claimed by any person for private interment at his own expensse or delivered for the purpose of medical or surgical study or dissection in accordance with law, they shall cause it to be buried at the expense of the township or corporation, but, if such trustees or officer notify the infirmary directors, such directors shall cause the body to be buried at the expense of the county."

Section 3496 of the General Code provides:

"In a township in which is located a state benevolent institution, the trustees of the township shall pay all expenses of the burial of a pauper that dies in such institution, and send an itemized bill of the expenses thereof to the infirmary directors of the county from which the pauper was sent to the institution. Such infirmary directors shall immediately pay the bill to such township trustees."

Section 9984 of the General Code is as follows:

"Superintendents of city hospitals, directors or superintendents of city or county infirmaries, directors or superintendents of work-houses, directors or superintendents of asylums for the insane, or other charitable institutions founded and supported in whole or in part at public expense, the directors or warden of the penitentiary, township trustees, sheriffs, or coroners, in possession of bodies not claimed or identified, or which must be buried at the expense of the county or township, before burial, shall hold such bodies not less than thirty-six hours and notify the professor of anatomy in a college which by its charter is empowered to teach anatomy, or the president of a county medical society, of the fact that such bodies are being so held. Before or after such burial such superintendent, director, or other officer, on the written application of the professor of anatomy, or the president of a county medical society shall deliver to such professor or president, for the purpose of medical or surgical study or dissection, the body of a person who died in either of such institutions, from any disease, not infectious, if it has not been requested for interment by any person at his own expense."

The above three sections of the General Code cover all cases of the disposal of dead bodies of indigent and unclaimed poor, except the unknown, or indigent, dying from contagious diseases.

Section 3496 governs in cases where the pauper dies in a benevolent institution supported by the state.

Section 3495 of the General Code provides for the burial of a person having a legal settlement in the county or whose legal settlement is not in the state, or is unknown, and *not the inmate* of a penal, reformatory, benevolent or charitable

institution. The benevolent and charitable institutions referred to in Section 3495 of the General Code are benevolent and charitable institutions supported in whole or in part by the state.

I am of the opinion that if a pauper taken care of by some private, benevolent or charitable institution, situated within Lucas county and not supported by the state, should die and the charitable institution should notify the proper municipal officer or township trustees, it would be the duty of the township trustees or the proper officer in the municipal corporation, to bury such person and if such person had a legal settlement in the county, or whose legal settlement was not in the state, or was unknown, and was not claimed by any person for private interment or delivery for the purpose of medical or surgical study or dissection in accordance with law, that they should cause said body to be buried at the expense of said township or corporation; or should notify the infirmary directors and the infirmary directors should bury the body at the expense of the county.

The fact that the county is saved the expense of providing for the indigent poor who are taken care of by private benevolent institutions, is no reason why these institutions should have the burden of burying the pauper dead. A pauper may be kept at some private residence without extra expense to the county out of the goodness of heart of the owner. On his death, he may not desire to have the expense and trouble of burial and he can notify the proper authorities and burial will be provided for by law.

So it is with a purely private, charitable institution. It may provide for persons, as was done in Toledo, so long as they live. On their death, they may desire the public to provide for their burial. In that event, they should give the information to the trustees of the township or proper officer of a municipal corporation as provided by Section 3495 of the General Code.

Answering your question specifically, it becomes the duty and obligation of the county, to make burial (of persons dying in benevolent or charitable institutions which are situated in the county, and not supported by the state) when the dead body of a person having a legal settlement in the county, or whose legal settlement is not in this state, or is unknown, and not an inmate of a penal, reformatory, benevolent or charitable institution supported by the state, in whole or in part, has been found in such township or corporation and is not claimed by any person for private interment at his own expense or is not delivered for the purpose of medical or surgical study or dissection in accordance with law.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

441.

SMITH ONE PER CENT. LAW—GARRET LAW—ROAD IMPROVEMENT NOT WITHIN TOWNSHIP TWO MILL LIMITATION—SPECIAL DISTRICTS.

Levies under the Garret road law are "levies in special districts created for road improvements over which the budget commission shall have no control," within the meaning of Section 9 of Section 5649-3a, General Code, and therefore, such levies are not included within the requirement of Section 5649-3a that the aggregate of all taxes by a township for township purposes, shall not exceed in any one year, two mills.

COLUMBUS, OHIO, June 20, 1912.

HONORABLE CHARLES S. HATFIELD, *Prosecuting Attorney, Wood County;* L. E. MALLOW, *Assistant Prosecuting Attorney, Lucas County, and* J. W. SMITH, *Prosecuting Attorney, Putnam County, Ohio.*

GENTLEMEN:—I beg to acknowledge receipt of a brief prepared by yourselves, with the assistance of Honorable Edward M. Fries, in the matter of the application of the Smith one per cent. law, so-called, to levies under what is known as the Garret road law. I wish to take this opportunity of expressing my appreciation of your courtesy in furnishing this brief in conformity to my own request.

I have read your brief with great care and interest. With equal interest I have read the opinion of special counsel in this office, Mr. Clarence D. Laylin, who still adheres to the former opinions of this department. I might say by way of introduction that when the former opinion reached me for inspection and examination, it was while one of the hotly contested bribery cases was on, and I found it somewhat difficult to bring myself to that clear consideration of the case which its importance demanded. This, however, was not due to any lack of interest, but to physical and mental exhaustion. Whatever doubts I had, and I was not without them, I resolved them in favor of the writer of the opinion, who I can say with both truth and propriety, is a lawyer of exceptional ability, and the very highest order of integrity, and from whose opinions I very rarely have occasion to dissent. My own general views in the beginning led me to the same conclusion as those I am herein going to express, but looking at it from the angle by which it was viewed by Mr. Laylin, I drifted to his conclusion. In the beginning, it may be said, that the policy of the state has been, and particularly is now, toward the making and maintaining of good and safe public highways. All of the exceptions in reference to taxation as disclosed by a reading of the living statutes, as well as those not in force, disclose this.

The question we are interested in is this: Do the provisions of Section 5649-3*a* of the General Code which read as follows:

> "The aggregate of all taxes that may be levied by a township for township purposes, on the taxable property in the township on the tax list, shall not exceed in any one year two mills."

apply to the tax which, under the Garret law, may be levied by the county commissioners on the duplicate of the township or townships in which the road to be improved is located?

The limitation referred to is found in subdivision 9 of Section 5649-3*a* of the General Code. This *inter alis* provides:

> "* * * Such limits for county, township, municipal and school levies shall be exclusive of any special levy, provided for by a vote of the electors, special assessments, levies for road taxes that may be worked out by the tax payers, *and levies and assessments in special districts created for road or ditch improvements, over which the budget commissioners* shall have no control."

The budget commissioners, of course, have control over the internal limitations, and the sole question to be here determined is whether or not your townships are bound by the following provisions without the exceptions, to-wit:

> "The aggregate of all taxes that may be levied by a township for township purposes, on the taxable property in the township on the tax list, shall not exceed in any one year two mills."

No exceptions mentioned, in my judgment, apply, unless it be under the heading of—"levies and assessments in special districts created for road or ditch improvements." Now, is a district created for road improvement when the plan provided for by Sections 6926 et seq., has been followed? Section 6926 of the General Code is as follows:

> "When a majority of the resident owners of real estate situated within one mile of a public road, present a petition to the board of county commissioners asking for the grading and improving of such road, the county commissioners shall go upon the line of the road described in such petition. If, in their opinion, the public utility requires such road to be graded and improved, they shall determine whether the improvements shall be partly or wholly constructed of stone, gravel or brick, any or all, and what part or parts of such road improvement shall be of stone, gravel or brick, and enter their decision on their journal."

I am impressed with the fact that the very procedure under this section suggests something special. It is clear that it is not regular. Again, suppose the balance of the cost and expenses after assessing upon the owners of real estate, and the real estate benefited thereby, be assessed a certain distance out in each township and not covering the whole township, it could not be denied that such district would be a special district. To my mind, because the township or townships are to pay the entire balance, they being political subdivisions, does not alter the case. The point of difference between you gentlemen and special counsel in this department seems to be right here. You regard the township or townships for the purposes as special districts, while counsel regards them as still being political subdivisions.

Your point in directing attention to the road districts under the so-called one mill assessment Pike law and likening it to a township with a view to showing that the latter under the Garret law is in reality a special taxing district with boundaries co-extensive with the political division and must be regarded as such with the meaning of the exemptions of Section 5649-3*a*, is, in my judgment, well taken as conclusive of the question.

I have given the matter a great deal of care, study and consideration. Our aim is to give every question presented such careful consideration as to have no occasion to reverse ourselves until compelled to do so by the decisions of the courts, but notwithstanding this care, and notwithstanding the pride of opinion that any conscientious official should have, I do not permit these considerations to stand in the path of my duty. At any rate, if a question is doubtful, the decision of

this department should be given so as to harmonize with the public welfare. I understand that the people of the counties affected desire improved roads constructed in harmony with Section 6926 of the General Code, that there is no disposition among them to create any litigation over the matter, that the condition of the roads in the counties affected and concerned here is such as to demand improvement, and I, therefore, reverse the former holding of this department, and announce to you that so far as the attorney general's office is concerned, the proper officers of your county may proceed to make the road improvement as upon the theory that you are not subject to the two mill limitation.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

443.

TOWN HALL BUILT JOINTLY BY TOWNSHIP TRUSTEES AND VILLAGE COUNCIL—VILLAGE MAY RENT ROOMS FOR JAIL THEREIN UPON MAJORITY VOTE OF BOTH BODIES.

The control of a hall built jointly by the township trustees and a village, is in the hands of these joint parties and when a majority of both bodies so agree, the village may rent a room in said hall for jail purposes.

HON. CHAS. F. RIBBLE, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—At your request I am herewith answering an inquiry received from Mr. H. I. Wheeler, a trustee of Salem township, Muskingum county, Ohio. Said inquiry is as follows:

> "As one of the trustees of my township I desire your construction of the law governing a joint town and township hall. We have a village in our township and a hall built jointly by the village and the township. The village now wants to rent a room in this building for jail purposes and two of the trustees favor it but the people are against it. Can it be leased for such purposes?"

In reply I desire to say that Section 3397 of the General Code provides as follows:

> "After such affirmative vote, the trustees may make all needful contracts for the purchase of a site, and the erection, or the improvement of enlargement of a town hall. They shall have control of any town hall belonging to the township, and from time to time, may lease so much thereof as may not be needed for township purposes, by the year or for shorter periods, to private persons, or for lectures or exhibitions, in all cases having the rent paid in advance or fully secured. The rents received may be used for the repair or improvement of the hall so far as needed, and the balance for general township purposes."

It will be noted that said section gives the township trustees the right to lease so much of such town hall as is not needed for township purposes, and then only to private persons or for lectures or exhibitions. Township trustees only have such authority as is given them by statute, and as a municipal corporation is not a private

person it follows that the township trustees are without legal authority to rent any portion of a township hall owned exclusively by the township to a municipal corporation, such as a city or village. Such township halls are ordinarily used for public meetings and to provide a meeting place for the public officials of the township, and when owned by a township such halls are to be used only for township purposes, which said purposes are to be determined by the township trustees in accordance with Section 3397, General Code, above quoted.

As I view it, however, that is not this case, for the reason that said section provides that the township trustees shall have the control of such township halls as are owned exclusively by the township. In the matter about which you inquire both the village and the township own the said town hall jointly, the same having been built jointly by the village and the township. It follows that the village and the township have equal jurisdiction over, and the co-ownership of, said hall. That being the case, I am of the opinion that such hall is subject to such uses as the said joint ownership may agree upon, Section 3397, General Code, above quoted, notwithstanding. As above stated, said section applies only to township halls belonging solely and exclusively to the township. Therefore, if the township trustees and the village council agree that one of the rooms of such township hall shall be used for a jail room, such room may be so used without being in contravention of any statutory prohibition.

By reason of the foregoing I am of the opinion that the village may use a room of such township hall, provided the township trustees and the village council agree thereto.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

451.

TAXES AND TAXATION—BONDS ISSUED BY ROAD DISTRICT, NOT EXEMPT.

Bonds issued as the obligations of a road district are not included within those enumerated in ArticleXII, Section 2, of the Constitution of Ohio and are, therefore not exempt from taxation.

COLUMBUS, OHIO, June 20, 1912.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 6th, requesting my opinion upon the following question:

> "The Greenwich township trustees formed that part of the township outside the incorporated village of Greenwich into 'The Greenwich Road District,' under the provisions of Sections 7033-7052, and issued bonds in the sum of $30,000.00, after an election had been successfully carried. Are these bonds exempt from taxation within the state of Ohio?"

Section 2, Article XII of the Constitution of Ohio provides in part as follows:

> "* * * Bonds of the state of Ohio, bonds of any city, village, hamlet,

> county or township in this state, and bonds issued in behalf of the public schools of Ohio and the means of instruction in connection therewith shall be exempt from taxation. * * *"

The specific exemptions from taxation are set forth in Sections 5349 et seq. of the General Code. These sections are not in any way repugnant to the provisions of the statutes; indeed, the statutes are entirely silent as to this point, the constitution being self-executing with respect to its exemptions of such bonds.

Section 7035, one of the sections to which you refer, authorizes the issuing by the township trustees of "bonds of the road district." The territorial limits of the road district created under authority of this section may or may not be co-terminus with those of the township itself (Section 7033). It is, therefore, clear that the bonds are not the obligations of the township as such, but of the especially created taxing district known as the road district.

It is a general principle that exemptions from taxation are strictly construed. Authorities need not be cited on this point. The constitution exempts bonds of the state and of any city, village, hamlet, county or township therein, but it does not exempt bonds of any sub-division or taxing district other than those enumerated. On the principle just stated, as upon the principle of construction, which is to the effect that the expression of one thing is the exclusion of others, which applies here, I am of the opinion that bonds in question are not exempt from taxation in Ohio.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

452.

MUTUAL INSURANCE COMPANIES AND ASSOCIATIONS—POWER OF COUNTY COMMISSIONERS TO INSURE COUNTY PROPERTY THEREIN—STOCK PLAN.

County commissioners are as much a branch of the government as boards of education and are equally prohibited from becoming stockholders in any joint stock company, corporation or association. They may not, therefore, insure county property in Mutual Insurance Associations nor in Mutual Insurance Companies except (with reference to the latter) when they are in a position to issue policies upon the stock plan.

COLUMBUS, OHIO, June 19, 1912.

HON. W. V. WRIGHT, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I herewith desire to acknowledge the receipt of your letter of May 20, 1912, wherein you inquire as follows:

> "Your opinion is respectfully solicited as to whether or not county commissioners are authorized or may lawfully insure county property in Mutual Insurance Companies.
>
> "In this connection your attention is directed to Sections 9538 and 9596, et seq. General Code, defining Mutual Insurance Companies.
>
> "As policies on some of our county property will expire within the next few days, an early answer will be full appreciated."

In reply thereto, I desire to say that this department has already held that

boards of education are without legal right or authority to insure school houses in mutual insurance associations and that school boards are also without legal right or authority to insure school houses in mutual insurance *companies,* unless such mutual insurance *companies* are in a position to issue policies upon the *stock plan.*

Both of said opinions were rendered to the bureau of inspection and supervision of public officers. The former opinion was rendered on April 28, 1911, and the latter opinion on May 13, 1912.

I am herewith enclosing to you copies of both of said opinions.

I desire furthermore to say that the former opinion, to-wit: the one rendered on April 28, 1911, was carefully reconsidered by this department by special request, and as a result of said request, said opinion was re-affirmed on December 29, 1911, an opinion to the legislator committee of the federation of Mutual Insurance Association of Ohio, a copy of which said opinion, I am also herewith enclosing to you.

I firmly believe that the principles set forth in all the above mentioned opinions are applicable to county commissioners as well as boards of education, for the reason that *county commissioners are as much a branch of the government as boards of education,* and are prohibited by Section 6, Article VIII of the Constitution from becoming stock holders in any join stock company, corporation or association whatever, or lending their credit to such joint stock companies, corporations or associations.

The entire question is fully discussed in said opinions, and I believe said opinions, copies of which I am herewith enclosing, fully answer your inquiry, therefore, I beg to remain,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

463.

BOND ISSUE FOR ELECTION ON REPAIR AND BUILDING OF BRIDGES —BALLOTS SHOULD SPECIFY PARTICULAR BRIDGES.

In providing for an election on the question of issuing bonds for the repairing and building of certain bridges, in order to comply with the purpose of Section 5640-1, *General Code, to give the electors accurate information upon the proposed expenditure, the ballots should specify the bridges to be improved.*

COLUMBUS, OHIO, June 26, 1912.

HON. R. I. GILLMER, *Assistant Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your favor of the 24th received. You advise as follows:

> "It is desired by the board of county commissioners of Trumbull county to issue bonds in the amount of $100,000.00 for the purpose of repairing and building certain bridges in Trumbull county. Under Section 5630-1, wherein it provides what the ballot shall contain, is it necessary to specify what bridges are to be repaired or built?"

Section 5640-1 of the General Code of Ohio provides:

> "The ballots provided by the deputy state supervisors shall have

printed upon the same the words, 'In favor of the expenditure of $_____ for the purpose of_____' and 'Against the expenditure of $_____ for the purpose of_____,' said blanks to be filled with the amount proposed to be expended and the purpose for which said money is to be expended. If the board of county commissioners desire to submit upon the same ballot more than one question as to the expenditure of money for any of the purposes referred to in Section 5638, the same may be done by proper resolution and notice, and by separately stating upon said ballot each proposition, as above provided."

The clause of interest is this:

"If the board of county commissioners desire to submit upon the same ballot *more than one question* as to the expenditure of money for any of the purposes referred to in Section 5638, the same may be done by proper resolution and notice, and by separately stating upon said ballot each proposition, as above provided."

What is the meaning of this, in the light of Section 5638, which is as follows (102 O. L., 447):

"The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expense of which will exceed $15,000.00, except in case of casualty, and as hereinafter provided; or *for building a county bridge,* the expense of which will exceed $18,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed $10,000.00; *without first submitting to the voters of the county, the question as to the policy of making such expenditure.*

You will notice the statute reads, "building a county bridge," not "building a county bridge or bridges." If it were one bridge to be built, unquestionably it would be proper to give notice as to what bridge it is. The same applies when more bridges than one are to be built. The object of the notice required in Section 5640-1 is to advise the people not only of the character of the improvement, but specifically as to what the improvement is. Where a notice is to be given that improvement will be made, the notice should be sufficiently full and definite to give accurate information to the electors as to what improvement is to be made, to the end that they may judge not only with reference to the advisability of the expenditure, but also as to the necessity for the expenditure. If the electors do not know what bridges are to be improved they have no way of passing judgment as to the necessity for the improvement. The commissioners may have in mind a set of bridges not requiring improvement as badly as other bridges which the electors might have in mind.

I would suggest, therefore, that in the proposition submitted you specify the bridges to be improved in such a way as that the electors may be fairly advised.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

467.

COUNTY SURVEYOR—DUTIES OF DEPUTY SURVEYOR—ALLOWANCE BY COUNTY COMMISSIONERS FOR COMPENSATION—DATE DIRECTORY.

Under Section 2787, General Code, the county surveyor is required to make application to the county commissioners for an allowance of an amount sufficient for compensation of the surveyor's assistants. Until such allowance is made, a deputy surveyor may not be compensated for his services.

The requirement of Section 2787, General Code, however, that such allowance shall be made before the first Monday of June, is merely directory and it may be made at a future date.

The deputy may perform all acts of his principal and such acts performed in the absence of the latter, are legal and valid.

COLUMBUS, OHIO, May 29, 1912.

HON. FRANK X. FREBIS, *Prosecuting Attorney, Brown County, Georgetown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter wherein you state:

> "You would greatly favor me by rendering me an opinion upon the following matter: The duly elected and qualified surveyor of Brown county, Ohio, has appointed a deputy surveyor under the General Code, Section 2788, but he has not asked the commissioners to fix the amount of the allowance to be paid said deputy. The said surveyor is out of the county most of his time and practically all of the work is done by this deputy, who makes all estimates for the county commissioners and renders accounts to said commissioners for his per diem fees and expenses.
>
> Can the commissioners allow the bills of this deputy, when he is acting for and in place of the regular surveyor, and are his acts, such as making estimates and the like, legal?"

Two separate and distinct questions are involved in your inquiry; first, whether the county commissioners may legally allow the per diem and expenses of a deputy acting for and on behalf of a county surveyor during the latter's absence from the county when said surveyor has not made an application to the county commissioners asking them to fix the deputy's compensation, and secondly, whether the acts of said deputy in the preparation of estimates, etc., during the absence of his principal are legal.

In answer to your first question, I call your attention to Sections 2787 and 2788 of the General Code, which are as follows:

> "Section 2787. On or before the first Monday of June of each year, the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning September first next succeeding and their aggregate compensation. The county commissioners shall examine such statement and, after making such alterations therein as are just and reasonable, fix an aggregate compensation to be expended therefor for such year.
>
> "Section 2788. The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems neces-

sary for the proper performance of the duties of his office, and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners. After being so fixed, such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor."

It will be observed that it is the duty of the county surveyor, under Section 2787, to file with the county commissioners, on or before the first Monday of June of each year, a statement of the number of assistants, deputies, etc., required in his office for the year beginning September first thereafter, and that the county commissioners shall fix an aggregate compensation to be expended in payment of the salaries of such persons for such year.

Section 2788 empowers the surveyor to appoint such assistants, deputies, etc., and fix their compensation.

If the application has been filed with the county commissioners, and the commissioners have acted thereon, as provided by Section 2787, they have nothing further to do with the payment of the salaries of such deputies, etc., and the same, when fixed by the county surveyor, should be paid monthly out of the county treasury, upon the warrant of the county auditor, as provided by Section 2788.

If, however, the surveyor has not made an application, and the commissioners have not fixed the aggregate amount that may be expended in payment of salaries of the deputies, etc., in the county surveyor's office, then such deputies, etc., are not entitled to receive any pay from the county treasury.

In view of the foregoing, the deputy to whom you refer would not be entitled to receive the salary of the surveyor. The only salary that he could receive is that fixed by Section 2788, provided the requirements of Section 2787 have been complied with.

If the commissioners have not made the allowance as provided by Section 2787, they may yet do so, notwithstanding the provision of said section, that said application must be made on or before the first Monday of June, for the reason that the said section has been held directory as to time.

The answer to your second question is determined by Section 9 of the General Code, as follows:

"A deputy, when duly qualified, may perform all and singular, the duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. In all cases the principal shall be answerable for the neglect or misconduct in office of his deputy or clerk."

The language of the foregoing section, particularly the first sentence, is so clear and explicit as to leave no room for doubt that the deputy surveyor takes the place of his principal, and, accordingly, his acts, such as preparing estimates and the like, during the absence of the surveyor, are legal and should be so recognized by the county commissioners.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

468.

HORSES AND VEHICLES—COUNTY COMMISSIONERS MAY NOT PROVIDE DEPUTY SEALER OF WEIGHTS AND MEASURES WITH CONVEYANCE.

As the legislature has not so provided, a deputy sealer of weights and measures may not be provided by the county commissioners, with a conveyance for use in his official duties.

COLUMBUS, OHIO, April 19, 1912.

HON. JOHN V. CAMPBELL, *Assistant Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Answering your communication of January 20th, delayed until now by reason of the facts already made known to you, wherein you state:

> "I have advised the commissioners of this county that under Section 2622 as amended, 102 Ohio laws, page 426, they might provide the deputy county sealer with a conveyance for use in his official duties. I had been in doubt about their authority to do this, until I saw a letter from the state auditor's office to Mr. C. E. Bertton, state examiner, advising him that under an opinion of the attorney general, deputy county sealer should be allowed necessary expenses, including livery hire, etc. It seemed to me that if livery hire might be allowed, a conveyance might be furnished from the same fund, but after my opinion was read by the board, I was told by the president thereof that your office, while ruling that the county surveyor might be allowed livery hire, might not be furnished with a conveyance, and it was determined that no conveyance would be furnished the deputy county sealer until I had asked your advice thereon."

it does appear very reasonable that, under the facts disclosed as to the situation of the deputy sealer of weights and measures of your county, there should have been some provision made for the allowance of an expenditure for such a conveyance as would, eventually, save the county many dollars. But the legislature did not see fit to make such provision, and I find myself unable to read into the law what, possibly, it would have been better to have included therein.

This department, under the preceding administration, rendered an opinion, found in attorney general's report, 1909, at page 226, that under Section 1181, Revised Statutes, providing for the furnishing of county surveyor's office "with all necessary tools, instruments, books, blanks and stationery, necessary for the proper discharge of the official duties of said county surveyor," the county commissioners were without authority to purchase automobiles for the use of the surveyor's department.

In the case of State vs. Commissioners, 10 C. C. n. s. 398, the circuit court, construing Section 1235, Revised Statutes, Section 2997, General Code, to determine whether, as the law then stood, the county commissioners, who were permitted to allow to the sheriff "all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office, could supply the sheriff with horses, vehicles and harness, or allow him the expense necessarily incurred in their purchase, held in the negative. In that case the court said:

> "Public officers can be allowed only such compensation or fees,

as are provided for in *express terms,* or by necessary implication from the terms used."

and again:

"If the legislature intended to have county commissioners supply sheriffs with horses, vehicles and harness, or to allow them the expense necessarily incurred in their purchase, it certainly would have so provided in unambiguous terms. *Simple words only were needed to make such a provision.*"

In the recent case of Peter vs. Parkinson, treasurer, 83 O. S., Judge Crew, at page 49, uses this language:

"While in a sense the board of commissioners is the representative and financial agent of the county, its authority is limited to the exercise of such powers only as are *conferred upon it by law.* As said by this court in the first paragraph of the syllabus in Jones, Auditor vs. Commissioners of Lucas county, 57 O. S., 189: 'The board of county commissioners represents the county in respect to its financial affairs *only so far as* authority is given to it by statute.'"

In view of the law as we find it, and the adjudications on somewhat similar statutes, I am constrained to hold that your county commissioners would be without authority to purchase a conveyance for use by your deputy county sealer.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

471.

SMITH ONE PER CENT. LAW—FISCAL YEAR OF COUNTY—CERTIFICATE OF INDEBTEDNESS ISSUED BY COUNTY COMMISSIONERS FOR CLAIMS ARISING IN MONTHS OMITTED IN ESTIMATE TO BUDGET COMMISSION—DUTIES OF BUDGET COMMISSION.

The fiscal year of the county begins and ends on March 1st, but when the county commissioners, in submitting their budget, mistakenly assumed the fiscal year to end on January 1st and made their estimates accordingly, they may lawfully issue certificates of indebtedness, under Section 5656, General Code, for the legally authorized claims of the omitted months of January and February, for which "law vouchers" might be lawfully issued.

The amounts necessary to retire such certificates of indebtedness may be certified to the budget commission for the ensuing year and the budget commission may reduce or allow such estimates as the circumstances justify.

HON. THOMAS L. POGUE, *Prosecuting Attorney of Hamilton County, and* HON. ALFRED G. BETTMAN, *City Solicitor of Cincinnati, Cincinnati, Ohio.*

GENTLEMEN:—I have been asked to advise the budget commission of Hamilton county as to its power and duties under the following statement of facts:

"A year ago the commissioners of Hamilton county, in submitting

their budget, assumed the fiscal year of the county to be identical with the calendar year; this assumption was acquiesced in by the budget commission, with the result that it is now apparent that the fixed and legal charges against the county during the months of January and February, 1913, cannot be paid from the appropriations for the current year. The commissioners of Hamilton county are about to submit their budget to the auditor and are at a loss as to whether or not they may or should include in such budget for the year 1913 the estimated amount of indebtedness incurred in the months of January and February of that year. The budget commission is at a loss to know whether or not it would have the right to make an allowance for such indebtedness in the 1913 budget."

As you know, I have held in opinion to Hon. E. C. Turner, prosecuting attorney of Franklin county, that the fiscal year for the county begins and ends on March 1st.

In the same opinion I held that for the payment of claims against the county, for which "law vouchers" might be honored by the county auditor, and which, therefore, are not within the purview of Section 5660 of the General Code, known as the "Burns law," the county commissioners may issue certificates of indebtedness, under Section 5656, General Code.

I have also held, in an opinion to the bureau of inspection and supervision of public offices, that Section 5649-3*d*, insofar as it provides that "all expenditures within the following six months shall be made from and within such appropriations," does not apply to the expenditure of the proceeds of loans lawfully made.

From these three conclusions it follows that the commissioners of Hamilton county, for the payment of the salaries of county officers, and like claims, will have the power to borrow money and expend the proceeds of such loans, even though the result will be the expenditure for current needs of the county of a greater amount than the appropriation made for the last half of the fiscal year 1912-1913.

As I understand it, this is exactly what is anticipated, and it is now foreseen that there will be certificates of indebtedness outstanding on March 1, 1913, covering obligations of this sort, incurred in the months of January and February of that year.

Section 5649-3*a* provides as follows:

"On or before the first Monday in June, each year, the county commissioners of each county, the council of each municipal corporation, the trustees of each township, each board of education and all other boards or officers authorized by law to levy taxes, within the county, except taxes for state purposes, shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budget shall specifically set forth:

"1. The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year.

"2. The balance standing to the credit or debit of the several funds at the end of the last fiscal year.

* * * * * * * * * * * * * *

"7. The amount of the bonded indebtedness setting out each issue and the purpose for which issued, the date of issue and the date of maturity, the original amount issued and the amount outstanding, the rate of interest, the sum necessary for interest and sinking fund

purposes, and the amount required for all interest and sinking fund purposes for the incoming year.

* * * * * * * * * * * * * *

"9. Such other facts and information as the tax commission of Ohio or the budget commissioners may require."

In connection with this section I call attention to the provisions of Section 5649-1, which is as follows:

"In any taxing district, the taxing authority shall levy a tax sufficient to provide for sinking fund and interest purposes."

I call attention to the following facts:

1. The first sub-paragraph of Section 5649-3*a* includes everything for which levies can be asked; the remaining paragraphs, which prescribe the form of budget are for the information and guidance of the budget commission.

2. While the seventh paragraph speaks of bonded indebtedness only, no inference can thereby be raised that the Smith law is not intended to provide the means for the payment of indebtedness not bonded; or if this be the inference, then, such inference would result in requiring all indebtedness incurred under Setcion 5656 to be funded by an issue of bonds before it could be paid with levies under the Smith law.

As this opinion is written in haste I will come immediately to my conclusion, without elaborating further upon the reasons therefor. I am of the opinion that whenever indebtedness is created or funded the authority creating the indebtedness —in this instance, the county commissioners—has, unless otherwise provided in the statute authorizing the creation of the indebtedness, the discretionary power to determine the date of payment of such indebtedness. If the commissioners issue notes, for example, it lies within their discretion to determine the date at which those notes shall be payable; so likewise with bonds.

Now, if the commissioners had issued bonds for some lawful purpose, prior to the present time, and had determined that one installment of this issue should become due and payable in the year 1913, the levy to pay that installment of principal and the interest on the entire issue would be a levy for one of the purposes "allowed by law for which it is desired to raise money for" the year 1913, within the meaning of the first paragraph of Section 5649-3a; and would also be one of the "sums necessary for interest and sinking fund purposes" within the meaning of paragraph seven thereof, and within the meaning of Section 5649-1.

The only question which I can see is as to whether or not the commissioners may, at the present time, treat anticipated indebtedness as they would treat indebtedness already accrued. I can see no reason for distinguishing between the two cases. It is a matter which rests within the sound financial discretion of the county commissioners to determine how much of the anticipated indebtedness ought to be paid in the year 1913. They have, perhaps, the right to make all the notes or bonds issued on this behalf due in that year. Such policy would avoid the payment of interest but it would seem of questionable wisdom, in view of the strict limitations of the Smith law. On the other hand, the commissioners have the right to fund the notes or refund bonds which they may have outstanding on March 1, 1913, because of their necessities as aforesaid. In so funding or refunding such indebtedness they have the power to provide what portion thereof shall become due and payable in the year 1913. Such portion as is so determined would then be one of the purposes for which it is desired to raise money for the year 1913, within the meaning of Section 5649-3*a*.

So much, then for the duty of the county commissioners. They may include

all, any part, or none of the anticipated indebtedness, in the budget which they submit to the auditor. The budget commissioners then, would have nothing whatever to do with the budget of the county commissioners, unless a reduction of that budget was made necessary by reason of its exceeding the limitations of Section 5649-3*a*, or, in some taxing districts in the county, the other limitations of the Smith law. If, however, as will undoubtedly be the case, it becomes necessary for the budget commission to scale down the budget of the county commissioners in order to enforce the limitations of the Smith law, then, such budget commission may, and properly ought, to take into consideration in so doing the fact that the county commissioners have the power to fund or refund indebtedness like that concerning which you inquire. They may, accordingly, if they see fit, scale down this item of the county budget to a proportionally greater extent than that to which they reduce the other items of the county budget, leaving it to the county commissioners to readjust their finances in such manner as to provide that a relatively smaller portion of the anticipated indebtedness shall fall due in the year 1913.

It is, of course, true that, broadly speaking, the intention of the Smith law is that each fiscal year of the county shall take care of itself and that the county in common with all other taxing districts shall be operated upon a strictly cash basis. The county, however, must pay the legal claims against it for salaries, judicial expenses, compensation of assessors and other like claims. The Smith law does not disclose any intention to relieve the county of the obligation to pay such claims, although it does provide that, not to exceed certain amounts and rates shall be levied and expended in a given year. The solution of the difficulty is, of course, found, as I pointed out in my opinion to Mr. Turner, in Section 5656, General Code. The practical result of the exercise of power under this section is to carry part of the business of a given year over into another year or years, thus violating, in a sense, the broad purpose of the Smith law, as I have already referred to it. This apparent inconsistency, however, is not absolutely real. Obligations created under Section 5656 must be provided for within some of the limitations of the Smith law itself; so that if the policy of borrowing money be recklessly or improvidently adhered to there will come a time when the fiscal authorities will find themselves face to face with the necessity of exhausting practically all of their power to levy under the Smith law for the purpose of meeting sinking fund and interest charges. The law, then, does ultimately place a restraining influence or check upon the tendency to borrow money; and while elastic enough to permit the necessary adjustments and changes incident to its enactment, and the casual emergencies occurring from time to time under its operation, to be met and provided for, will in the long run tend to establish each taxing district upon the much to be desired cash basis.

For all of the foregoing reasons, then, I am of the opinion that the county commissioners of Hamilton county may lawfully ask in their budget for the year 1913, and as one of the needs of that year, for sufficient money to discharge indebtedness due and payable in that year, although existing by virtue of the failure of the appropriations for the year preceding to furnish enough money to operate the county and pay all legal claims against it; that the determination of whether or not a part or all or none of such indebtedness shall fall due in the year 1913 rests, primarily, in the discretion of the county commissioners; that the exercise of this discretion and the determination that a given part of the indebtedness shall fall due in the year 1913 constitutes a levy for such part one of the needs of the year 1913; and that the budget commission, if called upon for any reason to reduce the county budget, may lawfully take into consideration the broad powers of the commissioners in funding and refunding indebtedness, and if the commissioners,

in the judgment of the budget commission, have asked for too much money for this purpose, may lawfully single out this particular item of the budget in making whatever reductions may be necessary for the purpose of enforcing the limitations of the law.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

474.

COLLECTION OF AMOUNTS DUE CERTAIN OFFICES—PAYMENT INTO GENERAL FUND.

Under Section 2979, General Code, certain county officers are required to file with the prosecuting attorney for collection, reports of amounts overdue their office from persons and individuals.

After the report is filed, the officers have nothing more to do with the same and the amounts when collected are turned, by the prosecuting attorney, into the general fund of the county.

COLUMBUS, OHIO, June 27, 1912.

HON. EDWARD C. TURNER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Replying to your letter of January 21, 1912, in which you state that under Section 2979, General Code, 102 O. L. p. 290 "certain county officers are required to file with the prosecuting attorney a report in writing showing the amount of fees, percentages, penalties, allowances and perquisites due his office from each person or corporation which has remained due and unpaid for more than one year prior to January 1st next preceding and makes it the duty of the prosecuting attorney to collect the same" and after the list has come into the hands of the prosecuting attorney and he has proceeded under the statute to collect, can the officer filing the list collect the same and credit the same to the respective fee fund? *Section 2979, General Code, page 290 O. L.* 102, requires certain county officers to file with the prosecuting attorney a report in writing showing the amount of fees, percentages, penalties, allowance and perquisites due his office from each person or corporation, which has remained due and unpaid for more than one year, prior to January 1st next preceding, and makes it the duty of the prosecuting attorney to collect the same and to pay the amount so collected into the county treasury to the credit of the general county fund.

When the report of the county officers, containing list of all delinquents are placed in the hands of the prosecuting attorney, the county officer has nothing more to do with the collection thereof, the same has passed from his hands into that of the prosecuting attorney; if the county officer does so collect he should pay the same to the prosecuting attorney by whom it is placed in the county treasury.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

478.

REDEMPTION BY OWNER OF REALTY PURCHASED FROM HOLDER OF A TAX CERTIFICATE AT DELINQUENT TAX SALE—SEPARATE PROCEDURES — BUILDING ERRONEOUSLY TAXED AS REALTY—VOID SALE—REMEDY.

When "A" holds a "tax certificate" against a property but fails to pay the taxes on the same and it is sold for taxes, being purchased by "B." Held:

That the primary owner can redeem said property only by paying to the treasurer on the certificate of the auditor, the proper amount of money, under Section 5734, General Code, to cancel "A's" lien, and also by paying the proper amount of money, under Section 5735, General Code, to cancel "B's" lien.

The effect of "B's" purchase does not destroy "A's" lien but does destroy its priority and also prevents "A" from receiving a deed in the event of non-redemption after two years.

A "lodge" erects a building on ground owned by "A," the real estate appraiser appraising the building as real estate owned by the "lodge" and the same is placed on the real estate duplicate and sold to "B" at a delinquent land sale, upon failure of the "lodge" to pay the tax thereon. Meanwhile, the lodge sells the building to "C" and disbands, when it is removed by "C" to other lands. Held:

The building was personalty and being erroneously taxed as realty, the sale to "C" was void, under Section 5729, General Code, and "C" is entitled to receive his purchase money back.

The only remedy is to treat the building as omitted personalty and place the same upon the duplicate as of the year it should have been listed and a proceeding had against the members of the lodge for the taxes due.

COLUMBUS, OHIO, June 21, 1912.

HON. L. T. CROMLEY, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of February 24th, submitting for my opinion the following questions:

> "1. 'A' holds a 'tax certificate' against a property, but fails to pay the taxes on the same and it is sold for taxes, being purchased by 'B.' Should 'A's' 'tax certificate' be considered in computing the amount necessary for redemption?
>
> "2. A 'lodge' erects a building on ground owned by 'A.' The real estate appraiser appraises it in the name of the 'lodge,' and the same is placed on the real estate duplicate. 'A' pays the tax on the real estate upon which the 'lodge' is located, but the 'lodge' fails to pay the tax on its building, and it is sold at delinquent land sale to 'B.' In the meantime, the 'lodge' sells the building to 'C' and disbands. 'C' removes the building (before it is sold for tax) to another farm. ('C' is the son of 'A.') Is 'B' entitled to a refunder from the county auditor? If not, how will he receive a deed for a 'building?'"

I quote the following sections of the General Code, which seem involved in the consideration of your first question:

> "Section 5715. The county auditor shall make and deliver to the purchaser of land or lots, sold for delinquent taxes as aforesaid, a cer-

tificate of purchase, therein describing the land or lots so sold, as described in the tax duplicate, and stating therein the amount of taxes, and penalty for which they were sold. * * *

"Section 5717. No deed shall be made by the county auditor for any land or lot so sold for taxes, until the expiration of two years from and after such sale. * * *

"Section 5719. After the lapse of two years from the time of such sale for taxes, if the land or lot so sold has not been redeemed, the county auditor, on request and production of the certificate of purchase, and in case of the sale of part only of a tract of land or lot, on production of the county surveyor's return of a survey, if he deems such survey necessary, in conformity with the requisitions of such certificate, shall execute and deliver to the purchaser, his heirs, or assignee, a deed of conveyance for the tract of land or town lot, or such part thereof as has been sold as aforesaid.

"Section 5724. Upon the sale of land or town lots for delinquent taxes, the lien which the state has thereon for taxes then due shall be transferred to the purchaser at such sale. If such sale should be invalid on account of irregularity in the proceedings of an officer, having a duty to perform in relation thereto, the purchaser at such sale shall be entitled to receive, from the owner of such land or lot, the amount of taxes, interest, and penalty legally due thereon at the time of sale, with interest thereon from the time of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale. Such land or lot shall be bound for the payment thereof.

"Section 5731. A county auditor delivering a certificate of purchase of forfeited lands, or delinquent lands sold for taxes, shall forthwith transfer it on his duplicate, into the name of the purchaser, charging therefor the sum of ten cents, which shall be considered part of the expenses of the sale. If an auditor neglects to make such transfer, he shall be liable to action by any person injured thereby as for a neglect of official duty.

"Section 5733. All lands and town lots sold for taxes at a delinquent sale, may be redeemed at any time within two years from and after the sale thereof. * * *

"Section 5734. A person desiring to redeem land or town lots sold at a delinquent tax sale within one year after the sale thereof, or within one year after the expiration of any of the disabilities named in the next preceding section, may deposit with the county treasurer, upon the certificate of the county auditor, particularly describing and specifying such land or town lot, an amount of money equal to that for which such land or town lot was sold, and the taxes subsequently paid thereon by the purchaser, or those claiming under him, together with interest, and fifteen per cent. penalty on the whole amount paid, including costs, and one dollar to pay the expenses of advertising as hereinafter provided.

"Section 5735. A person desiring to redeem any land or town lot sold at a delinquent tax sale, after the expiration of one year from the sale thereof, and within the time limited by law for such redemption, may deposit with the county treasurer, upon the certificate of the county auditor, particularly describing and specifying such land or town lot, an amount of money equal to that for which such land or town lot was sold, and the taxes subsequently paid thereon by such purchaser, or those claiming under him, together with interest and twenty-five per cent.

penalty on the whole amount paid, including costs, and one dollar to pay the expenses of advertising, as hereinafter provided.

"Section 5737. Upon the presentation of such certificate of the county auditor to the county treasurer, for the redemption of land or town lots sold for taxes, and upon the payment of the money into the county treasury, the county treasurer shall give the person or persons making such payment, duplicate receipts therefor, describing the property of the land or the town lot as it is described in or upon the certificate of the auditor. One of such receipts shall be registered by the treasurer, and forthwith filed with the county auditor, by the party receiving it. Thereupon the auditor shall forthwith cancel the sale, and transfer the property, land, or town lot to the proper party; and such receipt, when so filed, shall operate as an extinguishment of all rights, either in law or equity, conferred in any manner by such sale. The auditor shall publish a notice of such redemption in the newspaper in which the advertisement of sale was published, for the term of three weeks, either in a weekly or a daily paper, once in each week, at an expense not exceeding one dollar.

"Section 5738. Upon the demand of the purchaser, or his legal representative, and the surrender of the tax certificate, and upon the payment of the auditor's fees, the county auditor shall draw his warrant upon the county treasurer in favor of such purchaser, or his legal representative, for the amount of money so deposited as hereinbefore provided, with the treasurer, after deducting therefrom the treasurer's fees for such services"

In answering your first question, I assume that the owner of property desires to redeem the same within two years after the first sale thereof for taxes.

A purchaser of land sold for delinquent taxes acquires the state's lien thereon for taxes then due. Section 5724, supra, State ex rel. vs. Godfrey, 62 O. S., 18. This lien may or may not ripen into a legal title by the failure of the owner to redeem the land within two years from the date of the sale, and subsequent execution and delivery of a tax deed to the purchaser. During the two-year period, however, at least, and within the general statute of limitations applicable to the enforcement of such liens, at most, (there being no special statute of limitations applicable thereto in the chapter relating to the sale of delinquent lands) such a lien remains valid and subsists in the purchaser. As stated in the case last above cited, this lien, at least, is "surely conferred upon the purchaser holding the certificate."

As I construe the related sections above quoted, they provide a statutory method of extinguishing this lien. Of course, the owner of the land may himself buy the tax certificate from the purchaser at the delinquent tax sale, and, as an assignee, under Section 5718 of the General Code, may effectually extinguish the lien. The only way, however, by which the equitable lien witnessed by the entry on the margin of the grand duplicate, made in accordance with Section 5831, General Code, may be extinguished of record, is by depositing with the county treasurer under Section 5734 or Section 5735, as the case may be, the proper amount of money.

I am of the opinion, that because of the considerations above mentioned, the owner of land which has been twice sold for delinquent taxes to different parties cannot extinguish all equitable titles arising by virtue of such sales without depositing with the treasurer a sufficient sum of money to redeem the land as against each and every outstanding certificate.

Another way of working out the same conclusion is afforded by considering the matter from the standpoint of the county auditor. His duplicate shows two tax transfers, one from the owner to the first purchaser, and the other from the first purchaser to the second purchaser. He would, of course, have authority to cancel but one of such transfers, at a time, and for each such cancellation he must have filed with him a proper receipt.

I am further of the opinion that the first purchaser is not to be regarded as having lost all his rights by reason of his failure to pay the tax assessed against the land during his possession of the tax title. To be sure, he is personally liable for the taxes on the land during such time. But the essential liability for the tax assessed against the land is that of the land itself, rather than that of the land owner. It cannot be inferred from the sections above quoted that the purchase by failing to pay the taxes on the land thereby extinguishes his lien. It seems to me reasonable to hold that such neglect on his part causes him to lose the priority of his lien, as, upon the reasoning above set forth, the second purchaser's lien becomes prior to that of the first purchaser, furthermore, the first purchaser's neglect to pay the taxes effectually precludes his rights to receive a deed in case of non-redemption. So that it cannot be said that the first purchaser may with impunity fail to pay the taxes.

Upon careful consideration of all the sections, I am of the opinion that the land's redemption from the lien of "A's" certificate is a separate thing from that of "B's" certificate. The amounts to be deposited would, under Sections 5734 and 5735 be different, the character and dignity of the two liens is slightly different, each case stands by itself. That is to say the original owner may redeem from "B's" lien alone. *Brodie vs. State,* 101 *Minn.,* 202. If he desires to redeem as against "B," he must deposit the proper amount of money under Section 5734, supra. By so doing he leaves still in force the lien of "A," although the auditor and treasurer may proceed to extinguish "B's" lien just as if "A" did not hold a certificate. If, however, the owner wishes to redeem his land from all outstanding tax certificates, he must deposit under Section 5734 to provide for "B's" certificate, and under Section 5735 to provide for "A's" certificate. Separate proceedings on the part of the county auditor and county treasurer should then be had in the case of "A" and "B."

Your second question involves several interesting propositions. In the first place it appears that the real property assessor listed the building in question and returned the same as real estate in the name of the owner of the building, and not in that of the owner of the land on which it was situated.

In the memorandum which you append to your opinion you state that the arrangement between the lodge and the owner of the property upon which its building was situated was such that the building was clearly personal property. I assume this conclusion of law to be correct.

If the building, being personal property, is required to be listed as personal property in the name of the owner thereof, then, of course, its sale as "delinquent land" was simply void, and under the provisions of Section 5729, General Code, the purchaser at the delinquent land sale is entitled to receive the amount of money he paid for his certificate from the county treasury. In that event, also, the sole remedy of the taxing authorities in the premises would be to cause the building to be placed on the personal property duplicate of the year for which it ought to have been returned for taxation as such, unless that year be a year prior to the year 1911, and to proceed personally against the lodge or against its members. (See Sections 5399 et seq., General Code.) I doubt very much whether this remedy would be efficacious, in view of the fact that the lodge has disbanded.

Certainly the county treasurer would not be able to distrain any property in order to secure payment of such personal tax.

I am not certain, however, that the property ought to have been assessed as personalty in the name of the owner. Section 5554, General Code, applies here. It provides as follows:

> "The assessor, in all cases, from actual view, and from the best sources of information within his reach, shall determine, as near as practicable, the true value of each separate tract and lot of real property in his district, according to the rules prescribed by this chapter for valuing real property. He shall note in his plat-book separately, the value of all dwelling houses, mills and other buildings, which exceed one hundred dollars in value, on any tract or plat of land not incorporated, or on any land or lot of land included in a municipal corporation, which shall be carried out as a part of the value of such tract. He shall also enter therein the number of acres of arable or plow land, meadow and pasture land, and wood and uncultivated land, in such tract, as near as possible."

It will be noted that it is the duty of the real property assessor to determine the value of all buildings which he finds on any tract of real property, and include the value thereof in the assessment of the value of the plat or lot. This peculiar phraseology raises an interesting question as to whether or not the original assessment should have included the value of the portable building as a part of the value of the real estate on which it was found by the assessor, and the further possible question as to whether or not the knowledge of the assessor as to the actual ownership of such a building, or the lack of such knowledge would be factors which would determine the course he ought to take. The solution of these questions, however, is not necessary to a decision of that which you present. If the value of the buildings should have been included with that of the other buildings found on the real estate assessed, then the separate assessment of the building as real property was void and could not lay the foundation for a valid tax sale of the building.

If, however, the assessment of the building as real estate against the actual owner thereof and separately from the land on which it was situated at the time of the assessment, as actually made in the case you present was itself valid, I would be of the opinion that the sale was void. It is only "land and town lots" that may be sold for delinquent taxes. The effect of the tax sale being to divest the owner of the property of his title, the statutes providing for such proceeding must be strictly construed, as, indeed, has always been the case wherever such statutes have been put to the test. Therefore, the failure to provide for the sale of a building separately from the land on which it is situated for taxes due on such building as real estate has the effect of depriving the taxing authorities of any such remedy for the collection of such taxes; the power to sell a building for taxes cannot be inferred from the power to sell land and town lots.

Whether, therefore, the assessment was originally legal or illegal, and if illegal, whether the proper assessment should have been of the building as a part of the real estate on which it was situated, or as personal property, it follows in any event that the tax sale is void, and that the amount paid by the purchaser at the delinquent land sale should be refunded to him from the county treasurer.

You ask also as to who is to pay the taxes charged on the duplicate by virtue of this assessment. If the assessment was legal—that is, if it was proper to assess the building separately as real estate, then, in my opinion, there is no method pro-

vided for by the statutes for the collection of such taxes. A careful examination of the statutes fails to show the existence of any form of action for the recovery of delinquent real estate taxes. Such taxes are in theory assessed in rem and the procedure of delinquent lands and lots seems to be exhausted; inasmuch, then, as the procedure does not apply to the collection of taxes upon a building as such, I am of the opinion that no remedy exists whereby collection of taxes as they stand charged on the duplicate can be enforced.

If it were possible to assess the building against the owner of the real estate and include the valuation thereof in the aggregate of all the buildings found by the assessor on the tract of land, then the listing of the building as real estate in the name of the owner of the building would have to be regarded as a clerical error apparent on the face of the tax list and the duplicate. It is clear, however, after settlement with the county treasurer, the county auditor has no authority to correct clerical errors of this sort, so that there does not now seem to be any way of bringing property on the duplicate of any past year in the name of the owner of the soil, even if that be conceded to be the proper assessment.

If, as seems most likely, the building should have been assessed by the personal property assessor in the name of the lodge, then the remarks which I have already made would apply, and the property would have to be dealt with, if at all, as omitted personalty.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

498.

FORFEITURE OF RECOGNIZANCES GIVEN IN STATE AND MUNICIPAL CASES—DUTIES OF PROSECUTING ATTORNEY AND CITY SOLICITOR TO COLLECT.

The recognizances referred to in Section 13548 *of the General Code, which requires the prosecuting attorney to collect forfeiture of the same, are those given to the state of Ohio.*

Bonds for violation of city ordinances, however, are given to the city and must be collected in accordance with Section 4308 *of the General Code by the city solicitor, and by him paid into the city treasury in accordance with Section* 4310 *of the General Code.*

COLUMBUS, OHIO, July 6, 1912.

HON. ALFRED BETTMAN, *City Solicitor, Cincinnati, Ohio.*

DEAR SIR:—In your letter of April 22, 1912, you request my opinion upon the following question:

> "Should the prosecuting attorney of the county or the prosecuting attorney of the city file suit to collect forfeited bail bonds in cases of violation of city ordinances?"

The answer to the question depends upon the following sections of the General Code, with reference to forfeiting recognizances:

> "Section 13545. When a person under recognizance in a criminal

prosecution to appear and answer or to testify in court, fails to perform the condition thereof, his default shall be recorded, and such recognizance forfeited in open court.

"Section 13546. Probate judges, prosecuting attorneys, clerks of the court of common pleas and the police court, justices of the peace and other magistrates, shall return forthwith to the county auditor of their respective counties all forfeited recognizances in criminal cases.

"Section 13547. The county auditor shall make, in a book to be kept for that purpose, a memorandum of each recognizance returned to him, the court in which it was taken, the name of the case, the names of all the parties, the amount and date, the person to whom paid, the time when delivered and the final disposition thereof. He shall deliver it to the prosecuting attorney and take his receipt forthwith therefor.

"Section 13548. The prosecuting attorney shall prosecute recognizances by him received, for the penalty thereof. Such action shall be governed by the code of civil procedure so far as applicable.

Section 13552 provides the form for recognizance as an accused person, of a witness, and to keep the peace; and it is seen from these forms, as well as from the statutes themselves, that the recognizances spoken of in this chapter, and necessarily those upon which suit is directed to be brought by the prosecuting attorney, by Section 13548, are recognizances given to the state of Ohio, and therefore, necessarily, suit on the same must properly be brought by the prosecuting attorney of the particular county in which the recognizance is given.

The bonds for violation of city ordinances, however, are not given to the state but are given to the city, and when it is necessary that suit be brought on such bonds, it seems to me that the city solicitor, and not the prosecuting attorney of the county, is the proper officer to bring those suits. This seems to me to be clear without any reference to Section 13548 (which undoubtedly refers to the prosecuting attorney of the county), for the reason that Section 4308 of the General Code provides:

"When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

and Section 4310 provides that the solicitor shall pay to the treasurer "all moneys which may come into his hands belonging to the corporation, or by way of fines, *forfeitures,* costs, or otherwise * * *;" and in case of the forfeiture of a bail bond, payable to a city, it would undoubtedly, under Section 4308, when so required, be the duty of the solicitor to bring suit to collect the penalty of such bond.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

ADDENDUM.

Section 1 of the act of February 24, 1871, found in volume 68, laws of Ohio,

page 31, provides for the "return to the county auditor of their respective counties all forfeited recognizances in *state* cases immediately after forfeiture."

Section 13545, General Code, provides:

> "When a person under recognizance in a criminal prosecution to appear and answer or to testify in court, fails to perform the condition thereof, his default shall be recorded, and such recognizance forfeited in open court."

This change in the use of words hardly warrants evidence of an intention to change the law in respect to prosecutions of recognizances. The words "criminal prosecution" in lieu of "state cases" doubtless were selected as being more in harmony with the provisions that followed. If Section 13546 were intended to embrace forfeited recognizances in city cases doubtless the word "mayor" would occur. It is true that "other magistrates" would cover the word "mayor," but in view of the fact that probate judges, prosecuting attorneys, clerks of courts, chiefs of police, police courts and justices of the peace are specifically mentioned it is hardly likely that the mention of "mayor" specifically would be overlooked unless the legislature had in mind that city cases were not intended to come within the purview of the statutes herein referred to, and by the words "other magistrates" is unquestionably meant magistrates having jurisdiction in *state* cases and exercising jurisdiction in such cases. There is nothing in the change of language referred to in the light of Sections 13545, 13546, 13547 and 13548, and in the further light of the separation to be kept in mind between municipalities and other jurisdictions in the administration of their respective affairs, to warrant the conclusion that a county prosecuting attorney is to prosecute the action on a forfeited recognizance running in favor of a municipal corporation.

500.

GRAND JURY PROCEEDINGS—SECRET—PROSECUTING ATTORNEY MAY NOT FURNISH TRANSCRIPT OF TESTIMONY TO DAIRY AND FOOD COMMISSIONER.

The statutes impose absolute secrecy as to grand jury proceedings and prohibits their disclosure to all except a court of justice. The prosecuting attorney may not therefore furnish the dairy and food commissioner with a transcript of testimony taken before the grand jury.

COLUMBUS, OHIO, July 2, 1912.

HON. WM. VINCENT CAMPBELL, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—You inquire in your letter of February 26th whether you were correct and within the law in refusing to furnish the dairy and food commissioner's office with a transcript of the testimony taken before the grand jury in cases for violation of the county local option laws, so that they could use the same for the purpose of placing the liquor tax against the property used for such purposes.

You will observe that by *Section* 13556, *G. C.*, an oath is administered to the foreman of the grand jury, which provides, among other things, as follows:

inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service; the counsel of the state, your own and your fellows, you shall keep secret, unless called on in a court of justice to make disclosures * * *."

Section 13557, *G. C.*, gives the oath to be administered to the other grand jurors:

"The same oath which your foreman has taken before you on his part, you and each of you, shall well and truly observe and keep on your respective parts."

Section 13560, *G. C.*, authorizes the prosecuting attorney and the assistant prosecuting attorney to appear before the grand jury to give information, or advice upon legal matters, and may interrogate witnesses before such jury when it or he deems necessary and in a matter or case which the attorney general is required to investigate or prosecute by the governor or general assembly; he shall have the rights, privileges and powers conferred by this section and the next succeeding section, upon prosecuting attorneys.

Section 13561, *G. C.*, provides:

"The official stenographer of the county, at the request of the prosecuting attorney, shall take shorthand notes of the testimony and furnish a transcript thereof to him and to no other person, but the stenographer shall withdraw from the jury room before the jurors begin to express their views or give their votes on a matter before them. The stenographer shall take an oath, to be administered by the court after the grand jurors are sworn, imposing an obligation of secrecy to not disclose any testimony taken or heard except to such jury or prosecutor, unless called upon in a court of justice to make disclosure."

By these sections we are impressed with the great care of the general assemby, the courts and all those in authority to guard the secrecy of the grand jury proceedings. There is but one place where the secrets of the grand jury can be laid bare and that is in a court of justice, where called before the court.

In view of these statutes your question is easily answered, and in fact you have answered it yourself, when you refused to deliver the transcript. These secrets are locked up, and there is but one key to unlock them, and that is in the hands of the court.

Very truly,
TIMOTHY S. HOGAN.
Attorney General.

503.

COMMON PLEAS JUDGES TO FIX AMOUNT TO BE PAID ASSISTANTS IN PROSECUTING ATTORNEY'S OFFICE FOR COLLECTING UNPAID FEES.

Under Section 2014 of the General Code the judge of common pleas, on or before the first of January, may fix the amount to be expended by the prosecuting attorney for assistants.

Under Section 2915 of the General Code the prosecuting attorney may appoint assistants to collect the uncollected fees, etc, filed by the various county officers and may compensate them from the fund so fixed.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your letter of January 16, 1912, received. You state that:

> "From present indications the statements of uncollected fees, percentages and penalties filed by the several county officers under Section 2979, General Code, page 290, 102 O. L. is going to be large. The collecting of those various fees, percentages and penalties will be a task sufficient for one man for a good long while to come. This duty is placed upon the prosecuting attorneys. In this county we have not heretofore employed assistance in the prosecutor's office, save in isolated cases where special counsel has been appointed for particular purposes. If, however, the office is to be called upon to collect these delinquent fees, percentages and penalties, it will be necessary to have assistance."

and inquire whether you are entitled to assistance in order to make the collections referred to, and also the method of employment and payment of such assistance.

Section 2014 of the General Code provides as follows:

> "On or before the first Monday in January of each year in each county, the judge of the court of common pleas, or if there be more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office.
>
> "Section 2915. The prosecuting attorney may appoint such assistants, clerks and stenographers as he deems necessary for the proper performance of the duties of his office, and fix their compensation, not to exceed in the aggregate the amount fixed by the judge or judges of the court of common pleas. Such compensation after being so fixed shall be paid to such assistants, clerks and stenographers monthly from the general fund of the county treasury upon the warrant of the county auditor."

You will note that the judge of the court of common pleas of your county, on or before the first Monday in January in each year, should fix an aggregate sum to be expended for the incoming year for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office. After the amount is fixed by the common pleas judge, then, under authority of Section 2915 of the General Code, you have the right to appoint such assistants, clerks and stenographers as you deem necessary for the proper performance of the duties of your office; and

under authority of said section you have the right to fix their compensation. But the amount paid to your assistants, clerks and stenographers shall not exceed, in any one year, the aggregate amount fixed by the common pleas judge. After the compensation is fixed the same shall be paid to each assistant upon the warrant of the county auditor, out of the county treasury.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

508.

MEDICAL AND SURGICAL RELIEF—TOWNSHIP TRUSTEES MAY ALLOW COMPENSATION FOR OPERATIONS UPON NEEDY POOR.

The term "medical relief" as employed in Sections 3480, 3490 *and* 3546 *of the General Code providing for the furnishing of such to the poor by township and county authorities includes "surgical relief."*

When therefore, physicians are not regularly contracted for by township authorities, upon the proper notice given, surgeons may be reimbursed for operations performed for needy poor, in such measure as the township trustees see fit to allow.

COLUMBUS, OHIO, June 22, 1912.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Under date of June 12, 1912, you inquire of this department as follows:

> "Our city has built a city hospital, since then the township trustees of Tuscarawas township and the county infirmary directors are getting numerous applications for surgical operations at the expense of the tax payers. For example in appendicitis cases the doctors, since the hospital is built, when they get one of these patients they call up the township trustees or infirmary directors and say that a certain patient who is not able to pay must be operated upon at once or they will die.
>
> "I have examined the statutes and am unable to find any direct authority on such cases, that is are the township trustees or infirmary directors authorized to pay for surgical operations upon people who are a public charge?
>
> "These people are taken to the hospital, the doctor charges from thirty-five to fifty dollars for the operations and the care and nursing in addition runs from thirty-five to fifty dollars and it is getting to be quite a burden."

Section 3480, General Code, authorizes the township trustees to grant medical relief under certain conditions, as follows:

> "When a person in a township or municipal corporation requires public relief, or the services of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer. If medical services are

required, and no physician or surgeon is regularly employed by contract to furnish medical attendance to such poor, the physician called or attending shall immediately notify such trustees of officer, in writing, that he is attending such person, and thereupon the township or municipal corporation shall be liable for relief and services thereafter rendered such person, in such amount as such trustees or proper officers determine to be just and reasonable. If such notice be not given within three days after such relief is afforded or services begin, the township or municipal corporation shall be liable only for relief or services rendered after notice has been given. Such trustees or officer, at any time may order the discontinuance of such services, and shall not be liable for services or relief thereafter rendered."

The authority to regularly employ a physician by contract is found in Section 3490, General Code, which provides:

"The trustees of a township, or the proper officers of a municipal corporation in any county, may contract with one or more competent physicians to furnish medical relief and medicines necessary for the persons who come under their charge under the poor laws, but no contract shall extend beyond one year. Such physician shall report quarterly to the clerk of the township or municipality, on blanks furnished him for that purpose, the names of all persons to whom he has furnished medical relief or medicines, the number of visits made in attending such person, the character of the disease, and such other information as may be required by such trustees or officers."

It will be observed that in Section 3480, General Code, the term "physician or surgeon" is used, in addition to the term "medical services." In Section 3490, General Code, no reference is made to a suregon, but the township trustees are authorized to contract with one or more "physicians to furnish medical relief." Does this latter phrase include relief by a surgeon by an operation?

The same term is used in the statute authorizing the infirmary directors to enter into a contract for medical relief.

Section 2546, General Code, before the amendment of 102 Ohio Laws 433, provided:

"Infirmary directors may contract with one or more competent physicians, to furnish medical relief and medicines necessary for the persons of their respective townships, who come under their charge, but no contract shall extend beyond one year. Such contract shall be given to the lowest competent bidder, the directors reserving the right to reject any or all bids. The physicians shall report quarterly to the infirmary directors on blanks furnished by the directors, the names of all persons to whom they have furnished medical relief or medicines, the number of visits made in attending such persons, the character of the disease, and such other information as may be required by the directors. The directors may discharge any such physicians for proper cause."

The amendatory act does not take effect until January 1, 1913, and the above section applies at the present time,

The provisions of Section 3480, General Code, were under consideration in the case of Trustees vs. White, 48 Ohio St., 577, the syllabus of which case reads:

"Physicians affording relief to a person in condition requiring relief under Section 1494, Revised Statutes, which provides that the township shall be liable for relief afforded "only in such amount as the trustees determine to be just and reasonable," have a claim against the township wherein such relief is afforded for no greater amount than the trustees determine to be just and reasonable. And where the trustees have considered a claim, and, acting in good faith, have rejected it, no action can be maintained against the township."

The bill rendered in the above case and for which payment was demanded was for services as a surgeon.

The court, Spear, J., says on page 579:

"Although many changes were made in this statute by amendment, the section quoted was not altered until the statute of April 12, 1876, when, for the first time, the services of physicians and surgeons were in terms included in the statute."

On page 584, it is further said:

"In regard to the effect of the determination of the trustees, we think the language used leaves no serious question. The words of the additional clause as to liability are apt words to express a purpose to lodge with the trustees the discretion and power to determine finally the amount of compensation to be awarded to *physicians and surgeons* rendering services under the statute, and it is difficult to attach any meaning whatever to those words unless the plain ordinary signification is the true meaning. We conclude that the legislature meant, by the clause quoted, that which the words naturally import, and that the discretion conferred upon the trustees, when exercised, is to be held conclusive and final."

In case of Wetherall vs. Marion county, 28 Iowa 22, it is held:

"The term 'duties of physician" as used in a contract between the plaintiff, as a physician, and the board of supervisors of the county of M., for the performance by him of professional services for the paupers of said county at the poor house therein, was held to include, in its general and ordinary acceptation, the usual cases of surgery as well as the administration of medicine."

Cole, J., says at page 24:

"If we were, therefore, driven (as perhaps we are not) to determine as a matter of legal construction, the meaning of the terms 'duties of physician' and 'medical treatment' we should not hesitate long in deciding that they, like the degrees or diplomas of those who practice them, include both medicine and surgery."

Section 3480, supra, provides that if "no physician or surgeon is regularly employed by contract to furnish medical attendance," relief may be given in the manner therein provided. This section contemplates that a physician or surgeon may be employed by contract. Section 3490, General Code, authorizes a contract

with a physician for medical relief. There is no other statute authorizing the township trustees to contract for the services of a physician. Section 2546, General Code, authorizes a contract with a physician for medical relief by the infirmary directors. These are the only provision of the statute authorizing a contract with a physician for medical relief of the poor.

The provision of Section 3480, supra, as to a contract with a physician or surgeon, refers to the authority granted in said Sections 3490 and 2546, General Code. It is therefore evident that the term physician as used in said sections, will include a surgeon, and that the term "medical relief" will include "surgical relief." I am of the further opinion that where a contract is entered into with a physician either under Section 3490 or under 2546, General Code, to furnish medical relief for the poor, said contract will include services to be performed as a surgeon as well as services performed as a physician as those terms are understood in the profession of medicine. The words "physician" and "medical relief" as used in the statutes are to be given their ordinary meaning, rather than the narrow professional meaning of the terms.

The provision of Section 3480, General Codee, applying when no physician or surgeon is regularly employed to furnish medical attendance to the poor, who are a public charge.

By the decision in the case of Trustees vs. White, 48 Ohio St., 577, supra, it is seen that the amount to be paid for such services is to be determined by the trustees. The trustees also are to determine if the claim is a proper one to be paid by the township.

Said Section 3480, General Code, will include services of a surgeon for surgical operations, but pay for such services and the amount to be paid is subject to the decision of the trustees.

The obligation of the public to furnish relief to the needy and poor is stated by Spear, J., at page 578, in Trustees vs. White supra as follows:

> "Whatever moral duty rests upon the well-to-do to aid those less fortunate, in their distress there is aside from the obligations attaching to husband, parent and guardian, no legal obligation to perform that moral duty, nor to recompense another who may voluntarily render the needed service, nor is there, at common law, any such legal duty imposed upon the community. Clearly, then, the plaintiffs could not recover unless, by statutory authority, a right of action is given."

The authority to pay for such services is prescribed by the statutes, and the provisions thereof must be complied with.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

510.

GRAND JURORS—MILEAGE WHEN GRAND JURY ADJOURNS FROM TIME TO TIME.

Though the law expressly provides for only one session of a grand jury, yet if in the interests of economy and justice it is deemed advisable to adjourn from time to time the grand jurors may be allowed mileage upon each return to the county seat after a period of such adjournment.

COLUMBUS, OHIO, July 11, 1912.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I am in receipt of your letter of June 11th, wherein you state as follows:

> "On account of the stress of business in my county it has been found necessary to adjourn the grand jury from time to time in order to complete the business and to give men confined in the county jail and out on bond, an opportunity for being tried, and especially it is true on account of our jail facility, having a small and inadequate building. The grand jury met for the April term and after being in session about six days and disposing of their business at that time, they were adjourned by order of the court subject to the call of the clerk, in order to dispose of the business that would accumulate before the end of the term in July and the beginning of the next term in October. They reconvened on the tenth day of June and disposed of the business for which they were called.
>
> "QUERY: Are they entitled to mileage for the distance covered by them from their homes to the court house?"

Section 3008, General Code, provides as follows:

> "Each grand or petit juror drawn from the jury box pursuant to law, each juror selected by the court as talesman as provided by law, and each talesman, shall receive two dollars for each day of service, and if not a talesman, five cents each mile from his place of residence to the county seat. Such compensation shall be certified by the clerk of the court and paid by the county treasurer on the warrant of the county auditor."

There is no provision in the above statute that mileage shall only be paid once, nor is there any provision that such mileage shall not be paid more than once. The statute is silent upon the subject and should, therefore, receive, a reasonable construction.

It is contemplated that whenever a grand jury is brought together, such jury shall consider all the business before it without adjournment, except from day to day, and that after such business is completed the said jury will be discharged finally. However, if in the interest of public justice and economy it is deemed advisable by the court to adjourn said jury, subject to the call of the clerk instead of holding it together during the entire term, and thus allow the jurors to return to their respective homes, I believe a reasonable construction of the statutes in question would entitle said grand jurors to their mileage in returning to the per-

formance of their duties upon order of the court and call of the clerk. It is not only just so to do, but more economical to allow them to return to their respective homes than to hold them together during the entire session of the court.

I, therefore, hold that grand jurors who are adjourned by order of the court and allowed to return to their respective homes, subject however, to be reconvened upon call of the clerk are, on so returning entitled to the mileage provided for in Section 3008 of the General Code.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

511.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—FUNDING INDEBTEDNESS OF COUNTY COMMISSIONERS—PAYMENT OF SALARIES—APPROPRIATIONS—CERTIFICATES OF INDEBTEDNESS—PURCHASE OF SUPPLIES—CLAIMS OF BENEVOLENT INSTITUTIONS AGAINST COUNTY.

A county officer's salary may be said to be "an existing, valid and binding obligation against the county" within the meaning of Sections 5656 *and* 5658 *of the General Code so as to justify the borrowing of money by the county commissioners in order to meet the same, when the claim for such salary accrues at the end of each month.*

Even though it would be legal practice for the commissioners to transfer from the undivided tax fund to the county general fund, such a proceeding would not avail, to pay salaries for the reason that Section 5049 *of the General Code will not permit expenditures from other than funds specifically appropriated therefor.*

Section 5656 *of the General Code in providing that the commissioners "may borrow money 'or' issue bonds thereof" enables them to issue certificates of indebtedness or promissory notes.*

In the absence of specifically appropriated funds the commissioners may not purchase supplies. Appropriations may be made for contingencies however, to take care of deficiencies in the various funds.

Claims presented by benevolent institutions of the state, for clothing for inmates from the county may not be paid in the absence of appropriations for the purpose. Money may be borrowed for the purpose of paying the same however, under Section 5656 *of the General Code.*

COLUMBUS, OHIO, July 6, 1912.

HON. F. A. SHIVELY, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 27th, submitting several questions that have arisen in Adams county under the appropriation sections of the Smith one per cent. law, so-called. You state that you have a copy of my opinion to Hon. Edward C. Turner, prosecuting attorney of Franklin county, Ohio, and that the questions which you are submitting are such as have arisen in your mind concerning the application of that opinion. In answering your several questions I shall leave out much of the reasoning upon which my conclusions have been based, because it is set forth rather fully in the opinion to Mr. Turner.

Your questions are as follows:

"1. When may a claim, such as a county officer's salary, be said to be 'an existing, valid and binding obligation against the county' within the meaning of Sections 5656 and 5658 of the General Code?

"2. May the commissioners, for the purpose of securing money necessary to pay salaries and other legal claims, without the necessity of a monthly borrowing, transfer temporarily from the undivided tax fund to the county fund; and when a sufficient indebtedness has been incurred to make the borrowing of money convenient, proceed to do so and reimburse the county fund and transfer back to the undivided tax fund the amount taken therefrom?

"3. Must the commissioners, in borrowing money under Section 5656 of the General Code, issue bonds, or may certificates of indebtedness or notes be issued and redeemed subsequently by the isuance of bonds?

"4. If an appropriation account for a class of expenses subject to contract, such as office supplies becomes exhausted before the time for the next semi-annual appropriation, how may the commissioners secure money to furnish such supplies?

"5. Certain benevolent institutions of the state have presented their bills for clothing for inmates from Adams county, etc., due prior to March 1, 1912, but not presented until after that date; no appropriation was made to pay such bills nor is there any money in the treasury appropriated. How may these claims be paid, if at all?"

In connection with all these questions you state that the county officials' fee funds do not produce enough money to accumulate any surplus transferable to any of the other funds of the county.

Answering your first question, I am of the opinion, upon the reasoning found in the opinion to Mr. Turner, that a claim for the salary of a county officer becomes "an existing, valid and binding obligation against the county" within the meaning of Section 5658 of the General Code, when it has been earned. County officers' salaries are payable monthly. Such claims, therefore, accrue monthly. Money may not be borrowed in advance of the accrual of such claims.

Answering your second question, I beg to state that in my opinion a temporary transfer from the undivided tax fund to the county fund to pay salaries, so as to enable the commissioners to borrow a larger amount at a given time than they would otherwise be able to borrow, would not solve the problem, even if authorized by law. The plain requirement of the Smith law, Section 5649-3*d*, is that all expenditures within the six months following an appropriation period shall be made from and within the appropriations then made, and the balances thereof. If, therefore, the county fund should subsequently to the appropriation period, receive an accession of money, either by transfer from the undivided tax fund or from any other source, such money would not be available for expenditures for any purpose covered by any of the regular funds of the county until after the next appropriation period.

I enclose herewith a copy of an opinion to the bureau of inspection and supervision of public offices, in which I discuss the reasons for this holding. In other words, the only exception to the rule of Section 5649-3*d*, aside from the payment of salaries of deputies and assistants, out of the fee funds of the various county officials, is that of the proceeds of loans made by the county commissioners or other like authorities. All the ordinary current revenues of the county can only be expended after appropriation. Therefore, even after the money from the un-

divided tax fund has been transferred, in the manner of which I speak, to the county fund, it could not then lawfully be expended from the county fund in the absence of an appropriation thereof. The method which you suggest may be a convenient one and might be approved by the bureau of inspection and supervision of public offices as an emergency measure, the attitude of that department during the current year to relax the strict letter of the law so as to enable the various counties to get most conveniently upon the cash basis which the Smith law clearly requires. I would rather, however, that you would communicate directly with the bureau of inspection and supervision of public offices, to ascertain the attitude of that department as to the procedure of which I have just been speaking.

Answering your third question, I am of the opinion that the power of the commissioners is to borrow money by other methods than the issuance of bonds, if deemed advisable. Section 5656 of the General Code provides that the commissioners "may borrow money *or* issue the bonds thereof." The significance of the word "or" in this connection is dwelt upon in Commissioners vs. State, 78 O. S. 287, to which I refer you. The commissioners, therefore, have the power to issue certificates of indebtedness or promissory notes of the county, not binding themselves personally in any way, for such amounts as they may need from time to time. Indebtedness created in this manner may be refunded by an issue of bonds, advertised and sold in the manner prescribed by law for the issuance and sale of county bonds. Such bonds may not be *exchanged* for the outstanding notes. Commissioners vs. State, supra.

Answering your fourth question, I beg to state that in my opinion the commissioners have no way in which they may secure money to furnish supplies or otherwise provide for contractual claims after an appropriation has been exhausted, and are therefore simply without power to purchase such supplies or to enter into such contracts during such time. In the opinion to the bureau of inspection and supervision of public offices, copy of which is enclosed, you will find suggested a method for ameliorating the rigidity of the appropriation section of the Smith law in this particular. That method is, in short, for the commissioners to provide in each fund a contingent account at the time of making the semi-annual appropriation. The purpose of this contingent account would be to provide for deficiencies in any of the detailed appropriations made from that fund.

I am of the opinion also that it would be proper and lawful for the commissioners to levy a sufficient amount expressly for the purpose of creating a contingent fund the proceeds of which should be subject to appropriation and expenditure in providing for deficiencies in any of the detailed appropriations from any of the funds. In the absence of such provision, however, I know of no manner in which an emergency, such as you speak of in your fourth question, can be met.

Answering your fifth question, I am of the opinion that the claims presented to you by the benevolent institutions of which you speak cannot be paid until there is money in the treasury appropriated for the purpose of paying them, unless the commissioners desire to borrow money for that purpose. Without quoting the various statutes under which benevolent institutions are authorized to draw upon the various counties for a portion of the expense of the maintenance of the wards of the state, suffice it to state that such claims are created independently of the action of the county commissioners and constitute an obligation of the county independently of the provisions of Section 5660 of the General Code. So that, upon the principles set forth in the opinion to Mr. Turner, money may be borrowed for the purpose of paying such claims under authority of Section 5656 of the General Code.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

515.

COMPENSATION OF JUDGES AND CLERKS AT ELECTIONS WITHIN SPECIAL SCHOOL DISTRICT WHEN BOND ISSUE VOTED ON SAME DATE AS PRIMARY NOT DOUBLED—CHANGE OF HOURS—EXPENSES PAID BY COUNTY.

Judges and clerks are to be paid three dollars ($3.00) *under Section* 4860 *of the General Code for each "election" at which they serve, and the fact that the judges and clerk of the West Carrollton school district served at an election whereat votes were cast both upon the primary and also upon a school district bond issue would not entitle them to double pay.*

Under Section 5092 *of the General Code school elections are paid for by the county and there is no authority to charge back the expenses of the same against the special school district.*

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Your favor of July 1st received. You state:

> "After the call had been issued for the primary election on May 21st, the board of education of the West Carrollton village school district determined to submit a bond issue question at that same election, for which the proper notices were given, and both elections were held at the same time. The hours of the primary election closed at 5:30 p. m., but the election board held that the hours for the special election on the bond issue could not close until 6:00 p. m. The election officers in the two precincts comprising the West Carrollton village school district are claiming two days' pay for their services."

and request my opinion as to whether they are entitled to two days' pay or only one.

The duties and compensation of judges and clerks of election are found in Sections 4859 and 4860 of the General Code, which are as follows:

> "Section 4859. The judges and clerks of elections, provide for herein, shall serve as such in all elections held under the provision of this title. They shall perform all the duties and be subject to all the penalties imposed by law upon judges and clerks of election.
>
> "Section 4860. Such judges and clerks shall each receive as compensation for their services the sum of three dollars, which services shall be the receiving, recording, canvassing and making returns of all the votes that may be delivered to them in the voting precinct in which they preside on each election day. In any county containing a city having a population of three hundred thousand or more by the last preceding federal census, the compensation of such judges and clerks for such services shall be five dollars. In cities where registration is required, the compensation of judges and clerks shall be as otherwise provided by law."

Both elections were held on the same day; ballots for the primary and ballots for the bond issue were handed to the voters as they came into the polls. I agree with you that though the hours required for the special election are longer than those for the primary election the greater would include the less. It became the duty of the judges and clerks, as such, to receive, record, canvass and make

returns of all the votes that were delivered to them in the voting precincts in which they presided on election day, whether on bond issue or primary election. The judges and clerks receive three dollars for the election and not for any particular number of hours of work; the time of closing the polls has nothing to do with the amount of compensation; they are paid, as before stated, so much for an election, and it does not make any difference how many questions are voted on a said election, or how many tickets there may be in the field, and there is no express statutory authority for additional compensation for special elections called on the same day as a general election.

You state in your letter that the claim was made for double compensation for the reason that the expense of the primary election was paid by the county and the expense of the special election would be charged back against the school district, that for that reason election judges and clerks were entitled to compensation for two days. I have already held, in an opinion addressed to Hon. Roderic Jones, city solicitor, Newark, Ohio, dated March 9, 1912, that under Section 5092 of the General Code provision is made for the payment of school elections by the county, and there is no authority to charge back such special election against the special school district wherein such special election is held. I therefore hold that the election judges and clerks in the two precincts comprising the West Carrollton village school district are entitled to but one day's pay for the services at the primary held on May 21, 1912.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

516.

INTOXICATING LIQUORS—PENALTY FOR ADVERTISING OF INTOXICATING LIQUORS IN DRY TERRITORY BY KENTUCKY FIRM.

A person engaged in the sale of intoxicating liquors both in Ohio and Kentucky who advertises in dry territory, giving purchasers the option of buying either at the Kentucky or Ohio establishment is subject to the penalty prescribed in Section 13223 *of the General Code.*

COLUMBUS, OHIO, July 11, 1912.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—In your letter of February 29, 1912, you ask my opinion upon the following question:

> "Where a person is lawfully engaged in the sale of intoxicating liquors in both Ohio and Kentucky, and has his letter heads, literature, etc., showing that he is engaged in business in both states.
>
> "Can he advertise by posters and through the mails in any dry territory in this state?"

Section 13223 of the General Code provides:

> "Whoever, directly or indirectly, solicits orders for intoxicating liquors in a county or territory where the sale of such liquor as a beverage is prohibited shall be fined not less than one hundred and fifty

dollars nor more than four hundred dollars, and, for each subsequent offense shall be fined not less than four hundred dollars nor more than eight hundred dollars."

Our supreme court, in the case of Hayner vs. State, 83 O. S. 178, has held that this statute is constitutional. The court further decided that "such solicitations may be made by letter as well as in person."

If the posters, spoken of in your inquiry, were solicitations for sale of intoxicating liquors, the prospective purchasers having the option of sending their orders either to the Ohio or Kentucky establishment, and such solicitations were mailed to persons situated in dry territory, then, it is my opinion, under the authority of the Hayner case, supra, that the person is guilty of a violation of Section 13223 of the General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

525.

TOWNSHIP CLERK—EXTRA COMPENSATION AS CLERK OF SCHOOL BOARD BUT NOT AS CLERK OF BOARD OF HEALTH.

By provision of Section 3391 *of the General Code the township clerk is required to act as clerk of the township board of health and as there is no provision therefor, he cannot receive extra compensation for services in the latter capacity, where the limitation of* $150 *per year specified in Section* 3308 *of the General Code has been reached.*

Under Sections 4747 *and* 4781 *of the General Code by virtue of the specific provisions therein the township clerk may receive added compensation for his services as clerk of the township board of education.*

COLUMBUS, OHIO, July 11, 1912.

HON. M. O. BURNS, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—Your communication of sometime ago received, in which you state that the clerk of Fairfield township, of your county, acting as clerk of the board of health, received additional compensation for such services, and that he had already received $150.00, the maximum sum allowed township clerks payable out of the township treasury, and requesting my opinion upon the question as to whether or not township clerks are allowed additional compensation for acting as clerk of boards of health of the townships, and

Second: requesting my opinion as to whether or not township clerks are entitled to extra compensation for acting as clerk of the township board of education.

In answer to your first question, I desire to say that Section 3391 of the General Code of Ohio provides as follows:

> "In each township the trustees thereof shall constitute a board of health, which shall be for the township outside the limits of any municipality. Each year they shall elect one of their number president and the township clerk shall be clerk of the board of health. They

> shall appoint a health officer and may appoint as many sanitary officers as they deem necessary to carry out the provisions of this chapter and they shall define the duties and fix the compensation of such appointees who serve during the pleasure of the board. Such board of health shall meet annually and at such other times as it deems necessary."

By virtue of the above section, just quoted, the township trustees become ex-officio the board of health of the township, and the township clerk becomes ex-officio clerk of the board of health of the township, but nowhere in this, or any other section does the law grant any extra compensation or fees to a clerk of the township board of health, nor authorize the trustees, as the township board of health, to make any allowance to the township clerk as its clerk.

Section 3308 of the General Code specifically provides what fees the clerk shall receive as clerk of the township, and specifically provides as follows:

> "In no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars."

It will be plainly seen that township clerks are compensated by statutory fees, and the maximum which any township clerk may receive out of the township treasury is $150.00, and in your inquiry you state that the township clerk of Fairfield township had received the maximum amount allowed by law as to township clerks, and extra compensation as clerk of the township board of health.

While under the rule laid down in the case of Marion Township Board of Health vs. Columbus, 12 Ohio Decisions, 554, "that township boards of health and township trustees, although the latter constitutes the former, are separate and distinct functionaries, and neither have control over the affairs of the other," I am of the legal opinion that the township trustees, as the township board of health, have such powers, and such only, as are conferred upon them by statute, and the statute above quoted (Section 3391 of the General Code) creating said board, did not grant it the power to allow any compensation to its clerk, who is ex-officio clerk of the board by virtue of his office as township clerk, and in view of the fact that the legislature has not provided any lawful additional compensation to said clerk, nor authorizing the township board of health to make any allowance to its clerk, I am of the opinion that the township clerk, acting as clerk of the board of health, cannot draw any additional compensation from the township treasury, but is limited to receive only the sum, or sums, which he may be entitled to as township clerk, and in no case, other than where there is legal authority to extra compensation or allowance, can he receive in excess of the maximum amount provided in Section 3308 of the General Code viz.: $150.00, in any one year.

In reply to your second question, as to whether or not township clerks are entitled to extra compensation for acting as clerk of the township board of education, I desire to say, that on February 9, 1912, I rendered an opinion on said question to the Hon. Theo. H. Tangeman, prosecuting attorney of Auglaize county, Ohio, in which I held that the board of education may lawfully pay additional compensation to the township clerk for acting as clerk of said board, and base my opinion upon the following statutes, to-wit:

Section 4747 of the General Code provides that the board of education of each school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, one as vice president, and, in township school districts, the clerk of the township shall be clerk of the board.

Therefore, in the first place, under said section, the township clerk becomes ex-officio clerk of the board of education of township school districts.

Section 4781 of the General Code provides, in part, as follows: "The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the contingent fund of the district."

Hence, Section 4781, just above quoted, authorizes the board of education to fix the compensation of its clerk and treasurer, and, under the ruling laid down in the case above cited in answer to your first question, the duties being separate and distinct, and provisions having been made by the legislature for compensation to be fixed by the board, I am of the opinion that the clerk of the township, acting as clerk of the township school district by virtue of his office, may receive additional compensation as such clerk, although he may have received from the township treasury the maximum sum of $150.00 in any one year, as provided in Section 3308 of the General Code.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

527.

COUNTY EXPERIMENT FARM—POWER OF COUNTY COMMISSIONERS TO PURCHASE LAND WITH RESERVATION OF COAL MINING RIGHTS.

The general power given to the county commissioners under Sections 1165-1 *to* 1165-12 *of the General Code to purchase land for experiment farms, is subject to no statutory restrictions with respect to the nature of the title which may be taken and therefore they may take a deed with reservations of mining rights therein.*

COLUMBUS, OHIO, July 14, 1912.

HON. WILLIAM V. CAMPBELL, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 29th, containing the following question, upon which you ask my opinion:

> "The matter of the purchase of an experiment farm about which I called your office this morning stands as follows:
>
> "The county has taken the necessary steps to provide for the purchase of an experiment farm as provided by Section 1165-1, and following sections, and have decided on the location and farm, but the owner wants to reserve the No. 8 vein of coal underlying all of said premises, and the following reservation on 36 acres:
>
> "The right to use such part of the thirty-six acres in square form off the northwest corner of the lands above described as may be necessary for the purpose of mining said coal or other coal belonging to the said A. O. Orison, his heirs and assigns, or exercising any right incidental thereto, or that may be necessary for the depositing of gob or refuse from the mines on said lands, or in any way necessary to carry on the coal business, except for the erection of dwelling houses thereon.
>
> "This is the part concerning which I was in doubt."

It is well settled in this state that the county commissioners possess only such powers as are derived from the statute. The provisions of the experiment

farm act, Sections 1165-1 to 1165-12, inclusive, provide for the establishment, and the manner of selection and purchase, of an experiment farm within a county where the voters have authorized the same, and the issue of notes or bonds for the purchase and equipment of such farm.

The section of the code authorizing the purchase of a site for a court house contains the provision that "the title to such real estate shall be conveyed in fee simple to the county."

The statute providing for the establishment, selection and purchase of an experiment farm is general, and it is my opinion that the commissioners would be authorized to purchase said farm, even with the vendor reserving to himself the coal rights underlying the premises sold.

In ordinary acceptation "purchase" is the voluntary conveyance of title by one living person to another. In common usage as a verb Webster defines it as, "To buy, to obtain property by paying the equivalent in money." So, the statutory provisions would authorize the commissioners, before the requirements have been complied with, to buy such lands as they deem fit for the purposes of an experiment farm, and which had been selected as provided by the act; the fact that there was a reservation of the coal underlying the premises would not, in my opinion, prohibit them from taking the title, since it is the surface that they expect to use.

In other jurisdictions are found statutory prohibitions against public officers or counties taking deeds with reservations and conditions, whether in lands donated or purchased, but we have no such statute.

While apparently a more serious question arises in the extended reservation as to the 36 acres, still I am inclined to the view that if the commissioners and board of control deem the 36 acre tract a mere incident to the rest of the farm, there is no reason for not taking a deed for same even with all the reservations noted. The legislature authorized the purchase of the farm; it was not seen fit to prescribe the character of title to be taken, and it is my opinion that a wide discretion is granted to the purchasing officers.

Of course, no permanent improvements should be placed on such 36 acre tract, nor should expenditures be made thereon which would cause loss to the county by reason of the owner of the coal exercising his right to make use of such tract. The respective rights of the parties should be carefully guarded in the deed and provision made for saving the crops of the current year, and for due notice to the county in the event that the owner of the coal desired to so use the tract as to exclude its use for farming purposes.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

528.

ELECTION VOID WHERE TWO CANDIDATES FOR JUSTICE OF THE PEACE INSERTED ON BALLOT WHEN ONLY ONE OFFICE TO BE FILLED.

When by mistake the names of two justices of the peace were inserted upon the ballots and voted upon at an eleection whereat only one could have been properly elected, held:

The election was void for uncertainty as there was no way of ascertaining the choice of the electors and neither one of the candidates could be declared to have been elected.

COLUMBUS, OHIO, July 11, 1912.

HON. CHARLES F. RIBBLE, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Under date of February 5, 1912, you inquire as follows:

> "In Monroe township, this (Muskingum) county, at the November election, 1911, by mistake, there were two justices of the peace elected when there should have been but one. There was in said township at the time, a justice holding who had been elected two years previous for the term of four years. In the printing of the ballots, it appears the error crept in, and provided for the election of two instead of one justice, as above mentioned. There were only two candidates for election to said offices and each received a certificate of election, also a commission from the governor. And each has presented his bond to the township trustees for approval. Said trustees have accepted and approved the bond for the one of said two justices which received the highest number of votes, and so far have refused to accept and approve the bond of the other."

It appears that two persons were voted for the same office when in fact but one could be elected, as there was but position to fill.

In the case of People vs. Board, 11 Mich, 111, the converse of this situation was presented. It was therein held:

> "Under a law authorizing the election of two circuit court commissioners an election was held, but is was conducted in all respects as if one only was to be chosen; two persons were opposing candidates, and each elector voted for one of the two, but in no instance did a ballot contain more than one name for this office. It was held that only the one receiving the highest number of votes was chosen, and as to the other there was a failure to elect, and it remained vacant."

A situation somewhat similar to the present one was passed upon in case of People vs. Ames, 19 How. Pr., 551, wherein the syllabi read:

> "By the statute of 1847 (Sessions Laws 1847, ch. 489, which is constitutional), the legislature provided that the boards of supervisors might limit the number of county superintendents of the poor to one, and that when no resolution to that effect was passed, the number should be three. If, therefore, a board of supervisors pass a resolution,

under this statute, declaring that hereafter there should be but one superintendent of the poor for the county (there being three at the time), they have no power thereafter, by resolution or otherwise, to declare that thereafter there shall be three such superintendents elected for the county. They have power only to reduce the number, none to increase it after it is reduced.

"If under a resolution to restore the number from one to three, an election is had, and three candidates are voted for, the election is void, because the resolution authorizing it is a nullity.

"And when but one person can be elected to an office, and three persons are named on the same ballot, the ballot is void."

Mullin, J., says on page 558:

"When but one person can be elected to an office and three are named on the same ballot, such ballot is void.

"So when three persons are declared elected to an office which but one can fill, there is no way of determining which one of them was elected, hence neither is entitled to the office."

In Paine on Elections at Section 554, it is said:

"Suppose three persons to be voted for when only two can be elected. What is the choice of the elector in such case? It is manifestly impossible to determine. The insertion in a ballot of a single name more than ought to be on it renders it as uncertain as though twenty were inserted. The result is that such a ballot is void for uncertainty. It fails to express the choice of the elector, and consequently cannot be counted as a vote."

The electors of a township have a right to choose who shall be justice of the peace. In the case presented only one justice could be elected, but the voters were permitted to vote for two persons for the office. There is no way to determine which one of the two receiving the highest number of votes would have been chosen if the electors had been given the privilege of voting for only one candidate. As between the two candidates there was no contest. They were not opposing each other.

The ballots were defective and did not permit the electors to express their preference for one of the candidates as against the other.

The election was void as to the office of justice of the peace and neither of the persons receiving a plurality of the votes can claim the office. The one who received the highest number of votes has no better claim to the office than the other.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

532.

TAXES AND TAXATION—LONGWORTH ACT—ROADS LOCATED OUTSIDE OF MUNICIPAL CORPORATION AND WITHIN TOWNSHIP —TAXING CORPORATION THEREFOR—POWER TO BORROW MONEY FOR DOES NOT INCLUDE POWER TO IMPROVE.

There is no constitutional objection to conferring upon a township power of levying upon the taxpayers of the entire township including those resident within a municipal corporation situated in said township for the "governmental" benefits of the improvement of roads located within the township but entirely outside of said corporation.

The fact that Sections 3295 *of the General Code and* 3939 *of the General Code confer upon townships the power to "issue bonds for road improvements in the same manner as such power is conferred upon municipal corporations, is not conclusive of the possession of the power of townships to make road improvements" when this power is not otherwise conferred.*

Power to improve roads situated as aforesaid upon election of the voters however, is conferred by Sections Nos. 7053 *to* 7060 *of the General Code.*

Such roads may also be improved under Section 7019 *to* 7032 *of the General Code, but only in the event that the county commissioners have not themselves taken up the work of improving said roads.*

COLUMBUS, OHIO, June 28, 1912.

HONORABLE LEWIS P. METZGER, *Prosecuting Attorney, Salem, Ohio.*

DEAR SIR:—On April 19th you submitted a question to me which I have studied under considerable difficulties. It was received at a time when I was busily engaged in various matters, so that some delay, for which I beg to apologize, has ensued in answering it. The question is as follows:

> "Can Perry township, Columbiana county, Ohio, within the territory of which is a city, to-wit, the city of Salem, issue bonds under Sections 3295, 3939 and 3940, General Code, by authority of the trustees, without an election, in an amount not to exceed 1 per cent. of all the property within the township, including the city of Salem, in any one year, for the purpose of improving the highways leading into the city, but entirely located within the territory of the township outside the incorporated city, and tax all the property within the township, including the property within the municipal corporation, to pay the interest and principal of said bonds?"

Two principal legal propositions are involved in this question, as follows:

1. What is the effect, if any, of the fact that proposed levies for payment of bonds are to be made upon the taxable property in the village as well as that in the remaining portions of the township; this question to be considered from the broader, or constitutional aspect?

2. What power has the township to construct improved roads?

I mention these questions separately because it seems to me from the phraseology, and from that of Mr. K. L. Cobourn to the bureau of inspection and supervision of public offices relating to the same matter, which has also been referred to me, that the first question is the one which has given you concern. It has been otherwise with me. There is a general implied constitutional limitation upon

the exercise of taxation which is stated as being that the purposes for which taxes are levied must pertain to the district within which the levy is made, see Wasson et al. vs. Wayne, 49 O. E., 622. Hubbard vs. Fitzsimmons, 57 O. S. 436.

The application of this principle to the question you submit does not offer any obstacle to the exercise of the power in question by township trustees. The incorporation of a municipality within the territorial limits, a township does not, as a general proposition, take the territory within the new corporate limits out of the township. It is still a part of the original taxing district, and the property therein must pay its share of the burden of taxation for township purposes. It is true that the taxable property in the city is subject to the additional burden, and the real property therein to the exceptional burden on account of the improvement of streets by paving as it customary. This furnishes no reason in law, however, for the conclusion that such property is no longer chargeable for a share of the burden of improving the road of the township, if the improvement of the roads be an activity which the township as a political subdivision is authorized by law to engage in. Many statutes, and some cases, may be cited upon the proposition that the mere fact that the power of the township and city as to a certain subject matter is similar does not prevent the township from supporting the exercise of its powers by a levy within the limits of the corporation.

Lewis vs. Laylin, 46 O. S., 663, Sections 6976 et seq. of the General Code.

The determination of what charges are township charges as such rests primarily in the discretion of the legislature, although the exercise of that discretion is not conclusive as disclosed by the cases already cited. If, however, the legislature enacts a law whereby a certain political subdivision is empowered to engage in a certain governmental activity, a very strong presumption arises to the effect that such activity is beneficial to all the inhabitants of that subdivision, and to no other, so, therefore, if townships are by the statutes authorized to build improved roads, it is to be presumed that this authority is granted because the inhabitants of that subdivision share with substantial equality to the exclusion of the inhabitants of other political subdivisions the benefits of such a policy in the governmental sense. If such statutes existed it would not do for a court to hold them unconstitutional either because it might be made to appear that as a matter of fact the inhabitants of other townships than the township making the improvement shared largely in the benefits thereof, nor because, on the other hand, a part of the inhabitants of the township might be subject to other and additional taxes or assessments for the purpose of improving certain specific roads or streets. The acceptance of the first theory would logically result in a holding that if road-making is a state or county activity no locality can be especially taxed therefor; the adoption of the other extreme, too, would necessitate the passage of a law virtually limiting the payment for the improvement of the road to assessments on specially benefited property.

Of course, governmental benefits must be carefully distinguished from special benefits. It is seemingly the intention of our legislature, as witnessed by the statutes on the subject, that the construction of a road confers both kinds of benefits. It is of the latter that I speak when I say that the legislature's determination as to the political subdivision the inhabitants of which are benefited in that sense by the making of an improvement and which ought, therefore, be the improving agency, and the district in which that tax shall be levied is therefore conclusive.

I am, therefore, of the opinion that as to the first of the two questions into which I have separated your query, that if the township as a political subdivision is authorized to engage in the undertaking of improving roads, then the burden of taxation for the support of this activity not only may, but *must* be shared by all

the taxable property in the township, including that which is situated within a city or village wholly or partly within such township, which said city or village may be itself a unit for the improvement of streets and roads.

It will thus be seen that the second of the two questions suggested by me is directly raised, and, therefore, it must be ascertained whether or not the statutes of this state do authorize the townships as such to engage in the enterprise of improving roads.

Sections 3295 and 3296 of the General Code are referred to by you and Mr. Coburn seemingly with the idea that they constitute legislation of the kind which I have been discussing. These sections provide as follows:

> "Section 3295. The trustees of any township may issue and sell bonds in such amounts and denominations, for such periods of time and at such rate of interest, not to exceed six per cent., in such manner as is provided by law for the sale of bonds of such township, for any period of the purposes authorized by law for the sale of bonds by a municipal corporation for specific purposes, when not less than two of such trustees, by an affirmative vote, by resolution deem it necessary, and the provisions of law applicable to municipal corporations in the issue and sale of bonds for specific purposes, the limitations thereon, and for the submission thereof to the voters, shall extend and apply to the trustees of townships.
>
> "Section 3939. When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by resolution or ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, at such rate of interest, not exceeding six per cent., and in the manner as provided by law, for any of the following specific purposes:
>
> * * * * * * * * * * * * * * * * *
>
> "4. For improving highways leading into the corporation, or for building or improving a turnpike, or for purchasing one or more turnpike roads and making them free.
>
> * * * * * * * * * * * * * * * * *
>
> "22. For resurfacing, repairing or improving any existing street or streets as well as other public highways."

Section 3940 provides as follows:

> "Such bonds may be issued for any or all of such purposes, but the total bonded indebtedness created in any one fiscal year under the authority of the preceding section, by a municipal corporation shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation, except as hereinafter provided in this chapter."

The question which has troubled me most arises right here.

I am aware that it has become generally understood that the so-called Longworth act, of which the above sections are parts, is sufficient authority for municipal, county or township authorities to undertake any of the things enumerated therein. Some of the enumerated things seem to be included in Section 3939 upon this theory. I cannot assent to it, however. In my opinion this statute authorizes the borrowing of money, but not the doing of the thing for which the money

is to be borrowed. I am aware of the seeming paradox here, and of the apparent *reductio ad absurdum* involved in holding that the legislature meant to authorize a municipal corporation to borrow money for an object for which it could not expend it when borrowed. A little reflection, however, will, I think, convince one that the view which I take here is correct. Suppose, for example, that the legislature should by amendment of other sections of the statute take away the power of a municipal corporation granted to it in such other sections to provide for the poor, and should make that exclusively a county function, could it still be held that the power of a municipal corporation to borrow money "for erecting infirmaries," as provided in paragraph six of Section 3939, would exist? I think not. I think it is intended by Section 3939 and the succeeding sections to provide that municipal corporations and townships may borrow money for the accomplishment of such of the enumerated purposes as may be committed by the legislature to such political subdivisions in other statutes.

So, therefore, a township cannot be said to have power to borrow money "for erecting workhouses, prisons and police stations," "for constructing wharves and landings on navigable waters" "for erecting infirmaries" "for the establishment of free public baths and municipal lodging houses," or any of the other enterprises in which townships are not otherwise authorized by law to engage. These four seemingly do not apply to townships, although all the "specific purposes" enumerated in Section 3939 are supposed to be purposes for which by Section 3295 townships can borrow money.

In truth, the Longworth act, so-called, though many times re-drafted by the general assembly, still fails to express the meaning which it is evidently designed to express. Section 3939 itself is in very bad form; it is certainly improper, if not unconstitutional, for the legislature to attempt to confer upon a political subdivision the power of engaging in certain governmental or proprietary activities simply by authorizing such subdivision to borrow money for that purpose.

I am, therefore, of the opinion that Section 3939 does not of itself confer authority on the township trustees to borrow money for the purpose of improving the highways, nor to levy a tax for the purpose of paying such a loan. I am of the opinion, however, that if elsewhere in the statutes there is found authority on the part of the township trustees to improve the roads of the township, then bonds may be issued under Section 3939 and subject to its limitations for the purpose of carrying that power into effect.

The whole subject of the improvement of the highways of a township by township trustees is provided for in Sections 6976 to 7060 of the General Code. In these sections will be found several striking inconsistencies which are explicable, however, by the fact that these sections are made up of different acts passed at different times, seemingly without regard to the existence of other laws covering the same subject matter.

Section 6976 authorizes the township trustees, upon petition, and after the favorable result of a general election, in the township, to improve by general taxation the road within such township.

"* * * including a road running into a through a village or city."

The machinery for this purpose is provided for by the sections beginning with the one already cited and ending with Section 7108 of the General Code. Sections 7019 to 7032, General Code, authorize the township trustees of any township, without any petition and without submitting any question to the vote of the electors of the township to make a levy each year

> "for the purpose of improving by macadamizing and graveling the public highways in the township."

Although the sections are short and not numerous, they provide a complete scheme for improving the roads of the township. Sections 7033 to 7052, inclusive, provide for the creation of the township, or part of it, as a special district for the improvement of the roads. It is expressly provided, however, in Section 7033 that territory within the boundaries of a municipal corporation shall be excluded from such road district.

Sections 7053 to 7060, inclusive, authorize the creation of the township into a separate road district, the boundaries of which seemingly are co-extensive with that of the township, which must be effected by a vote of the people.

Now coming to the application of these different statutory provisions to the question at hand, it appear that Sections 6076 to 7018, General Code, do not apply to nor authorize such an improvement as is contemplated, because it is only when one of the roads to be improved passes through or enters a municipal corporation that these sections apply, and this, as I understand it, is not the case which gives rise to the question submitted by you.

Sections 7033 to 7052 do not apply for the manifest reason that no territory within a municipal corporation can be included within the road district to be created thereunder. Sections 7053 to 7060 might apply, but would require an election, which, as I understand it, you want to avoid.

The only sections which would apply, and which would authorize township trustees to improve the roads of the township without authority of a vote of the people are Sections 7019 to 7032, inclusive. Section 7020, one of these sections, provides as follows:

> "The next preceding section shall not apply to townships in a county in which the county commissioners have improved or are improving the high ways by macadamizing and graveling."

The effect of this section is to withdraw the application of the whole subdivision of the chapter from the townships in which the county commissioners have improved the roads.

For the reasons already suggested, I am of the opinion that if there are at the present time in Perry township, Columbiana county roads improved by the county commissioners, or in process of improvement by such commissioners, the township trustees, without a vote of the electors, are without power to improve the roads of the township either within or outside of the corporate limits of the city of Salem; and they likewise without power, in spite of the provisions of Section 3939 of the General Code (adopted in 3295, G. C.), to borrow money and expend the proceeds thereof in making such improvement. On the other hand, I am of the opinion that if the county commissioners have not or are not now improving any roads in Perry township, the trustees of that township have the power, under Sections 7019 to 7032, inclusive, to improve by macadamizing and graveling the public highways in the township, and to levy annually for this purpose; and to aid in the execution of this power such trustees may borrow money under Sections 3295 and 3939, General Code.

I am further of the opinion that the taxes levied either with or without an issue of bonds, whether under Seections 7019 and 7021 themselves, or for interest and sinking funds purposes, to retire the bonds issued under Section 3939 for this purpose, must be upon the duplicate of the entire township including the city of Salem.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

535.

SHERIFF—FEES FOR RECEIVING, DISCHARGING OR SURRENDERING PRISONERS—PAYMENT INTO FEE FUND.

By Section 2845 of the General Code the sheriff is entitled to charge a fee of fifty cents for receiving, discharging or surrendering each prisoner to be charged but once in each case and such fee is to be paid by virtue of Sections 2982 and 2983 of the General Code into sheriff's fee fund.

COLUMBUS, OHIO, July 17, 1912.

HON. R. A. BEARD, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your favor of June 21st, in which you state that your sheriff has discovered that many of the other sheriffs in the state are charging a fee of fifty cents as jail fees for receiving, discharging or surrendering each prisoner to be charged but once in each case, is received.

Then you inquire:

"Is the sheriff entitled to this fee, and if so, does it go to him personally or to his fee fund?"

Section 2345, General Code, provides as follows:

"For the services hereinafter specified, when rendered, the *sheriff* shall charge and collect the following fees and no more: * * * jail fees for receiving, discharging or surrendering each prisoner to be charged but once in each case, fifty cents * * *."

Section 2977, General Code, is as follows:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2978, General Code, provides as follows:

"Each probate judge, auditor, treasurer, clerk of courts, sheriff and recorder, shall charge and collect the fees, costs, percentages, allowances and compensation allowed by law."

Section 2983, General Code, is as follows:

"At the end of each quarter, each such officer shall pay into the county treasury on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during such quarter, for his official services, which money shall be kept in separate funds by the county treasurer, and credited, to the office from which they were received."

You will note that under authority of Section 2845, General Code, the sheriff has a right to charge fifty cents as jail fees for receiving, discharging or surrendering each prisoner to be charged but once in each case.

Section 2977, General Code, provides that "all fees, costs, percentages, penalties, allowances and perquisites collected or received by law as compensation for services by the sheriff, shall be received and collected for the sole use of the treasury of the county and shall be held as public moneys."

Section 2978, General Code, provides that "the sheriff shall charge and collect the fees, costs, percentages, allowances and compensation allowed by law."

Section 2982, General Code, provides that he shall keep account of all fees collected, and Section 2983, General Code, provides that he shall pay into the county treasury on the first Monday of April, July, October and January of each year, all fees collected.

I therefore, held that the sheriff is entitled to charge a fee of fifty cents for receiving, discharging or surrendering each prisoner, to be charged but once in each case and the fee is to be paid into the sheriff's fee fund.

Very truly yours

TIMOTHY S. HOGAN,

Attorney General.

536.

COUNTY FAIR ASSOCIATIONS—RIGHT TO FUNDS IN COUNTY—GENERAL FUND RAISED BY LEVIES FOR FAIR PURPOSES AT FORMER TIMES—ASSESSMENTS AGAINST ASSOCIATIONS FOR STREET IMPROVEMENTS NOT PAYABLE BY COUNTY.

By virtue of Sections 9893 *and* 9894 *of the General Code money raised by taxation for county agricultural society purposes need not be used within any specific time and when there is such money in the general fund of the county it may be used by said association after it has been properly appropriated.*

There is no statutory authorization permitting the county commissioners to pay special assessments for street improvements fronting on county fair association's property, from moneys in the county treasury.

COLUMBUS, OHIO, July 11, 1912.

HON. DAVID A. WEBSTER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Your favor of March 25, 1912, is received in which you inquire:

> "The directors of our county fair association failed to make the request upon the county commissioners, as provided by Section 9894, General Code, and for that reason the commissioners failed to make a levy for that purpose. But there is in the treasury, credited to the general fund, several hundred dollars that have been raised for the purpose of the county fair association prior to the levy made for this year.
>
> "Would the county commissioners have a right to pay out of the treasury, credited to the general fund, that sum which remains in the treasury and raised under the former levies, to the fair association, and under that portion of Section 9894, General Code, which reads as

follows: 'Said commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy.'

"A part of the fair grounds lies within the village of Montpelier and last summer they paved the street running along in front of the fair ground and the fair association's portion or assessment amounts to about $2,000.00 and they have paid into the village treasury about two hundred and seventy odd dollars, as the first installment of the assessment and while it might have been an oversight on the part of the fair association or the county commissioners, yet is would come very acceptable to the fair association this year if there could be paid out of the county treasury the amount of this assessment as paid by the fair association, as it will be impossible for them to get that amount as provided under said Section 9894, to-wit $1,500.00, as there is not that amount in the general fund not appropriated."

Section 9894, General Code, provides:

"When a county or a county agricultural society, owns or holds under a lease, real estate used as a site wherein to hold fairs, and the county agricultural society therein has the control and management of such lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners shall on the request of the agricultural society annually levy taxes not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy."

It appears that the county commissioners have made no levy as authorized by this section. The power of the commissioners to pay out of the general fund any money not otherwise appropriated, as given in the last sentence of Section 9894, General Code, is in anticipation of such levy. In your case no levy has been made, and there is therefore no levy to anticipate. The power here given is to advance the money until the amount due under the levy can be collected from the taxpayers.

It appears, however, that there is money in the county treasury which has been heretofore levied for the purposes of the county fair association, but which has not been expended by it.

Section 9893, General Code, provides:

"When money has been raised by taxation in a county for the purpose of leasing lands for county fairs, or of erecting buildings for county fair purposes, or for making improvements on county fair grounds, or any purpose connected with use of county fair grounds or the management thereof by a county agricultural society, it shall be used for such purpose only, notwithstanding the law under which the money was so raised has expired by limitation. Such moneys shall be used for the purpose intended by the act under which they were levied and collected by taxation."

There is nothing is Section 9894, General Code, to require the money that is raised by taxation for the purpose therein set forth, to be expended in any certain year. It may be partly expended in one and partly in another year.

By virtue of Section 9893, General Code, the money so raised by taxation cannot be used for any other purpose. It is my conclusion, therefore, that the money in the county treasury, which has been raised by taxation for the use of a county agricultural society under Section 9894, General Code, must be used for the purpose for which it was levied. A balance remaining at the end of the year may be used the following year.

The balance in your county treasury to the credit of the county fair association, or which was levied for its use, may be now used by said association, after the necessary appropriation has been made thereof.

You inquire further as to securing a repayment from the county of the amount paid for a special assessment upon the property of the fair association for the improvement of a street.

The assessment is made against the property, which is under the control and management of the fair association. It is in fact a debt of the association and not of the county. I find no authority for the county commissioners to pay such special assessment from the funds of the county.

Section 9895, General Code, provides:

> "If a county society and the county commissioners decide that the interests of the society and county demand an appropriation from the county treasury for the purchase and improvement of county fair grounds greater than that authorized by the preceding section, or without action of or purchase by the society, the commissioners may levy a tax upon all the taxable property of the county, the amount of which they shall fix, but shall not exceed half a mill thereon, in addition to the amount authorized in the preceding section to be paid for such purpose."

By virtue of Section 9896, General Code, a levy under the foregoing section must be submitted to a vote of the electors of the county.

Section 9887, General Code, provides:

> "When a county society has purchased, or leased real estate whereon to hold fairs for a term of not less than twenty years, or the title to the grounds is vested in fee in the county, but the society has the control and management of the lands and buildings; if they think it for the interests of the county, and society, the county commissioners may pay out of the county treasury the same amount of money for the purchase or lease and improvement of such site as is paid by such society or individuals for that purpose, and may levy a tax upon all the taxable property of the county sufficient to meet such payment."

These sections authorize the commissioners to levy a tax under certain conditions, but do not authorize them to pay money from the county treasury to meet the expenditures of the fair association, such as are made for a special asessment.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

537.

BOXWELL-PATTERSON GRADUATE—TUITION—BOARDS OF EDUCATION—EFFECT OF REMOVAL TO OTHER DISTRICT—DIPLOMA ENTITLES TO ATTENDANCE AT ANY HIGH SCHOOL.

When a Patterson graduate whose tuition at an outside district first grade high school has been paid by the school board of her legal residence, removes to a special school district maintaining a third grade high school, and still continues to attend the fourth year of the first grade high school aforesaid, there is no provision of law by which either the school board of her first or that of her new residence can be made chargeable with her tuition.

Under Section 7744 of the General Code she is entitled to attend any high school in the state. This statute applies to the first grade high school aforesaid, and no contrary provision being made for tuition, none need be paid.

COLUMBUS, OHIO, June 24, 1912.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I herewith acknowledge the receipt of your inquiry of June 14, 1912, wherein you inquire as follows:

> "A Patterson graduate in Miami township, Clermont county, Ohio, attended the Milford (Ohio) school for three years as such graduate, gave due notice to the Miami township school board, and the Miami township school board paid her tuition for three years at the Milford high school.
>
> "In March of her third year in the Milford school she moved from Miami township to Owensville special school district in Stone Lick township, Clermont county, Ohio. She continued from March to June to go to the Milford school which was her third year at that school, the Milford school maintaining a four years' course. In the following fall she again attended the Milford school for her fourth year, being then a resident of the Owensville school district in Stone Lick township, there being maintained by the Owensville school board a high school having three years' course. She did not notify the Owensville board of her attendance at the Milford high school for the fourth year. After she attended the Milford school and graduated therefrom the Owensville board of Stone Lick township refused to pay her tuition at the Milford school, on the ground, first, that she had never gone to the Owensville school; second, that she was not a graduate of Stone Lick township; and, third, that she gave no notice of attending the Milford school during the fourth year.
>
> "The board of education of both the Milford school in Miami township where she attended high school and the board of education of the Owensville school where she resided, have requested an opinion from me as to who is liable for the payment of her tuition."

In reply to your inquiry I desire to say, that Section 7651 of the General Code classifies high schools as follows:

> "The high schools of the state shall be classified into schools of the first, second and third grades. All courses of study offered in such schools shall be in branches enumerated in Section 7649."

Section 7652, of the General Code, provides as follows:

"A high school of the first grade shall be a school in which the courses offered cover a period of not less than four years, of not less than thirty-two weeks each, in which not less than sixteen courses are required for graduation."

Section 7653, of the General Code, provides:

"A high school of the second grade shall cover a period of not less than three years, of not less than thirty-two weeks each, in which not less than twelve courses of study are required for graduation."

Section 7654. of the General Code, provides:

"A high school of the third grade shall cover a period of not less than two years, of not less than twenty-eight weeks each, in which not less than eight courses of study are required for graduation."

In your inquiry you state that the board of education of the Owensville school district, located in Stone Lick township, maintained a high school having a three-year course, so that, I concluded, the said Owensville high school is a high school of the second grade, as classified by statute.

The Milford high school, which the said Patterson graduate attended, being a high school with a four-year course, comes within the first grade, as classified by statute, above quoted.

Section 7748, of the General Code, provides as follows:

"A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except, that, a board maintaining a second or third grade high school is not required to pay such tuition when a levy of twelve mills permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a town-

ship or special district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a Boxwell-Patterson graduate."

It will be noted that said section only requires the boards of education of such high schools to pay the tuition of their graduates from such respective high schools to the high schools of a higher grade.

In an opinion of the date of July 31, 1911, which was rendered to the Hon. F. M. Stevens, prosecuting attorney, Elyria, Ohio, this department held that a board of education is not required to pay the tuition of pupils residing in its district while attending another high school, *unless such pupil is a graduate of its own school.* I am herewith enclosing a copy of said opinion.

In view of said opinion, it follows, therefore, that inasmuch as the Patterson graduate, about whom you inquire, was not a graduate of the Owensville high school, the board of education of the said Owensville school district is not liable for her tuition.

The said graduate is a Patterson graduate, and Section 7747, of the General Code, provides as to the tuition of such graduates, as follows:

"The tuition of pupils holding diplomas and residing in township or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other non-resident pupils."

After said graduate removed from Miami township, where she received her diploma, to the Owensville school district, she lost her legal school residence in said township.

It is to be noted that said Section 7747, of the General Code, specifically states that the board of education is only required to pay the tuition of pupils holding diplomas, and residing in township or special districts *in which no high school is maintained and in which such pupils have legal school residence.* In this connection, it is also to be noted that the Owensville school district, to which said pupil removed, maintained a high school of the second grade. It, therefore, follows, that said Section 7747, G. C., eliminates the school board of Miami township from any and all liability for the tuition of the said Patterson graduate for and during the time after she removed from Miami township, in Clermont county, to the Owensville school district in Stone Lick township in said county.

Section 7744, of the General Code, and its co-related sections provide for the acquiring of diplomas to attend high schools by pupils residing in districts which have no high school.

Said Section 7744 provides that such diploma shall entitle its holder to enter any high school in the state, as follows, to wit:

"The board of county school examiners shall provide for the holding of a county commencement not later than August 15th, at such a place as it determines. At this commencement an annual address must be delivered, at the conclusion of which a diploma shall be presented to each successful applicant wha has complied with the provisions hereof. *Such diploma shall entitle its holder to enter any high school in the state.*"

It is the clear intention of said section to give all pupils in the state, residing in school districts not having high schools, an opportunity to attend a high school, if such pupils desire to avail themselves of the opportunity to do so.

The fact that the said Patterson graduate had such diploma entitled her to enter any high school in the state.

For the reason herein stated, I am of the opinion that the school board of Miami township is not liable for the tuition of the said graduate for and during the time she attended the Milford high school after she removed from said township; also, for reasons heretofore stated, I am of the opinion that the board of education of the Owensville school district is not liable for her tuition for and during the time she attended the Milford high school after she removed from Miami township to Owensville.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

545.

AGRICULTURAL SOCIETIES—STATUTORY REQUIREMENTS—LEVY FOR—REQUEST FOR COUNTY AID—ONE SOCIETY TO A COUNTY.

That an agricultural society may receive the benefit of the levy provided for in Section 9894, of the General Code, all statutory provisions must be complied with, and when such an association is not properly organized and has not made the required request for the levy to the county commissioners they may not receive the benefit thereof.

The statutes provide for but one such agricultural society to a county, and where more than one has complied with the procedure for organization, the one which has first complied with the statutes is alone entitled to recognition.

COLUMBUS, OHIO, July 16, 1912.

HON. SHOLTO M. DOUGLAS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your favor of June 17, 1912, is received in which you inquire:

> "I wish to ask your opinion upon certain questions arising under Section 9894, G. C., which provides for a tax levy to support 'agricultural societies.'
>
> "Prior to the making of the tax levy a year ago there were in this county two fair associations. One was not organized as an 'agricultural society' as required by Section 9880, et sequor, and there is doubt as to whether or not the other association was so organized, but they, at least, were recognized by Mr. Sandles, of the state board of agriculture, as 'The Pike County Agricultural Society,' and upon his certificate they drew the '2c per capita' provided for by Section 9880.
>
> "This latter association by their officers requested in writing that this levy be made for their benefit; the president of the former says they made no request, but the secretary says an informal request for the levy was made to the auditor.
>
> "Shortly after this time both associations reorganized so as to

leave no doubt, I understand, that they were organized so as to entitle them to the proceeds of any future levy.

"The right of the association which claims to have been properly organized to the money is now disputed, and I desire to submit for your opinion, the following questions:

"Which, if either, of these associations is entitled to the proceeds of the levy made a year ago?

"Having now two 'agricultural societies,' now should the next levy be made for the benefit of both if both request it? If not, for which should it be made?"

Section 9894, General Code, to which you refer, provides:

"When a county or a county agricultural society, owns or holds under a lease, real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners shall on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out from the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy."

This section authorizes the county commissioners to make a levy upon "request of the agricultural society." One of the associations in your county made a written request for the levy to the county commissioners. The other made no request to the commissioners, but claim to have made an "informal request" to the auditor. You further state that the society claiming to have made the request to the auditor was not organized as required by Sections 9880, et seq., General Code.

Section 9880, General Code, provides:

"When thirty or more persons, residents of a county, or of a district embracing one or more counties, organize themselves into an agricultural society, which adopts a constitution and by-laws, selects the usual and proper officers, and otherwise conducts its affairs in conformity to law, and the rules of the state board of agriculture, and when such county or district society has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then, upon presentation to the county auditor, of a certificate from the president of the state board attested by the secretary thereof, that the laws of the state and the rules of the board have been complied with, the county auditor of each county wherein such agricultural societies are organized, annually shall draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents to each inhabitant thereof, on the basis of the last previous national census. The total amount of such order shall not in any county exceed eight hundred dollars, and the treasurer of the county shall pay it.

In order for such an association to secure aid from the county it must comply with the conditions of the statutes.

The request for the levy to be made under Section 9894, General Code, should in my opinion, be made to the county commissioners, who are to make the levy.

The one association in your county was not organized in accordance with the provisions of Section 9880, General Code, and did not make a request to the county commissioners for the levy. In fact, it is doubtful if they made any request. The levy was made by the commissioners upon the request of the other association and for their aid. The money collected under such levy should go to the association upon whose request the levy was made, provided, of course, that it has complied with all the conditions of the statutes.

You state that there is doubt whether this association was organized as required by Section 9880, et seq., General Code. In order for this association to receive public aid it must come clearly within the provisions of the statutes.

It appears that there are now two agricultural societies in the county organized as required by Section 9880, et seq., both of which are claiming the aid of the county.

Section 9881, General Code, provides:

> "The several county or district societies formed under the provisions of the preceding section, annually shall offer and award premiums for the improvement of soils, tillage, crops, manures, implements, stock, articles of domestic industry, and such other articles, productions and improvements, as they deem proper, and may perform all acts they deem best calculated to promote the agricultural and household manufacturing interests of the district and of the state. They shall regulate the amount of premiums, and their different grades, so that small as well as large farmers may have an opportunity to compete therefor. In making their awards special reference shall be had to the profits which accrue, or are likely to accrue, from the improved mode of raising the crop, or of improving the soil, or stock, or of the fabrication of the articles thus offered, so that the premium will be given for the most economical mode of improvement."

The statutes do not specifically limit the number of agricultural societies that may be organized in a certain county. Neither do they specifically limit the number of associations to which public aid can be given. There is no authority or provision of statute by which the aid to be granted under Sections 9880 and 9894, General Code, can be apportioned between two or more associations, or that such aid may be paid alternately to two societies.

The purpose of these statutes is to encourage agriculture, and the aid of the public is given to promote county fairs in order to exhibit the products of the farm and of the home.

The language of Section 9894, General Code, is that "the county commissioners shall on the request of the agricultural society, annually levy taxes—which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society." The language of Section 9880, General Code, is "the county auditor—annually shall draw an order on the treasurer of the county in favor of the president of the county or district agricultural society." A district must embrace one or more counties as provided in Section 9880, supra.

These provisions as well as those of the other sections make it clear that the

county can give aid to but one agricultural society in any one year, and that it cannot aid more than one. The money is to be paid to the "agricultural society" and not to the "agricultural society, or societies."

The statutes fix no means of determining which association shall receive the support of the county, where there are two associations in a county that have complied with the requirements of the statutes. In such cases the society first properly organized is the only society which can receive the aid of the county.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

547.

BOARD OF EDUCATION OF TOWNSHIP—PAYMENT OF PATRONS FOR CONVEYANCE OF OWN PUPILS WHEN SUB-DISTRICT SCHOOLS SUSPENDED.

Under Sec. 7730, of the General Code, when schools in sub-districts have been suspended, a township board of education may pay each patron for conveying his own pupil instead of employing one man to convey all pupils, where funds are insufficient to apply the latter method.

COLUMBUS, OHIO, July 19, 1912.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Your favor of July 9th received. You state:

> "The board of education of Jefferson township, in this county, have centralized the schools and have made provision to transport the pupils to a central school in one of the sub-districts, however, in which there are but a few pupils and very hard to get at.
>
> "They have thus far been unable to get a man to transport the pupils for the money that the board is able to offer, but instead of that they offer to each patron who have pupils to send, $20.00 apiece and take his own pupils to and from the central school.
>
> "It is now contended by some of these patrons, that transportation means that they be hauled by one man, and that the arrangement for each patron to take his own pupil or pupils is not in compliance with Section 7730, of the General Code.
>
> "It was my opinion that such transportation would be a compliance with the law, and I desire very much to have your opinion, and to have it as soon as possible, for the board must make arrangements soon to comply with the law.
>
> "In order that you might understand my question, I will put it in this way: A, B, C and D each have pupils to attend the central school. Is the board compelled to hire one man to transport all those pupils or can the board pay A, B, C and D individually for each to transport his own pupils?"

You inquire whether it is lawful for the board of education to employ each patron who has pupils to send to the central school established in Jefferson town-

ship, your county, to take his own pupils to and from the central school because your board is unable to get one person to transport the pupils for the money the board has for that purpose, it being contended by some of the patrons of the district, you state, that transportation means that they must be hauled by one person, and that the arrangement for each patron to take his own pupil or pupils is not in compliance with Section 7730, General Code.

Section 7730, General Code, is as follows:

> "The board of education of any township school district may suspend the schools in any or all sub-districts in the township district. Upon such suspension the board must provide for the conveyance of the pupils residing in such sub-district or sub-districts to a public school in the township district, or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. Or, the board may abolish all the sub-districts providing conveyance is furnished to one or more central schools, the expense thereof to be paid out of the funds of the district. No sub-district school where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast thereon were against the proposition of centralization, or when a petition has been filed thereunder and has not yet been voted upon at an election."

This section authorizes the board of education to abolish all sub-districts of a township, provided conveyances are furnished to one or more central schools, and the expense thereof to be paid out of the funds of the district.

This section authorizes and makes it mandatory upon the board of education to provide conveyances in the abolished sub-districts.

The board, under authority of this section, may find it necessary to employ one or more persons to transport the pupils to and from the central school. In the interest of economy, it may be necessary to have more persons than one employed.

You state that you are unable to get one person to transport the pupils for the money that the board is able to offer, but that you can employ the parents of pupils to haul their own children to and from the central school within the sum provided for that purpose.

I am of the opinion, therefore, that such contracts would be legal, provided, of course, no contract can be made with any member of the board of education to transport his own children, for the reason that such contracts are prohibited by law.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

548.

SALARY OF MEMBERS OF BOARD OF REVIEW CANNOT BE CHANGED BY COUNTY COMMISSIONERS DURING ANNUAL SESSION—PERSON FILLING VACANCY SUCCEEDS TO SALARY OF PREDECESSOR.

By authority of State vs. Edwards, when the county commissioners fix the salary of the members of the board of review such salary cannot be changed during the annual session of the board. When at the opening of such session the commissioners have failed to fix said salary the salary fixed for the previous session shall remain unchanged throughout the existing session.

When a person is appointed to fill a vacancy in the board of review, his salary may not be made different from that of the prior encumbent.

COLUMBUS, OHIO, July 19, 1912.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Your letter of June 12th received. You submit the following inquiry:

> "The board of review of the cities of Fostoria and Tiffin appointed for the purpose to determine the values of the real and personal properties of the two cities, appointed by the attorney general, the treasurer of state and the auditor of state, had their compensation fixed at $5.00 per day. They have rendered faithful and efficient service ever since their organization, and it is a good investment for the taxpayers of both cities. However, the board of county commissioners of this county struck with a spasm of economy, propose to reduce that now to $4.00 per day. My contention is that these men are state officers appointed for a definite fixed period of time; that when their salary is once fixed as it was in this case, that it can neither be deducted from nor added to during their term of office. This, then, is my contention; that at the time of their appointment by the board who had the appointing power, the term of office fixed and their compensation fixed, that that can neither be added to or reduced.
>
> "Second question. A former member of the Tiffin board of review having been elected mayor of the city of Tiffin, resigned his membership on the board of review and his place was filled by Michael Morrow.
>
> "Query: If the first question is answered in the affirmative, does he succeed to the same compensation that Mr. Keppel enjoyed or is he bound by the action of the board of county commissioners?"

Section 5621, General Code, requires the county commissioners to fix the salary of the members of the board of review within certain limitations therein prescribed.

> "Query: When the county commissioners have, in compliance with this provision, fixed the salaries of the members of the board, for what period of time does the resolution fixing the compensation extend?"

Section 5621, General Code, provides as follows:

"The county commissioners shall fix the salary of the members of the board of review, which shall not be less than three dollars and fifty cents per day for each day the board *is in session,* and not to exceed two hundred and fifty dollars per month for the time such board *is in session.* Such salary shall be payable monthly out of the county treasury upon the order of said board and the warrant of the county auditor. The board shall meet in rooms provided by the county commissioners, and when in session, shall devote their entire time to the duties of their office. No member thereof shall be engaged in any other business or employment during the period of time covered by the session of the board."

The question of the authority of the county commissioners to fix compensation of members of the board of review, was up before the circuit court of Montgomery county recently, in the case of State ex rel. vs. Edwards, unreported.

The Dayton city board of review was established in 1884, and the board of county commissioners at that time fixed the salary of each member of said board at $2,000.00 per year. No further action was ever taken by the board of county commissioners relating to fixing the salaries of members of the board, until March, 1910, when the county commissioners by resolution upon their minutes, reduced the salary of each member to $3.50 per day. One of the members of the board of review thereupon brought suit in mandamus against the county auditor to compel him to issue a warrant for his salary at the old rate of $2,000.00 per year. Upon hearing the circuit court held that the *salary of members of the board of review could be fixed by the county commissioners at the beginning of each year's session in June, and that salary would remain unchanged during the year, that if no action was taken by the county commissioners at the beginning of the year's session, the salary fixed for the former year would continue as the salary of the members of the board of review for the ensuing year.*

Following that opinion I hold, that it is the duty of the county commissioners to fix the compensation for members of the board of review for each annual session of the board, and when the commissioners have failed, at the opening of a session of the board of review, to fix the salaries of the members for such session, they cannot fix it during the session and the salary previously fixed is presumed to apply to the current session.

Your letter also states that:

"A former member of the Tiffin board of review having been elected mayor of the city of Tiffin, resigned his membership on the board and his place was filled by another party.

"Query: If the first question is answered in the affirmative, does he succeed to the same compensation that the former member enjoyed or is he bound by the action of the county commissioners?"

Answering your second question, when a member of the board of review resigns during a session, his successor succeeds to the same compensation enjoyed by the resigning member.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

553.

TAXES AND TAXATION—LEVY FOR AGRICULTURAL SOCIETY—NECESSITY FOR REQUEST—DISCRETION OF COUNTY COMMISSIONERS AND BUDGET COMMISSION.

In accordance with the provisions of Section 9894 of the General Code an agricultural society as a condition precedent to receiving the benefit of the levy therein provided for such levy to the county commissioners.

The latter officials may then determine the amount to be levied, which shall not exceed $1,500.00 which amount is submitted to the further discretion of the budget commission's power to reduce the same.

COLUMBUS, OHIO, July 24, 1912.

HON. F. L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—I have your inquiry of July 15th, wherein you state:

> "Has the county auditor the right to pay the Greene county agricultural society $1,500.00 under Section 9894 as amended, Ohio Laws, Vol. 102, page 105, when no levy has been made for such purpose and no demand filed for such levy until after the time has passed for the commissioners to make their levy?
>
> "A bill has now been filed with the county auditor by the agricultural society for $1,500.00 to be paid from the taxes of 1911. The agricultural society made no demand, nor did the county commissioners make a levy for the years 1911 or 1912."

Section 9894 of the General Code provides:

> "When a county or a county agricultural society, owns or holds under a lease, real estate used as a site whereon to hold fairs, and the county agricultural society therein has the control and management of such lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners shall on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy."

In an opinion to the Hon. J. W. Smith, prosecuting attorney of Ottawa, Ohio, under date of October 19th, 1911, inter alia, in construing the above section, I said:

> "The sole object and purpose of county assistance to agricultural societies is for the express purpose of encouraging agriculture. Heretofore it was optional for county commissioners to grant this assistance and the only purpose of the amendment of Section 9894 was to extend the list of societies to whom assistance should be given, to limit the maximum amount of such assistance, and make it mandatory upon the commissioners

to make the levy, providing the agricultural societies come within the purview of the statutes. Nor could it be that the legislature intended that the agricultural societies should fix the amount that was to be levied upon their request. Their only function in the matter is to make the request and then it is within the authority of the commissioners to determine the amount of the levy that would be made to raise the fund required so long as it did not exceed the limitation the law provides. I take it that it is fairly inferable from the section that if the societies make such representations as would be deemed proper, showing the necessity for a certain amount of money, the commissioners then should determine how much, in their judgment, will be necessary, keeping within the limitation provided, and then it becomes the duty of the commissioners to raise the amount so determined. Of course, this section must be read in the light of the amended tax laws, and now instead of a direct levy, it becomes the duty of the county commissioners to take care of the amount decided to be raised for the purpose in their annual budget, as provided by Section 5649-3*a*, and the amount determined and certified by the commissioners is subject to reduction by the budget commission."

You state in your question that the agricultural society made no demand, nor did the county commissioners make a levy for either the year 1911 or 1912.

Now, the only power granted the commissioners to pay out of the general fund any money not otherwise appropriated, is given in the last sentence of Section 9894 of the General Code, and is to be "in anticipation of such levy." In the case cited, no levy having been made, there is no levy to anticipate.

You state further, that "a bill has now been filed with the county auditor by the agricultural society for $1,500.00 to be paid from the taxes of 1911."

Since the society has no claim against the county, as a matter of right, I fail to see how they can present a bill for $1,500.00, or any other sum. As stated in my opinion to Hon. J. W. Smith, the society must make the request, the commissioners must determine the amount to be allowed up to the maximum provided for in the law, and the commissioners must then carry this amount into their budget, and the budget commissioners finally determine the exact amount to be provided before the levy would be authorized.

I sadly fear that your agricultural society has mistaken the legal manner of obtaining assistance from the county, and it is my opinion that the so-called "bill" for $1,500.00 now filed with the county auditor should not be allowed or paid.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

570.

BOARD OF EDUCATION—LIABILITY FOR TUITION OF RESIDENT PUPIL ATTENDING HIGH SCHOOL OF ANOTHER DISTRICT—NO DEDUCTION OF SCHOOL TAX ON PROPERTY OWNED BY PUPIL OR PARENT IN LATTER DISTRICT.

The provisions of Section 7683 of the General Code, providing for a deduction from the tuition of a non-resident high school pupil, of the amount of school tax paid by such pupil or his parent upon property owned and located within the school district attended, referred to cases where the pupil or parent were themselves chargeable with such tuition.

Said section has no application to Section 7747 of the General Code, under which the board of education of such pupil's residence is now made liable for such tuition.

In this case, therefore, the amount of said school tax may not be deducted.

COLUMBUS, OHIO, July 31, 1912.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Your favor of May 29, 1912, is received, in which you inquire as follows:

> "A pupil holding a diploma under Section 7747 of the General Code, and residing in a district where no high school is maintained, attends a high school in another district. The parent of such pupil owns propery in the district where he attends such high school. Should the amount of school tax collected from such property, be deducted from the charge for tuition against the board of education of the district, in which the pupil resides? I refer to Section 7683 of the General Code."

Section 7747, General Code, to which you refer, provides:

> "The tuition of pupils holding diplomas and residing in township or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other non-resident pupils."

Section 7682, General Code, provides:

> "Each board of education may admit other persons upon such terms or upon the payment of such tuition as it prescribes."

Section 7683, General Code, provides:

> "When a youth between the age of six and twenty-one years or his parent owns property in a school district in which he does not reside, and he attends the schools of such district, the amount of school tax paid on such property shall be credited on his tuition."

The statutes do not specifically provide that the board of education may secure the benefit of the school tax as provided in Section 7683, General Code. Do the provisions of Section 7683, General Code, extend to the board of education in the case in which you submit?

The intent and purpose of the legislature in passing the provisions of Section 7683, General Code, will aid in reaching a conclusion on this question. This purpose can be ascertained by noting the history of the legislation upon this provision.

The first provision statute of a similar nature is found in Section 71 of the act of 70 Ohio Laws 195, wherein it was provided:

> "* * *and boards of education of city, village or special districts shall also have power to admit without charge for tuition, persons within the school age who are members of the family of any freeholder whose residence is not within such district, if any part of such freeholder's homestead is within such district."

In the amendatory act in 77 Ohio Laws 196, a similar provision is found, to-wit:

> "And such youth may also be admitted free if they are members of the family of a freeholder whose residence is without but whose homestead is partly within such district."

These provisions for free attendance applied only when a part of the homestead was in the district. In the amendatory act of 84 Ohio Laws 69, the provision was made so as to apply as a credit of the school taxes upon the tuition to be paid as follows:

> "Each board of education may admit other persons of like age upon such terms or upon payment of such tuition as it may prescribe; provided, that in all counties which do not contain a city of the first grade of the first class, in such case there shall be credited on the tuition so charged the amount of school tax in such district for the current school year which may be paid by such non-resident pupil or a parent thereof."

This amendatory act was passed March 11, 1887. This provision is in substance the same as is now found in Section 7683, General Code. At the time it was first inserted in the statutes there was no provision of statute similar to that found in Section 7747, General Code. At that time, therefore, the provision of Section 7683, General Code, applied only to the tuition to be paid by the pupil or parent. In passing this provision the legislature, no doubt, thought it unjust that a pupil or parent should pay school taxes to a certain school district in which they did not reside, and that they should in addition pay full tuition if such pupil attended the schools of such district.

On March 22, 1892, in 89 Ohio Laws 123, is found the first provision similar to that found in Section 7747, General Code. Section three of said act is as follows:

> "The tuition of such graduates as may attend any village or city high school of the county may be paid by the board of education of the special or township districts in which such pupils reside."

There is nothing in this act to show that the legislature had in contemplation the provisions now found in Section 7683, General Code.

This provision was amended in 94 Ohio Laws 175, so as to require the board of education to pay the tuition, as follows:

> "The tuition of such successful applicant shall be paid by the board of education of the township or the special district in which such applicant resides, provided that there is no high school maintained and supported by the township or special district in which such pupil resides, where such pupil may attend without paying tuition."

This provision was placed in substantially its present form by act of 95 Ohio Laws 71.

In none of these acts pertaining to the provision now found in Section 7747, General Code, is there any reference to a credit upon the tuition to be so paid.

Prior to the passage of this act in 1892, 89 Ohio Laws 123, a school district that did not maintain a high school could not pay the tuition of its pupils in another high school. After the passage of the amendatory act in 94 Ohio Laws 175 a school district was required to pay the tuition of pupils residing in their district, who had complied with the provisions of the statutes as to examination, etc.

The evident purpose of this legislation was to require each school district to give its resident pupils a high school education at the expense of the school district.

The situation where a pupil or parent pays the tuition is somewhat different. The same reason for the credit of the school tax paid by such pupil or parent upon the tuition, does not apply to the tuition to be paid by the school district under the provisions of Section 7747, General Code. There is nothing in the statutes to show that the legislature intended that such school tax should be credited upon the tuition to be paid by the school district.

It is my opinion, therefore, that the school taxes to be credited by virtue of Section 7683, General Code, is to be credited upon the tuition when it is to be paid by the pupil or parent, and not when such tuition is to be paid by a school district by virtue of Section 7747, General Code.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

578.

POOR RELIEF—LEGAL SETTLEMENT OF MINOR IS THAT OF FATHER —REMOVAL AFTER DEATH OF FATHER OF NO EFFECT.

The county of legal settlement of a minor for purposes of poor relief is that of the father, and such settlement cannot be changed during minority by removal of said minor after the death of the father for any length of time.

When, therefore, a minor who, with his parents, had a legal settlement in Mahoning county, removes after the death of his parents to Columbiana county and there resides for a period of three months, Mahoning county is liable alone for his support.

COLUMBUS, OHIO, July 24, 1912.

HON. LEWIS P. METZGER, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—Your favor of June 25, 1912, is received in which you state:

> "Honorable R. A. Beard, prosecuting attorney of Mahoning county,

does not agree with me as to the construction to be placed upon Sections 3477, 3478 and 3479 of the General Code and we have agreed to submit the matter to your department for determination.

"The case involved is as follows: A minor by the name of A. W., whose father and mother were both deceased, left Smith township, Mahoning county, where he had resided for a number of years, sometime between the 25th and 30th of March, 1912, and went to live with Leroy Gobley, in Knox township, Columbiana county, Ohio. At the time he left Mahoning county, his father and mother having both died shortly prior to that time, he had no intention of again returning to Mahoning county but went to Columbiana county with the intention of trying to earn his own living and making Columbiana county his home.

"On November 12, 1912, he was accidently shot injuring him so severely that it was imperative that he be taken to a hospital for treatment and he was taken to the hospital at Alliance on November 12, 1912. Mr. Beard contends that inasmuch as he had been in Knox township, Columbiana county more than three months that either Knox township, Columbiana county or both were responsible for his care until his recovery. I contend that inasmuch as he was a minor whose parents had last resided in Smith township, Mahoning county, Ohio, and he had not been in Columbiana county, twelve months that either Smith township or Mahoning county, or both, are required by law to provide for his support and maintenance until his recovery.

"Your determination of this matter will avoid litigation between the counties."

The foregoing statement of facts is agreed to by Hon. R. A. Beard, prosecuting attorney of Mahoning county.

The question to be determined is the legal settlement of the minor, who was injured, under the poor laws of Ohio.

Section 3477, General Code, provides:

"Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor, subject to the following exceptions:

"First. An indentured servant or apprentice legally brought into this state shall be deemed to have obtained a legal settlement in the township or municipal corporation in which such servant or apprentice has served his or her master or mistress for one year continuously.

"Second. The wife or widow of a person whose last legal settlement was in a township or municipal corporation in this state, shall be considered to be legally settled in the same township or municipal corporation. If she has not obtained a legal settlement in this state, she shall be deemed to be legally settled in the place where her last legal settlement was previous to her marriage."

Section 3478, General Code, provides:

"In an action to compel the support or relief of a pauper, or in an action based upon the refusal of such officers to afford support

or relief to any person, it shall be a sufficient defense for the township trustees, or proper municipal officers to show that such person, during the period necessary to obtain a legal settlement therein has been supported in whole or in part by others with the intention to thereby make such person a charge upon such township or municipal corporation. The fact that such person, during the period necessary to obtain a legal settlement therein, has been supported in whole or in part by others shall be prima facie evidence of such intention."

Section 3479, General Code, provides:

"A person having a legal settlement in any county in this state shall be considered as having a legal settlement in the township, or municipal corporation therein, in which he has last resided continuously and supported himself for three consecutive months without relief, under the provisions of law for the relief of the poor."

In the case of Trustees vs. Trustees, 3 Ohio 99, it is held:

"A minor obtains a settlement in the township where his father was legally settled, and can by no act of his own, whilst a minor, obtain a legal settlement elsewhere."

On page 103, Judge Hitchcock says:

"In the case before the court, the pauper, it is true, at the time he went to reside in the township of Letart, had no father living. This, however can not vary the case. Samuel Jackson, the father, was last legally settled in the township of Lebanon. In virtue of the settlement, Edmund, the son, was legally settled in the same place. By no length of settlement in any other township, previous to arriving at the age of twenty-one, could he gain any other legal settlement. Having been reduced to poverty during his infancy, the township of Lebanon was chargeable with his support."

In the case cited the minor was seventeen years of age and left the township in which his father died after his father's death and was absent for more than a year, working for his support. The court held, however, that the township in which his father had a legal settlement at the time of his death, was the legal settlement of the boy and this township was liable for his relief under the poor laws.

Under Section 3477, General Code, a person must reside in the county for twelve consecutive months in order to obtain a legal settlement therein. The minor in question in this case did not reside in Columbiana county that length of time. Even though he could change his legal settlement he has not resided in Columbiana county the required length of time.

The three month period provided in Section 3479, General Code, refers to a township or municipal corporation within the county in which the person has a legal settlement. He must first obtain a legal settlement in the county before he can obtain a legal settlement in township of the county.

The legal settlement of the minor in question is that of his father at the time of his death. It is not stated that the father lived in Mahoning couny for one year as required by Section 3477, supra. I assume that is the case. I also assume that the father had a legal settlement in Smith township at the time of his death.

The relief of the minor in question, if he is entitled to public relief, must be borne by Smith township and Mahoning county, in the same manner as any other pauper is relieved who has a settlement in said township and county. Columbiana county is not liable therefor as the legal settlement of the minor is in Mahoning county.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

580.

COUNTY COMMISSIONERS—POWER TO SELL AND PURCHASE LAND FOR COUNTY INFIRMARY.

Under Sections 2447 and 2433, of the General Code, when it is deemed best for the interests of the county, the county commissioners may sell land and buildings held for infirmary purposes and purchase new land for the same purposes.

COLUMBUS, OHIO, August 9, 1912.

HON. LAWRENCE E. LAYBOURNE, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Your favor of August 3d received. You state that:

> "More than fifty years ago, Clark county purchased a site of about fifty acres and erected buildings thereon for the purpose of establishing a county infirmary and still maintains a county infirmary on the same site, which is now within the corporate limits of the city of Springfield.
>
> "The greater part of this land is still used for farm purposes in connection with said infirmary. The buildings are out of date and badly dilapidated so that extensive repairs and improvements are now needed.
>
> "A real estate company has offered the county commissioners a splendid offer for this property for the purpose of dividing the same into lots to be sold for residence purposes. The county commissioners are of the opinion that it is desirable, necessary and to the best interests of the county from a financial standpoint, to sell their present infirmary site and purchase a farm a reasonable distance from the city and erect new buildings thereon for the purpose of a county infirmary.
>
> "They are satisfied that the price offered for the present site, with the worn and dilapidated buildings thereon, is at least equal to an amount necessary to purchase a farm of equal size and to erect new and improved buildings for the purpose of providing a new infirmary suitable to the present needs of the county."

and you inquire whether under the above state of facts the county commissioners may dispose of the infirmary land and purchase another site for the county infirmary. The authority of the commissioners to purchase another site for the infirmary is found in Section 2433, of the General Code, which provides as follows:

> "When, in their opinion, it is necessary, the commissioners may purchase a site for a court house, or jail, or land for an infirmary or a detention home, or additional land for an infirmary or county children's

home at such price and upon such terms of payment, as are agreed upon between them and the owner or owners of the property. The title to such real estate shall be conveyed in fee simple to the county."

The authority of the commissioners to sell real estate belonging to the county is given in Section 2447, of the General Code, which is as follows:

"If, in their opinion, the interests of the county so require, the commissioners may sell any real estate belonging to the county, and not needed for public use."

You state that your present infirmary buildings were built more than fifty years ago, and that the buildings are out of date and badly dilapidated, and the present location of the infirmary is undesirable. This would be sufficient reason for the county commissioners to act under Sections 2433 and 2447, of the General Code, and pass appropriate resolutions declaring that it is to the best interests of the county to sell the real estate where the infirmary is now located, and to purchase a site for the county infirmary, concurring in your opinion and advice to the county commissioners.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

582.

COUNTY BRIDGES—POWER OF COUNTY COMMISSIONERS TO EXPEND MONEY, ISSUE BONDS AND LEVY TAXES FOR—EMERGENCY CASES.

Under Sections 2434, 5638 *and* 5642-1 *to* 5644, *of the General Code, the county commissioners may expend money, or issue bonds in anticipation of a levy or levy and issue bonds in anticipation of collection for the purpose of building at any time a county bridge whose cost is less than* $18,000.00, *or in case of emergency for the purpose of building a bridge in excess of that sum.*

For building a bridge whose cost exceeds $18,000.00, *when no emergency exists, the authorization of the electors under Sec.* 5638, *of the General Code, is essential.*

COLUMBUS, OHIO, August 15, 1912.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—In your letter of August 1st, receipt whereof is acknowledged, you ask me to define the authority of the county commissioners to issue bonds or borrow money for the repair and rebuilding of bridges injured by floods, without submitting the question to a vote of the electors.

This power seems to exist by virtue of Section 2434, General Code, as amended, 102 O. L., 54, which provides in part as follows:

"* * * for the purpose of * * * * a court house, county offices, jail, county infirmary, detention home, or additional land for an

infirmary * * * or other necessary buildings *or bridges,* or for the purpose of enlarging, *repairing,* improving, *or rebuilding* thereof * * * * * the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue bonds of the county to secure the payment of the principal and interest thereof."

So far as this section is concerned, there is no requirement that the proposition of borrowing money, or that of making the repairs and improvements themselves be submitted to a vote of the electors for any reason whatever.

I am of the opinion, however, in view of certain language in Section 2434, which I have not quoted above, that the limitations of Section 5638, etc., General Code, apply to the making of improvements for which, under Section 2434, money may be borrowed. Said sections provide in part as follows:

Section 5638, General Code.

"The county commissioners shall not levy a tax, appropriate money or *issue bonds* for the purpose of building county buildings, * * * * the expense of which will exceed $15,000.00 * * * *; or for building a county bridge, the expense of which exceed $18,000.00, except in case of casualty, and as hereinafter provided; * * * * without first submitting to the voters of the county, the question as to the policy of making such expenditure."

It will be observed that the question to be submitted is not the policy of issuing the bonds, but that of making the expenditure, and the question would have to be submitted even if the county had accumulated sufficient surplus funds to make the contemplated improvement without levying any tax therefor or borrowing any money on that account.

Section 5642-1, General Code:

"If a majority of the votes so cast are against the proposed expenditure the board of county commissioners shall not assess a tax or issue bonds therefore. If a majority of the votes cast are in favor of the proposed expenditure, the board of county commissioners shall proceed to issue bonds in any sum not exceeding the amount stated upon said ballots, the proceeds of which shall be used exclusively for the purpose stated upon said ballot, and said board shall levy such amount of tax as may be necessary to pay the interest accruing on said bonds to redeem them at maturity."

Section 5643, General Code:

"If an important bridge, belonging to or maintained by any county, becomes dangerous to public travel, by decay or otherwise and is condemned for public travel by the commissioners of such county, the repairs thereof, or the building of a new bridge in place thereof, is deemed, by them, necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county, may levy a tax for either of such purposes in an amount not to exceed in any one

year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county."

Section 5644, General Code:

"If the county commissioners deem it necessary or advisable, they may anticipate the collection of such special tax by borrowing a sum not exceeding the amount so levied, at a rate of interest not exceeding six per cent. per annum, payable semi-annually and may issue notes or bonds therefor, payable when said tax is collected, or the commissioners, without such submission of the question, may proceed under the authority conferred by law to borrow such sums of money as is necessary for either of the purposes before mentioned, and issue bonds therefor. For the payment of the principal and interest on such bonds, they shall annually levy a tax as provided by law."

It is my opinion that the scheme of legislation embodied in the section last above quoted does not become applicable at all unless the cost of repairing or rebuilding a particular bridge exceeds $18,000, then, unless the situation constitutes an emergency or casualty it will be necessary to submit the policy of making the improvement to a vote. If, however, the emergency exists, the commissioners may proceed without a vote and under the limitations of Sections 5643 and 5644 may levy taxes and anticipate the collection thereof by the issuance of bonds; or under Sections 5644 and 2434, which are evidently referred to therein, may simply borrow the money and then levy the tax so as to meet the principal and interest thereof. That is to say, if in your county it is necessary to borrow money for the purpose of repairing and rebuilding certain bridges injured by floods, and the cost of repairing and rebuilding any one bridge does not exceed $18,000, the commissioners may proceed under Section 2434 to borrow money and issue bonds and to levy taxes for the retirement thereof under the provisions of Section 2434 and related sections without paying any attention to the provisions of Section 5638, etc. If, however, the cost of repairing any one bridge does exceed $18,000, and as to that particular bridge, its unavailability for public travel does not constitute an emergency (which I do not imagine to be the case, then the proceeding would have to be in accordance with the provisions of Sections 5638 to 5642-1, inclusive, *supra.* If, however, there is a bridge among those which must be repaired, the cost of which rebuilding will exceed $18,000 and the bridge is important and its condition constitutes a menace to public travel, then the commissioners may lawfully proceed under Sections 5643 and 5644, and their powers under these sections are practically the same as those which they could exercise under Section 2434, if the cost of making the repairs did not exceed $18,000 as to any one bridge.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

583.

COLLATERAL INHERITANCE TAX—TAX ON "RIGHT TO RECEIVE" AND NOT ON "PROPERTY"—DEDUCTION OF DEBTS AND COSTS OF ADMINISTRATION—APPEAL IN PROBATE COURT.

From a review of the decisions it is now settled in this state that the collateral inheritance tax is a tax upon the right to receive the property and not a tax upon the estate itself.

It is the specific legacies which are to be taxed therefore, and debts due the estate; as well as costs of administration must be deducted when the estate in the aggregate has been devised collaterally.

These deductions may not be made from the inventory filed by the probate judge, under Section 5341, *of the General Code, with the auditor. Such deductions must be made by application to probate court under the procedure set out for appraisal, etc., under Sections* 5343 *and* 5344, *of the General Code. Such procedure may be avoided, however, by agreement between the prosecuting attorney and all interested parties.*

COLUMBUS, OHIO, August 15, 1912.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I beg to apologize for the delay which has ensued in answering your letter of May 6th, in which you submit an inquiry relating to the procedure under the collateral inheritance tax law. Matters have become so congested in the office during the late term of court in this county that I am just now engaged in an effort to bring my advisory work down to date. The question which you submit is as follows:

> "An estate of approximately twenty thousand dollars is subject to distribution among several heirs and personal representatives, the relationship of all of whom to the decedent is such as to make the entire estate, in the aggregate, subject to the collateral inheritance tax. There are now claims against the estate for taxes and costs of administration, amounting approximately to five thousand dollars. The probate judge desires to be advised as to his duty under Section 5340, of the General Code, to make and deliver to the county auditor, for the purpose of assessing a tax thereon, a copy of the inventory of the whole estate, it being contended that the five thousand dollars, which has been or will be expended for taxes, funeral expenses and costs of administration, shall be deducted from the amount of this inventory. The question also seems to be raised as to the duty of the county auditor in certifying the value of the estate subject to taxes, and particularly as to whether, if inventory of the entire estate, without any deduction, be delivered to him by the probate judge, he may or should lawfully make any deductions on account of the premises."

The statutes in question are as follows:

> "Section 5331. All property within the jurisdiction of this state, and any interests therein, * * * which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the

grantor, to a person * * * other than to or for the use of (those within certain degrees of relationship) shall be liable to a tax of five per cent. of its value, above the sum of two hundred dollars. * * * All administrators, executors and trustees, and any such grantee * * * shall be liable for all such taxes * * *. Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid.

"Section 5336. An administrator, executor, or trustee, having in charge, or trust, property subject to such law, shall deduct the tax therefrom or collect the tax thereon from the legatee or person entitled to the property. He shall not deliver any specific legacy or property subject to such tax to any person until he has collected the tax thereon.

"Section 5337. When a legacy subject to such tax is charged upon or payable out of real estate, the heir or devisee, before paying it, shall deduct the tax therefrom and pay it to the executor, administrator, or trustee, and the tax shall remain a charge upon the real estate until it is paid. Payments thereof shall be enforced by the executor, administrator, or trustee, in like manner as the payment of the legacy itself could be enforced.

"Section 5340. Within ten days after the filing of the inventory of every such estate, any part of which may be subject to a tax under the provisions of this sub-division of this chapter, the judge of the probate court, in which such inventory is filed, shall make and deliver to the county auditor of such county a copy of the inventory; or, if it can be conveniently separated, a copy of such part of the estate, with the appraisal thereof. *The auditor shall certify the value of the estate, subject to taxation* * * *.

"Section 5343. *The value of such property, subject to said tax, shall be its actual market value as found by the probate court.* If the state, through the prosecuting attorney of the proper county, or any person interested in the succession to the property, applies to the court, it shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of this tax, and make return thereof to the court. The return may be accepted by the court in a like manner as the original inventory of the estate is accepted, and if so accepted, it shall be binding upon the person by whom this tax is to be paid and upon the state. * * *

"Section 5344. The probate court, having either principal or auxiliary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to such tax that arise, affecting any devise, legacy or inheritance under this sub-division of this chapter, subject to appeal as in other cases, and the prosecuting attorney shall represent the interests of the state in such proceedings.

"Section 5348. The word 'property' as used in this sub-division of this chapter includes real and personal estate, any form of interest therein, and annuities."

Legislation of this sort is of comparatively recent date in this state, but in several states, notably in New York and Pennsylvania, has long been a feature of the system of taxation. Accordingly, many questions like that which you submit, which have been frequently considered in other jurisdictions, have not been passed

upon in Ohio. Practically the only decisions in this state under the provisions of the above quoted sections, and others like them, relate to constitutional questions exclusively. Yet, these few decisions, none of them directly in point, furnish a reliable index to the solution of the questions which you submit.

It is obvious, of course, that your questions lack definite answer in the above quoted sections themselves. It is required that the probate judge cause a copy of the inventory and appraisement to be filed with the county auditor and the county auditor to compute the amount of tax, and to certify the same to the county treasurer for collection. It is not, however, expressly required that the county auditor be bound by the appraisement, as conclusively showing the value of the estate, in fixing the amount of the tax. On the other hand it is expressly required that the value of the property subject to taxation be fixed and determined by the probate court; yet, no method is provided for the certification by the probate court to the county auditor of the value as determined by him; this is left to inference.

Furthermore, the statutes are themselves ambiguous as to what it is that is to be valued by the probate judge. True, Section 5348 contains a definition, but that definition does not solve the question which arises here, and which is as follows:

> "Is the thing to be valued the estate as a whole or only the interests therein which pass to the collateral heirs, devisees, grantees, or legatees, as the case may be?"

In reality the question is deeper than this, and is concerned with the real subject of taxation; for I am satisfied that the thing to be valued is identical with the subject of the tax; so that if it be ascertained that the estate as a whole is the thing taxed, then, it would naturally follow that such estate should be valued as an entirety.

It is here that what decisions are available in Ohio become helpful. In State ex rel. vs. Ferris, 52 O. S., 314 ,the court was considering the constitutionality of a direct inheritance tax law, very similar in many respects to the one now under consideration. Thus, the first section of that act (91 O. L., 166) provided as follows:

> "All property within the jurisdiction of this state, and any interest therein, * * * which shall pass by will, etc., * * * to the use of (certain persons in the direct line of ascent or descent) shall be liable to a tax * * *. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property."

The first attack upon the act was to the effect that it was a property tax and, not being levied by "a uniform rule," was, therefore, repugnant to Section 2 of Article XII, of the Constitution. On this point the court, per Burket, J., made use of the following language:

> "In view of the authorities cited, it must be conceded that the general assembly has the power to pass an inheritance tax for purposes of general revenue, unless prohibited by the Constitution of our state. Properly understood, it is not the right to transmit, but the right and privilege to receive, that is taxed. The right to dispose of property during the lifetime of the owner, cannot be separated from the property itself, and therefore to tax the right of disposal by contract in the life-

time of the owner, even though to take effect at his death, is to tax the property itself. But the right to dispose of the property by will or descent taking effect after the death of the owner, is not so closely connected with the right of property, and it is not so clear that such right may not be taxed.

"But when the right to receive the property is considered, it is clear that the right is distinct and separate from the property itself, and the state may tax this right to receive property, and this is so whether the property is disposed of by the owner during his lifetime, or at his death.

"This right to receive property is under the control of the legislature, and it has the power to regulate and lay such burdens thereon as it may see fit, within the provisions of the Constitution. To regulate by taxation or otherwise the privilege or right to receive property, is not in conflict with the first section of the bill of rights, which recognizes the inalienable right of acquiring, possessing and protecting property. Were it otherwise, all our laws as to wills, descent, distribution and conveyances would be unconstitutional.

"It is urged, however, that the statute in question does not tax the right or privilege of receiving property, but taxes the property itself.

"It must be conceded that the language used in the statute, is upon its face clearly a taxation of the property itself, and not of the right to acquire property. And for myself, I think this is the true construction of the act. Others of the court, however, think that when the operation and effect of the statute are considered, that it may be regarded as taxing the right or privilege, rather than the property. Certain it is that the only thing that can be constitutionally taxed is the right or privilege of succession, and a statute having such taxation in view, should express its purpose in words applicable to such subject matter of taxation.

"It is conceded by all parties, that if this statute imposes a tax on property, that it is unconstitutional. As a majority of the court are of opinion that it is not a tax on property, but upon the right to receive property, the statute must, as to this point, be sustained.

"It is also contended that this tax is a tax on property because it is made a lien upon the real estate received, and cases are cited sustaining this view. Estate of William Bittinger, 128 Pa. St., 344.

"The statute in that case provides as follows: 'The tax on *real estate* shall remain a lien on the real estate on which the same is charged until paid.' While the statute in this state provides simply that the inheritance tax 'shall at once become a lien upon said property.' But aside from the difference in the words of the statute there is no force in the contention. If the legislature has the power to assess a tax upon the right to receive and succeed to property, it clearly has the right to make such tax a lien upon the property received by the use of such right; and the making of such lien does not change the tax from a tax upon the right to receive, to a tax upon the property received under the right."

In Hagerty vs. State, 55 O. S., 613, the court was passing upon the constitutionality of the very act now under consideration. The following is found in the opinion of the court:

"Most of the objections urged against the validity of the act are answered in State ex rel. vs. Ferris, 53 Ohio St., 314. The act there held invalid made an inhibited distinction as to the value of the property received, *the right to receive being there, as here, the real subject of the imposition.*"

In State vs. Guilbert, 70 O. S., 229, a subsequently enacted direct inheritance tax law was held constitutional, and in the course of the opinion, per Spear, C. J., the following language appears:

"We are relieved of any extended inquiry with respect to the question of the power of the general assembly to impose an inheritance tax. It was held in the State ex rel. vs. Ferris, 53 Ohio St., 314, that a tax on inheritance is an excise tax; that is, it is a tax on the right to receive property as distinct from a tax on the property itself, and this right to tax is within the power of the general assembly, which body may regulate the privilege and lay such burdens thereon as it may see fit within the provisions of the constitution, and that such imposition is not in conflict with the first section of the bill of rights. The act in question in that case was held unconstitutional because it undertook to exempt from taxation the right to succeed to estates not exceeding twenty thousand dollars in value, while taxing the whole right of succeeding to estates which exceed that sum in value, and also because it sought to tax at a higher rate per centum the right to succeed to estates of larger value than to estates of smaller value. The act in question in Hagerty vs. the State, 55 Ohio St., 613, laid a tax upon collateral inheritance, making provision for exemptions in the amount of two hundred dollars; and was assailed because it discriminated among collateral kindred, the tax being imposed upon the value of the property received by some and not upon that received by others. It was sustained on the ground that the power exercised is legislative, being vested by the first section of the second article of the constitution, which provides that the legislative power of the state shall be vested in the general assembly; that the right to receive property by inheritance is not guaranteed by the constitution; neither does that instrument prescribe any limitation upon the power of the general assembly to designate the persons who may thus receive, and the discrimination is based upon and justified by the fact that there are degrees in collateral kinship. The ground upon which the power to levy such taxes rests is stated in Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283, thus: 'They (the cases cited) are based in two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. Upon these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality in taxation.'"

So that it is now completely settled in Ohio that the subject of the inheritance tax is not the property itself, but the right or privilege of receiving the property upon the death of the intestate or the donor.

It is here to be remarked also that though the question is suggested in State ex rel. vs. Ferris, supra., it is not the right to *transmit* that is taxed, even if a tax could be constitutionally levied upon a right personal to a deceased person. The Ohio courts have correctly reasoned, that in order to sustain the constitutionality of the inheritance tax, as well as the indirect inheritance tax as now the repealed direct inheritance tax, they would have to hold those taxes to be levied not upon the property belonging to the estate as such, but upon the several interests of the takers thereof subject to the tax.

There are, of course, internal evidences of such an intention which may be found in the act itself, though the provisions affording such evidence are perhaps seemingly inconsistent with other provisions which might be relied upon in support of an opposite conclusion. Thus, Sections 5336 and 5337, supra, support the conclusion that it is the interest of the person entitled to the property by virtue of the laws of intestacy or the testamenary act of the decedent, and not the estate as a whole which is taxed; indeed, the latter section uses the significant phrase "a legacy subject to tax." There are other like provisions scattered through the above sections, and such provisions are in a way inconsistent with some other provisions thereof, but, as I have already pointed out, it is now perfectly settled that the real subject of the tax is the interest of the legatee or donor and not the estate itself.

This proposition is ultimately decisive of the question, although it may not so appear at first blush. In the often cited case of in re estate of Swift, 137 N. Y., 77, Gray, J., delivering the opinion of the court reasons elaborately and convincingly to the conclusion that under language substantially identical with that which we are considering the subject of the inheritance tax of the state of New York is not the right of succession or devolution but the property itself. In the course of this reasoning he hints very strongly that because of this premise there may be no deductions from the appraised value of the estate, and that the tax is assessed upon the value of the entire estate, regardless of debts and expenses of administration. I mention this case because it has been followed in other decisions in the same state, notably, in re Millward's Estate, 27 N. Y., Supp. 286, where it was distinctly held, in the language of the first syllabus that

> "The appraiser of an estate subject to the transfer tax * * * is not authorized to deduct the debts, funeral expenses and expenses of administration in making his report of the value of the estate."

holding, at the same time, that debts owing by the decedent might be so deducted. This was the only question in the case, and in re estate of Swift, supra, is the only authority cited.

However, Judge Gray, in writing the opinion in the Swift case, clearly stated that the other members of the court disagreed with him as to the nature of the tax. Thus, on page 88, the following language appears:

> "My brethren are of the opinion that the tax imposed under the act is a tax on the right of succession, under a will, or by devolution in case intestacy; a view of the law which my consideration of the question precludes my assenting to."

Thus it is that in later cases in the same jurisdiction the Swift case has been ignored, and it has been repeatedly held that debts of the decedent, debts of the estate in the hands of the administrator, costs of administration, and costs and expenses of litigation necessary to protect the estate and to determine the duty of

the trustee or administrator, must be deducted before the tax is computed. In re Hoffman, 143 N. Y., 327; in re Western, 152 N. Y., 93; in re Gihon, 169 N. Y., 443.

So far as I am able to ascertain, this rule is followed in all other jurisdictions where inheritance tax laws are in force. See

Gallup's Appeal, 76 Conn., 617.
Hopkins' Appeal, 77 Conn., 644.
Connell vs. Prosby, 210 Ill., 380.
Succession of May, 120 La. Annual, 692.
Callahan vs. Roodridge, 171 Mass., 595.
Orcutt's Appeal, 97 Pa. St., 179.
Commonwealth's Appeal, 127 Pa. St., 435.
Shelton vs. Campbell, 109 Tenn., 690.
Trust Company vs. Speed, 114 Tenn., 677.

The reasoning of the court in many of these cases is as follows:

The law (like the Ohio law) requires that the subject of taxation is to be valued for taxation. The subject of taxation is the right to succeed. Therefore, the value to be ascertained is the cash value of the interest of the ultimate taker of the estate, not that of the specific property which may be held by the administrator or executor; therefore, also, debts must be deducted from the estate as a whole, and only that portion of the value represented by the whole estate be divided ratably in order to ascertain the value of the separate interests of the various takers.

I have taken the pains to ascertain that the above cited decisions are under statutes substantially identical with that of Ohio. I am, therefore, of the opinion that in the case you submit all the claims against the estate must be deducted from the total appraisement thereof for the purpose of fixing the total amount of the tax due.

But such a holding does not necessarily carry with it the conclusion that these debts should be deducted from the appraisement filed with the auditor by the probate judge, under Section 5341. I am of the opinion that the inventory of the whole estate and the appraisement thereof, or of such part thereof as may be conveniently separated as representing the amount of the estate subject to the tax, must be certified by the probate judge to the auditor. That is to say, if the probate judge is able to separate from the inventory certain items that are not subject to the tax he may do so, otherwise he must file the inventory of the entire estate.

The question is, then raised as to how and when deduction is to be made. The statute furnishes no answer to this question, excepting that afforded by Sections 5343 and 5344, of the General Code, supra. In view of the provisions of these sections, I am of the opinion that if no application to the probate court is made under this section there is no manner in which the deduction may be made; but that these sections afford a convenient method by which the probate judge may hear and determine all questions relating to what debts, funeral expenses and costs of administration ought to be deducted from the original appraisement in determining the value of the estate. I beg to advise you, therefore, that, with the single exception expressly made in Section 5340, it is the duty of the probate judge to make and deliver to the county auditor a copy of the inventory of the entire estate of the decedent; that, presumably, this inventory represents the value of the estate for inheritance tax purposes, except as to specific devises, legacies and trusts, exempt under Section 5332, General Code, or such as are not included within the catalogue enumerated in Section 5331; but that any interested party may lawfully

apply to the probate court for an order valuing the several interests subject to taxation, so as to provide for the deduction of debts and costs of administration. I know of no reason why an agreement between the prosecuting attorney and all interested parties, may not be entered into whereby the expensive procedure provided for in Sections 5343 and 5344, may be avoided and the expense to the county done away with.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

593.

ELECTION ON CONSTITUTIONAL AMENDMENTS—COMPENSATION OF DEPUTY STATE SUPERVISORS OF ELECTIONS, JUDGES, CLERKS, CHALLENGERS AND INSPECTORS—CHALLENGERS AND INSPECTORS.

In counties having no registration cities, under Section 4822, *of the General Code, the compensation therein provided for shall serve for the services required of deputy state supervisors of elections and their clerks. There is no authority for further compensation for services connected with the constitutional amendment election of* 1912.

Under Section 4800, *of the General Code, judges and clerks shall receive the* $3.00 *per diem prescribed for "each election day," during which they preside, and the same shall apply to services rendered at the constitutional amendment election.*

There being no provision for compensation for challengers and inspectors at said election, none can be paid to such. The deputy supervisors must be guided by the directions of the secretary of state, who is the chief election officer of the state in the matter of compelling attendance of said inspectors and challengers.

COLUMBUS, OHIO, August 21, 1912.

HON. CHEEVER W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—Replying to your communication of August 14th, wherein you ask my opinion on the following questions:

> "First. Are the members of the board of deputy state supervisors of election and their clerk entitled to extra compensation for taking charge of the constitutional election to be held September 3, next, or is the work imposed upon them in the holding of said election to be done by them without compensation other than that which they would receive if no constitutional election was held?
>
> "Second. Are the judges and clerks of the constitutional election to receive the same per diem as in general elections?
>
> "Third. Can the persons appointed as challengers receive any pay for their services at such constitutional election?

Section 4822, General Code provides as follows:

> "Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and

the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred and twenty-five dollars each year. Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof. Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it."

The only other sections providing for the compensation of deputy state supervisors and their clerk are Sections 4942 and 4943, General Code, but since they apply to counties containing registration cities they would have no application to your case.

A cursory reading of Section 4822, *supra,* discloses that the compensation therein provided is a yearly compensation for all services as such deputy state supervisors unless otherwise in the statutes extra compensation is fixed. The only other compensation for members of boards of deputy state supervisors and their clerk outside of the sections heretofore referred to will be found in Section 4990, General Code, which is only applicable to primary elections. It is my opinion that the compensation provided for in Section 4822, *supra,* is for all elections, general and special, and that the work imposed upon such officers by reason of the holding of the election on the constitutional amendments under a well known rule of law in the absence of special provision otherwise, is deemed compensated by their regular compensation.

Answering your second question, would say that since Section 4860, General Code, provides that judges and clerks shall each receive as compensation for their services the sum of $3.00, which services shall be "the receiving, recording, canvassing and making returns of all votes that may be delivered to them in the voting precinct in which they preside on *each election day.*" I do not think there can be any question but that they are entitled to the per diem provided for their services at the special election held on the proposed changes in the constitution.

Answering your third question, I would call your attention to the concluding "schedule" of the constitutional amendments under the heading of "Method of Submission." Among other things, it provides that challengers and witnesses shall be admitted to the polling place under such regulations as may be prescribed by the secretary of state. By virtue of that authority, the secretary of state on July 19th, 1912, formulated certain instructions to deputy state supervisors of elections in re special election, Tuesday, September 3, 1912, on constitutional amendments. Instruction No. 7 reads as follows:

"The board of deputy state supervisors of elections in each county are hereby instructed to appoint for each voting precinct two challengers and two inspectors, the challengers shall be permitted to remain in the voting places during the time the polls are open. The inspectors shall be permitted to remain in the voting places after the polls are closed and during the time of the counting and tallying of the ballots. The challengers and inspectors shall be qualified electors of the precinct in which they are to serve, and they shall be fair, impartial, unbiased and unprejudiced as to each proposal."

Subsequently on July 29, 1912, the secretary of state addressed to the deputy state supervisors of election of the state of Ohio, a further communication instructing the election authorities that there was no provision in the law authorizing the payment of challengers and inspectors or witnesses at elections, and that the constitutional convention did not make any provision for the payment of those who act as challengers, inspectors and witnesses at the special election to be held September 3, 1912. The state supervisor of elections further said:

> "If it is impossible to procure competent persons to serve in any precinct or precincts without compensation, it is a condition which cannot be helped by either myself as chief election officer of the state or by you as deputies."

Inasmuch as the state supervisor of elections is made, by law, the chief election officer with power to advise the deputy state supervisors as to the usual method of conducting elections, it is my opinion that the deputy state supervisors should follow the instructions of their chief.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

596.

ACTING MAYOR—VILLAGES—PRESIDENT PRO TEM. OF COUNCIL HAS NO JUDICIAL POWERS IN MAYOR'S ABSENCE.

Inasmuch as all judicial officers must be elected by the people of their district, and as a president pro tem. of a village council is elected by the council and not by the people, that official can have no jurisdiction to act in a judicial capacity during the absence of the mayor.

COLUMBUS, OHIO, August 22, 1912.

HON. TOM O. CROSSAN, *Prosecuting Attorney, Perry County, New Lexington, Ohio.*

DEAR SIR:—Your favor of August 15th received. You inquire whether the president pro tem. of the village council has any judicial powers in the absence of the mayor and while acting as mayor.

The circuit court of Belmont county, in the case of the State of Ohio vs. William T. Hance, expressly held:

> "The president pro tem. of a village council as acting mayor * * has no jurisdiction to hear and determine a misdemeanor."

You call my attention to the fact that the Hance case was decided in 1904, and in 1908 the legislature amended Section 195, of the Municipal Code, as you say, "for the express purpose of giving the president pro tem. these powers in the mayor's absence." I am still of the opinion that the president pro tem. of the village council has no jurisdiction to hear and determine a misdemeanor. One of the reasons assigned by the court in the Hance case was, that it was not within the competency of the legislature to clothe with judicial power any officer or person not elected as a judge.

The supreme court of Ohio, in the case of the Logan Branch Bank ex parte, in 1 Ohio State, 432, says, at page 434:

> "The tenth section of the same article provides 'that all judges, other than those provided for in this constitution, shall be elected by the electors of the judicial district for which they may be created, but not for a longer term of office than five years.'
>
> "Thus all the judicial power of the state is vested in the courts designated in the constitution, and in such courts as may be organized under the first section. But it is perfectly clear that, upon the creation of any additional court by the legislature, the judicial officer must be elected, as such, by the electors of the district for which such court is created; and it is not within the competency of the legislature to clothe with judicial power any officer or person, not elected as a judge."

The president pro tem. of the village council is not elected by a vote of the people of the municipality—he is chosen by the council. Judicial power, then, cannot be conferred upon him by the legislature. I, therefore, follow the decision in the Hance case, and hold that the president pro tem. of the village council as acting mayor has no jurisdiction to hear and determine a misdemeanor or to act in a judicial capacity.

Respectfully yours,
TIMOTHY S. HOGAN,
Attorney General.

597.

EXTRADITION CASES—FEES OF CLERKS OF COURTS PAID BY AGENT OF STATE AND CHARGED AS NECESSARY EXPENSES.

The statutes do not compel the clerk of courts to perform any services in connection with the extradition cases. When a clerk provides the requisite papers, his services for the same should be compensated for by the agent of the state appointed in such cases by the governor, and charged as his neecssary expenses against the state.

COLUMBUS, OHIO, August 22, 1912.

HON. JAMES J. WEADOCK, *Prosecuting Attorney of Allen County, Lima, Ohio.*

DEAR SIR:—I hereby acknowledge receipt of your communication of July 2, 1912, which is as follows:

> "When a prosecuting attorney makes application to the governor of the state of Ohio for the extradition of a fugitive under indictment the application must be accompanied by a certified copy of the indictment found against the fugitive. In case of forgery, embezzlement, fraud and false pretenses, the application must be accompanied by an affidavit of the complaining witness. The application must also be accompanied with a copy of the capias and certificate of the clerk of court of the official capacity of the prosecuting attorney. These papers must all be in duplicate and are all issued by the clerk of courts.

"Certain fees are taxed for these various papers. Are these fees to be taxed by the clerk as his costs and collected by him as his costs and made a part of the costs of the case by him, or are these fees to be paid to the clerk by the agent of the state under the extradition and by him charged up in his expense account?"

Extradition in such cases as your inquiry covers is a matter in which the governor exercises his discretion. The proceedings are all statutory, and such cases as you mention are covered under the title, "Fugitives from Justice," in Sections 109 to 118, G. C., inclusive. There is nothing in the statutes providing for the payment to the clerk of the fees mentioned by you; neither is there any law compelling the clerk to perform any duties in relation to extradition proceedings; nor any provision requiring him to keep a record thereof. The record is kept in the governor's office. (Section 144, G. C.)

Section 109, of the General Code provides:

"On application, the governor may appoint an agent to demand of the executive authority of another state a person charged with felony who has fled from justice in this state."

The documents necessary and required by Sections 110 and 111 should all be secured by the agent, officers or others interested in the return of the fugitive. The clerk, of course, is entitled to such fees as are usual for like services, and, in my opinion, he can demand payment therefor at the time of their rendition.

The requisition may never be effective, and the accused never brought to trial, thus leaving the clerk's fees for these preliminary services uncollectable from the county.

Furthermore, the whole proceeding in extradition is generally secret, the case not being docketed, and therefore no place to make a record of these fees on the part of the clerk.

Section 2491, G. C., seems to provide for the payment of such expenses, as follows:

"When any person charged with a felony has fled to another state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just."

I believe this includes all such matters as your inquiry covers, and are a part of the agent's "necessary expenses," for without such document he could not pursue and return the accused. I am, therefore, of the opinion that the agent aforesaid should pay for all these documents and include the same in his account to the commissioners for allowance.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

601.

COUNTY COMMISSIONERS OFFICE—VACANCY—ELECTION OF SUCCESSOR—APPOINTEE PRO TEM.

Under Section 2397 of the General Code, when a vacancy occurs in the office of county commissioner, more than thirty days prior to the next election for state and county officers, the successor must be elected at the said election. Said successor shall serve, under Section 2396 of the General Code, for the unexpired term of his predecessor.

A commissioner pro tem. may be appointed under Section 2397 of the General Code by the probate judge, auditor and recorder of the county, to serve until the successor aforesaid is elected and qualified.

When a commissioner pro tem. is so appointed, the fact that the governor's commission states that the appointment is for the unexpired term, does not affect a change in the law.

COLUMBUS, OHIO, August 22, 1912.

HON. DAVID T. SIMPSON, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—In your communication of July 24, 1912, you state:

> "J. S. was elected commissioner and served two months and died, his son was appointed by Governor Harmon to serve out the unexpired term of his father J. S., and has commenced the discharge of his duties. There being about twenty months of the term of J. S. to be filled, will it be necessary to have an election at this fall election and have a commissioner elected for the short term of about one year? Does this commissioner hold good for the full length of time of the term of J. S. as it says on its face that he is to serve for the unexpired term of J. S.?"

Section 2397, General Code, provides as follows:

> "If a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, auditor and recorder of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified."

It is apparent from a consideration of the above section that in the event a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, *a successor shall be elected thereat.* In the case submitted the vacancy occurred more than thirty days before the election for state and county officers which will be held this November, and as a consequence a successor should be elected thereat. The commissioner pro tem. provided for in Section 2397, supra., and I take it that A was appointed as provided by this section by the probate judge, auditor and recorder or a majority of them, holds his office until his successor is elected and qualified, and since provision is made for the election of a successor at this November election, being the next regular elec-

tion more than thirty days after the occurrence of the vacancy, the term of his appointment would expire upon the election and qualification of said successor.

In your question you state that A was appointed by Governor Harmon, but in your communication of July 27th you refer to the "commission given him by the governor which provides that he is appointed to fill out the unexpired term of J. S."

The provision for the filling out of the unexpired term written into a commission executed by the governor has no effect as to determining the term of the office. That is governed solely by the statute, and it is a principle too well settled to need citation of authorities that the law and not the commission determines an officer's term. As to certain other county officers the statute provides for a successor pro tem. who fills out the unexpired term, but in the case of county commissioners other provision has been made. This is rendered all the more apparent by a mere reading of Section 2396, General Code, which is as follows:

> "When a commissioner is elected to fill a vacancy occasioned by death, resignation, or removal, he shall hold his office for the unexpired time for which his predecessor was elected."

If the appointee, in case of vacancy, was entitled to hold the full unexpired term there would be no necessity for such a provision as contained in Section 2396, *supra.*, for there would never be a commissioner *elected* to fill the vacancy.

In view of Sections 2396 and 2397, *supra.*, I can come to no other conclusion but that a successor to J. S. should be elected at the coming November election and that the term of said successor would be for the unexpired term; also that at said election, it being the regular time of the election of county commissioners, a commissioner should be elected for the full term whose tenure of office would commence on the third Monday in September next after his election. (Section 2395, General Code.)

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

605.

TAXES AND TAXATION—LIEN OF STATE FOR TAXES A RIGHT IN REM—RIGHT ATTACHES SECOND MONDAY IN APRIL, BUT PAYMENT AFTER OCTOBER 1st MUST BE ENFORCED AGAINST LAND ITSELF—EFFECT OF APPROPRIATION PROCEEDINGS BY BOARD OF EDUCATION AFTER SECOND MONDAY IN APRIL.

Under the present state of the statutes, the tax against real estate is a right in rem, and can only be satisfied by the state by action against the land itself, regardless of the ownership of the land.

Under 5671 *of the General Code, the right of the state for taxes against land attaches on the day preceding the second Monday in April. When action is begun, therefore, by the board of education after the second Monday in April, the land is not exempt from taxes for that year, and, after October first, judgment meanwhile having been granted for such appropriation, the state must obtain its taxes when they are not paid, through sale of the land itself.*

The board of education, however, may recover the amount of said taxes in a personal action against the party owning the land on the day preceding the second Monday in April.

COLUMBUS, OHIO, July 5, 1912.

HON. CHEEVER W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I herewith desire to acknowledge the receipt of the following inquiry from you:

> "On April 11, 1911, application was made to the probate court of Harrison county, Ohio, for the appointment of a jury to award compensation and assess damages to the owner of a tract of land which had been appropriated by a board of education of a municipality in this county. The said jury was selected and the compensation and damages were awarded by their verdict on May 5, 1911. And the said board of education at once paid same and took possession of the land appropriated.
>
> "Now, the question comes up as to whether the owner of said property on the day preceding the second Monday of April, 1911, should pay the taxes on said land so appropriated as aforesaid, for the tax year, 1911, or whether the owner of said land on said date escapes liability for the reason that the land was taken by appropriation proceedings in said probate court before October 1, 1911. The resolution of the board of education declaring its intention to appropriate said land was of course, passed before the day preceding the second Monday of April, but the application aforesaid was not filed in probate court till after said date set out in Section 5671, General Code of Ohio.
>
> "Kindly let me have your opinion as to whether or not we should hold the aforesaid owner of said land at time aforesaid, for the taxes on said land for the tax year 1911."

In reply thereto, I desire to say that Section 7624 of the General Code provides for the appropriation of lands for school purposes, as follows:

"When it is necessary to procure or enlarge a school site, and the board of education and the owner of the proposed site or addition are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or court of insolvency, of the proper county. Thereupon the same proceedings of appropriation shall be had which are provided for the appropriation of private property by municipal corporations."

Section 5671 of the General Code provides that the lien for taxes attaches to real property on the day preceding the second Monday of April annually, as follows, to-wit:

"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person shall be liable, in the hands of an executor or administrator, for any tax due on it from the testator or intestate."

In your letter you state that the application to appropriate the said lands for school purposes was not filed in the probate court by the board of education until April 11, 1911. The lien for taxes had attached to said lands prior to that date: in other words, the taxes for the year 1911 were a lien on said lands before the appropriation proceedings even became lis pendens by the filing of the application, on April 11, 1911. The fact that the resolution to appropriate said lands was passed by the board of education before the day preceding the second Monday of April, would in no wise change my opinion in this regard. (See Trust Co. vs. Root, 72 O. S. 535).

Section 5671 of the General Code, above quoted, specifically says that the lien of the state for taxes for all purposes in each year shall attach to all real property on the day preceding the second Monday of April, annually, and shall continue until such taxes are paid, together with any penalty accruing thereon.

It was held in Creps vs. Baird, 3 O. S. 287, that

"Taxes due upon lands are a personal debt of him in whose name the lands are listed when the taxes accrue, as well as a lien upon the lands, unless 'the same are not his property, and are erroneously charged in his name for taxation.'"

Since this decision, however, there have been fundamental changes in the statutes of the state. No longer is it possible to sue the owner of real property and secure a personal judgment against him for the amount of taxes thereof, nor distrain personal property of such owner for the same purpose.

Section 5697 of the General Code provides for the only civil action which may be brought to collect taxes, and Section 2658 of the General Code, as construed in state ex rel. vs. Gibson, 1st N. P. n. s., 565, affirmed 70 O. S. 424, authorizes the treasurer to distrain personal property of the person charged with personal taxes. Both of these sections, however, apply solely to the collection of taxes on personal property.

The remedies afforded by Sections 5704 to 5773, inclusive, of the General Code, for the collection of the tax on real estate are exhaustive, or at least

pursuit of them to the end thereof is a condition precedent to the assertion of any personal right of action against the owner of the property.

In other words, in the present state of the law, which is made even clearer by the history of legislation, which I shall not recite, the tax on real estate is assessed in rem, and that on personal property is assessed in personam.

The obligation to pay the tax upon real estate is, of course, a personal one as among different parties, and is recognized as such by the various statutes, so that the party paying the taxes on real estate may, by virtue thereof, have a right of action against the party who sought to have paid them, as between the two, but the state and county are not primarily interested in such matters.

In Hoglen vs. Cohan, 30 O. S. 436, it was held that taxes on real estate sold at judicial sale after the day preceding the second Monday of April and before the first of October, could not be deducted from the proceeds of the sale, in spite of the provisions of Section 5671 of the General Code.

In the course of that opinion the following language is used on page 443:

> "The duplicate of taxes, delivery into the possession of the county treasurer on the 1st day of October annually is his warrant of authority for collecting the several levies found against the entries thereon, to-together with penalties and interest that may accrue. From that date, each parcel of land entered upon the tax duplicate, is seized in law and charged with the payment of the levy against it. This is not changed, in any degree, by the fact that the owner is personally liable. In these respects a tax levy, on the land, does not differ in principle from a levy on land by the sheriff under an execution."

so that, even if my conclusion as to the nature of the tax upon real estate were incorrect, it would still be true that such tax is primarily a tax upon the land as such, regardless of its ownership at tax paying time.

Now, the tax against the land in question was lawfully assessed; that is to say, the property was not exempt at the time the lien of the state attached. The taxes, therefore, must be paid, as I have already held.

The enforcement of the state's lien for taxes against this property must take its usual course. If the board of education does not pay the taxes on this land (although the board is not liable for them) it would be the duty of the auditor to advertise the same as delinquent, and, in other respects, seek to make the tax out of the land itself. The land is clearly subject to sale for taxes, and the board of education must protect itself by the payment of the taxes or else find itself divested of a portion, or all of its title in and to the premises.

The board of education should have protected itself in this regard in the course of the appropriation proceedings. In fact, the jury in these proceedings may be presumed to have taken the taxes into account in fixing the compensation to be paid by the board of education for the property.

For all the foregoing reasons I am of the opinion that the county treasurer may not, at least without exhausting the remedies provided for in Sections 5704 to 5773, inclusive, of the General Code, proceed against the owner of this property.

If the board of education does not pay the taxes when due the land must be offered for sale. Only in the event that it fails to sell at either the delinquent or forfeited land sale may any personal action be brought, if at all.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

606.

BOARD OF EDUCATION—INCORPORATION OF VILLAGE OUT OF TERRITORY ATTACHED TO VILLAGE SCHOOL DISTRICT—BOND ISSUE OF FORMER VILLAGE SCHOOL DISTRICT UNAFFECTED AND TERRITORY REMAINS ATTACHED—NEW VILLAGE DOES NOT CONSTITUTE A NEW VILLAGE SCHOOL DISTRICT, AND ELECTION OF BOARD OF EDUCATION VOID.

The legislature has made provision for the formation of various other school districts from the township school districts. The evident purpose of the legislature, however, as disclosed by Sections 4681, 4687 *and* 4728 *of the General Code, is to protect such school districts formed out of the township school district, e. g., city and village school districts and special school districts, from the encroachments of other school districts of a similar class.*

When, therefore, a village is created entirely out of lands which have been attached to another village for school purposes, even though the valuation of said newly incorporated village exceeds $100,000.00, *nevertheless Section* 4681 *of the General Code, providing that a village of such valuation shall become a village school district, will have no application. The former village school district will remain intact, and the territory out of which the new village was formed shall be deemed detached from said newly incorporated village for school purposes within the sense of Section* 4681 *of the General Code.*

(1) *From the premises; a bond issue made by the first village school district shall remain unaffeceted by the incorporation of the second village, and the same may be taxed against the residents thereof.*

(2) *An election of a board of education by the residents of the newly incorporated village is null and void.*

COLUMBUS, OHIO, August 6, 1912.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Under date of June 6, 1912, you state as follows:

> "The Empire village school district in this county includes all the territory in the village of Empire and also some outside territory attached for school purposes.
>
> "By a vote of the people bonds were issued to the amount of about $30,000.00 by the Empire village school district and sold May 1, 1912.
>
> "About the same time the persons living in the territory outside of the village in said school district created another village called Ekeyville. The same persons had voted on the bond issue, The election upon the incorporation of Ekeyville was held May 9, 1912, eight days after the bonds were sold. The bond issue, of course, was based upon the entire valuation of the district.
>
> "The bonds were issued for the purpose of building a new school house, plans for which have been made costing an amount approximately equal to the bond issue. The contract has not yet been let. About one-fourth of the total valuation of the school district is in the proposed incorporation of Ekeyville.
>
> "What, if any, effect would the new incorporation of Ekeyville have upon taxes to be levied to pay the bonds? Would the property in the new village of Ekeyville be subject to taxation to pay the bonds or would

the General Code, Section 3544 apply, and would the total amount of the bonds be taken into consideration in dividing the funds or debts? I take it that the incorporation of a new village carries with it the creation of a new school district."

In response to the foregoing inquiry you were sent an opinion given to Hon. James F. Bell, prosecuting attorney of London, Ohio, under date of April 18, 1912, released, May 13, 1912. On June 27, 1912, you send a further communication in which you state:

"In this county the bonds were sold for the purpose of erecting a new school building before a vote was taken of a part of the people in the school district to create another village. The board of education desires to know if the people in the new village would be relieved of paying taxes for the purpose of paying off the indebtedness thus incurred by the issuing of the bonds.

"One of the five members of the old Empire village school district is a resident of the new village of Ekeyville. The new village of Ekeyville has held a special election and has elected five members of its board of education. Was the election legal, and if it was, what is the status of the Empire village school district whose board of education consists of four members living therein and one member living in the new village of Ekeyville?

"There is no doubt but what the value of the property of the new village of Ekeyville exceeds the sum of one hundred thousand dollars."

The question to be determined in this situation is whether or not the new village becomes a village school district by operation of the statute.

Section 4681, General Code, provides:

"Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars, shall constitute a village school district."

Section 4687, General Code, provides:

"Upon the creation of a village, it shall thereby become a village school district, as herein provided, and, if the territory of such village previous to its creation was included within the boundaries of a special school district and such special school district included more territory than is included within the village, such territory shall thereby be attached to such village school district for school purposes."

Section 4710, General Code, provides:

"In villages hereafter created, a board of education shall be elected as provided in the preceding section. If such election is a special election, the members elected shall serve for the term indicated in such section from the first Monday in January after the last preceding election for members of the board of education, and the board shall organize on the second Monday after the special election."

The provisions of Section 4681, General Code, were under consideration in the case of Buckman vs. State 81 Ohio St., 171 wherein it was held:

> "By force of the provisions of Section 3888, Revised Statutes, as amended April 2, 1906, and in effect April 16, 1906 (98 O. L. 217), each incorporated village then existing—April 16, 1906—or since created, 'together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total valuation of not less than one hundred thousand dollars,' constitutes and is a village school district, no vote of the electors of such village being necessary to the creation or establishment of such district."

It will be observed that in Section 4681, supra, the district thus formed which is to constitute the new village school district is to consist of the territory of the village and also such territory as is attached to it for school purposes, "and excluding the territory within corporate limits detached for school purposes." These provisions were not construed in Buckman vs. State, supra. They must be considered in determining the present question.

Before the incorporation of the village of Ekeyville, all the territory thereof was in the Empire village school district for school purposes. The territory outside the village of Empire, part of which is now in the new village, was attached at some time to the Empire village school district and was so attached at the time of the incorporation of the village of Ekeyville. After it was so attached for school purposes a village was formed from this attached territory. Did the creation of a village have the effect of detaching the territory therein from the village school district of Empire?

It is conceded that the new village has a tax valuation of more than one hundred thousand dollars, and comes within the amount required for the formation of a village school district by the operation of Section 4681, General Code.

The real question to be determined in this case is, can a village school district be created from another village school district by the mere operation of the statute?

In the case of Scott vs. McCullough, 72 Ohio St., 538, it is held:

> "No part of the territory of a special school district is subject to be taken to form another special school district."

Summers, J., says on page 539:

> "The civil township is the basis of our school system."

He then reviews the history of legislation on the formation of subdistricts, village and city districts, and in conclusion, says on page 540:

> "The important thing is the fact that only territory forming part of the township shool district was taken in creating other districts."

On page 546, he further says:

> "If part of one district may be embraced in another, then part of the latter may be taken for another, and so on as long as other provisions of the statutes may be complied with, and with such con-

sequences as make it unreasonable to assume that such a possibility was within the contemplation of the legislature."

Section 4728, General Code, provides for the formation of special school districts, as follows:

"A special school district may be formed of any contiguous territory, not included within the limits of a city or village, which has a total tax valuation of not less than one hundred thousand dollars."

The statute under consideration in Scott vs. McCullough, supra, contained similar provisions, and defendants contended, as shown on page 544, that as the statute in terms exempts territory included within a village or city, any constructive exemption is precluded. The court, however, overruled this contention.

In the case of Fulks vs. Wright, 72 Ohio St., 547, it is held:

"When the schools of a township have been centralized, no part of the territory comprised in such centralization is subject to be taken to form a special school district."

The defendants in error contended in this case that a special school district may be formed from any contiguous territory not included within a village or city. The court, Summers, J., says on page 548 and 549:

"But we are of opinion, for the reasons stated in the opinion in that case, (Scott vs. McCullough, supra), that the words 'contiguous territory' are to be limited to such territory as the legislature manifestly had in contemplation when the section was enacted, and that is, to territory that had not been pre-empted by being taken to form some other district, but such as remained a township district or a part thereof. Many illustrations of such construction might be given. Two presently occur. Literally construed, the statutes providing for the organization of villages and hamlets would authorize their creation out of territory already forming a part of a village or hamlet. That would be absurd and manifestly was not intended."

In the formation of special school districts the statute specifically protects the territory of a village or city. When a village is formed composing a special school district, the special school district is in effect continued in existence under the form of a village school district, as shown by the provisions of Section 4687, General Code, supra.

The evident purpose of the legislature is to protect city school districts, village school districts, and special school districts from the encroachment of other school districts of a similar class.

The original school district was that of the township. The legislature in providing for the formation of other school districts has from time to time taken the territory of the township to form these other districts. As held by Summers, J., in the case of Fulks vs. Wright, supra, the territory to be taken in the formation of some other school district, is to be taken from the township, and not from territory which has "been pre-empted by being taken to form some other school district."

The territory now composing the new village of Ekeyville has been attached to the Empire school district. It has been "pre-empted" by that school district, and cannot be taken to form another village school district.

In determining whether or not a new village school district has been formed by the creation of a new village, the territory in such new village attached thereto or detached therefrom for school purposes must be taken into consideration. The attaching of the territory in question to the Empire school district for school purposes is in effect a detaching of that territory from the territory which now composes the village of Ekeyville. The statute operates upon the territory which forms the new village and not necessarily upon the village which was not in fact in existence at the time the territory was attached to the Empire school district.

If we take from the new village the territory therein, which is attached to the Empire district for school purposes, there will not remain any territory from which to form a new village school district.

The creation of the village of Ekeyville did not create a village school district by operation of law.

The provisions of Section 4710, General Code, as to the election of a board of education in a newly created village apply only when such village becomes a village school district. It does not apply to the village of Ekeyville.

The Empire village school district remains the same as it was prior to the incorporation of the village of Ekeyville. The territory in the village of Ekeyville is still attached to the Empire school district for school purposes. The election of a board of education in the new village was null and void.

The other questions which you submit are based upon the conclusion that the creation of the new village made a new school district. The holding above disposes of all those questions.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

609.

SALARY OF PROBATE JUDGE BASED ON FEDERAL CENSUS PRECEDING ELECTION—VACANCY AFFECTS NO CHANGE IN SALARY.

Inasmuch as under Section 2992 of the General Code the salary of a probate judge is based upon the last federal census preceding his election, a probate judge who was elected prior to 1910, will receive salary based upon the federal census of 1900.

The salary fixed at the beginning of an official term remains the same and is in no wise affected by the occurrence of a vacancy.

COLUMBUS, OHIO, August 23, 1912.

HON. F. M. STEVENS, *Prosecuting Attorney of Lorain County, Elyria, Ohio.*

DEAR SIR:—I have your letter of August 6th, wherein you state:

> "I submit to you for your opinion the following question: Whether or not a probate judge, appointed in June of this year to fill the vacancy caused by the death of our former probate judge, should receive a salary upon the basis of the 1910 census, or whether the same should be determined upon the basis of the 1900 census?"

Section 2992 of the General Code prich provides what salary shall be paid to a probate judge is, in part, as follows:

"Each probate judge shall receive one hundred dollars for each full one thousand of the first fifteen thousand of the population of the county, as shown by the last federal census next preceding his election; * * *."

I have not been informed as to when the deceased probate judge was elected but assume that is was prior to the year 1910. His salary was therefore based upon the population of the county as shown by the federal census of 1900; it was a fixed and definite sum which could neither be increased nor diminished during the term for which he was elected, had he lived to complete it.

The salary attaching to the office of probate judge, once the amount is determined according to the method prescribed by Section 2992, remains unchanged until the taking of another federal census and an election thereafter. No election to the office of probate judge having been held since the taking of the federal census of 1910, it follows that the salary attaching to that office will not change until another election is held. A person appointed to fill a vacancy occurring during a term stands in the same relation as the officer who was elected, and cannot receive an increase of salary during the unexpired portion of the term in the absence of a statutory regulation to that effect.

The only reported case that I have been able to find on this question is the case of Storke vs. Goux, 129 Cal., 526, where it was held:

"The salary attached to a county or municipal office at the beginning of an official term must continue without increase during the entire term for which the officer was elected notwithstanding the creation of a vacancy in the term, which is filled by the appointment of another."

I am of the opinion, therefore, that the salary of the present probate judge of your county should be the same as that of his predecessor in office.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

610.

REMOVAL OF MAYOR—REMOVAL BY GOVERNOR EXECUTIVE FUNCTION AND COMPULSORY PROCESS OF WITNESSES NOT ESSENTIAL—FORFEITURE AFTER PROCEDURE IN PROBATE COURT A JUDICIAL PROCEDURE.

The removal of a public official from office is an executive function. The procedure set out in Sections 4268 *and* 4269, *General Code for removal of a mayor by the governor for causes therein specified is not void and ineffective, for the reason that no provision is made for witnesses by compulsory process.*

The procedure set out in 4670, *General Code, providing for a hearing before the probate court in certain instances of misfeasance or malfeasance in office, is essentially a judicial procedure, and not withstanding the fact that provision is made for an entry of removal from office, the procedure is directed properly to the ascertainment of the fact of malfeasance or misfeasance, which in itself works a forfeiture of office. The power of removal being executive in its nature, such power is not to be deemed vested in the probate court.*

The misfeasance or malfeasance complained of in Section 4670, *General Code, must be some act specifically prohibited by statute, whilst the procedure set out in* 4268 *and* 4269, *General Code, may be invoked for general causes, not so defined, but which constitutes misconduct, gross neglect of duty, gross immorality or habitual drunkenness.*

COLUMBUS, OHIO, August 26, 1912.

HON. T. J. KREMER, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of August 7th, in which you set forth the following facts:

> "An action has been brought before the probate court of Monroe county, Ohio, to oust the mayor of the incorporated village of Clarington, Ohio, for malfeasance and misfeasance in office. The attorneys for the mayor have questioned the jurisdiction of the probate court in such a proceeding and insist that the probate court has no jurisdiction but insist that an action of this kind must be brought before the governor of the state under Section 4268 of the General Code of Ohio."

I gather from your letter that the probate judge desires my opinion as to whether or not he has jurisdiction of a complaint before him. Upon this assumption I venture to answer your letter. I should not presume to express my view in a matter already in litigation except upon the assurance that the judge before whom it was pending desired me to do so.

At the outset of the consideration of this question I am confronted by the fact to which you called my attention in your letter of August 13th, that Hon. Wade H. Ellis, one of my predecessors, has held that the procedure under Section 4268, General Code, is not available at all and that the action in the probate court is the only method by which a mayor may be removed. This holding of Mr. Ellis' was embodied in an opinion rendered to Hon. Myron T. Herrick, governor, on March 16, 1905, and is on file in this office. On examining it I find that Mr. Ellis held that what was then Section 226, Municipal Code, now embodied in Sections 4268 and 4269, General Code, is "vitally ineffective and inoperative." The reason upon which Mr. Ellis' conclusion was based is stated to be the fact

that the section, as considered by him and as at present constituted, contains no authority, by compulsory process or otherwise, to bring before the governor witnesses to sustain the charges or to refute them on behalf of the accused official. Mr. Ellis' view seems to have been that the absence of such a provision was itself a denial of what the statute requires as "a full and fair opportunity to be heard in his defense" as affecting the accused and, also, constituted a deficiency in the machinery, because of which the governor would be virtually helpless to sustain charges which might be filed in his office by him under the section.

In his discussion of the question, however, Mr. Ellis goes further than this and suggests that the statute is unconstitutional because it does not afford to the mayor a full and fair opportunity to be heard in his own defense. He cites certain authorities upon the proposition that the removal of a public official for cause necessitates notice of the cause and hearing upon the facts involved, and that such a hearing must possess the necessary ingredients of a fair trial.

Ultimately, I think, all of the propositions which Mr. Ellis discusses are founded upon the assumption that a public officer who is subject to removal for cause has a right, regardless of the provisions of the statute, to compulsory process to secure the attendance of witnesses in his behalf, so that the failure of the statute to secure him this right renders it void.

I am unable to agree with Mr. Ellis upon this proposition. Some of the authorities cited by him are inapposite; others, notably Dullman vs. Wilson, 53 Michigan, 392, have been expressly disapproved by our own supreme court. The proposition which lies at the foundation of the case just cited is that removal for cause is a judicial power and must be exercised under all the safeguards and sanction which characterize the exercise of that power. The supreme court of Michigan, in so holding, follows a line of decisions to the same effect which have not been accepted by the supreme court of Ohio. In state ex rel. vs. Hawkins, 44 O. S., 98, will be found in the language of Minshall, J., an exhaustive discussion of the nature of the power of removal for cause. This case is peculiarly in point, because it involves the power of the governor of the state to remove, for cause, certain officers of the city of Cincinnati. Without quoting exhaustively from the decision, suffice it to say that it is there held that the power of removal for cause is an executive, and not a judicial power, at least to the extent that the legislature is authorized to vest it in executive officers. It is also held, as a necessary corollary to this proposition, that when an executive officer is proceeding to exercise this power so vested in him by the legislature his determination and finding on the facts, unless fraudulently or arbitrarily reached, constitutes an exercise of executive discretion which is not reviewable by the courts. The contrary, of course, would be the case if the power were judicial. Speaking of the line of decisions of which Dullman vs. Wilson, supra, is an instance and specifically mentioning that case among others, Judge Minshall says at page 113:

> "Those decisions have, as a rule, proceeded upon the ground, that an incumbent has a property in his office, and that he cannot be deprived of his right without the judgment of a court. This view finds support in the doctrines of the common law, which regarded an office as an hereditament, but has no foundation whatever in a republic government like our own. (Citing a large number of cases)."

The ultimate conclusion reached by the court in this case is, as already pointed out, that the power of removal for cause may be vested by the general assembly in an executive officer under statutes which provide for its exercise as an executive function under safeguards requiring notice and hearing, but not amounting to the procedure of a trial in a court of law or equity.

This decision of the supreme court of Ohio has been approved in cases subsequently decided,

"State ex rel. vs. Sullivan, 58 O. S., 504;
"State ex rel. vs. Hoglan, 64 O. S., 532."

In both of these cases, one of which is cited in Mr. Ellis' opinion, the court came to the conclusion that the power of removal had not been properly exercised. In neither of them, however, was its conclusion based upon the denial of any supposed right to have compulsory process for securing the attendance of witnesses in behalf of the accused. On the contrary, the statutes under which both of them were decided did not authorize issuance of such compulsory process. If the position taken by Mr. Ellis was correct these cases would have been decided upon that point alone, and the decision in State ex rel. vs. Hawkins would have been opposite to that actually reached; on the contrary in each one of these cases the proposition laid down is adhered to and the legality of the exercise of the power of removal for cause was in each case determined by standards applicable to the action of an executive officer.

I have searched in vain for authority in support of the proposition advanced by Mr. Ellis. The cases and texts cited by him do not support his contention. There are many well established statutes, both those providing for removal from office for cause and others involving even property rights which would have to be held unconstitutional if this conclusion be admitted, for example, the statutes creating the state board of pharmacy, the state dental board and state medical board, the office of the chief inspector of workshops and factories, and other similar statutes providing for executive action, as, for example, the revocation of the certificate of a practitioner of medicine, necessitating notice and hearing, but not affording either to the officer or to the adversary party compulsory process to secure the attendance of witnesses.

In this state of the law I believe it to be inadvisable and unsafe to hold that a statute is unconstitutional which does not afford to an officer subject to removal for cause the opportunity to enforce the attendance of witnesses in his behalf upon the hearing which the law requires; nor do I believe it proper to hold that a statute is inoperative which does not afford to the removing officer the power to secure the attendance of witnesses in support of the specifications upon which the hearing was held. While there can be no doubt as to the propriety, policy, and convenience of affording such means, both to the removing officer and to the officer subject to removal, I am unable to reach the conclusion that the failure of the statute to provide such means to either of such officers renders it either unconstitutional or inoperative.

It has never been my policy to hold statutes void in the absence of authority sustaining such a proposition where, as in this case, there is a total absence of authority upon the proposition, and where, also, the proposition contended for, if correct, would involve a large number of statutes which have been in force and effect for a number of years. I think it my duty to afford every presumption of constitutionality to the statute which is so questioned.

In addition to what I have said, I may state that in a hasty examination of statutes providing for removal for cause I find that many of them fail to provide for securing compulsory attendance of witnesses at the hearing, which must be considered to be a necessary feature of the exercise of the power. Indeed, I do not understand that it is essential that the governor, for example, should be required to receive verbal testimony only in support of or against the charges filed in his office under the statute now under consideration. He is not precluded from receiving and considering affidavits which may be filed by any interested party and which may

bear in any way upon the subject of the complaint. The authorities are unanimous upon the point that whatever be the nature of the proceeding to remove it need not be characterized by adherance to the technical rules of evidence.

I, therefore, am of the opinion that Section 4268, General Code, which provides for the removal of the mayor of a municipal corporation by the governor of the state, is a valid, constitutional, and fully operative statute. Such a conclusion brings me then to the consideration of the scope and effect of this section, considered in connection with Section 4670, General Code.

Section 4268, General Code, provides in effect that the governor, after notice and hearing, shall remove the mayor if guilty of "misconduct in office, bribery, any gross neglect of duty, gross immorality, or habitual drunkenness." With the exception of "bribery" these enumerated causes are all general in their nature and do not constitute specific offenses prohibited by other statutes. Section 4670, General Code, on the other hand, is essentially dissimilar; the causes of complaint therein prescribed, insofar as the mayor might be concerned, are as follows:

> "that * * officer of a corporation is or has been interested, directly or indirectly, in the profits of a contract, job, work or service, or is or has been acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by the corporation, contrary to law, or that * * an officer of the corporation has been guilty of misfeasance or malfeasance in office."

It is clear that as to the first of these enumerated causes of complaint in the probate court it may be said that it concerns an act unlawful in itself which works a forfeiture of the office. In view of the nature of the proceeding, I am of the opinion, too, that the "misfeasance or malfeasance" of which the section speaks must be some positive act or acts prohibited by law, which of themselves work a forfeiture of the office. The purpose of the whole proceeding is not so much the removal from office as it is the ascertainment of facts which constitute a forfeiture of office. It is true that Section 4674 provides that at the conclusion of the proceeding, if the verdict of the jury sustains the charges "the probate judge shall enter the charges and findings thereon upon the record of the court, (and) make an order removing such officer from office." The proceeding is spoken of, therefore, as if it were an exercise of the power of removal or amotion, as it is sometimes called. It would be more accurate, however, I think, to consider it as a proceeding to forfeit office. Even the above quoted language of Section 4674 is not inconsistent with this theory, because it provides that the charges and findings shall themselves be entered upon the record, and because, further, Section 4675 provides for *proceedings in error*. Removal from office being an executive function purely, to be exercised by the use of sound discretion, it is clear that there could be no question of *judicial error* arising in the course of the exercise of such a power. It would not be inconsistent with the idea of executive removal to provide for an *appeal* for the purpose of reviewing the discretion of the removing officer or tribunal, but this is entirely a different thing from a proceeding in error, the only purpose of which is to test the sufficiency, in law, of the charges filed or the correctness of the verdict, or the rulings of the court.

I am, therefore, of the opinion that Section 4670 and succeeding section provide for the exercise of purely judicial powers, the object of the inquiry being to ascertain whether or not, in fact and in law, the accused officer has committed an act or acts which constitute ground for removal or, more accurately, which themselves amount to a forfeiture of the office.

Section 4268, as already pointed out, provides for an exercise of executive

power, not under the sanction of any hard and fast rules of laws but rather in the use of sound discretion, to be exercised liberally, as the case may require.

The two proceedings being essentially dissimilar there is, therefore, nothing inconsistent between the two sections under consideration and both must be regarded as fully in effect. Section 4670 having been considered in the case of State ex rel. vs. Ganson, 56 O. S., 315, as applicable to a mayor, I am of the opinion that, for the reasons stated, no intention can be imputed to the legislature to create an exception in the case of a mayor by the enactment of Section 4268.

The principle is well stated in Dillon on municipal corporations, 5th Ed., Section 467, as follows:

> "* * the removal of an officer upon conviction of an offense which forfeits his right to hold the office is an act mainly judicial, and perhaps administrative only as connected with the exercise of the police power. The removal of an officer as incident to the executive power of appointment, is not judicial, and, even where such removal is restricted by the establishment of certain precedent formalities, it is not judicial in the same sense as a removal made wholly as a punishment for an offense. The distinction referred to undoubtedly exists as between a proceeding before the courts of the state by way of indictment for official misconduct, (upon which forfeiture of office results, * * *) on the one hand, and a removal for cause after a hearing by the council or executive officers of the city, on the other hand. * * *."

In the note, at page 786, the author says:

> "The statutory provision for trial before the appointing power and removal thereby *does not preclude the indictment of the officer for official misconduct and removal thereon upon a verdict of guilty pursuant to another statute.* The remedies are concurrent. Coffey vs. Superior Court, 147 Cal., 525; Roberts vs. Superior Court, 147 Cal., 568."

I am therefore of the opinion that the probate court has jurisdiction in a proper case of a complaint filed under Section 4670 against a mayor. I venture to suggest, however, that the judicial character of the proceeding and its essential nature, as I have tried to describe it, necessitate holding that the "misfeasance or malfeasance" complained of shall be some act prohibited by law or unlawful at the common laws; mere "gross neglect of duty" or "habitual drunkenness," as spoken of in Section 4268, would not be proper grounds for complaint under Section 4670.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

632.

ROADS AND HIGHWAYS—CONTROL OF ROADS IMPROVED THROUGH BONDS, ISSUED BY COUNTY COMMISSIONERS UNDER STATE HIGHWAY ACT, IS VESTED IN STATE HIGHWAY COMMISSIONER.

When the county commissioners issue bonds under Section 53 of the state highway act, for the highway improvements therein provided for the control and management of the work of constructing, improving, maintaining or repairing such highways, is vested in the state highway commissioner and the county commissioners have no authority in this respect.

COLUMBUS, OHIO, September 18, 1912.

HON. JAMES W. DARBY, *Prosecuting Attorney, Vinton County, McArthur, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 16th, wherein you state:

> "Our county commissioners insist that they have a right under Section 53, page 348 of Vol. 102 of the Ohio Laws to issue bonds and build pikes, superintending looking after, controlling and doing everything that is to be done. My idea of the matter is that this provides a part of the machinery for running the requirements in connection with the state highway department."

Section 53 of the act of May 31, 1911, 102 O. L., 348 provides as follows:

> "The county commissioners in anticipation of the collection of such taxes and assessments, and whenever in their judgment it is necessary, are hereby authorized to sell the bonds of any such county in which such construction, improvement, maintenance or repair is to be made to any amount not exceeding in the aggregate one per cent. of the tax duplicate of such county. Such bonds shall state for what purposes issued, and bear interest at a rate not in excess of five per cent. per annum, payable semi-annually, and in such amounts to mature in not more than ten years after they are issued, as the county commissioners shall determine. Such bonds shall be advertised once each week for four consecutive weeks in two newspapers published and having a general circulation within the county. Such bonds shall be sold to the highest responsible bidder and for not less than par and accrued interest. The county commissioners may reject any and all bids. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement, maintenance or repair of the highway for which the bonds were issued, except that any balance remaining after all of the cost and expense of the improvement have been paid, shall become a part of the county road improvement fund."

The foregoing is a part of the law providing for aid by the state in the construction, maintenance and repair of highways. The bonds therein provided for are to be issued by the county commissioners to pay the county's portion of the cost of an improvement in cases where financial aid is received from the state under the state highway law. The moneys derived from such bonds must be expended in conjunction with the funds received from the state and in accordance with the requirements of Section 33 of the highway law, which provides:

"The state's proportion of the cost and expense of the construction, improvement, maintenance or repair of any highway under the provisions of this chapter shall be paid by the treasurer of state upon the warrant of the auditor of state issued upon the requisition of the state highway commissioner from an appropriation made to carry out its provisions. The county's, township's and property owner's proportion of the cost and expense of such construction, improvement, maintenance and repairs, shall be paid by the treasurer of the county, in which the highway is located upon the warrant of the county auditor issued upon the requisition of the state highway commissioner from any funds in the county treasury for the construction, improvement, maintenance or repair of roads."

The letting of contracts is vested in the state highway commissioner subject only to approval by the county commissioners. Section 6 of the highway act, now Section 1183, General Code, gives to the state highway commissioner general supervision as follows:

"The state highway commissioner shall have general supervision of the construction, improvement, maintenance and repair of all highways, bridges and culverts which are constructed, improved, maintained or repaired by the aid of state money. * * *"

I am of the opinion, therefore, that when bonds are issued by the county commissioners under favor of Section 53, above quoted, the commissioners are not authorizing to assume charge of the work of constructing, improving, maintaining or repairing highways.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

636.

BANKS AND BANKING—DEPOSITORIES OF COUNTY—ACTIVE AND INACTIVE—PAYMENT BY TREASURER BY CHECK ONLY—CURRENT EXPENSES—AWARD OF DEPOSITS WHEN BANKS DO NOT BID ON ALL FUNDS.

By virtue of the express provision of Section 2745, General Code, and also by reason of the fact that Section 2736, General Code, is the later section, the provision of Section 2736, General Code, that "all money shall be payable only upon the check of the county treasurer" governs the provision of Section 2675, General Code, that payment of warrants may be made in cash.

In the language of 2736, General Code, providing that "thereafter before noon of each business day, he shall deposit therein all money received by him during the preceding business day, except as hereinbefore provided," the word "therein" necessarily refers to active depositories and the words "except as hereinbefore provided" refer to amounts not necessary for current demands. Such amounts may, therefore, be deposited in inactive depositories directly.

When the commissioners have advertised for bids for inactive depositories, under 2716, General Code, and when after all the banks bidding therefor have been awarded the amounts bid for, there still remains a balance of funds unawarded, the commissioners may, under 2715-1, General Code, either first increase the deposits in the banks awarded the first deposits, upon the procurance of additional security, at the same rate of interest; or may deposit such balance in banks outside the county after advertising for bids as provided in Section 2716, General Code.

COLUMBUS, OHIO, September 12, 1912.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Under date of August 28, 1912, you inquire of this department as follows:

> "The commissioners of this county have just established depositaries for the funds of the county, under the county depositary law as amended in 102 Ohio Laws 59-60, and in connection therewith two or three questions have arisen upon which I am not clear.
>
> "First. Is Section 2736, General Code, to be literally construed so that every cent which comes into the treasury must be deposited by the treasurer and checked out in payment of all warrants, or can he keep in the treasury sufficient cash to pay, and is he authorized to pay warrants in cash which come in during the course of the day? It will be readily observed that to compel the treasurer to draw a check upon the depositary in payment of every small warrant, such as witness fees, etc., would entail a great additional burden upon the treasurer, and it does not seem to me that such a condition was contemplated by the legislature.
>
> "Second. Section 2736, General Code, contains this sentence:
>
> "Thereafter before noon of each business day, he shall deposit ***therein*** all money received by him the preceding business day, except as hereinbefore provided.
>
> "Does this word 'therein' refer to the active depositary, compelling the treasurer to deposit all moneys in the active depositary and check therefrom into the inactive depositary, or may it be construed

to refer to both the inactive and active depositaries, so that the treasurer may select either one in which to make his deposit?

"Third. At the opening of bids for depositaries recently, three different banks bid for the inactive deposits, to the amount of $300,000.00, each bank specifying the amount they desired, and these were all the bids received. The funds of the county at tax paying time and until the semi-annual distribution amount approximately to $400,000.00. Under the circumstances I could see no other relief except to readvertise for depositaries for this extra money, and have so instructed the commissioners. If you are aware of any other legal manner in which this money can be deposited, would be glad to receive such information."

Section 2736, General Code, as amended in 102 Ohio Laws 59, provides:

"Upon the receipt by the county treasurer of a written notice from the commissioners that a depositary, or depositaries, have been selected in pursuance of law, and naming the bank or banks or trust companies so selected, such treasurer shall deposit in such bank or banks or trust companies as directed by the commissioners, and designated as inactive depositaries to the credit of the county all money in his possession, except such amount as is necessary to meet current demands, which shall be deposited by such treasurer in the active depositary or depositaries. Thereafter before noon of each day, he shall deposit therein all money received by him the preceding business day except as hereinbefore provided. Such money shall be payable only on the check of the treasurer."

This section as amended in 101 Ohio Laws 354, provided:

"Upon the receipt by the county treasurer of a written notice from the commissioners that a depositary, or depositaries, have been selected in pursuance of law, and naming the bank or banks or trust companies so selected, such treasurer shall deposit in such bank or banks or trust companies as directed by the commissioners, to the credit of the county all money in his possession, except such as is necessary to meet current demands. Thereafter before noon of each business day, he shall deposit therein all money received by him the preceding business day except as hereinbefore provided. Such money shall be payable only on the check of the treasurer. The proceeds of checks, warrants, drafts or other claims deposited for collection and on which no interest is paid as provided by law shall be promptly returned to the county treasury."

The amendatory act of 102 Ohio Laws 59, provided for active and inactive depositaries. The original act made no provisions as to active and inactive depositaries, all depositaries were in effect inactive depositaries.

Under the provisions of Section 2736, General Code, as found in the amendatory act of 101 Ohio Laws, supra, the money "necessary to meet current demands," was not required to be deposited in a county depositary. The amendment of said section in 102 Ohio Laws made an additional provision as to such moneys, by adding after the words "except such amount as is necessary to meet current demands" the following: "which shall be deposited by such treasurer in the active depositary or depositaries." This clause so added plainly limits and applies to the amount necessary to meet current demands.

The specific purpose of the legislature in making this amendment was to provide for active depositaries and to require all moneys to be deposited either in an active or an inactive depositary. Prior to this amendment the active funds remained in the county treasury. The statute did not fix the amount to be retained as active funds, but left it to the discretion of the treasurer.

Before passing definitely upon this question other sections must be considered.

Section 2675, General Code, provides:

> "When a warrant drawn on him as treasurer by the auditor of the county is presented for payment, if there is money in the treasury or depository to the credit of the fund on which it is drawn, and the warrant is endorsed by the payee thereof, the county treasurer shall redeem it by payment of cash or by check on the depository, and shall stamp on the fact of such warrant, "redeemed," and the date of redemption."

The provision herein as to paying warrants in cash or by check was contained in the act of 97 Ohio Laws 459. It was therefore in the statutes prior to the amendment of Section 2736, General Code, in 102 Ohio Laws, supra.

Section 2745, General Code, provides:

> "Any provision of statute which conflicts with any provision herein relating to county depositaries shall be held to be superseded by the latter as to any inconsistency and not otherwise in counties having a depositary or depositaries for county funds under these provisions. If for any reason, any such county is without a depositary for such funds, the money of the county shall be placed and remain in custody of the treasurer until another depositary is designated, and he shall be governed by the general laws relating to county treasurers."

This statute specifically provides that if there is any inconsistency in the statutes, the provision of the county depositary law should control. Section 2736, General Code, is a part of the county depositary law. It is also a later enactment than Section 2675, General Code.

Sections 2736, General Code and 2675, General Code, should be construed, if possible, so as to give effect to the provisions of each. If they are so inconsistent that only one can be given operation, then the later enactment must control. The later enactment in this case is further sustained by the provisions of Section 2745, General Code.

Are the two sections inconsistent? Section 2675, General Code will permit a county treasurer to pay warrants either in cash or by check upon the depositary. Section 2736, General Code, requires the county treasurer to deposit all money, including that needed to meet current demands, in a county depositary. It provides further that such money shall be payable only upon the check of the county treasurer. This will include the money necessary to meet current expenses. In other words current demands must be paid by check upon the county depositary where such money is on deposit.

The sentence following must also be considered. It reads:

> "Thereafter before noon of each business day, he shall deposit therein all money received by him the preceding business day except as hereinbefore provided."

This sentence is also found in the act of 101 Ohio Laws 354, supra. In this act, the words, "except as hereinbefore provided" referred to the money necessary for current demands" which, in accordance with said act, could be retained in the county treasury. In the amendatory act of 102 Ohio Laws 59, all moneys, that not needed to pay current demands and that necessary to pay current demands, are required to be placed in a county depositary. Therefore, the words "except as hereinbefore provided" if they now refer to any part of the section, must still refer to the moneys needed to pay current demands, but as limited by the provision added in the amendatory act in 102 Ohio Laws 59, that such money shall be deposited in an active depositary.

Section 2736, General Code, does not permit warrants to be paid in cash and is therefore inconsistent with Section 2675, General Code.

It is my conclusion that under the provisions of Section 2736, General Code, as amended in 102 Ohio Laws 59, the county treasurer is not authorized to pay warrants in cash from the current receipts of the day. He must pay all vouchers by check upon the active depositary, or depositaries.

This, as you state, will require additional labor and inconvenience for the county treasurer. No doubt the law could be made so as to permit the county treasurer to pay current demands from current receipts and then require that the balance in the county treasury at the end of each business day should be deposited in a county depositary upon the following business day. The statute does not so provide and this is a matter for the legislature to determine. We can only construe the statutes as we find them.

You inquire further as to the meaning of the word "therein" as used in said Section 2736, General Code. The sentence containing this word is quoted on page five of this opinion.

The original county depositary act did not contain provisions for active and inactive depositaries. This was provided for in the amendatory act of 102 Ohio Laws 59.

In the original act the word "therein" referred to the only banks which were made depositaries and which were in fact the inactive depositaries. The active funds were retained in the county treasury. As now used in the present Section 2736, General Code, the word "therein" refers to the inactive depositaries, and the words "except as hereinbefore provided" refer to the funds needed for current demands, which funds are now required to be placed in an active depositary. In making this construction, we are following the meaning of these words as used in the original act.

Applying this construction to your specific inquiry, I am of opinion that the county treasurer can deposit funds directly in an inactive depositary and is not required to first deposit such funds in the active depositary. In fact it is made the duty of the county treasurer to deposit the funds not needed to pay current demands in an inactive depositary, and that which is necessary to pay current demands in an active depositary.

You next inquire as to the manner of determining depositaries for the amount remaining in the county treasury after all the banks bidding therefor have given the total amount for which they bid.

This is covered by Section 2715-1, General Code, which was enacted in 102 Ohio Laws 59. Said section reads:

> "The deposits in active depositaries, as provided for in the next preceding section shall at all times be subject to draft for the purpose of meeting the current expenses of the county. The deposits in inactive depositaries shall remain until such time as the county treasurer is obliged to withdraw a portion or all of same and place it in the active depositary

> or depositaries for current use. Each bank or trust company, when submitting proposals as provided in Section 2716 for the inactive deposits, shall stipulate the amount of money desired by such bank or trust company; and when the aggregate amount placed with all the banks and trust companies, qualifying for same, in any county, does not equal the amount that may be placed into inactive depositaries, the county commissioners shall, upon securing sufficient additional security from any or all of such inactive depositaries authorize the county treasurer to increase the deposits therein; or such county commissioners shall in the manner herein provided designate a bank or banks or trust companies, located outside of the county in which the county treasurer shall deposit such excess funds."

It appears from your letter that the aggregate amount placed with all the banks qualifying for the same does not equal the amount that may be placed in the inactive depositaries. The banks have been given the full amounts for which they bid and qualified for. In such case the county commissioners may pursue either or both of two courses for the deposit of the excess. They may take additional security from the inactive depositaries and authorize the county treasurer to increase the deposits therein; or they may designate, in the manner provided in the depositary act, a depositary outside of the county.

If they pursue the first course, competitive bidding is not required. The rate of interest to be paid will be the same as that offered in the bank's original bid and upon which it was given some of the inactive funds. In order for a bank to secure funds under this provision it must first be an inactive depositary.

If it is desired or necessary to pursue the second course, that is designate a bank or banks outside the county, then the provisions of Section 2716, General Code, as to advertising for bids must be complied with.

Said Section 2716, General Code, provides:

> "When the commissioners of a county provide such depositary or depositaries, they shall publish for two consecutive weeks in two newspapers of opposite politics and of general circulation in the county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next two preceding sections, which proposals shall stipulate the rate of interest, not less than two per cent. per annum on the average daily balance, on inactive deposits, and not less than one per cent. per annum on the average daily balance on active deposits, that will be paid for the use of the money of the county, as herein provided. Each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted."

In conclusion, the additional $100,000.00 may be given to the inactive depositaries without competitive bidding, upon the giving by any or all of them of additional security and by the direction of the county commissioners, at the same rate of interest such banks are now paying, or the county commissioners may readvertise for the letting of such funds and may designate a bank or banks outside of the county as such inactive depositary or depositaries.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

640.

ROADS AND HIGHWAYS—TWO MILE ASSESSMENT PIKE LAW—COUNTY COMMISSIONERS NOT OBLIGATED TO KEEP IN REPAIR THOSE PARTS OF MACADAMIZED OR GRAVELED ROADS WHERE SIDEWALKS HAVE BEEN CURBED AND GUTTERED.

When a county or state road passes through a street of a municipal corporation of a county, which road has been improved by graveling or macadamizing under the old two mile assessment pike law: HELD:

Under 7734 and 7744, General Code, it is the duty of the county commissioners to keep in repair only those portions of such road within their county included within the corporate limits of a city or village, whereon the sidewalks have not been curbed and guttered by the municipality.

COLUMBUS, OHIO, September 27, 1912.

HON. CHEEVER W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 3rd, wherein you state:

> "A certain county or state road passes through the main street of a municipal corporation of our county. The sidewalks along said street have been curbed and guttered between certain points in said corporation. Some 25 or 30 years ago the road passing along said street through said village was improved under the old two mile assessment pike law."

and then inquire:

> "Whose duty is it to keep said improved road in repair within the limits of said municipal corporation betweeen the points therein where the sidewalks have been curbed and guttered?"

Section 7444, General Code, provides:

> "The county commissioners shall keep in repair the portions of such roads within their respective counties, as are included within the corporate limits of a city or village in such counties, to points therein where the sidewalks have been curbed and guttered, and no further."

In your letter of inquiry you call my attention to an opinion rendered by me to the Hon. Frank J. Rockwell, under date of January 30, 1912, which you state was brought to your attention by reason of a newspaper article commenting thereon. The opinion which I rendered to Mr. Rockwell involved the question as to whose duty it was to repair a county road improved by paving with brick inside of a municipality, and in such opinion following the construction laid down in the case of Railroad vs. Defiance 52 O. S. 262, I held that the provisions of Section 7444, General Code, do not apply to other than macadam or gravel free road as set out in Section 7443, General Code, and that since the road concerning which the inquiry was made was a road paved with brick, such Section 7444, General Code, was not applicable to the matter under consideration and would, therefore, not be further considered. Having eliminated Section 7444, General Code, from discussion I considered the various cases in Ohio, and came to the conclusion that the county commissioners and municipal authorities have concurrent jurisdiction of so much of the county improved roads as lie within the corporate limits of a municipality.

You can, therefore, readily see that the exact question submitted by you, the road in question being as you state macadam, was not considered in such opinion. I presume that the person who prepared the article for the newspaper on the Rockwell opinion did not read the same carefully and simply took the conclusion at which I arrived as being a general proposition covering all cases. However, such conclusion should have been stated as follows:

> "That the county commissioners and municipal authorities have concurrent jurisdiction of so much of county improved roads, except those specified in Section 7443 and 7444, General Code, as lie within the corporate limits of a municipality."

Section 7444, General Code above set out in full has been construed, so I am informed, in two different ways. That is to say, that the words "to points therein wherein the sidewalks have been curbed and guttered, and not further," refer to points along the side of the road and that it is still the duty of the county commissioners to improve the road through its entire length on either side thereof only to where the sidewalks have been curbed and guttered. The other construction which has been placed upon this statute is that the county commissioners are required to repair such road only up to where the municipal authorities have constructed sidewalks and curbed and guttered the same along such roads. In other words, one construction as placed upon it is that the words "to points therein" mean to points in the road, and the other construction the word "therein" is construed to mean within the municipality.

Since the county commissioners have absolutely no authority to place sidewalks along county roads and since a municipality is by law given such power, I am of the opinion that such Section 7444, General Code, means that the county commissioners shall keep in repair a county road up to a point where the sidewalks having been curbed and guttered begin, and that they no longer are required to keep in repair such road beyond where the sidewalks so begin, and that at the other end their duty again begins at the place where the sidewalks having been curbed and guttered ceases. In other words, that such county commissioners are relieved from all duty of repair of all that portion of county roads within the municipality along the side of which sidewalks have been curbed and guttered. There is no specific authority in Ohio in relation to this matter but by way of dictum I would call your attention to the case of Railroad vs. Defiance 52 O. S. 262, at page 301 wherein the court, William, J., says:

> "It is quite clear, therefore, that Section 4906 has no application to the roads involved in this case; and, where applicable, it has no other effect than to cast on the commissioners the burden of keeping the roads to which it relates in repair, until otherwise improved by the city or village, and does not exclude the power of the municipal authorities to improve them at their discretion. (Section 4906 above referred to is now Section 7444, General Code.)"

In passing I would state that the proposition as laid down by said court in said case on page 299 as follows:

> "This position we think, untenable. The highways so brought within the corporate limits of the defendant, were removed from the control which the county commissioners theretofore had over them, and become subject to the control, supervision and care of the municipal authorities, like other streets and highways of the corporation."

has been fully discussed in the case of The State of Ohio ex rel. Peter Witt vs. W. E. Craig et al., 22 C. C. 135, at 138 the court reaching the conclusion that the results of the two cases (Railroad Company vs. Defiance and Lewis vs. Laylin) is simply to sustain the jurisdiction of the county commissioners and municipal authorities over such highways.

A further dictum is found in the case of Slusser vs. City of Sidney 11 N. P. n. s., 297 at page 301, which was a case involving the approach to bridges and in which case the court states as follows:

> "So that even if the bridge was for all practical purposes to be considered a part of the highway and come within the purview of Section 7444, General Code, requiring the county commissioners to keep in repair the portions of such roads within their respective counties which are included within the corporate limits of the city to points only where sidewalks have been curbed and guttered, yet effect ought to be given to the statute which requires them, even if curbs and gutters have been constructed up to or past the point of this bridge, to erect and maintain the bridge and its approaches."

Specifically answering your inquiry I desire to state, first, that the opinion to the Hon. Frank J. Rockwell, under date of January 30, 1912, specifically excepted Sections 7443 and 7444, General Code. In other words, macadamized roads, and therefore, is no authority either way in reference to your inquiry. The court in the case of Railroad Company vs. Defiance has declared that Section 7444 applies to Section 7443, to wit: all macadam and gravel free roads whether constructed under the general or local laws by taxation or assessment or both, and I am, therefore, of the opinion that it is the duty of the county commissioners to keep a macadam state or county road passing through the main street of a municipal corporation in repair within said corporation only until they come to the place of beginning of the sidewalks where they have been curbed and guttered, and that then the duty of repairing said road passes to the municipal authorities to keep the same in repair to the place at the other end of said road where the curbing and guttering of said sidewalks stops.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

649.

ELECTION POLLS—OPEN FROM 5:30 TO 6:00 EXCEPT IN REGISTRATION CITIES WHERE THEY SHALL BE OPEN FROM 5:30 TO 5:30.

Section 5056, *General Code, providing that the polls shall be opened from* 5:30 *to* 6:00 *is a general statute and applicable to all cities. Section* 4925, *General Code, providing that the polls shall be opened from* 5:30 *to* 5:30 *is a special statute applicable only to registration cities.*

The ruling of the secretary of state, therefore, that polls in all cities shall be open from 5:30 *to* 6:00, *except registration cities which are excepted by Section* 4925, *supra, wherein the polls shall be open from* 5:30 *to* 5:30, *is concurred with.*

COLUMBUS, OHIO, October 3, 1912.

HON. HENRY HART, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 18th, wherein you state:

> "In looking over the Code I find that Section provides that the polls shall be opened from 5:30 a. m. to 5:30 p. m., and that Section 5056 provides that the polls shall be opened from 5:30 a. m. to 6:00 p. m., central standard time. These two sections plainly are repugnant to each other and it is hard to figure out just what the law is upon the subject. I find that Section 5056 was amended in the last session of the legislature, found in Session Laws 102, page 446, making this therefore the latest law.
>
> "I have, therefore, advised the sheriff to provide for the opening and closing of the polls from 5:30 a. m. to 6:00 p. m. central standard time, and I do this under the numerous decisions that where two acts of the legislature are repugnant that the one last enacted should control.
>
> "I notice in the instructions given by the secretary of state to the election boards that under Section 4925 he holds and instructs that the polls be opened from 5:30 a. m. to 5:30 p. m., holding differently from what I construe to be the law.
>
> "I, therefore, write you and ask your opinion and construction of these acts as above indicated * * *."

Part first, title 14, of the General Code, is entitled of Electors." In chapter 5, supra, will be found Section 4925, which provides as follows:

> "On the day of the November election in each year and of any other election, the polls shall be opened by the judges of elections appointed and organized, as herein provided, by proclamation made by the chairman at the hour of five-thirty o'clock forenoon, standard time, and shall be closed by proclamation at the hour of five-thirty o'clock afternoon."

Chapter 9 of title 14 is entitled "Casting and Counting of Votes." In this chapter will be found Section 5056, General Code, which provides as follows:

> "The polls shall be opened at five-thirty o'clock forenoon and kept open up to and close at six o'clock, central standard time in the afternoon of the same day."

While these two sections appear to be repugnant to each other, and Section 5056, as amended, 102 O. L. 446, appears to be the later law, still, since Section 4925 is found in the chapter applying to registration cities, and is the latest amended form of the provision for the closing of polls in registration cities, while Section 5056 is the general statute, which was applicable to all places other than registration cities, it is not difficult to see that both statutes can be given effect, and it is not necessary to argue that the older statute is repealed.

Statutes fixing the time for the opening and closing of polls are more particularly directly to those having charge of the election machinery (19 O. S. 25); and since it is incumbent upon the state supervisor and inspector of elections, by virtue of his office, to advise as to the proper method of conducting elections, your question is more properly referable to him. The state supervisor has, as I understand, made a ruling upon this exact question. He has held, and his instructions to the various deputy state supervisors of elections throughout the state, will be, that the provisions of Section 4925 shall apply to all registration cities, and in such places the polls shall close at 5:30 o'clock in the afternoon; and that the provisions of Section 5056, requiring that the polls shall be opened at 5:30 o'clock forenoon and kept open up to and close at six o'clock, central standard time in the afternoon, shall apply to all polls other than in registration cities. I fully concur with the construction the state supervisor of elections has placed upon these sections, enabling them both to be given full and proper meaning.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

650.

TOWNSHIP TRUSTEES—POWER TO PURCHASE ROAD ROLLER AND OTHER ROAD MACHINERY—PAYMENTS MUST BE MADE FROM TOWNSHIP TREASURY—BONDS MAY NOT BE ISSUED THEREFOR.

By Sections 3275 and 7164, General Code, the township trustees are given power to purchase a road roller and other road machinery and pay for the same out of moneys in the township treasury not otherwise appropriated.

Under Section 3295, General Code, the trustees may issue bonds when not otherwise provided for, only for the amounts and for the purposes for which municipal corporations may issue bonds.

Municipal corporations cannot issue bonds except for purposes expressly authorized, and as they are not authorized to issue bonds for the purpose of purchasing road machinery, said power cannot therefore exist in the township trustees.

COLUMBUS, OHIO, October 4, 1912.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 27th, which reads in part as follows:

> "A board of trustees of one of the townships in this county desires to submit the question of levying a tax and bonding the township in question exclusive of the municipal corporation therein for $4,000.00, for the pur-

pose of purchasing a road roller and other road machinery for use in the construction and repair of the roads in said township.

"Section 3275 and Section 7164, of the General Code, clearly authorize the purchase of road machinery, but I can find no section specifically authorizing the submission of this question, and the issue of bonds for the purchase of such machinery upon the vote of the electors of the said township. The question is one of considerable importance to us, and I am submitting it to you for your opinion."

Sections 3275 and 7164, General Code provide:

"Section 3275. The trustees may purchase such number of plows and scrapers and any other road building or road repairing machinery they deem necesssary, for the use of the township, which shall be used exclusively for that purpose. The cost and expenses thereof shall be paid on the order of the trustees, from moneys in the township treasury not otherwise appropriated. They shall take possession of such plows, scrapers or machinery, or may authorize an employe of the township or other person, to take charge thereof, who shall take care of and preserve them when not in use.

"Section 7164. The township trustees may furnish such tools, implements and machinery, as they deem necessary, for the construction, repair and maintenance, of the roads in the several road districts within their township, to be paid for out of money in the township treasury not otherwise appropriated. They shall take a receipt from each road superintendent for such implements as are delivered to him, showing the number, kind and condition thereof."

There can be no doubt of the right of township trustees to purchase road machinery, under the foregoing statutes, when the money required therefor is in the township treasury. I have not been able to find any statute which, in express terms, grants to township trustees the right to issue and sell bonds for the purchase of road machinery. The power of township trustees to issue bonds in cases not specifically provided for by other statutes is conferred by Section 3295, General Code, as follows:

"The trustees of any township may issue and sell bonds in such amounts and denominations, for such periods of time and at such rate of interest, not to exceed six per cent., in such manner as is provided by law for the sale of bonds by such township, for any of the purposes authorized by law for the sale of bonds by a municipal corporation for specific purposes, when not less than two of such trustees, by an affirmative vote, by resolution deem it necessary, and the provisions of law applicable to municipal corporations in the issue and sale of bonds for specific purposes, the limitations thereon, and for the submission thereof to the voters, shall extend and apply to the trustees of townships."

It will be observed that the foregoing limits the purposes for which township trustees may issue and sell bonds of the township to the specific purposes for which municipal corporations may issue and sell their bonds.

Sections 3939 and 3939-1 set forth the various purposes for which a municipal corporation may issue and sell its bonds, none of which is similar to the purpose for which the township trustees in question desire to issue and sell the bonds of

the township. It is well settled that municipal corporations have only such powers as are expressly conferred upon them by statute. The right of such a corporation to issue and sell bonds, for a purpose not expressly authorized by statute, was before the circuit court in the case of Dunham vs. Opes, 3 C. C. R., 274. On page 281 of the opinion the court say:

> "As heretofore stated, it seemed to us, that in view of the legislation as it now stands, that the council of a municipal corporation cannot properly issue bonds in anticipation of the collection of tax levied, *even for the current year,* without a grant of such power—that as the right to do this is expressly conferred in certain cases by Sections 2685 and 2700, the maxim, that 'the express mention of one thing implies the exclusion of another' applies, and leads to the conclusion that the legislature did not intend to confer the right to anticipate the collection of any other taxes, than those expressly mentioned."

and on page 282 of the opinion is found the following:

> "We think the claim cannot now be properly made as urged by counsel for the village, under the decision of the supreme court in the case of The Bank of Chillicothe vs. The City of Chillicothe, 6 Ohio, pt. 2, 31, that independent of the statutes the village has the right to issue the bonds in anticipation of any tax. That case held substantially, that when the charter contains no restriction on the power of a municipal corporation to borrow money, it may do so. Our municipal code is now the charter of all such corporations, and it is full of restrictions on the power to levy taxes and borrow money, as we have already shown. In the case of Morrill vs. The Town of Monticello (9th Weekly Law Bulletin, 113), the U. S. circuit court for the district of Indiana, Judge Gresham delivering the opinion of the court, it was held, 'that municipal corporations have no general power to issue bonds or other commercial paper. That it must be conferred by statute. And no such power having been granted by the legislature in that case, that purchasers of the bonds, notwithstanding their form, hold them as non-negotiable paper, and subject to all legal and equitable defenses in favor of the maker."

Inasmuch as township trustees cannot issue and sell bonds of the township for a purpose for which a municipal corporation may not issue and sell them, and as the latter is without authority to issue and sell its bonds to provide a fund for the purchase of road machinery, I am of the opinion that township trustees may not legally issue and sell bonds for the purchase of such machinery.

No authority having been granted to township trustees to issue and sell such bonds, I am of the opinion that a favorable vote of the electors upon a submission of the question to them would not confer such authority.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

651.

CORRUPT PRACTICE ACT—CIRCUIT AND COMMON PLEAS JUDGES—STATE OFFICES—$2,500.00 LIMITATION—MAY MAKE CONTRIBUTION TO POLITICAL COMMITTEES.

The office of circuit or common pleas judge is a state office and the sum of $2,500.00, *provided by Section* 5175-29, *General Code, fixing the limitation of expenditures for state offices, determines the amount which may be expended by a candidate for common pleas or circuit court judge.*

There is no prohibition in the corrupt practice act that would inhibit a candidate for common pleas or circuit judge in making a contribution to a political committee, so long as such contribution added to his other expenses in connection with his nomination and election, did not exceed the amount fixed by law to wit, $2,500.00.

COLUMBUS, OHIO, October 7, 1912.

HON. W. H. SMITH, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 16th, wherein you submit the following questions for my consideration:

> "1. Does Section 29, of the act to prevent corrupt practices at elections make any provision for the amount of expenditures that may be made by candidates for common pleas or circuit judges?
>
> "2. Can the candidates named in query first lawfully make contribution to political committees?"

Answering your first question, I beg leave to inform you that in an opinion to Hon Charles Krichbaum, prosecuting attorney, Canton, Ohio, under date of February 8, 1912, I held that the office of circuit or common pleas judge is a *state office.* (See Section 1, Article XVII, Dillon Municipal Corporations, fourth edition; Section 58, People vs. Curley, 5 Colorado 419); and that the sum of twenty-five hundred dollars, provided for in Section 29 of the corrupt practices act, fixes the limitation of the amount of money a candidate for judge of the common pleas or circuit court is entitled to expend for his nomination and election.

Answering your second question, Section 5175-2, of the General Code (Section 2 of the corrupt practices act), provides for the filing of a statement of expenditures by candidates, and contains the following exception:

> "but individuals other than candidates *making only contributions,* the receipts of which must be accounted for by others, need not file such statement under this section."

Section 5175-26, of the General Code, provides that:

> "Any person is guilty of a corrupt practice if he, directly or indirectly, by himself or through any other person, in connection with, or in respect of any election, pays, lends or contributes * * * any money or other valuable consideration, for any other purpose than the following matters and services * * *"

There is no provision in this section for a contribution. It details the matters and things for which money or other valuable consideration may be paid, loaned or contributed.

Section 5175-29 provides that:

> "The total amount expended by a candidate for a public office, voted for at an election, by the qualified electors of the state, or any political sub-division thereof, for any of the purposes specified in Section 26 of this act, *for contributions to political committees,* as that term is defined in Section 1 of this act, or for any purpose tending in any way, directly indirectly, to promote or aid in securing his nomination or election, shall not exceed the amount specified herein * * *"

The corrupt practices act must be read as a whole. Certain expenditures are looked upon and regarded as legitimate; and it is conceded that, in the conduct of a campaign, either by a candidate or a committee, there are many necessary expenses that must be incurred and met. The law recognizes, as shown by reference to Section 2 of the act, supra, that individuals may make *contributions* as counter-distinguished from expenditures. Section 29 of the act likewise specifically mentions "contributions to political committees" as one of the component parts of the total expenditure of a candidate, which is limited by this section. The candidate making the contribution to the committee contemplates that they will expend the same for the legitimate and permitted things pertaining to the election, as provided by Section 26 of the act.

It is my opinion, therefore, that there is no prohibition in the corrupt practices act that would inhibit a candidate for common pleas or circuit judge in making a contribution to a political committee, so long as such contribution, added to his other expenses, in connection with his nomination and election, did not exceed the amount fixed by law, to wit: Twenty-five hundred dollars.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

656.

HOLIDAYS—ACTS ILLEGAL ARE ONLY THOSE EXPRESSLY PROHIBITED—MORTGAGE MAY BE FILED ON SATURDAY AFTERNOON.

Statutes prescribing holidays are construed to make illegal only such acts performed therein as are expressly prohibited in terms.

A county recorder's office may, therefore, be kept open Saturday afternoons and mortgages filed at that time, take precedence over a chattel mortgage filed at any time the following Monday.

COLUMBUS, OHIO, October 2, 1912.

HON. CHAS. A. BLACKFORD, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—Under date of August 19th you wrote me, in part, as follows:

> "This county has pursued the plan of closing the county offices at three o'clock p. m. each Saturday. The statute reads that 'Every Saturday of each year shall be a one-half legal holiday for all purposes, beginning at twelve o'clock noon and ending at twelve midnight.' As a compromise between the parties contending for and against a half holiday, the officials of this county have authorized the officers to close the offices at three o'clock p. m. and the question arises:

"1. As to whether or not this half legal holiday is compulsory.

"2. If a chattel mortgage should be filed between twelve o'clock and three o'clock p. m., the time of closing the recorder's office, whether such filing would take precedence over a chattel mortgage filed the first minute after opening the recorder's office on the following Monday?"

The rule on this subject is stated in Cyc., volume 21, page 445, as follows:

"As in the case of other transactions the validity *vol non* of official acts performed on a legal holiday depends on the terms of the statute. The mere designation of a day as a holiday does not invalidate a sheriff's sale, or an order adjourning the sale made on such day. Indeed statutes having for their object the suspension of official transactions on holidays will be construed as prohibiting only such acts as are in express terms or by clear implication described. Thus, a prohibition against the transaction of public business in the public offices of the state or the counties of the state on a legal holiday has been held not to apply to municipal legislation, or to the making of a return by surveyors of a public road."

The principle announced in the text is amply supported by authorities therein cited. Our supreme court, in the case of State of Ohio vs. Thomas, 61 O. S., 444, in the opinion, on page 466, say:

"Where the transaction of judicial business on Sunday or holidays is expressly forbidden by statute, acts of a ministerial character on those days are held unlawful; such as the issue of a warrant for the apprehension of a criminal and his admission to bail, the receiving of a verdict and committing the defendant for sentence, the issue and service of civil process, and many other acts of a similar nature. All of which is a recognition of the rule already stated, that whatever acts may be lawfully done on other days are also lawful when performed on Sunday or a holiday, except when, and in so far as their performance on those days is prohibited by statute."

And in the case of Glenn vs. Eddy, 22 Vroom, 255, Justice Magie, in rendering the opinion of the court, says:

"When the statute declares them to be legal holidays, it does not permit a reference to the legal *status* of Sunday to discover its meaning, for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment, what shall not be done thereon. *What it thus expresses is prohibited; what it fails to prohibit remains* lawful to be done."

To the same effect are judicial decisions in other jurisdictions. So that it may be said to be the weight of authority that any act may be performed on a holiday which is not expressly prohibited by statute.

In view of the foregoing, I am of the opinion that county officers may legally keep their offices open for the transaction of business on Saturday afternoons, inasmuch as the same is not expressly prohibited by the statute which you have quoted above.

It follows from the answer to your first question that a chattel mortgage, filed at any time on Saturday afternoon, would take precedence over a chattel

mortgage filed the first minute after opening the recorder's office on the following Monday.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

657.

ROADS AND HIGHWAYS — TOWNSHIP ROAD DISTRICTS — COUNTY COMMISSIONERS MAY NOT AID CONSTRUCTION BUT MUST MAINTAIN AND KEEP IN REPAIR.

The county commissioners are required by Section 7050, General Code, to maintain and keep in repair roads constructed by the township trustees under Sections 7033 to 7052, General Code, providing for road districts.

The commissioners are not authorized, however, to take any part in the construction of such road and may not render assistance when the trustees are short of funds.

COLUMBUS, OHIO, September 25, 1912.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Under date of September 6th, you inquired of me as follows:

> "Brighton township, this county, within about a year under Sections 7033-7052, inclusive, General Code, organized itself into a road district. It has now under process of construction a road, but will only have funds sufficient to complete part of the work, i. e., to do the excavating, grading and ditching, and the trustees have applied to the county commissioners for enough funds to finish this road, i. e., put on the stone, properly roll it and apply the top dressing, for which it is estimated about $700.00 will be required, and I am unable to find any authority for such practice.
>
> "At their request, however, I am submitting for your determination the question above involved."

Sections 7033-7052, inclusive, of the General Code, constitute a subdivision of the township road laws entitled "Township or Precinct, a Road District." Under said subdivision the township trustees may organize a part or all of a township into a road district. When this is accomplished, the trustees are empowered to borrow money, issue bonds and levy taxes upon the taxable property of the road district, to pay the costs and expenses of improving public ways therein.

County commissioners are required, by Section 7050, General Code, to *maintain and keep in repair,* such roads, after they are improved, but there does not seem to be any authority permitting them to assist in the *construction* of such roads.

It is, therefore, my opinion that the commissioners of Lorain county may not legally expend county funds in assisting the township trustees to construct the road in question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

660.

COUNTY BRIDGES AND APPROACHES TO SAME—POWERS OF COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES TO CONTRACT FOR CONSTRUCTION AND REPAIR—POWER OF COUNTY COMMISSIONERS AND INFIRMARY DIRECTORS TO EMPLOY PHYSICIAN FOR CHILDREN'S HOME.

By virtue of Section 2422, General Code, the county commissioners are required to pay the entire cost of construction and repairs to the approaches and ways to all bridges, over streams and public canals on state and county roads, free turnpikes and plank roads, in common public use, except where such bridges are wholly in cities and villages which have received the part of the bridge fund which they are entitled to demand, and except also where the cost of such construction and repair does not exceed fifty dollars, in which case said construction and repair must be accomplished by the township trustees.

Under 7562, General Code, the township trustees are required to pay the entire cost of construction and repair of all bridges and culverts except upon improved and free turnpike roads when the cost of such construction does not exceed fifty dollars. Such bridges are taken entirely from the jurisdiction of the county commissioners.

Also by Section 7562, General Code, the township trustees are required to keep in repair all bridges constructed by the county commissioners, but only to the extent of ten dollars per year upon any one bridge. When, therefore, the cost of any one repair will bring the total amount expended for such bridge, to an excess over ten dollars for a given year, the entire cost of such repair must be borne by the county commissioners.

What shall constitute a reconstruction and what a repair of a bridge depends upon the facts in each particular case.

The work done under the supervision of the county commissioners should be contracted for by them, and the work to be done by the township trustees should be constructed for by the township trustees, but this rule may have exceptions when applied to particular facts.

Under Section 2546, General Code, the infirmary directors are given power to contract for physicians for the relief of county poor, and by virtue of this section they may contract for a physician for the county children's home. After January 1, 1913, however, this power will be vested in the county commissioners.

COLUMBUS, OHIO, October 5, 1912.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your favor of September 6, 1912, is received, in which you inquire:

> "Sections 2422 and 7562 provide for the construction and repair of bridges and approaches by township trustees.
>
> "First. When the cost of construction of bridges exceeds fifty dollars, should the township trustees pay on such construction the sum of fifty dollars, or should the county commissioners pay the whole amount, when the cost of construction exceeds fifty dollars?
>
> "Second. When the repair of such bridges in any one year exceeds ten dollars, should the total amount of the repair be paid by the county commissioners, or should the excess of the amount of ten dollars be

paid by the county commissioners and the amount of ten dollars be paid by the township trustees?

"Third. When such bridges are washed off of foundations and one, or part of the abutments are destroyed by floods, should replacing and rebuilding such abutments and bridges be considered construction or repair?

"Fourth. Should such construction and repair be contracted by county commissioners or township trustees, or both?

"Sections 3070-3108, of the General Code, provide for the organization of children's homes but make no specific provision for employment of physician, unless the by-laws or regulations provide for the same as authorized in Section 3085, of the General Code.

"Trustees of the children's home of Lawrence county have made no regulations relative to employment of a physician.

"Fifth. Who has the authority to employ a physician in the children's home, trustees, county commissioners or matron?"

Section 2422, General Code, provides:

"Except as therein provided, the commissioners shall construct and keep in repair, approaches or ways to all bridges named in the preceding section. But when the cost of the construction or repair of the approaches or ways to any such bridge does not exceed fifty dollars, such construction or repair shall be performed by the township trustees."

Section 2421, General Code, provides:

"The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

Section 7562, General Code, provides:

"The township trustees shall cause to be built and kept in repair all bridges and culverts, except upon improved and free turnpike roads, when the cost of construction does not exceed fifty dollars, and shall keep in repair all bridges constructed by the commissioners. Such repair by said trustees of a bridge in any year shall not exceed ten dollars and they may levy a tax for the payment thereof."

By virtue of Section 2422, General Code, the county commissioners are required to construct and keep in repair the approaches and ways to all bridges named in Section 2421, General Code, unless the cost of such construction or repair does not exceed fifty dollars. If the cost does not exceed fifty dollars such repair or construction of such approaches or ways is to be performed by the township trustees. This does not apply to the repair of the bridge itself. Section 2421,

General Code, directs the commissioners to keep the bridges in repair, but does not limit the amount to be expended for such repairs.

By virtue of Section 7562, General Code, the township trustees are required to build and keep in repair certain bridges and culverts, when the cost of construction does not exceed fifty dollars.

Sections 2422 and 7562, General Code, do not provide that the county commissioners shall pay the excess above fifty dollars of the cost of construction of the bridge or of the cost of the construction or repair of the approaches. Neither do they provide for a division of the liability. They plainly provide that the county commissioners shall construct the bridges or the approaches and keep the approaches in repair, if the cost is in excess of fifty dollars, and the township trustees shall construct the bridges, or the approaches, and keep said approaches in repair, if the cost thereof does not exceed fifty dollars.

Therefore, if the cost of construction of the bridge, or of the approaches thereto, or the cost of the repair of the approaches exceeds fifty dollars the county commissioners should pay the entire amount thereof. If the cost of construction of the bridge or approaches, or the cost of the repair of the approaches, does not exceed fifty dollars, then the township trustees shall pay the same.

Your second inquiry is as to the cost of the repair of the bridges. It is not in reference to the repair of the approaches to the bridge.

By virtue of Section 7562, General Code, the township trustees are to keep in repair bridges the construction of which did not exceed fifty dollars. They are also required to keep in repair all bridges constructed by the county commissioners. Then follows a provision which limits the amount the township trustees can expend upon a bridge within any year. It must be first determined whether this limit applies to all bridges or only to those constructed by the county commissioners.

In the present section the limitation is in a separate sentence. In the original section, as shown in Bates Rev. Stat. of 1908, Section 4940, the limitation is a part of the sentence which requires the township trustees to make the repairs.

This part of Section 4940, Rev. Stat. reads:

> "but the trustees of the several townships shall cause to be built and kept in repair all bridges and culverts, except upon improved and free turnpike roads, when the cost of construction does not exceed fifty dollars, and shall keep in repair all bridges constructed by the commissioners; provided, however, *such* repair by said trustees of any *such* bridge in any year shall not exceed ten dollars and they are authorized to levy a tax for the payment of the same."

The use of the word "such" before "repair" and "bridge" in the above section shows that it was intended that the limitation of ten dollars was to apply to the bridges constructed by the county commissioners and not to the bridges consructed by the township trustees. There would be no reason why the county commissioners should pay any part of the repair of bridges which the township trustees are required to construct. The needed repairs of a bridge constructed by the township trustees may exceed ten dollars in a year. Such a bridge is under the control of the trustees. They are required to construct the same and they are required to keep the same in repair. That bridge is taken from the jurisdiction of the county commissioners.

The language used in the statutes governing the repair of the bridges constructed by the county commissioners and the payment of the cost thereof is different from that used in reference to the cost of construction.

If the township trustees expend in a certain year ten dollars for the repair of a bridge, and said amount is not sufficient to keep said bridge in repair, it then becomes the duty of the county commissioners to make the additional repairs, as authorized by Section 2421, General Code. The statute does not, specifically authorize a division of the expenses of the repairs, if the same amount to more than ten dollars in a year.

It may occur that the township trustees would expend, in the early part of the year, ten dollars for certain repairs, and that later other repairs were needed, which of necessity would have to be made by the county commissioners. In such case the county would not be required to refund to the township the ten dollars already expended by it nor would the township be authorized to make any further repairs.

It may occur that the amount of repairs needed at a given time would require an expenditure in excess of ten dollars. The statute, in my opinion, does not contemplate in such case that the township trustees shall contract for repairs in the sum of ten dollars, and that then the county commissioners should make the additional repairs. This would mean a division of responsibility and would likely lead to extravagance, rather than to economy or efficiency. The evident purpose of the statute is that the trustees shall make all small repairs, while the county commissioners shall make the larger repairs to a bridge.

Therefore, I am of opinion, that if the repairs to be made upon a bridge constructed by the county commissioners at a given time, will require an expenditure in excess of ten dollars, such repairs shall be made by the county commissioners at the expense of the county. If the cost does not exceed ten dollars, such repairs should be made by the township trustees, provided, however, they have not made repairs on such bridge to the amount of ten dollars in that year. If they have made repairs in an amount less than ten dollars, then they can only make such repairs as will not cause an expenditure by them for the year in excess of ten dollars. This rule applies only to the bridges constructed by the county commissioners and which the township trustees are required to keep in repair by virtue of Section 7562, General Code.

Your third inquiry is an abstract proposition, which will depend for answer upon the particular facts of each case, and which may also be controlled by the provisions of the statute to be applied or construed.

There is no definite rule of law by which it may be determined in all cases as to what shall constitute a reconstruction of a bridge and what shall constitute a repair of a bridge. This will depend upon the facts of each particular case. If your inquiry in reference to the statutes above construed, I cannot now see that it is of importance in view of the construction that has been placed upon said sections in answer to your first and second questions.

However, if this does not answer your purpose, this department will give the matter further consideration upon the statement of further facts.

In answer to your fourth inquiry, I am of opinion that the work to be done under the supervision of the county commissioners should be contracted for by them, and that the work to be done by the trustees should be contracted for by the township trustees.

Section 2344, General Code, provides:

> "When it becomes necessary to erect a bridge, the county commissioners shall determine the length and width of the superstructure, whether it shall be single or double track, and advertise for proposals for performing the labor and furnishing the materials necessary to the erection thereof. In their discretion, the commissioners may cause to be prepared plans, descriptions and specifications for such superstruc-

ture, which shall be kept on file in the auditor's office for inspection by bidders and persons interested, and invite bids or proposals in accordance therewith.

Section 3274, General Code, provides:

"When money is received into the township treasury from the county treasury for road purposes, the trustees shall cause such money to be appropriated to building bridges or repairing public roads within the township. After public notice, they shall let by contract to the lowest bidder, such part or parts of any road as they deem expedient, equal to the amount of money to be appropriated, if in their opinion such bidder is competent to perform the work. When such labor is performed in accordance with the contract or conditions of the letting, the trustees shall draw an order in favor of the person who has performed such labor for the amount due therefor."

The rule stated above is a general rule which may have exceptions when applied to particular facts.

Your next inquiry is in reference to the employment of a physician for a county children's home.

The county children's home is under the management of a board of trustees, appointed by the county commissioners.

Section 3081, General Code, provides:

"When the necessary site and buildings are provided by the county, the commissioners shall appoint a board of four trustees, as follows: One for one year, one for two years, one for three years, and one for four years, from the first Monday of March thereafter. Not more than two of such trustees shall be of the same political party. Annually thereafter on the first Monday of March, the county commissioners shall appoint one such trustee, who shall hold his office for the term of four years and until his successor is appointed and qualified."

Section 3084, General Code, provides:

"The board of trustees shall designate a suitable person to act as superintendent of the home, who shall also be clerk of such board, and who shall receive for his services such compensation as the board of trustees designates at the time of his appointment. He shall perform such duties, and give security for their faithful performance, as the trustees require.

Section 3085, General Code, provides:

"Subject to such rules and regulations as the trustees prescribe, the superintendent shall have entire charge and control of such home and the inmates therein. Upon the recommendation of the superintendent, the trustees may appoint a matron, assistant matron, and teacher, whose duties shall be the care of the inmates of the home and to direct their employment, giving suitable physical, mental and moral training to them. Under the direction of the superintendent, the matron shall have the control, general management and supervision of the household duties of the home, and the matron, assistant matron and teacher shall perform

such other duties, and receive for their services such compensation as the trustees may by by-laws from time to time direct. They may be removed at the pleasure of the trustees or a majority of them."

Section 3086, General Code, provides:

"The superintendent may suspend temporarily a matron, assistant matron, or teacher, notice of which must be immediately given to the board of trustees for their approval or disapproval, but, if in their judgment it is for the best interest of the home and of the county, the trustees may dispense with a superintendent and authorize the matron to assume entire charge of the home and its management."

It appears from your letter that by virtue of the foregoing section the board of trustees has dispensed with a superintendent and placed the home in charge of the matron.

The matron has charge and control of the children's home and of the inmates, under the rules and regulations prescribed by the board of trustees.

The statutes do not specifically authorize the board of trustees of the home, or the matron, to employ a physician for the home or to furnish medical relief to the inmates.

The trustees are required to report to the county commissioners, and the commissioners are required to make appropriations for the expenses of the home.

Section 3105, General Code, provides:

"At their regular quarterly meeting at which such estimate is presented to them, the commissioners shall carefully examine the estimate, and if, in their judgment, it is reasonable and ratably within the assessment for the support of the home for the current year, or so much thereof as they deem reasonable and within such assessment, the board of commissioners shall allow and approve, and shall appropriate and set apart such amount for the use of the home. Upon the order of the trustees of the home, the county auditor shall draw his warrant upon the county treasurer, who shall pay such warrant from the fund so appropriated and set apart.

Section 3104, General Code, provides:

"The board of trustees shall report quarterly to the commissioners of the county the condition of the home, and make out and deliver to the commissioners a carefully prepared estimate, in writing, of the wants of the home for the succeeding quarter. Such estimate shall specify separately the amounts required for each of the following purposes, to wit: First, food, fuel and forage; second, clothing; third, pay of officers and employes; fourth, repairs; fifth, improvement of buildings and grounds; sixth, books and stationery; seventh, furniture; eighth, transportation of inmates; ninth, live stock; tenth, other expenses."

It is apparent that the children's home is a county institution in which the poor and dependent children of the county are cared for. The inmates are wards of the county.

The only specific provision of statute authorizing the employment of a physician by the county, is found in connection with the provisions for the relief of the poor in the county infirmary.

Section 2546, General Code, provides:

> "County commissioners may contract with one or more competent physicians, to furnish medical relief and medicines necessary for the persons of their respective townships to come under their charge, but no contract shall extend beyond one year. Such contract shall be given to the lowest competent bidder, the county commissioners reserving the right to reject any or all bids. The physicians shall report quarterly to the county commissioners on blanks furnished by the commissioners, the names of all persons to whom they have furnished medical relief or medicines, the number of visits made in attending such persons, the character of the disease, and such other information as may be required by the commissioners. The commissioners may discharge any such physician for proper cause."

This statute is not limited to the relief of those who may be confined in the county infirmary. It is for the relief of "persons of their respective townships to come under their charge."

Section 2544, General Code, provides:

> "In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith *receive and provide for him in such institution, or otherwise*, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

Section 2545, General Code, provides:

> "The superintendent of the infirmary shall report quarterly to the board of state charities, the names of all persons to whom relief has been given outside of the infirmary, *whether medical or otherwise*, together with their age, sex and nationality, whether married or single, and, if married, the number of persons in the family, and the ages of each; also the reasons for extending relief, the nature and amount of the relief given, and any other information prescribed by such board."

Sections 2544 and 2545, General Code, were construed in an opinion of this department given to Hon. W. V. Wright, prosecuting attorney, New Philadelphia, Ohio, under date of October 4, 1911. In that opinion it was held that the infirmary directors could grant relief to persons outside the infirmary. The right to grant relief outside the infirmary will include the right to furnish medical services and relief, as is plainly shown by Section 2545, General Code, when it provides that the superintendent shall report "the names of all persons to whom relief has been given outside of the infirmary, whether medical or otherwise."

Sections 2544, 2545 and 2546, General Code, as above quoted, are as they were amended in 102 Ohio Laws, 433. This amendatory act does not become effective

until January 1, 1913. The purpose of the amendatory act is to abolish the offices of infirmary directors and transfer their duties to the county commissioners or to the superintendent of the infirmary. The commissioners cannot exercise the power granted them by Section 2546, General Code, until January 1, 1913. At the present time this power is vested in the infirmary directors. Also the duties prescribed to be performed by the superintendent of the infirmary in Sections 2544 and 2545, General Code, now devolve upon the infirmary directors and will so devolve upon them until January 1, 1913.

The authority granted to contract with one or more physicians under Section 2546, General Code, is sufficient to authorize a contract with one or more physicians for the relief of all dependent persons under the charge of the county. When a contract is entered into with a physician or physicians for the relief of the poor of the county, such contract may be made to include the furnishing of medical attention and services to the inmates of the county children's home.

I am, therefore, of the opinion that the infirmary directors are now authorized to and should provide for a physician for the medical care and attention of the inmates of the county children's home. After January 1, 1913, this power will be vested in the county commissioners.

Respectively,
TIMOTHY S. HOGAN,
Attorney General.

662.

PUBLIC OFFICERS—INTEREST IN PUBLIC EXPENDITURES—BOARD OF TOWNSHIP TRUSTEES MAY ASSESS COMPENSATION TO MEMBER FOR GRAVEL TAKEN BY ROAD SUPERINTENDENT.

Though it is general rule of common law that a public officer may not act in a judicial or quasi judicial capacity in which he has a pecuniary interest, yet, there is an exception to this rule which prevents a failure of justice where the interest of the officer in question is small and he is the only person authorized to act.

Under Section 7138, General Code, the board of township trustees may, therefore, assess the compensation to be made to a member of the board when the road superintendent has entered upon his land under authority of Section 7138, General Code, and carried away gravel for the use of a road. The interested member should withhold his vote upon the question, however.

COLUMBUS, OHIO, September 19, 1912.

HON. F. L. JOHNSON, *Prosecuting Attorney of Greene County, Xenia, Ohio.*

DEAR SIR:—In your favor of September 12th you request my opinion as follows:

> "Section 7137, of the General Code, gives the road superintendent power to enter on lands and dig and carry away gravel for the use of a road, and Section 7138 provides for the land owners' compensation to be assessed by the trustees of the township.
>
> "In Spring Valley township of this county, the road superintendent entered upon the land of one of the trustees of the township and hauled away gravel for the improvement of the roads in that township. There was, I believe, no other gravel pit in that township.

"The question then arises, can the trustee collect from the township for the gravel so used?"

Section 12910, of the General Code, provides as follows:

"Whoever, holding an office of trust or profit by election or appointment or as agent, servant or employe of such officer or of a board of such officers, *is interested in a contract* for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Section 12912, of the General Code, provides:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustees of a township, *is interested in the profits of a contract job, work or services* for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

Section 12910 *prohibits interest in a contract.* And Section 12912 *prohibits interest in a contract, job, work or services* for the township. The proceedings in these cases are an exercise of the police power in which the individual affected has no voice whatever, and this does not in any sense partake of the nature of a contract, job, work or services for the township as is contemplated by the statute. These sections, therefore, have no application.

It is a general rule of common law based upon public policy that a public officer may not act in a judicial or quasi-judicial capacity in a preceding in which he has a pecuniary interest. (Throop on Public Officers, Sec. 607; 29 Cyc., p. 1435.)

An exception to this rule is stated in Throop on Public Officers, Sec. 609, as follows:

"Exception; His Interest Small, and He the Only Judge Authorized to Act—We must, however, notice here one exception to the common law rule, as it applies also in cases where the power to be exercised is of a *quasi* judicial character. It relates to the case where a judge, although interested, is the only one who can administer justice between the parties. The rulings on this subject were fully reviewed, by a distinguishd judge of the court of appeals of New York, who declared his deduction therefrom as follows: 'That where a judicial officer has not so direct an interest in the cause or matter, that the result must necessarily affect him, to his personal or pecuniary loss or gain; or where his personal or pecuniary interest is minute, and he has so exclusive jurisdiction of the cause or matter, by constitution or by statute, as that his refusal to act will prevent any proceeding in it; then he may act, so far as there may not be a failure of remedy, or, as is someimes expressed, a failure of justice.'"

In Section 617 the same author says:

> "So, it has been held, that a commissioner, appointed by a special statute to award damages for land, taken in laying out a highway, is not rendered incompetent by the fact that he owns the land which has been taken for the improvement. The court said, that the maxim that no man shall be judge in his own case, applies to judicial officers, but not to officers whose duties partake of an administrative character, and are only quasi judicial * * *. If this objection should prevail, assessors, highway commissioners, tax commissioners and many other boards of public officers, would be incompetent to act, and it would be impracticable to exercise some of the most important functions of the government."

I am of the opinion that this exception is particularly applicable to the case at hand. Where an officer, though interested, is the only one who can administer justice, he may assess his own compensation. In the present case, the board of trustees is the only tribunal which can prevent a failure of justice. The trustee personally interested, however, should withhold his vote upon the assessment of his compensation, for the gravel so taken, and the same may be fixed by the other two members of the board. When the reimbursement has been so fixed, the trustee in question may receive its amount without incurring any liability for so doing.

Very truly yours

TIMOTHY S. HOGAN,
Attorney General.

665.

TAX MAPS—COUNTY COMMISSIONERS MUST ADVERTISE FOR BIDS IN QUADRENNIAL APPRAISEMENT YEAR FOR CONSTRUCTION OF MAPS WHEN COUNTY SURVEYOR REFUSES TO ACT.

Under Section 5551, *General Code, the county commissioners are authorized to appoint the county surveyor to make correct and keep up to date a set of tax maps of the county. When the surveyor refuses to act in accordance with such appointment, the only alternative granted by the statutes is the method provided by Section* 5549, *General Code, for sealed proposals upon advertisement and bids, for the construction of the necessary maps during quadrennial appraisement years.*

COLUMBUS, OHIO, October 3, 1912.

HONORABLE HENRY HART, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I herewith desire to acknowledge receipt of your letter of August 22, 1912, wherein you inquire as follows:

> "Under the provisions of Section 5551 of the General Code authorizing the county commissioners to appoint the county surveyor to make, correct and keep up to date a complete set of tax maps of the county, on September 7, 1910, the commissioners adopted the following resolution:
>
> "'Upon motion made by Mr. Rieger and seconded by Mr. Oswald that the county surveyor, A. C. Schults, be and he is hereby re-appointed tax-map draughtsman for one year at a salary of $25.00 per month. Motion carried. Upon a roll call the following vote was had: Mr. Rieger, aye; Mr. Oswald, aye; Mr. Riedy, aye.'

"The surveyor kept up this work for four or five months and then refused to do any further work and failed to keep up the tax maps to date. On the 14th day of this month the county commissioners without advertising or receiving bids, employed a firm of engineers not connected with the county surveyor's office to keep up the tax maps to date at the price of $25.00 per month, the same amount as offered the county surveyor.

"The county surveyor now argues that the county commissioners have no authority under Section 5548 to 5552, both inclusive, of the General Code, to employ any body outside of the county surveyor to keep up the tax maps under the provisions of Section 5551, and that if they do employ outside parties it would be necessary to advertise under the provisions of Section 5549 of the General Code. The county surveyor claims that the action of the county commissioners is therefore illegal and has asked me for an opinion upon the matter. I shall be pleased to receive your opinion on the construction of the statutes."

In reply to your inquiry I desire to say that Section 5551 of the General Code provides as follows:

"The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as are necessary, not exceeding four, to provide for making, correcting and keeping up to date a complete set of tax maps for the county. Such maps shall show all original lots and parcels of land * *. Such maps shall be for the use of the board of equalization and the auditor, and be kept in the office of the county auditor."

Section 5549 provides as follows:

"If, in the opinion of the county commissioners, it is necessary to the proper appraisal of the real estate of such county, on or before their June session, one thousand nine hundred and thirteen, and every fourth year thereafter, they may advertise for four consecutive weeks in one or more newspapers of general circulation in the county, for sealed proposals to construct the necessary maps and plats to enable the assessors in the county, or any district thereof, to correctly re-appraise all real estate. The maps and plats shall be made under the supervision of the county auditor, and such advertisement shall particularly specify the extent and character of the work to be done. Each bid shall be accompanied by * * * bond. * * The commissioners shall open the bids on the day named in the advertisement, and, within three days thereafter, award the contract to the lowest and best bidder, if, in their opinion, it is to the interest of the county so to do, or they may reject any and all bids."

The county commissioners have only such authority as is granted by the statutes. Section 5551 of the General Code provides that the county commissioners may appoint the county surveyor for making, correcting and keeping up to date a complete set of tax maps of the county. I take it that the phraseology of said section does not mean that the county commissioners can appoint any person other than the county surveyor unless there is some statutory provision therefor which is provided for by Section 5549 of the General Code, supra, insofar as the

original construction of such tax maps is concerned. The county commissioners may employ the county surveyor for such work, to wit, making, correcting and keeping up to date a complete set of tax maps of the county without requiring bids, and fix his salary at not to exceed $2,000.00 per year; or, such county commissioners, if they deem it necessary, may have such maps made by some other person than the county surveyor, by advertising for bids for the construction of such maps as provided by Section 5549, supra. Said section, however, gives the commissioners no authority to employ such person in correcting and keeping up to date such tax maps, but only goes so far as to authorize the county commissioners, when in their opinion it is necessary, to employ some party other than the county surveyor on or before their June session of 1913, and every four years thereafter to construct such tax maps as to enable the assessors of the county or any district thereof to correctly re-appraise all real estate.

Opinion—Therefore, in direct answer to your inquiry, I am of the opinion that the county commissioners have no authority to employ any person other than the county surveyor to correct and keep up the tax maps of the county, and if they see fit or deem it necessary to employ some person other than the county surveyor for making such tax maps before the time for making the quadrennial appraisement, then they must let the contract for such work by advertising for bids as provided in Section 5549 of the General Code, above quoted, which can be done at any time prior to their June session, 1913. If the surveyor refuses to keep up such maps, then the maps will have to be constructed in strict accordance with Section 5549 of the General Code.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

671.

COUNTY BRIDGES—NECESSITY FOR ADVERTISING AND BIDS WHEN PURCHASE PRICE EXCEEDS $200.00.

There is no provision of the General Code which authorizes county commissioners to enter into contract for the purchase of bridges, where the purchase price will exceed $200.00, without advertising for bids.

COLUMBUS, OHIO, October 15, 1912.

HON. G. P. GILMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 8th, wherein you state:

> "Will you kindly advise us if there is any provision of the General Code which authorizes county commissioners to enter into contract for the purchase of bridges where the purchase price will exceed $200.00 without advertising for bids. Your advice in this matter will be greatly appreciated by the county commissioners and by myself."

Section 2354 of the General Code provides that:

> "When the estimated cost of a public building, bridge or bridge substructure or of making an addition thereto or repair thereof does not exceed two hundred dollars, it may be let at private contract without publication or notice."

The foregoing is a part of the chapter of the General Code relating to building regulations. I have examined the other provisions of said chapter, as well as other statutes relating to the subject of bridges, and the powers and duties of county commissioners in reference thereto, and I have been unable to discover any provision other than that above quoted.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

674.

VOTER—CITIZENSHIP—UNNATURALIZED ALIEN WHO IS AN HONORABLY DISCHARGED U. S. SOLDIER MAY NOT VOTE BUT MAY BECOME A CITIZEN UPON PETITION TO COURT.

A man who comes to the United States at the age of six years, whose parents were not naturalized prior to his maintaining his majority and who has not himself been naturalized, is not a citizen within Article V, Section 1, *of the Ohio Constitution and may not be permitted to vote, notwithstanding he has been permitted to vote for many years, and is an honorably discharged soldier of the United States.*

Under 2166, *Revised Statutes of the United States, however, he may become a citizen upon petition to the court, without previous intention to become a citizen, by proof of one year's residence.*

COLUMBUS, OHIO, October 16, 1912.

HON. CHARLES KRICHBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I am in receipt of a communication from Hon. Charles C. Bow, probate judge of your county, asking an opinion upon the following question:

> "A boy came to this country from Germany when six years of age and afterwards enlisted in the Union army and served three years during the Civil war, after which he was honorably discharged and during all the years of his majority he has voted; his registration is now challenged upon the grounds of his failure to become naturalized. Some claim has been made that an honorably discharged soldier of the United States is entitled to the right of citizenship without naturalization papers. My question is, has this man the right to register and vote."

Article V, Section 1 of the Constitution provides who may vote in the following manner:

> "Every white male citizeen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election and of the county, township or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

In find no provision, constitutional or statutory that an honorably discharged soldier of the United States is entitled to the rights of citizenship without naturalization papers.

Van Dyne in his "Citizenship of the United States" paragraph 39, says:

"It is erroneously supposed by some that the mere fact of service and discharge operate to naturalize the party, whereas they are only part of the evidence on which naturalization may be granted. The alien soldier, sailor or marine can only avail himself of the privileges of the above laws by personal application to one of the courts having jurisdiction of the naturalization of foreigners and upon the declaration and proof required by law."

Section 2166 U. S. Statutes provides:

"Any Alien of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or the volunteer forces, and has been or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States."

In your inquiry you do not state whether the boy coming to this country from Germany, when six years of age, was accompanied by his parents, and if he was so accompanied, whether or not his parents were naturalized during the minority of the boy. If they were so naturalized, then, under Section 2177 Revised Statutes of the United States which provides that "the children of persons who have been duly naturalized under any law of the United States * * * being under the age of twenty-one at the time of the naturalization of their parents shall. if dwelling in the United States, be considered as citizens thereof * * *," he would become a citizen. If his parents were not naturalized and he did not become a citizen by their naturalization then it is my opinion that the mere fact that he was honorably discharged as a soldier of the Civil war, and has since voted, would not confer upon him any right to register and vote. He, of course, could avail himself of the privilege given him under Section 2166 Revised Statutes of the United States.

The supreme court of California, in the case of People ex rel. Orman vs. Reilly, 15 Cal. 48 holds "A mere residence in the country as a soldier does not make one a citizen."

So, while under the facts as stated in the question, it seems a hardship for a man who has served three years during the Civil war, was honorably discharged and during all the passing years has voted without any question now should be stopped from voting, still under the law as I find it, I can arrive at no other conclusion than that he is not entitled to register and vote.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

675.

FEE FUNDS—5 PER CENT. RESERVED BY SHERIFF FOR LISTING UNCLAIMED MONEYS MUST BE PAID INTO FEE FUND.

Under Section 2977, General Code, the 5 per cent. of all unclaimed moneys which is received by the sheriff under 3045, General Code for listing the same, must be paid into the fee fund.

COLUMBUS, OHIO, October 8, 1912.

HON. R. A. BEARD, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your favor of September 27, 1912, is received. You ask my opinion on the following matter:

> "Under Section 3045 does the 5 per cent. to the sheriff for paying unclaimed money into the treasurer's office belong to him as an individual or is he supposed to pay it into the fee fund?"

Section 3045, General Code, provides as follows:

> "Each clerk, probate judge or sheriff shall keep a book, which shall be the records of his office, showing in detail all the moneys paid by him into the county treasury, with proper references showing where each item may be found on the respective cash books and dockets, giving the names of the parties to whom such money belongs, in alphabetical order. A detailed statement of each item shall be furnished the county auditor, and no clerk, probate judge or sheriff, shall receive from his succssor in office any fees earned by him, which have come into the hands of such successor, until settlements are fully made. For making the lists and payment of unclaimed moneys into the treasury, the probate judge and sheriff shall be allowed five per cent. of the amount so paid."

This section as it now stands is found in 88 O. L., page 239 and was passed April 11, 1889.

Section 2977, General Code, provides as follows:

> "All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

This section is found in 98 O. L. page 89 and was passed March 22, 1906.

Under authority of the last named section all the fees, costs, percentages, penalties, allowances and other perquisites received by law as compensation for services by a county sheriff shall be received and collected for the sole use of the treasury of the county in which he is elected and shall be held as public moneys belonging to such county and accounted for and paid over as provided by law.

I am, therefore, of the opinion that the five per cent. allowed to the sheriff

for paying unclaimed money into the treasurer's office under Section 3045, General Code, shall be paid into the fee fund.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

681.

CORRUPT PRACTICES ACT—CANDIDATE FOR PROBATE JUDGE MAY HIRE REPRESENTATIVE IN EACH VOTING PRECINCT, A MAN TO PREPARE LIST OF VOTERS, A MAN WITH RIG TO TRANSPORT HIM ABOUT VILLAGE, AND TO DISTRIBUTE LITERATURE.

Under Section 5175-26, *General Code, a candidate for probate judge nominated at other than a party primary may hire a person to represent him in each voting precinct on election day, and if such candidate's nomination paper contains the name of the committee, such committeee should certify the names of the representatives so designated to the board of elections at least two days before the election day.*

Under 5175-26, *General Code, such candidate may hire and pay a man to prepare a list of voters in each precinct, but he may not hire more than one person to prepare such list.*

Under the provision of the same section, permitting a candidate expenses for traveling, such candidate may hire a man with a rig, for a reasonable sum, to drive him about his district and such a man may incidentally introduce him to the voters.

Under the provision of the same section, permitting the publication and circulation of literature, such candidate may hire a man with a rig to distribute literature.

All expenditures must be kept within the limitation of 5175-29, *General Code.*

COLUMBUS, OHIO, October 17, 1912.

HON. ALLEN THURMAN WILLIAMSON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—I have your letter of October 10th, submitting for an opinion thereon the following questions; involving the construction of the corrupt practices act:

> "1. Under Section 26, can a candidate, particularly a candidate for probate judge, select a person to represent him in each voting precinct on election day and pay him not to exceed $5.00 per day for his services? If so, who shall certify the name of such person to the board of deputy state supervisors of elections?
>
> "2. Can a candidate for probate judge hire and pay a man to prepare him a list of voters in each precinct for the individual use of such candidate?
>
> "3. Can any candidate hire and pay a man to drive him around and introduce him to the people of his township provided he pays no more than reasonable compensation for the man's time and use of his rig?
>
> "4. Can a candidate hire a man and rig to distribute literature for him in each township?"

In answer to your first question I beg leave to say that in an opinion to Hon. F. M. Stevens, prosecuting attorney at Elyria, Ohio, under date of May 18, 1912, I held that under Section 5175-26, General Code.

> "Each candidate may designate one representative in each voting precinct upon each election day, whose name shall be certified to by the chairman and secretary of the controlling committee of a party to the board of state supervisors of elections at least two days before such election or election day, and who may be paid for their services by such committee or candidate not in excess of five dollars per day each."

So if your question refers to a candidate for probate judge nominated at a party primary the opinion to Mr. Stevens, which I herewith enclose fully answers the same.

If your candidate is a judicial candidate, nominated other than at a party primary I am still of the opinion that such candidate would have the right to designate some person as his representative in each voting precinct upon election day. If this latter candidate's nomination paper contains the names of the committee as is usually done to represent the independent party or the candidate for the office nominated, then it is my view that such committee should certify the names so designated by the candidate to the board of deputy supervisors of elections at least two days before the election day.

Answering your second question would say, a candidate for probate judge has the same right as the candidate for any other office to hire and pay a man to prepare him a list of the voters in each precinct. Section 5175-26, General Code, makes it a corrupt practice for any person directly or indirectly, by himself or through any other person, in connection with or in respect to any election, to pay, lend or contribute or offer or promise to pay, lend or contribute any money or other valuable consideration for any other purpose than for the following matters and services at their reasonable, bona fide and customary value: " * * the preparation of lists of voters and payment of necessary personal expenses by a candidate; * * *." This same section further provides that, "no party organization or candidate shall compensate or hire in any one precinct more than one person to prepare lists of voters * * *."

It is my opinion, therefore, that a candidate may hire and pay a man to prepare him a list of voters in each precinct, but he must not hire or pay more than one person to prepare such list.

3rd. Section 5175-26 provides among other things that the following is a permitted expense, to wit: "* * * payment of necessary personal expenses by a candidate; the reasonable traveling expenses of the committeemen, agents, clerks and speakers; * *."

I think that under this section there is no question but that a candidate is entitled to his expense of transportation and if he hires and pays a man to drive him through his district, paying him no more than the reasonable, bona fide and customary compensation for the man's time and the use of his rig, he does not offend against the corrupt practices act, and the mere fact that such man may introduce him to the people that they meet on their travels, since it is merely accidental, and not the purpose for which the compensation is given, would not in my opinion militate against such expense.

4th. Answering your fourth question would say that Section 5175-26 enumerating the matters and things for which expenditures are permitted amongst other things lists the following:

"* * * the preparation, printing and publication of posters, lithographs, banners, notices and literary material, * * * the pay of newspapers for advertisements, pictures, reading matter and additional circulation, the preparation and circulation of letters, pamphlets and literature bearing on the election."

In Wooster's dictionary "publication" is defined as, "the act of publishing or making known, etc." In Webster the same word is defined as "the act of publishing or making known; notice to the public at large either by words, writing or printing." In Bouvier's Law Dictionary "publication" is defined as "the act by which a thing is made public." The Century dictionary defines "publication" as "the act of publishing or printing a public notice, notification to the people at large by special writing or publication."

The Century dictionary defines "circulation" as "1, the act of circulating or moving in a circuit or circle; 2, the act or state of being diffused or distributed; the act of passing from point to point.

Now, while Section 5175-26 does not in express words permit the hiring of a man and rig to distribute literature it does provide for the "publishing" of notices and literary material, etc., and also for the "circulation" of letters, pamphlets and literature bearing on the election.

In view of the above provisions it is my opinion that whatever expense the candidate is put to in distributing literature in a given township is a proper expense so long as the cost thereof is at the reasonable, bona fide and customary value.

You will understand, of course, that all expenditures must be kept within the limitation provided for in Section 5175-29, General Code.

Yours very truly,

TIMOTHY S. HOGAN.
Attorney General.

684.

COUNTY COMMISSIONER—POWER TO BORROW MONEY WHEN FUND EXHAUSTED, FOR SALARIES, ELECTION EXPENSES AND REPAIR OF BRIDGES—CANNOT BORROW TO REPLENISH OVERDRAWN FUNDS.

If there is no money in the general fund of a county at a given time and no surplus is available from the fee fund of the various county offices, money may be borrowed to meet the salaries as they become due, under Section 5656, *General Code.*

The same procedure may be employed to defray election expenses, when there is not sufficient in the election funds to meet the same.

In the case of exhaustion of the bridge fund when urgent necessity requires the repair of important bridges, bonds may be issued under authority of Sections 5643, 5644 *and* 2434, *General Code.*

There is no authority for the commissioners to issue deficiency bonds for the purpose of reimbursing overdrawn funds; existing, valid and binding indebtedness may be met, however, by borrowing under Section 5656, *General Code.*

COLUMBUS, OHIO, October 21, 1912.

HON. DANIEL W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of September 5th, submit-

ting four questions arising out of the present financial conditions of Clermont county.

As you have had some conferences with members of this department respecting these questions, I shall state them in brief and answer them in a rather summary manner, feeling more free to do this on account of the fact that the reasoning upon which my answers are based has been set forth in other opinions of this department, copies of which you have. Your questions are as follows:

> "1. If there is no money in the general fund of the county at a given time, and no surplus is available from the fee fund of the various county offices, how can the salaries of the various county officers be paid?
>
> "2. In case of exhaustion of the bridge fund and in the face of a condition of urgent necessity requiring the repair of important bridges, may deficiency bonds be issued by the county commissioners for this purpose without submitting the question to a vote of the people?
>
> "3. Have the county commissioners authority to issue deficiency bonds for the purpose of replenishing any overdraft or exhausted fund?
>
> "4. There is not enough money in the election fund of the county to defray expenses of the special elections held so far during the half of the fiscal year and those required yet to be held by law; may bonds be issued to defray those expenses without a vote of the people?"

Answering your first question, I beg to state that one method at least by which the situation may be met without great inconvenience is the borrowing of money to meet the salaries of the officers as the installments thereof become due. Such money may be borrowed on the notes of the county commissionrs on which they will not be personally liable, and such notes may be funded by issuing bonds when a sufficient amount of such notes are outstanding. Bonds must be advertised and sold as provided by law, and the proceeds used for this purpose. (Section 5656, et seq., of the General Code.)

Answering your second question, I beg to call your attention to the provisions of Sections 5643 and 5644, of the General Code, particularly the latter. It is to be observed that under these provisions, the county commissioners for the purpose of repairing any important bridges in case of necessity may regardless of the cost of such repairs,

> "proceed under the authority conferred by law to borrow such amounts of money as are necessary for said purpose before mentioned, and issue bonds therefor."

The authority "conferred by law" referred to herein is to be found in Section 2434, of the General Code. Ample authority, therefore, exists for the issuance of bonds as referred to in your second question, although for the sake of accuracy such bonds should not be called "deficiency bonds."

Your third question is fully answered, I think, in the opinion rendered to Hon. Edward C. Turner, prosecuting attorney of Franklin county, a copy of which you have, I think. In that opinion I hold that there is no authority to issue deficiency bonds directly for the purpose of reimbursing overdrawn funds, but that perhaps the more cumbersome and less direct method of issuing bonds to pay valid indebtedness under Sections 5656 et seq. of the General Code must be followed in a situation like the one you describe. Stating it in another way, I am unable to find a statute authorizing the county commissioners to issue what might

be properly termed "deficiency bonds" either by the vote of the people or otherwise, though the council in a municipal corporation has such power.

Answering your fourth question, I beg to state that the election expenses should be met in the same manner as the salaries must be met as pointed out in answering your first question. That is to say, the law requires that these expenses be incurred and when they constitute valid indebtedness of the county for the discharge of which money may be borrowed by the county commissioners on notes or otherwise, and such notes must be funded by the issuance of bonds.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

692.

CORRUPT PRACTICE ACT—BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS MAY NOT REFUSE TO PLACE UPON THE BALLOT THE NAME OF A PARTY NOMINATED AT PRIMARIES, WHO FAILS TO FILE ACCOUNT OF EXPENDITURES—REFUSAL OF ELECTION CERTIFICATE—CRIMINAL PENALTY.

Under Section 4985, *General Code, it is made the duty of the board of elections to place upon the ballots the names of persons nominated at the primaries, and there is no authority vested in said board to withhold the name of candidates who fail to file accounts of campaign expenditures.*

Under 5175-8, *General Code, however, the board may refuse a certificate of election to such candidates and under Section* 5175-13 *and* 5175-32, *General Code, criminal penalties may be enforced.*

COLUMBUS, OHIO, October 16, 1912.

HON. ARTHUR VAN EPP, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I am in receipt of your communication of the 7th, in which you state:

> "As you well know, the law requires that all persons who were candidates for nomination at the May primaries are required to file a statement of expenditures, and what I desire your opinion on is, whether or not the board of deputy state supervisors of elections of a county would have a right to place the name of such persons who were nominated at that primary, and who failed to file an affidavit as to expenditures, on the ballot, to be voted for at the coming election, and especially so if objection was raised with such board to the placing of a name of any such candidate on the ballot, for the reason that such candidate had not filed the affidavit of expenditures as provided by law, or in other words, is it a discretionary matter with the board, or is the disqualification such that the board must refuse to place the name on the ballot, especially if objection is made."

A reference to the statutes will disclose that Section 4985, General Code, is applicable to the question you submit. Said section is as follows:

> "When the primary has been held to make nominations of candidates to be voted for at the ensuing November election, the board of deputy state supervisors shall place the names of the persons so nomi-

nated upon the official ballot as the candidates of the respective political parties nominating them."

In the absence of any further provision it is apparent that when a candidate has been nominated at the primaries and his nomination has been determined by the canvass of the board of elections it is the duty of the said board to place said candidate's name upon the official ballot.

Section 5175-8, General Code, provides:

> "No board, office or officer authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any person required by this act to file a statement or statements until such statement or statements have been so made, verified and filed by such persons as provided by this act. No person required by this act to file a statement or statements shall enter upon the duties of any office to which he may be elected until he has filed all statements provided by this act, nor shall he receive any salary or emolument prior to the filing of the same."

This is the section that probably raised the question in your mind as to the right of the board to place the name of a person nominated at the primary, but who had failed to file an affidavit as to his expenditures, upon the official ballot.

You will see that the only inhibition in this section is the issuance by such board or officer of a commission or certificate of election to any person, who under the corrupt practices act was bound to file a statement of his expenditures. The said section further prohibits any person entering upon the duties of his office and provides that he shall not receive any salary or emolument incident to his office until he shall have first filed the statement of expenditures provided for by law. But the section by no manner or means authorizes the election board to refuse to place on the official ballot the name of a candidate who has omitted to file the required statement.

The corrupt practices act further provides (Sec. 5175-13, General Code) that

> "Any person who shall violate any of the provisions of the act shall be held to be guilty of a corrupt practice,"

and Section 5175-32 prescribes the penalty when one has been convicted of a corrupt practice, to wit, a fine or imprisonment or both and forfeiture of any office to which he shall have been elected These are the only provisions punishing a failure to file a statement of expenses. The legislature did not see fit to further provide that a candidate, by failing to file his statement of expenditures should be prohibited from having his name placed upon the official ballot, and in such absence it is my opinion that the deputy state supervisors of elections are not authorized to refuse to place the name of the candidate who has been duly nominated at the primary upon the official ballot merely because he has failed, neglected or refused to file the statement of expenses required by the corrupt practices act.

The question of penalizing him for such failure is taken care of in the act, but nowhere do we find authority for the board refusing to place his name on the ballot.

In my opinion, therefore, it is not a discretionary matter with the board, nor is the failure to file the expense account such a disqualification that would authorize the board to refuse to place his name on the ballot whether objection thereto is

raised or not. It is their duty, if he has been duly nominated to place his name upon the official ballot as provided in Section 4985, *supra.*

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

697.

CORPORATIONS — ARTICLES OF GAS CORPORATIONS WHICH FURNISH GAS BY PIPE LINE FROM PLANT IN ONE COUNTY TO CONSUMERS IN ANOTHER COUNTY MUST SET OUT ROUTE AND TERMINI OF PIPE LINE.

Although gas companies did not exist at the time of the passage of 8625, *General Code, yet the language employed in Section* 5 *of that statute, requiring the articles of a corporation formed for the purpose which includes the construction of an improvement not to be located at a single place to set forth the kind of improvement intended to be constructed and its termini and the counties in or through which it or its branches will pass, is applicable to gas companies which furnish gas by means of a pipe line from its plant in one county to consumers in another county, as well as in its own county. The practice of the secretary of state in requiring such companies to comply with Section* 5625 *is, therefore, correct.*

COLUMBUS, OHIO, November 7, 1912.

HON. THOMAS MULCAHY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 15th, submitting for my opinion the following question:

> "If a gas company is located at a village or city in one county, and is furnishing gas by means of a pipe line from its plant in said county to a village or city and the inhabitants thereof in another county, as well as to the village or city and the inhabitants thereof, where its plant is located, must the articles of incorporation set forth the names of the counties in which said villages or cities are located, in order to comply with the provisions of Section 8625, of the General Code, or are the provisions of the fifth clause of said Section 8625 not applicable to gas companies?"

Said Section 8625, of the General Code, provides in part as follows:

> "5. But, if the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth
>
> "a. The kind of improvement intended to be constructed.
>
> "b. Its termini, and the counties in or through which it or its branches will pass."

This language is prima facie applicable to gas companies as well as to any other kind of corporation, the purpose of which contemplates the construction of an improvement. Undoubtedly, this part of the statute, when originally enacted, was intended to apply only or primarily to railroad, turnpike, canal, pipe line and other transportation companies. However, the legislature designedly used language

which is not limited to such companies, and I am of the opinion, upon authorities which I need not cite, that even though the business of manufacturing artificial gas or producing natural gas may have come into existence since the statute was enacted, yet, if such corporations, organized for the purpose of transacting either of these businesses, require an improvement not to be located in any one place, they are within the genus of things in the legislative mind, as evidenced by the language used, and the section must be held to apply to them.

The question impressed me as being such a one as to make of some weight the contemporaneous administrative construction thereof by the secretary of state; that is to say, I was disposed to follow whatever ruling might have been adopted in that department upon the question, and I, therefore, caused inquiry to be made at that office and ascertained that it has been the practice there to require gas companies contemplating the construction of an improvement, not to be located at any one place, to set forth the route and termini of the improvement, as required by the statute.

For all of these reasons I am of the opinion that a gas company, such as that described by you, should, in order to comply with Section 8625, General Code, set forth in its articles of incorporation the kind of improvement intended to be constructed, its termini, and the counties in or through which its branches will pass.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

698.

ROADS AND HIGHWAYS—GARRETT LAW—NOT NECESSARY TO COUNT LAND OWNERS WITHIN MUNICIPALITY—NON-SIGNERS MUST BE COUNTED AGAINST, IF SIGNERS ARE COUNTED FOR THE IMPROVEMENT.

In a proceeding to construct a public road, under the so-called Garrett law, the object of the provision of Section 6929, General Code, prescribing that "it shall not be necessary in determining such majority petitioners to count land owners residing within a municipality," is to permit a majority of resident land owners residing outside of a municipality to petition for the improvement of the road.

Under this provision, if it is desired to count any of the land owners residing in a municipality, all such land owners should be counted.

When, therefore, a majority of the land owners residing outside of a municipality, did not sign, and also a majority of those residing within the municipality did not sign, and when the total of all signers did not constitute a majority of the resident land owners, the statute has not been complied with.

In brief, if the signers within a municipality are counted for the improvement, those not signing must be counted against in the determination of the majority.

COLUMBUS, OHIO, October 19, 1912.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your favor of September 20, 1912, through your assistant, Hon. Lewis E. Mallow, is received, in which you state as follows:

> "On April 22, 1909, the board of county commissioners of Lucas county, acting under the provisions of the Garrett law, so-called, Sections 6926-6950, of the General Code, found for and ordered constructed the improvement of a public road known as the Brown road, in Jeru-

salem and Oregon townships of said county as petitioned for. Such proceedings were thereafter had by and before said board that bonds of the county in approximately the sum of $65,000 were issued and sold for the purpose of constructing said improvement, and said improvement was thereafter constructed as planned. Upon completion of the improvement, the cost and expense thereof was assessed as provided in said sections of the General Code, and the assessment resolution passed by said board, one-third upon the real estate lying and being within one mile of said improvement, and the balance thereof upon the townships at large through which said improvement extends, in proportion to the length of said improvement in each of said townships.

"An injunction suit has been filed on behalf of a number of land owners whose property has been assessed on account of the one-third cost and expense of said improvement, one of the grounds of said suit, among others, being that the petition for said improvement was not signed by a majority of the resident owners of real estate situated within one mile of said road, as provided by law.

"We call you attention particularly to the last clause of Section 6929, of the General Code, which provides that 'it shall not be necessary, in determining such majority petitioners, to count land owners residing within a municipality.'

"After careful investigation made, it appears that twenty-four owners of land situated within a mile of said improvement, who live in a a municipality, to wit, the city of Toledo, signed the petition for the improvement of the Brown road, but that twenty-seven other owners of land situated within a mile of said improvement, living in a municipality, to wit, the city of Toledo, did not sign said petition. By counting the twenty-four signers referred to, for the petition, and not counting against it or considering the twenty-seven land owners referred to, who did not sign, it would appear that there is a slight margin of two or three over and above a majority of resident owners in favor of the improvement.

"The question presented, and upon which we desire your opinion is: In determining whether or not a majority of such resident owners are in favor of the improvement, may owners of land residing within a municipality and who have signed the petition be counted for the improvement, without, at the same time, counting as against the improvement owners of land residing within a municipality and who have not signed the petition?"

You further state that the object of securing an opinion of this department is to aid you in securing a compromise of the litigation and is not to be used in the trial of the action.

Section 6929, General Code, to which you specially refer, provides:

"Said order shall also state the lands which shall be subject to be assessed for the cost and expense of the improvement, and whether the estimated assessment therefor shall be made before the improvement is commenced, or after it is completed. *It shall not be necessary in determining such majority petitioners to count land owner's residing within a municipality.*"

Section 6926, General Code, provides:

"When a majority of the resident owners of real estate situated within one mile of a public road, present a petition to the board of county commissioners asking for the grading and improving of such road, the county commissioners shall go upon the line of the road described in such petition. If, in their opinion, the public utility requires such road to be graded and improved, they shall determine whether the improvement shall be partly or wholly constructed of stone, gravel or brick, any or all, and what part or parts of such road improvement shall be of stone, gravel or brick, and enter their decision on their journal."

The provisions of these two sections and also the provisions of Sections 6927 and 6928, General Code, were contained in the first section of the original act as said first section was amended in 99 Ohio Laws 489. This amendatory act was approved by the governor on May 9, 1908, and action of the county commissioners was had on April 22, 1909. The amendatory act will therefore apply to your situation, as the action of the commissioners was taken prior to the adoption of the General Code.

Section 1 of the original act, passed April 4, 1900, 94 Ohio Laws 96, was amended in 99 Ohio Laws 489, by adding the following proviso:

"Provided that it shall not be necessary in determining such majority petitioners to count any such resident land owners residing within any municipality.''

It is this provision of the statute which is now up for construction.

In the case of Darke County vs. Baker, 74 Ohio St., 258, to which you refer, the syllabi read:

"The words 'resident owners' as used in Section 1 of the act of the general assembly passed April 4, 1900 (94 O. L. 96), entitled 'An act to provide for the improvement of public roads,' mean, and were intended to designate and include, all owners of real estate who are residents of the county and own lands lying within one mile of the road to be improved, and all must be considered and counted in determining whether a majority of the resident owners of real estate have signed the petition asking for the improvement.

"A petition presented to the county commissioners under favor of this section, asking for the improvement of a public road, which is not signed by a majority of such resident land owners, does not confer upon the commissioners jurisdiction; and where said commissioners assume to act on such petition and are threatening to proceed with and make said improvement, they may be restrained therefrom by injunction."

In the foregoing case the resident owners of land residing in a village were taken into consideration in ascertaining the number for a majority.

The above proviso was inserted after the rendition of the above decision and was inserted, no doubt, for the purpose of changing the rule of ascertaining the majority which was applied by the court in the foregoing case.

The proviso makes it unnecessary to count the resident land owners residing within a municipality in determining the majority of the petitioners. The statute does not specifically provide that they shall not be counted. The purpose of the provision is evidently to permit the majority of the resident land owners residing outside of a municipality to petition for the improvement of the road.

In your case, a part of the resident land owners residing in a municipality

and owning real estate within one mile of the proposed improvement, petitioned for said improvement, and other such resident land owners did not so petition. In determining the majority those residing in the municipality and who signed the petition were counted for the improvement, while those who resided in the municipality and who did not sign the petition, were not counted against the petition, and were not taken into consideration in determining the total number of resident land owners. That is, a part of a certain class were considered for the improvement, while the remaining part of said class were eliminated from consideration entirely.

It is apparent that the majority of the resident land owners coming within the terms of the statute, and residing outside of the municipality did not sign the petition. It is also shown that a majority of the resident land owners residing in the municipality did not sign the petition. It is also apparent that a majority of the resident land owners residing within and without the municipality, and owning lands within a mile of said improvement, did not sign the petition. By eliminating those who resided in the municipality and who did not sign the petition, and by counting those who resided in the municipality and who did sign the petition, a majority is secured.

This, in my opinion, is not a proper application of the provisions of the proviso. The statute does not specifically prohibit the land owners residing in a municipality from being counted in ascertaining a majority, but says that it is not necessary to count such land owners.

If it is desired to count any of the land owners residing in a municipality, all such land owners should be counted. In other words, all must be counted or none. It would require specific authority of the legislature to count a part of a certain class and to exclude others. Even such a provision might be unconstitutional as class legislation.

By counting all of the resident land owners residing in a municipality with those residing without, a majority of the resident land owners did not sign the petition. So also by counting none of those residing in a municipality, a majority of the resident land owners did not sign the petition.

As a majority did not sign the petition, the county commissioners were without jurisdiction to proceed under the provisions of Sections 6926, General Code, et seq., as is held in Darke County vs. Baker, 74 Ohio St., supra.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

705.

ROADS AND HIGHWAYS—TOWNSHIP TRUSTEES MAY NOT RECEIVE COMPENSATION FOR SUPERINTENDING ROADS—EXTRA SERVICES IN PUBLIC OFFICE GRATUITOUS IF NO COMPENSATION NAMED.

When a statute adds certain duties to an office without making provision for payment for the same, such duties must be performed gratuitously. The township trustees, therefore, may not receive the sum of $2.00 *per day as superintendents of roads for the work required by Section* 1218, *General Code.*

COLUMBUS, OHIO, October 29, 1912.

HONORABLE W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Under date of October 21st, you inquired of me as follows:

> "I desire to ask your opinion as to whether or not the township trustees can be appointed and paid the sum of $2.00 per day as superintendent of roads on which state aid money raised prior to 1911 is used. You understand that the county commissioners are issuing money in the various townships and have authorized the township trustees in their respective townships to superintend or inspect the repairing of the roads that are being repaired with state aid money. We now have several bills filed by township trustees, and we are holding up the payment of these bills pending the receipt of your opinion."

In view of the fact that the fund mentioned in your letter was raised prior to 1911, the effect of the governor's veto of the section of the present highway act repealing the former law on that subject is not pertinent to your inquiry and will not be considered.

Section 1218 of the General Code, provides:

> "If permanent roads of not less than standard width have been constructed prior to the establishment of the state highway department and the materials thereof are gravel, brick, macadam or material of like quality, the county commissioners may make application to the state highway commissioner on or before January first of each year, for the amount of state funds apportioned to such county. Thereupon the amount so apportioned shall be paid to the county treasurer, if the county commissioners of such county have levied or will levy a tax on the duplicate of the county sufficient to equal the amount so appropriated. Such appropriation and levy shall become a part of the pike repair fund of the townships, and be apportioned to the townships or road districts of not less than one township each in proportion to the amount of the fund collected by such levy in each township or road district. Township trustees or other authorities having charge thereof shall apply such fund to the repair of improved roads in the same manner as other pike repair funds are applied, but the material used therefor shall be equal to the material used in the original construction of such road."

Neither the foregoing nor any other provision of the statutes that I have been able to find specifies that township trustees shall be entitled to any compensation for the services required of them by Section 1218. It is well settled in

Ohio that when a statute requires of a public officer the performance of certain services, and no provision is made for payment, such services are to be regarded as gratuitous, or as being compensated by other fees accruing to such officer by virtue of his office. The rule on this subject is stated by our supreme court in the case of Jones, Auditor vs. Commissioners, 57 O. S., 189, at page 209, as follows:

> "'An officer whose fees are regulated by statute, can charge fees for those services only to which compensation is by law affixed' (Debolt vs. Trustees, 7 O. S., 237); and the corollary is, as held in Anderson vs. Commissioners, 25 O. S., 13, 'where a service for the benefit of the public is required by law, and no provision for its payment is made, it must be regarded as gratuitous, and no claim for compensation can be enforced,' which rule is more fully stated, but to like import in Strawn vs. Commissioners, 47 O. S., at page 408."

In the case of Clark vs. Commissioners, 58 O. S., 107, it was said by Burket, J.:

> "It is well settled that a public officer is not entitled to receive pay for services out of the public treasury, unless there is some statute authorizing the same. Services performed for the public, where no provision is made by statute for payment, are regarded as a gratuity, or as being compensated by the fees, privileges and emoluments accruing to such officer in the matters pertaining to his office. Jones vs. Commissioners, 57 O. S., 189. To warrant payment out of the public treasury, it must appear that such payment is authorized by statute. Section 5, Article 10 of the Constitution. Diebolt vs. Trustees, 7 O. S., 237; Anderson vs. Commissioners, 25 O. S., 13; Strawn vs. Commissioners, 47 O. S., 404."

Other Ohio authorities in support of this principle are cited in Volume 11, at page 248, of Michie's Encyclopedic Digest of Ohio Reports.

Various statutes fix compensation for township trustees for particular services, but they cannot be held to apply to a service for which no compensation is expressly fixed by statute.

I am, therefore, of the opinion that township trustees are not entitled to any compensation whatever for superintending the repair of improved roads under Section 1218, supra.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

707.

SEWER DISTRICT—CREATION BY COUNTY COMMISSIONERS—SPECIAL TAX LEVY TO RETIRE CERTIFICATE OF INDEBTEDNESS AND BOND ISSUE IN ANTICIPATION OF ASSESSMENTS—POWER TO ISSUE CERTIFICATE OF INDEBTEDNESS TO COVER COST OF EMPLOYMENT OF ENGINEER TO PREPARE PLANS AND SPECIFICATIONS.

When the county commissioners desire to proceed under the act of 102 *Ohio Laws,* 482 *et seq., to create a sewer district within the county, and lying within three miles of an incorporated city therein, bonds may be issued under Section* 5 *of the said act, in anticipation of the collection of assessments, and under Section* 6 *of said act, money may be borrowed upon certificates of indebtedness, in anticipation of a tax levy upon all property in the county.*

Although Section 3 *of said act provides that all the cost of said improvement may be assessed upon the land, and Section* 8 *enumerated what items may be included in the assessment, still under a liberal interpretation of the act, this enumeration should not be held to be exhaustive of all possible items which may be made part of the costs of the improvement; and since Section* 9 *expressly authorizes the use of a sanitary engineer for making necessary plans and specifications, the expense of his employment should not be paid out of the current funds, but should be paid out of the special tax levy provided for. Under said Section* 6, *therefore, certificates of indebtedness may be issued for the moneys borrowed for the payment of an engineer for such purpose, which certificate may be met by the proceeds of a special tax levy.*

COLUMBUS, OHIO, November 11, 1912.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of letter of October 19th, from Hon. Lewis E. Mallow, assistant prosecuting attorney, submitting for my opinion the following question:

> "The county commissioners of Lucas county desire to proceed under the act approved June 8, 1912, 102 O. L. 482 et seq., therein designated as Sections 6602-1 to 6602-9, inclusive, to create a sewer district within the county, and lying within three miles of an incorporated city therein. A sanitary engineer has been employed to prepare the necessary plans and specifications for the improvement, but the commissioners have no funds in the treasury available to meet this preliminary expense.
>
> "May the commissioners borrow money under Section 6 of said act, on certificate of indebtedness, for the purpose of meeting this preliminary expense; or, is the borrowing power of the commissioners limited to that defined in Section 5 thereof?"

The sections specifically mentioned in your inquiry provide as follows:

> "Section 5. The board of county commissioners may, if they deem expedient, assess, by resolution, the property as provided in the improvement resolution and cause such assessment to be collected before the letting of said contract, or it may at (its) option, delay the making of such assessment until the work is completed, and then upon the certificate

of the sanitary engineer in charge showing the completion of the work, assess by resolution the real estate as provided in the improvement resolution, *and issue bonds in anticipation of the collection of such assessment.*

"Section 6. For the purpose of paying a part or the whole of the cost and expense of the construction of any such sewer, the board of county commissioners may borrow money at a rate of interest not exceeding six per cent., per annum, on certificate of indebtedness, to be signed by its president and clerk and may levy a tax in addition to the amount otherwise authorized, upon all property in the county appearing upon the tax duplicate, for the purpose of discharging and paying such certificates of indebtedness. * * *"

It is very clear to me that the bonds to be issued under Section 5 are limited to the anticipation of the collection of the assessment which is to be made, or has been made. It is equally clear to me that the borrowing of money under Section 6, on certificate of indebtedness, is for the purpose of meeting the portion of the cost and expense which is to be paid by the county, as distinguished from that portion which is to be assessed upon specially benefited property.

I am of the opinion, then, that the two powers are entirely separate and distinct; so much so, indeed, that the proceeds of assessment may not be used to discharge certificates of indebtedness issued under Section 6; but the latter must be met by levy upon the general county duplicate, as therein provided.

Now, the portion of the cost and expense which will be assessed upon specially benefited property, and that which will be paid by the county must be determined by the commissioners at the time of the passage of the "improvement resolution," as provided in Section 3 of the act, which contains, *inter alia,* the following language:

"* * * Said improvement resolution shall contain a statement of the district or part thereof proposed to be so improved, the character of materials to be used, a reference to the plan and specifications and mode of payment of the cost and expense thereof, and said improvement resolution *may provide for assessing any or all of the cost* and expense of the improvement upon the lots, lands and other real property in such district as may be specially benefited thereby, provided that in the case of a main sewer the property immediately abutting thereon may be assessed for local drainage and the balance of the cost and expense of such improvement may be assessed upon all of the property within said district proportionately and in accordance with the special benefits conferred. * * *"

So that, the entire cost of the improvement being estimated, and the portion thereof to be assessed upon specially benefited property having been determined, the remainder of the cost not so assessed, and that only, may be met by issuing certificates of indebtedness under Section 6.

But one question remains to be answered, namely: as to whether the preliminary expenses described by you are a part of the cost of the improvement for which money may be borrowed under Section 6.

It is provided by Section 9 that:

"* * * The county commissioners may use a competent sanitary engineer to prepare the necessary plans and specifications for the sewers and districts herein provided for. Said engineer may also be employed

in superintending the work of constructing the sewer improvements made under this act and the person so employed shall be compensated not to exceed $10.00 a day and expenses for each day actually employed in such services."

Section 8 of the act provides that:

"The assessment herein provided for may include the amount of money paid or to be paid to the contractor in the discharge of his contract, the cost of publication of all resolutions or notices, the cost of serving copies of such resolution declaring the necessity for the construction of such improvement, the cost of inspection, interest on bonds issued in anticipation of the collection of said assessments, and the cost of making said assessments, as well as any money paid for the purchase of land or right of way for any such sewer."

It seems clear from consideration of these sections that the *assessment* may not include the compensation of the engineer for preparing the plans and specifications. The peculiar language of Section 8 is such as to necessitate such a conclusion. On the other hand, the cost of superintendence of the construction work is clearly a part of the cost which may be assessed.

Does it follow, then, that because the cost of the preparation of the plans and specifications is not a part of the expense which may be assessed it is likewise not a part of the expense for which money may be borrowed under Section 6? Some provisions of the act seem to indicate an affirmative answer to this question. Thus, Section 3, as above quoted, provides that "any or all of the cost and expense of the improvement may be assessed upon the land." When, therefore, Section 8 provides, in detail, what items may be included in the assessment, it would seem to follow that such enumeration is exhaustive of all the items of expense which may be incorporated in the improvement account, whether met by assessment or otherwise.

Here, however, I am inclined to a liberal interpretation of the statute. Section 9 expressly authorizes the use of a sanitary engineer for making the necessary plans and specifications, and I do not believe that it was contemplated by the legislature that such an engineer should be employed by the county commissioners out of their current funds. In substance and effect this expense is a part of the expense of the particular improvement, despite any inference to the contrary that might be drawn from the peculiar language used. Although, therefore, I am of the opinion that the expense of the preparation of plans and specifications cannot be included in the amount assessed against specially benefited property, I am also of the opinion that if the commissioners have properly provided in their improvement resolution for the division of the total cost and expense between the county generally, and the specially benefited property to be assessed, they may include within that portion of the cost and expense which is to be paid for by the county the compensation of the sanitary engineer employed for the purpose of making necessary plans and specifications, as well as all other preliminary matters of like nature; and, for the purpose of paying the county's portion, may issue certificates of indebtedness, as provided in Section 6 of the act above quoted; and may, subsequently, levy taxes for the purpose of paying such certificates, when due, together with interest thereon.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

708.

ROADS AND HIGHWAYS—TOWNSHIP TRUSTEES MAY REPAIR ROAD BY GRAVELING, EITHER BY ONE OR SEVERAL CONTRACTS, WITH A FUND DERIVED FROM GENERAL LEVY—CONTRACTS NOT LIMITED TO $200.00.

When the trustees of a township have on hand a road fund derived from a general levy, under Section 5649-3a of the General Code, they may under Section 3274, General Code, let a contract for the repair by graveling a certain road or they may let separate contracts for the repair of separate sections of such road; upon advertising and bids. Such contract or contracts are not limited to $200.00.

COLUMBUS, OHIO, November 11, 1912.

HON. GEORGE D. KLIEN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I have your letter of September 23rd which is in part as follows:

> "The trustees of Tuscarawas township, our county, have a road fund at this time amounting to $3,300.00. I have held and instructed them numerous times that they cannot spend to exceed $200.00 on any one job or contract let by them and then it must be by competitive bidding for anything over $50.00.
>
> "These trustees have a road in their jurisdiction that needs gravel and would cost $1,000.00 or $1,500.00 to put in the whole work. They wanted to know of me whether they could split this road up into sections and let a number of contracts, so that no one section or contract of said road would cost to exceed $200.00."

Sections 6957 to 7060 inclusive of the General Code constitute the chapter relating to township roads. The first subdivision of the chapter refers solely to the procedure necessary to open and lay out township roads, and the several other subdivisions of the same chapter consist of a series of special acts which confer upon the township trustees the power to levy a tax or issue bonds for the purpose of improving roads within the township. Some of these acts expressly permit the trustees to let construction contracts in sections.

I am advised by you under date of September 26th that the fund mentioned in your letter of September 23rd came into the township treasury by virtue of the levy made under Section 5649-3a of the General Code and not under any of the special acts heretofore referred to and consequently it will not be necessary to consider the latter further.

Section 5649-3a provides in part as follows:

> "* * * the aggregate of all taxes that may be levied by a township for township purposes on the taxable property in the township on the tax list shall not exceed in any one year two mills."

Section 3274 of the General Code provides for the disposition of the money received from the county treasurer for road purposes as follows:

> "When money is received into the township treasury from the county treasury for road purposes, the trustees shall cause such money to be appropriated to building bridges or repairing public roads within

the township. After public notice, they shall let by contract to the lowest bidder, such part or parts of any road as they deem expedient, equal to the amount of money to be appropriated, if in their opinion such bidder is competent to perform the work. When such labor is performed in accordance with the contract or conditions of the letting, the trustees shall draw an order in favor of the person who has performed such labor for the amount due therefor."

I am unable to ascertain from the facts before me whether the graveling of the road in question would constitute "construction" or "repair," but assuming the latter to be true, it is my opinion that Section 3274 is applicable. That section clearly confers upon township trustees the power to let contracts for the repair of a part or parts of any road, that is, they may divide the road into sections and let the contract for each section separately or they may let the whole road in one contract. Our statutes do not contain any limitation upon the power of township trustees to expend more than two hundred dollars on any one contract. The limit of fifty dollars referred to by you applies to expenditures by the trustees under Section 7562, General Code, for the building and keeping in repair of bridges on other than improved or free turnpike roads and there is nothing contained in that section which has any reference to competitive bidding. The township trustees, when proceeding under Section 3274, must advertise for bids in all cases regardless of the amount involved.

I am, therefore, of the opinion that it is optional with the trustees of Tuscarawas township whether they repair said road as a whole in one contract or in sections by separate contracts. If the latter is done they are not limited to $200.00 for each section.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

709.

ROADS AND HIGHWAYS—FUNDS DERIVED FROM LEVY OF COUNTY COMMISSIONERS FOR REPAIR OF ROADS UNDER CONTROL OF COMMISSIONERS MAY NOT BE EXCLUDED BY TOWNSHIP TRUSTEES—JOINT SUPERVISION OF TRUSTEES AND COMMISSIONERS.

Funds levied by the county commissioners, under Section 6956-18, *General Code, for the repair and maintenance of roads, are county funds to be applied to roads under the control of the county commissioners, and such funds may not be apportioned to the various townships to be worked out by their trustees in conjunction with the county commissioners.*

The county commissioners are also without authority to order the township trustees to work out this money and present their bills and have the same allowed by the commissioners.

The county commissioners may, however, under Section 6596-20, *General Code, agree with the township trustees with reference to the expenditure of such funds.*

COLUMBUS, OHIO, September 29, 1912.

HON. JOHN F. MAHAR, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Under date of August 28th, you wrote me as follows:

"The Darke county commissioners have levied a road tax on the duplicate of Darke county under Section 6956-18 et seq.,

"(a) Can county commissioners apportion this money to the various townships and order said amounts given to the treasurer of the various townships, and allow the trustees of the various townships in conjunction with the county commissioners to work out said amounts?

"(b) Or must this money be worked out by the commissioners and paid for by the commissioners out of the above amounts?

"(c) Or can the county commissioners order the trustees to work out this money on the roads and present their bills for the same and then be allowed by the commissioners and paid out of the above amount?"

Sections 6956-18, 6956-19 and 6956-20 of the General Code provide as follows:
Section 6956-18.

"That the supervision and control of all roads and turnpikes which are known as county roads and were built under supervision of county commissioners either by petition or under existing laws at time same were built, or roads that were built by turnpike companies and afterward acquired by any county, or any road built under a special act shall be under the control of the county commissioners who shall have the power to make levies for repair and maintenance of same: authorize the commissioners to refuse to make a levy for road funds under the provisions of Sections 5635, 5636, 7419, 7420."

Section 6956-19.

"The supervision of all roads known as township roads which were built under the direction of township trustees by petition or under existing laws at the time same were built, shall be under the direct control of township trustees who shall have power to levy for improvement and repair of same."

Section 6956-20.

"The officers named in the foregoing sections shall exercise their jurisdiction under the existing laws over those roads as they now stand. The board of county commissioners and township trustees may enter into an agreement between said boards whereby they may jointly supervise, repair or maintain any state, county and township road in their respective jurisdictions."

Section 6956-18 vests the supervision and control of certain roads in the county commissioners and authorizes them "to make levies for repair and maintenance of same."

Section 6956-19 places the supervision of township roads under the control of township trustees, and they are likewise empowered to make levies for the improvement and repair thereof.

Section 6956-20 authorizes the county commissioners and township trustees to enter into an agreement "whereby they may *jointly* supervise, repair and maintain any state, county or township road in their respective jurisdictions."

Jointly is defined by Webster as: "In a joint manner, unitedly; so as to be or become liable to a joint obligation."

The funds in question are county funds levied by the county commissioners for the repair and maintenance of county roads, etc., and the payment thereof to the township trustees, according to the plan outlined in question (a) would constitute a supervision and expenditure by the trustees alone and not by the commissioners and trustees acting jointly as required by Section 6956-20.

I am of the opinion, therefore, that question (a) should be answered in the negative. In my opinion said money may be expended under the direction of the county commissioners alone or they may agree with the township trustees in reference thereto.

I am also of the opinion that the county commissioners are without authority to *order* the township trustees to work out this money and present their bills and have the same allowed by the commissioners.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

713.

INCORPORATION OF VILLAGE—BOUNDARIES IDENTICAL WITH TOWNSHIP—WHEN ELECTION FOR VILLAGE TREASURER RESULTS IN TIE, TOWNSHIP CLERK SHALL DETERMINE BY LOT—ABOLITION OF TOWNSHIP OFFICERS.

When proceedings were had for the incorporation of all the territory comprising Northfield township into a village, under Sections 3526 *et seq., General Code, and when an election was held for the officer of such village, under* 3536, *General Code, which election resulted in a tie vote, as to two candidates for village treasurer; held:*

That under Section 3536, *General Code, the election must be conducted as prescribed for the election of township officers and that, therefore, under Section* 5113, *General Code, the clerk of the township shall determine by lot which of the candidates for village treasurer was elected.*

Although Section 3512, *General Code, expressly provides that all township offices shall be abolished, such section does not contemplate the abolition of such offices until after the village organization has been perfected and after its officers have been elected.*

COLUMBUS, OHIO, November 8, 1912.

HON. FRANK J. ROCKWELL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Your favor of November 4, 1912, through Hon Charles T. Grant, assistant prosecuting attorney, is received, in which you inquire:

> "Some weeks ago proceedings were had before the township trustees for the incorporation of all the territory comprising Northfield township into a village, under Sections 3526, et seq., General Code, and such steps have since been had that on November 2nd an election of municipal officers was held in this newly incorporated village under Section 3536, General Code.
>
> "Such election resulted in a tie vote as to two candidates for village treasurer, each candidate receiving 65 votes.
>
> "Question. Who is to determine which of the two candidates is elected?"

Section 3536, General Code, provides for the first election of municipal officers in a newly created village, as follows:

> "The first election of officers for such corporation shall be at the first municipal election after its creation, and the place of holding the election shall be fixed by the agent of the petitioners. Notice thereof, printed or plainly written, shall be posted by him in three or more public places within the limits of the corporation, at least ten days before the election. *The election shall be conducted, and the officers chosen and qualified, in the manner prescribed for the election of township officers, and the first* election may be a special election held at any time not exceeding six months after the incorporation, and the time and place of holding it shall be fixed by such agent, and notice thereof shall be given as is required herein for the municipal election."

By virtue of this section the election is to be conducted and the officers chosen in the manner prescribed for the election of township officers.

Section 5111, General Code, provides:

> "In November elections held in odd numbered years for township officers, justices of the peace, municipal officers and members of boards of education the judges and clerks of election in each precinct shall make and certify the returns to the clerk of the township or the clerk or auditor of the municipality in or for which the election is held or the clerk of the board of education of the school district, respectively, instead of to the board of deputy state supervisors of the county. This provision shall not apply to the return of elections for assessors of real property."

There is no clerk of the new village at the time of the first election and the returns must be made to the clerk of the township as such returns are made in the case of the election of township officers.

Section 5112, General Code, provides:

> "The returns of township election shall be made by the judges and clerks in the severeal precincts to the proper township clerk within one day after the election. Such clerk shall canvass the vote, declare the result and issue and deliver certificates to the officers so elected."

Section 5113, General Code, provides:

> If two or more persons have the highest and an equal number of votes for any one of the township offices directed to be filled, the clerk of the township shall determine by lot which of such persons is duly elected."

Section 5116, General Code, provides:

> "If the result of an election for municipal officers cannot be determined from the votes cast for the reason that more than the number of persons to be elected have an equal number of votes for the same office, the officers whose duty it is to ascertain the persons elected, shall determine by lot which of such persons shall be declared elected."

The provisions of Section 5113, General Code, govern in case of a tie vote in the election of township officers. By virtue of Section 3536, General Code, supra, the first officers of a newly created village are chosen in the same manner as township officers. Section 5116, General Code, governs in case of a tie vote in the election of municipal officers. This section does not govern your case, because Section 3536, General Code, specifically provides that the first officers of a new village shall be chosen in the manner prescribed for the election of township officers.

In the case of a tie in the election of a township officer the clerk of the township determines the election by lot. So also at the first election of officers of a newly created village the clerk of the township has the power to determine by lot the person who has been elected where there is a tie vote.

In your case there is another question to be considered. It appears that the entire township was incorporated into the village. This makes the boundaries of the township and of the village identical.

Section 3512, General Code, applies to such a condition. Said section reads:

> *"When the corporate limits of a city or village become identical with those of a township, all township officers shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village,* except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

It is contended that Sections 3530 and 3531, General Code, contemplate that the township organization shall go out of existence as soon as the village is incorporated, that is, at the time of the proper certificate is forwarded to the secretary of state by the county recorder.

Section 3530, General Code, provides:

> "The trustees shall make a certified transcript of the journal entries of all their proceedings and a majority of them having signed it, with the original petition and plat, they shall deliver it to the county recorder, who shall forthwith make a record of the petition, transcript and plat or map, in the public book of records, and preserve in his office the original papers delivered to him by the trustees, and certify thereon that the transcribed petition and map are properly recorded. *When the recorder has so made such record, he shall certify and forward to the secretary of state a transcript thereof."*

Section 3531, General Code, provides:

> *"The corporation shall then be a village under* the name adopted in the petition, with all powers and authorities given to villages by this title, but no injunction shall be brought, as herein provided in case of filing the transcript with the county commissioners, unless the action be instituted within ten days from the filing of the papers by the trustees with the county recorder, but the right of petition to the court

of common pleas for error shall exist as provided in the following section of this chapter."

These two sections provide, among other things, when the territory shall become a village. They make no provision as to the discontinuance of the township organization.

In most cases a new village takes in but part of the township. It is not often that a whole township is incorporated into a village. Sections 3530 and 3531, General Code, apply to the incorporation of all villages and do not make special provision for a case similar to yours. Section 3512, General Code, governs in your case and determines when the township organization shall cease.

The newly incorporated municipality became a village, by virtue of Sections 3530 and 3531, General Code, when the recorder had made the record and forwarded a certified copy thereof to the secretary of state. It became a village at that time but it had not yet perfected its organization. It was not yet ready to carry on its government and its affairs. It had no officers. Officers could be elected at the next regular municipal election, or a special election could be called and held within six months after the incorporation.

At the time the certificate was forwarded to the secretary of state by the county recorder the boundaries of the village and of the township were identical.

Section 3512, General Code, provides that:

"When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished."

If this provision was strictly applied there would be no township officers from and after the date of incorporation, and at the time of the election in question there would be no township clerk to determine the tie vote.

Section 3512, General Code, further provides:

"and the duties thereof shall thereafter be performed by the corresponding officers of the city or village,"

This provision contemplates that there are officers of the village or city who can take over and perform the duties of the township officers whose offices are abolished. In other words, when the township officers relinquish their offices, the municipal officers are ready to take charge and conduct the governmental affairs of the territory.

It is not the purpose of the statute that the territory shall be entirely without officers and government during the interval between the incorporation of the village and the election of the first officers. On the other hand the statute contemplates that the township officers shall continue in office until the new village officers have been elected and qualified. The newly incorporated territory is a village in name from the time of its incorporation but it is not in full organization until the officers are elected and qualified.

Therefore, the township officers should continue to perform their duties as township officers until such duties can be performed by the newly elected village officers.

At the time of the election in question the clerk of the township was still in office and had power to determine the tie vote and he should cast lots to determine who has been elected.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

714.

CORRUPT PRACTICES—REPRESENTATIVES AT POLLS—LIST SIGNED BY CHAIRMAN AND SECRETARY OF COMMITTEE AND FILED AT OFFICE OF BOARD OF ELECTIONS, IS SUFFICIENT CERTIFICATION.

When a county chairman of a democratic executive committee, filed the list of party and personal representatives to be at or near the polls on election day, properly certified to by the chairman and secretary, with the chief deputy of the deputy state supervisors of elections, three days before election, when the supervisors were not in session and the clerk was not in his office, such action is a sufficient compliance with Section 5175-26, General Code, requiring such list to be "certified" to the board of elections at least two days before election.

COLUMBUS, OHIO, November 11, 1912.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your favor of November 8, 1912, wherein you state:

> "I desire your opinion on Section 5175-26, of the General Code, on the following:
>
> "On November 2, 1912, F. G. Roberts, county chairman of the democratic executive committee and one or more candidates on the judicial ticket filed the list of party and personal representatives to be at or near polls on election day, November 5, 1912, with the chief deputy of the deputy state supervisors of elections of Lawrence county, and said supervisors not being in session and the clerk of said board not being in the office. Said representatives were not to be paid in excess of $5.00 per day. Does this comply with the above section of law?"

Section 5175-26, General Code, provides as follows:

> "* * * * Each political party may designate one party representative in each precinct upon each registration day and such committee may designate not more than three (3) such representatives and each candidate one representative in each voting precinct upon each election day, *whose names shall be certified to by the chairman and secretary of the controlling committee of such party to the board of deputy state supervisors of elections,* at least two (2) days before such registration or election day, and who may be paid for their services by such committee or candidate not in excess of five ($5.00) dollars per day each." * * *

I call your attention to the fact that the language of the statute does not require a list of names to be "filed," but that the names shall be "certified to" by the chairman and secretary to the board of deputy state supervisors of elections.

The word "certify" is variously defined by the authorities:

> "'Certify,' to give certain knowledge or information of; make evident; vouch for the truth of; to testify in writing; give a certificate of; make a declaration about in writing under hand or hand and seal; to make

attestation either in writing or orally as to the truth or excellence of something. (Standard Dictionary, quoted in People vs. Foster, 27 Misc. (N. Y.) 576.)

"To testify in writing; to make a declaration in writing. (Webster's Dictionary, quoted in State vs. Gee, 28 Oregon, 100.)

"To testify to writing; to make note or establish as a fact. (Anderson's Law Dictionary, quoted in Chicago R. R. Co. vs. People, 65 N. E. 701.)

"The term 'to certify' as used in reference to legal documents and in the absence of statutory power declaring the particular form of certification, any form which affirms the fact in writing is sufficient." (State vs. Brill, 59 N. W. 989.)

So it is readily seen that all that is required under the section of the General Code referred to is that the names selected as representatives be made known to the board by some written declaration signed by the chairman and secretary of the controlling committee of the political party.

In your question you state that this list was filed with the chief deputy of the deputy state supervisors of elections of Lawrence county on November 2, 1912, the said supervisors not being in session at that time, and the clerk of said board not being in the office. It is my opinion that this is a sufficient compliance with the statutes, for, as it is well known, many of the boards of elections in the smaller counties do not remain in continuous session, and it is not unusual to hand such papers to the chief deputy or the clerk who is presumed to later place them with the papers on file with the board. It certainly would be repugnant to all justice and fairness to hold that when a party has done all that he is required to do under the law, that by reason of some mere irregularity and beyond his control or fault he would not be protected in complying with the statute insofar as it lay within his power. I take it that even the neglect or refusal of an official would not work to the injury of the party so complying with the statute as far as he was able to do.

I am, therefore, of the opinion, under the facts stated by you, that the certification to the deputy state supervisors of election complies with Section 5175-26, General Code.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

722.

TRANSFER OF DUTIES OF INFIRMARY DIRECTORS TO COUNTY COMMISSIONERS NOT AN EXERCISE OF APPOINTING POWER—ACT CONSTITUTIONAL.

The transfer of the duties of the infirmary directors to the county commissioners by the act abolishing the infirmary directors, is not an exercise of the appointing power, and therefore, is not in contravention to the constitutional requirement that all county officers shall be elected.

COLUMBUS, OHIO, November 22 ,1912.

HON. LAWRENCE E. LAYBOURNE, *Prosecting Attorney, Springfield, Ohio.*

DEAR SIR:—Under date of November 1st, you request my opinion, as follows:

"On May 31, 1911, the general assembly of Ohio repealed the laws

creating and incorporating boards of infirmary directors. Said repeal to be effective January 1, 1913. (102 O. L. 433.)

"By the same act all powers and duties of all boards of infirmary directors were attempted to be transferred to and vested in boards of county commissioners. The nominal term of the present board of infirmary directors began January 1, 1911, and expires January 1, 1913.

"The term of the present board of county commissioners began the third Monday of September, 1911, at which time said board had no jurisdiction over the county infirmary, and does not expire until the third Monday in September, 1913.

"Is the attempted transfer, beginning January 1, 1913, of the functions of infirmary directors, to a board which was never elected for the purpose of performing such functions, in conflict with article 10 of the constitution of Ohio?

"If so, can the constitutional difficulty be obviated by allowing the present board of infirmary directors to hold until the first Monday of September, 1913, when the commissioners to be elected at the coming election shall be qualified in their offices?"

Sections 1 and 2, of article 10, are material parts of article 10, of the constitution, to which you refer. They are as follows:

"Section 1. The general assembly shall provide, by law, for the election of such county and township officers as may be necessary.

"Section 2. County officers shall be elected on the first Tuesday after the first Monday in November, by the electors of each county in such manner, and for such term, not exceeding three years, as may be provided by law. (As amended October 13, 1885; 82 v. 446.)"

I take it that the gist of your inquiry is whether or not the transfer of the duties of the county infirmary directors to the county commissioners amounts to the appointment of the county commissioners to the position of infirmary directors, thereby contravening the requirement of these constitutional sections, which make it necessary for all county officers to be *elected.*

In the case of ex rel. Attorney General vs. Kennon et al., 7 O. S., page 547, at page 572, Judge Swan said:

"If the general assembly annex to an office already existing and filled additional powers and duties, upon what ground can it be claimed that this is the exercise by the general assembly of the appointing power? Certainly upon this only, that the general assembly has enlarged or added to the powers and duties of an existing office. But this is really absurd; for, if adding to the duties or powers of existing offices is an exercise of the appointing power, then every new duty required, or power conferred upon any state, county or township officer, must be deemed the exercise by the general assembly of the appointing power, and forbidden by the constitution.

"But these fallacious positions arise out of a misapprehension of what is meant by the exercise of the appointing power. An office, until filled, is an impersonal thing—an incorporated hereditament. It is filled by the exercise of the appointing power, and when filled, the office and officer both exist. The office itself may by law be enlarged in its powers, or new duties enjoined, without touching the appointment or tenure of office of the incumbent or his successor. It would therefore

seem highly probable, although the question is not before us, that the general assembly could, without displacing or appointing a governor of Ohio, annex to the office of governor the power of appointing directors of the penitentiary, or the duty of performing any other legitimate executive function."

It is well settled that the general assembly may increase the duties and add to the powers of the existing offices. I am of the opinion that this was what was done by the law to which you refer, with reference to the county commissioners, and that there has been no violation of the article of the constitution referred to, in adding to their duties, the duties formerly resting upon the infirmary directors.

Very truly yours

TIMOTHY S. HOGAN,
Attorney General.

727.

EXTRA COMPENSATION NOT ALLOWED TO TOWNSHIP TRUSTEES FOR SUPERVISING PUBLIC ROADS.

Under the general rule of law, that duties which are added to an office without fixing any extra compensation therefor are to be performed gratuitously, the township trustees may be allowed no extra compensation for supervising the improvement of public roads under Section 7052, General Code.

COLUMBUS, OHIO, November 12, 1912.

HON. P. G. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Under date of October 25, 1912, you inquire of me concerning the following question:

> "Question has been made in this township as to whether a member of the board of township trustees appointed in pursuance of the provisions of Section 7052, of the General Code of Ohio, to supervise the improvement of the public roads can receive extra compensation over and above the regular per diem allowed by law."

Section 7052, of the General Code, provides as follows:

> "The trustees shall designate one of their number to supervise the improvement of each working section of the public ways. They shall provide such blanks, books and records, as are necessary, and allow to the township clerk for the services to be rendered by him, reasonable compensation; all of which shall be paid out of the funds provided for such improvement on the order and allowance of the township trustees."

The foregoing is a part of the sub-division of the township road laws, entitled "Township or Precinct a Road District," and provides a method of improving township roads when a township or part thereof is created by the township trustees into a separate road district. Our statutes do not provide that township trustees shall be entitled to an extra compensation for services rendered by them when performing the duties required by Section 7052.

It is well settled in Ohio that when a statute requires of a public officer the performance of certain services, and no provision is made for payment, such

services are to be regarded as gratuitous, or as being compensated by other fees accruing to such officer by virtue of his office. The rule on this subject is stated by our supreme court in the case of Jones, Auditor, vs. Commissioners, 57 O. S., 189, at page 209, as follows:

> "'An officer whose fees are regulated by statute can charge fees for those services only to which compensation is by law affixed' (Debolt vs. Trustees, 7 O. S., 237); and the corollary is, as held in Anderson vs. Commissioners, 25 O. S., 13, 'where a service for the benefit of the public is required by law, and no provision for its payment is made, it must be regarded as gratuitous, and no claim for compensation can be enforced,' which rule is more fully stated, but to like import, in Strawn vs. Commissioners, 47 O. S,, at page 408."

In the case of Clark vs. Commissioners, 58 O. S., 107, it was said by Burket, J.:

> "It is well settled that a public officer is not entitled to receive pay for services out of the public treasury, unless there is some statute authorizing the same. Services performed for the public, where no provision is made by statute for payment, are regarded as a gratuity, or as being compensated by the fees, privileges and emoluments accruing to such officer in the matters pertaining to his office. Jones vs. Commissioners, 57 O. S., 189. To warrant payment out of the public treasury, it must appear that such payment is authorized by statute. Section 5, article 10, of the constitution. Diebolt vs. Trustees, 7 O. S., 237; Anderson vs. Commissioners, 25 O. S., 13; Strawn vs. Commissioners, 47 O. S., 404."

Other Ohio authorities in support of this principle are cited in volume II, at page 248, of Michie's Encylclopedia Digest of Ohio Reports.

In view of the uniformity of the Ohio authorities upon this point, and the fact that no compensation is fixed by statute for township trustees for services performed under Section 7052, I am of the opinion that they are not entitled to extra compensation for such services.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

741.

FUNDING AND REFUNDING OF INDEBTEDNESS BY BOARD OF EDUCATION—PURPOSES FOR WHICH BOARD MAY BORROW—CANNOT BORROW TO MEET CONTINGENT EXPENSES—CREATION OF SINKING FUND TO MEET INDEBTEDNESS AND INTEREST, MANDATORY.

Board of education may borrow money for only two purposes:

1. *For specific building or improvement enterprises.*
2. *To fund or refund a valid existing indebtedness of the district.*

Inasmuch as no indebtedness may be created except in case of hiring of teachers and other employes, without the issuance of a certificate of the clerk to the effect that the money necessary is in the treasury to the credit of the proper fund and not appropriated for any other purpose, it is clear that a valid existing indebtedness for contingent expenses could not be created beyond the amount in the treasury to cover the same. There cannot, therefore, exist, so far as contingent expenses are concerned, such a valid existing indebtedness as would permit the funding or refunding of the same.

Sections 7587 and 7613, General Code, provide for the creation of a sinking fund for the payment of bonds and interest out of the board's levy, and Section 7614, General Code, provides for the appointment of commissioners of the sinking fund, through the common pleas court.

These sections are mandatory and the interest on the money borrowed by reason of exhaustion of funds for the payment of teachers should be paid from such sinking fund and such should not be paid from either the tuition or the contingent fund.

COLUMBUS, OHIO, November 19, 1912.

HON. F. A. SHIVELEY, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 7th, in which you ask my opinion upon the following questions:

> "Have township boards of education the authority to borrow money for contingent expenses, such as providing fuel, furniture, crayon and all other items of expense for which payment must be made from the contingent fund?
>
> "If boards of education borrow money for the purpose of paying teachers in instances where the tuition fund is exhausted before the district may receive the state aid, from what fund is the interest on such debt properly payable? From the contingent or tuition fund?"

You have been kind enough to state your views in connection with these questions, which is to the effect that there is no statutory authority for borrowing money for the contingent expenses of a township board of education. I agree with you in this view. Boards of education may exercise the borrowing power for two purposes, and two only, viz.:

1. For specific building or improvement enterprises.
2. To fund or refund a valid existing indebtedness of the district.

An indebtedness of the district cannot be created except in case of the compensation of teachers and other employes save after the issuance of a certificate of the clerk to the effect that the money necessary to discharge the obligation is in the

treasury to the credit of the proper fund and not appropriated for any other purpose. It would be manifestly impossible therefore to incur an obligation for contingent expenses and to regard such an obligation as a valid indebtedness of the district.

The foregoing fully answers your first question. With respect to your second question, I beg to state that Section 7587 provides as follows:

> "Such levy shall be divided by the board of election into four funds: First, tuition fund; second, building fund; third, contingent fund; fourth, bonds, interest and sinking fund. A separate levy must be made for each fund."

Section 7613, of the General Code is in *pari materia* with the foregoing section and provides as follows:

> "In any school district having a bonded indebtedness, for the payment of which, with interest, no provision has been made by a special tax levy for that particular purpose, the board of education of such district annually, on or before the thirty-first day of August, shall set aside from its revenues a sum equal to not less than one-fortieth of such indebtedness together with a sum sufficient to pay the annual interest thereon.''

Sections 7614 et seq. provide for the creation of a board of commissioners of the sinking fund of the district, and it is my opinion, in the first instance, that the proper way to manage the payment of interest upon bonds issued for the purpose mentioned by you is through the machinery provided by these sections. The sections themselves are in form mandatory, and I am of the opinion that it is the duty of any board of education which has a bonded indebtedness to apply to the common pleas court for the appointment of a commission of this sort. (See State ex rel. vs. Board of Education, 3 N. P., n. s. 401.)

Whether or not such a commission has been created, and at least prior to its creation, if no one has taken steps to compel compliance with the sections just commented upon, I am of the opinion that interest charges upon bonded indebtedness created by a board of education must be met from the sinking fund levy expressly required to be made by Section 7587 supra, and that it is the duty of the board of education to divide its levy in the manner provided by that section if there are interest charges of this sort to be met. It follows, therefore, that such payments should not be made either from the contingent or from the tuition fund regardless of the nature of the indebtedness, to provide for which the bonds were originally issued.

In conclusion, I note that you state that you would like to have cited to you any authority that may exist for the borrowing of money for contingent expenses by boards of education. As already stated, I know of no such authority.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

744.

ELECTION EXPENSES—VILLAGE MAY NOT CHARGE TOWNSHIP FOR USE OF TOWN HALL FOR ELECTIONS—LIGHT, HEAT AND FUEL PAID BY COUNTY AND CHARGED BACK IN ODD NUMBERED YEARS.

As set out in a former opinion when a village furnished a room and heat, light and fuel for election purposes, the expense of fuel and light is paid from the county treasury and charged back to the political sub-division in odd numbered years, except for special elections.

The village cannot charge rent to the township for the use of its town hall for election purposes.

COLUMBUS, OHIO, November 29, 1912.

HON. D. W. MURPHY, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Under date of November 21, 1912, you inquire:

> "The township trustees of Miami township, Clermont county, Ohio, refuse to pay the village of Milford in Clermont county, Ohio, rent for election day for the use of the town hall, being the place where the election was held on November 5, 1912. Miami township has five election precincts, three being in the township proper outside of municipalities and two being precincts in villages, one being in Loveland and the other in Milford.
>
> "On November 5th the village of Milford furnished a room, electric light and heat for holding the election, and it asks pay from the township trustees for the same.
>
> "In November, 1911, the same room was used for a township and municipal election and the township trustees of Miami township refused to pay their proportionate share of the rent for the year 1911 under like circumstances."

Your question involves two propositions:

First. The right of the village to charge rent against the township for the use of its town hall for the purpose of holding elections therein, and

Second. The right of the village to charge for furnishing light and heat in such town hall when used for elections.

Both of these questions have been answered by this department in two opinions, in which it was attempted to provide rules for the payment of all expenses pertaining to elections. These opinions cover a number of matters, and therefore the propositions, in which you are interested will be specifically referred to.

In an opinion given to the bureau of inspection and supervision of public offices under date of February 27, 1912, it was held:

> "In counties having no registration city, and in precincts outside of a registration city in counties having a registration city, the expense of supplying chairs, tables, etc., provided by the board of elections, shall be paid by the county, and cannot be charged back. The expense for light, fuel and such supplies as are consumed at a particular election is to be charged back to the political division in which such election was held in odd numbered years, except for special elections."

The expense of fuel and light for voting places is paid from the county treasury and is charged back in odd numbered years. The county should pay the village for the light and heat furnished for elections and in the odd numbered years the county should charge such expense back to the political division in which such election was held, as prescribed in Section 5053, General Code.

The opinion above referred to has been printed by the bureau and a copy can be secured from it on application.

In a later opinion given to the bureau of inspection and supervision of public offices, approving a schedule of expenses for elections, the other proposition was considered.

In that opinion it was held:

> "Section 4844, General Code, provides that the township trustees shall select the place of voting in the township precincts; that the council of the corporation shall select the place in municipalities; and that the board of elections shall designate the place in registration cities. Nothing is said in this section as to who shall pay for such rooms or places. The payment of the rent of voting places is specifically provided for in registration cities and has been covered in the opinion of February 27.
>
> "There is no specific provision of statute directing how the rent for voting places in a township or in a municipality other than a registration city, shall be paid. In the absence of such specific provision, any necessary expense incurred for renting rooms for elections in such places would constitute a proper and necessary expense of the election to be paid as provided in Sections 4821 and 5052, General Code, by the county, and to be charged back in odd numbered years as provided in Section 5053, General Code.
>
> "You refer to the report of the attorney general of 1906, at page 10. An opposite holding is apparently made by the attorney general in the opinions of 1909-1910, at page 602.
>
> "A question will arise as to the right of a township or municipal corporation to charge the county rental for the use of its public hall or building for holding elections therein. I find no authority to make such charge. Said buildings are provided for public purposes, and it adds no expense to the township or municipality to permit the use of such building for elections."

I am, therefore, of the opinion that the village cannot charge rent for the use of its town hall for election purposes.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

748.

OFFICES INCOMPATIBLE—PROSECUTING ATTORNEY AND MEMBER VILLAGE BOARD OF EDUCATION.

Inasmuch as under Section 4701, General Code, the prosecuting attorney is obliged to prosecute all actions against member of a village board of education for misfeasance or malfeasance in office, considerations of public policy will not permit that official to hold a position on such board of education.

COLUMBUS, OHIO, December 20, 1912.

HON. LEVI B. MOORE, *Prosecuting Attorney-Elect, Waverly, Ohio.*

DEAR SIR:—Under date of December 9th, you request my opinion upon the question, whether you may serve as prosecuting attorney and at the same time retain your position as member of the Waverly school board.

In Throop on Public Officers, page 38, the following rule is stated:

> "'Offices are said to be incompatible and inconsistent, so as not to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability, or when, *their being subordinate and interfering with each other, it induces a presumption that they cannot be* executed with impartiality and honesty.' And in Dillon on Municipal Corporations (166, note), it is said, that '*Incompatibility in offices exists where the nature and duty of the two offices are such as render it improper,* from considerations of public policy, for one incumbent to retain both.'"

Section 4761, General Code, provides as follows:

> "Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all board of education of the county in which he is serving. *He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office,* and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education of the county."

In an opinion rendered to the state commissioner of common schools, under date of March 4, 1912, I held that the duties of the prosecuting attorney, as set out in this section, apply to village boards of education. The rule is fundamental that an officer may not be placed in a position which requires him to act as judge in his own case, and, inasmuch as Section 4761, General Code, provides that the prosecuting attorney shall prosecute all actions against members or officers of a board of education for malfeasance or misfeasance in office, it is clear that con-

siderations of public policy will not permit one individual to hold both these offices at the same time.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

752.

TEACHER—BOARD OF EDUCATION CANNOT PAY FOR SERVICES PERFORMED WITHOUT CERTIFICATE.

A contract made by a board of education to pay for services of a teacher performed by the latter, prior to the obtaining of a certificate, is void, and said teacher cannot be reimbursed for such services.

COLUMBUS, OHIO, December 3, 1912.

HON. H. R. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 15, 1912, wherein you inquire as follows:

> "On September 2, 1912, the board of education of Russel township, in our county, passed the following resolution: 'Whereas, Miss A. has presented an application for a school in Russel township school district, now therefore, be it
>
> "*Resolved,* That Miss A. be engaged to teach the school in sub-district No. 9, with a salary of $40.00 per month, and $2.00 janitor's fees, providing she presents the proper qualifications on or before September 16, 1912.'
>
> "It appears that Miss A. had no certificate at the time this resolution was passed, she began to teach the following Monday, but she did not receive her certificate until October 5, 1912. October 21, 1912, the board passed a resolution as follows:
>
> "'*Be it Resolved,* That Miss A. be hired to teach the school in sub-district No. 9 for the balance of the year, with a salary of $45.00 per month and with $2.00 for janitor's fees.'
>
> "It is apparent that the board is attempting to pay this teacher for her work during September, when she had no certificate and my query is, under the circumstances, is this last contract legal?"

In reply to your inquiry, I desire to say that Section 7830 of the General Code provides as follows:

> "No person shall be employed or enter upon the performance of his duties as a teacher in any elementary school supported wholly or in part by the state in any village, township or special school district who has not obtained from the board of school examiners having legal jurisdiction a certificate of good moral character; that he or she is qualified to teach orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States, including civil government, physiology, including narcotics, literature, and on and after September 1, 1912, elementary agriculture, and that he or she possesses an adequate knowledge of the theory and practice of teaching."

The provision of said section that no person shall be employed as a teacher unless he has first obtained the certificate required by law, does not render invalid a contract for such employment made with the teacher before such teacher obtains the required certificate, provided he obtains it before entering upon the duties of his employment.

> "A teacher may be appointed by a board of education, who at the time has no certificate, if he obtains one before the commencement of the schools." (Youman's et al. vs. Board of Education, 13 C. C., p. 207.)
>
> "The provision of Section 7, of the school law passed March 14, 1864, that 'no person shall be employed as a teacher unless he has first obtained the certificate required by law,' does not render invalid a contract for employment made with the teacher before he obtains the requisite certificate, provided he obtains it before entering upon the duties of his employment." (School Dis. No. 2, Oxford Tp., Butler Co. vs. Lewis N. Dillman, 22 O. S., 194.)

In view of the above decisions the teacher in question was qualified to contract with the said board of education even though she had not yet obtained the certificate to teach as required by law, provided she obtained a certificate before entering upon the duties of her employment. Inasmuch as she failed to obtain such certificate before entering upon her duties or as stipulated by the board of education, that she present proper qualifications on or before September 16, 1912, the contract of September 2, 1912, between said teacher and the board of education never became effective unless it be held that it took effect when Miss A. procured her certificate and continued to teach thereafter. The resolution of October 21, as quoted by you, if made with the intention you state, to wit, to pay this teacher for her work during September when she had no certificate, can be held to be nothing more nor less than an effort by the board to do that which the legislature undertook to prevent school examiners from doing when it enacted Section 7817, General Code, where it reads: "In no case shall the board hold any private examination nor *antedate any certificate.*"

Miss A. should be paid, and I am sorry that I can see no way by which she may be paid for the month of September. However, she knew what the requirements of the law and her contract were, and it cannot be said that any advantage has been taken of her in any legal sense.

My conclusion, in answer to your question is, the board had a perfect right to make a contract on October 21st, but no right to make one by which payment should be made to Miss A. for her September labors.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

757.

VILLAGE SCHOOL DISTRICT FORMED FROM SPECIAL SCHOOL DISTRICT—TIME OF ELECTION AND ORGANIZATION OF VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION.

When a special school district becomes a village school district, either by the creation of a village having school property to the valuation of $100,000.00 *or by vote of the electors when the valuation is less, the board of education of the special school district shall hold over until the board of education of the village school district is organized.*

When the village school district board is elected at a special election, the board shall organize on the second Monday after the special election.

COLUMBUS, OHIO, December 17, 1912.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Under date of December 10, 1912, you inquire:

> "In the township of Kingsville in this county there has existed for some time a special school district known as the North Kingsville school district, and recently the territory comprising this district has been incorporated into a village, and a special election had, at which a board of education was chosen. The question now arises as to when, if at all, the board of education of the special district shall turn over the property and control of the schools to the newly elected board of education."

Section 4687, General Code, provides:

> "Upon the creation of a village, it shall thereby become a village school district, as herein provided, and, if the territory of such village previous to its creation was included within the boundaries of a special school district and such special school district included more territory than is included with the village, such territory shall thereby be attached to such village school district for school purposes."

As submitted by you, I take it that the boundaries of the special school district and of the new village are identical. Even though they are not identical, the part of the special school district outside the village will by virtue of Section 4687, General Code, become attached to the village school district for school purposes.

Said Section 4687, General Code, provides that upon the creation of a village, "it shall become a village school district, as herein provided." Sections 4681 and 4682, General Code, prescribe when a village shall become a village school district. It is to the provisions of these sections that Section 4687, General Code, refers by the words "as herein provided."

Section 4681, General Code, provides:

> "Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars, shall constitute a village school district.''

This section has been constructed in case of Buckman vs. State, 81 Ohio St., 171, wherein it is held:

> "By force of the provisions of Section 3888, Revised Statutes, as amended April 2, 1906, and in effect April 16, 1906 (98 O. L., 217), each incorporated village then existing—April 16, 1906—or since created, "together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars," constitutes and is a village school district, no vote of the electors of such village being necessary to the creation or establishment of such district."

By virtue of this decision if the village, together with the territory attached for school purposes and excluding the territory detached for school purposes, has the necessary tax valuation it becomes a village school district without a vote of the electors.

Section 4682, General Code, provides:

> "A village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than one hundred thousand dollars, shall not constitute a village school district, but the proposition to dissolve or organize such village school district shall be submitted by the board of education to the electors of such village at any general or special election called for that purpose, and be so determined by a majority vote of such electors."

This section provides for villages which with the territory attached for school purposes and excluding that which is detached for school purposes, have a tax valuation of less than one hundred thousand dollars.

I assume that the school district now in question has the necessary tax valuation to constitute it a village school district without a vote of the electors as provided in Section 4681, General Code. If it has not such necessary tax valuation, it will remain a special school district unless the question of organizing a village school district has been submitted to the electors, and such election resulted favorable, as provided in Section 4682, General Code.

For the purposes of this opinion it will be necessary to assume that the district is a village school district.

The special school district has now been changed to a village school district by virtue of Section 4687, General Code. This section makes no provision as to the continuance in office of the board of education of the special school district.

Section 4686, General Code, provides:

> "When a village is advanced to a city, the village school district shall thereby become a city school district. When a city is reduced to a village, the city school district shall thereby become a village school district. The members of the board of education in village school districts that are advanced to city school districts, and in city school districts that are reduced to village school districts shall continue in office until succeeded by the members of the board of education of the new district, who shall be elected at the next succeeding annual election for school board members."

This section does not apply to your case. It governs when a city school district becomes a village school district, or vice versa. It makes no provision for a board of education when a special school district becomes a village school district.

The election of a board of education of a special school district is provided for in Sections 4736, et seq., General Code.

Section 4736, General Code, provides:

> "The board of education of a special school district shall consist of five members, elected at large at the same time as township officers are elected and in the manner provided by law."

Section 4737, General Code, provides:

> "At the first township election after the creation of a special district therein, a board of education shall be elected in such district, as herein provided, two members to serve for two years and three to serve for four years, and at the proper township election thereafter, their successors shall be elected for the term of four years."

These sections make no provision for the continuance in office of the board of education of a special school district when such district becomes a village school district.

Sections 4708, et seq., General Code, provide for the election of the members of the board of education of a village school district.

Section 4708, General Code, provides:

> "In village school districts, the board of education shall consist of five members elected at large at the same time as municipal officers are elected and in the manner provided by law."

Section 4709, General Code, provides:

> "At the first election in such district, a board of education shall be elected, two members to serve for two years and three to serve for four years. At the proper municipal election held thereafter, their successors shall be elected for a term of four years."

Section 4710, General Code, provides:

> "In villages hereafter created, a board of education shall be elected as provided in the preceding section. If such election is a special election, the members elected shall serve for the term indicated in such section from the first Monday in January after the last preceding election for members of the board of education, and the board shall organize on the second Monday after the special election."

It appears that in your case a special election was held in the new village, and that a board of education was elected thereat. This board of education was elected for the village school district. The special school district for which the former board of education was elected has been superceded by the village school district. The statutes do not authorize the members elected on the board of edu-

cation of a special school district to act for a village school district, nor do the statutes continue such members in office and make them members of the board of education of the succeeding village school district.

As soon as the board of education which was elected for and by the village school district is organized, it may take charge of the property and affairs of the school district, and thereupon the board of education of the special school district will cease to exist.

Very truly,
TIMOTHY S. HOGAN,
Attorney General.

767.

CHILDREN'S HOME—CHILDREN COMMITTED BY JUVENILE COURT UNDER CONTROL OF COURT AND NOT OF TRUSTEES

It is the intention of the juvenile court provisions to place children under the complete control of the courts and its provisions therefore, as to children committed by the juvenile court of the children's home, supersede the earlier statutes providing that children shall not be admitted to the children's home without approval of the trustees and that the trustees shall have full control of all children admitted to the home.

COLUMBUS, OHIO, December 9, 1912.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I beg to acknowledge yours of November 14, 1912, which is as follows:

> "Kindly give me your opinion as to the construction of Sections 1643, 1653, 3090 and 3093, General Code.
>
> "Section 1643 fixes the time that the jurisdiction of the court over a juvenile lasts.
>
> "Section 1653 provides that the judge may commit a dependent child to a county institution.
>
> "Section 3090 provides that children can only be admitted to children's home upon approval of trustees.
>
> "Section 3090 provides that children of the home are under full control of the trustees.
>
> "Query: Can the court, who has found a child dependent, commit such child to the children's home until the further order of the court, or during all the time such child remains under the jurisdiction of the court, without the approval of the trustees of such home, and without them exercising such control over said child as is provided by Section 3093.
>
> "Sections 1643 and 1653 having been passed subsequent to the other sections in question, I am of the opinion that they would prevail, and would only be an additional method of admission to the home. I believe that the court could be given full control over any child found to be dependent, and the trustees would have no power of control over such child, regardless of Section 3093, and it would be the duty of the trustees to keep and care for such child until such dependent child arrived at the age of 21, or until the further order of the court, regardless

of the fact that another section (3093, G. C.) places inmates under the guardianship of the trustees until such inmates arrive at the age of 18, giving such trustees power to find homes for children.

"Not being able to agree with the trustees of the local children's home on this subject, I write for your opinion."

I am of the opinion that your construction of these sections of the law, as set forth in your above letter, is the correct one.

In construing statutes on a given subject, like the above, reference must be had to their history, date of passage and subject matter. They should be read in connection with each other, with a view of obtaining from the whole their true meaning as intended by the legislature.

By a careful observation of the above rules, as to the questions submitted herein, there is no apparent conflict. Sections 3090 and 3094, General Code, were substantially embraced in Sections 931 and 932, Revised Statutes. These provisions comprised part of the old law as to children's homes, in force before the year 1880. The old manner of receiving, controlling, discharging, etc., still prevails, *as to all children who are not admitted through the* channels of the courts. None of the rights, powers or duties of the trustees are curtailed as to that class of children.

On the 25th of April, 1904 (97 O. L., 561), the legislature framed a law entitled: "An act to regulate the treatment and control of dependent, neglected and delinquent children."

This created the juvenile court system, and was an advance movement in the care of Ohio's unfortunate children. This statute being somewhat imperfect and experimental, the legislature took up this progressive and humane subject, and through amendments from time to time, finally enacted substantially the present law, on April 23, 1908 (99 O. L., 192). This act embraces Sections 1643, 1653, General Code, cited by you.

The intention of the legislature was to vest in the courts the *absolute control of all dependent children brought before them.*

This is what Section 1643 provides, and this is true whether the child is in an institution or elsewhere. The court can remove it, and place it where the child's interests, as viewed by the court, require.

Section 1653 says the judge may commit a dependent child, under 17 years, "to the care of some suitable state or county institution, etc." Now a children's home is a *suitable county institution,* and I am of opinion that the officers of such home are bound to receive into said home, dependent children committed thereto by the judge, providing they are residents of the county, and free from disease or dangerous bodily infirmities. This is a cumulative means of admission, not provided in the old law, and is the outgrowth of the advanced grounds provided by the juvenile act.

The juvenile law and the sections above quoted, do not deprive the trustees of the home of the *absolute control of the child* while in the home, but they may not place the same out, indenture or adopt it, without the consent of the committing court. Neither can they discharge or return the child to parents or guardians without the court's consent.

The court retains jurisdiction of the child, and may discharge it any time, or change its location, or do any other thing for the child's good, as determined by the court, and the trustees are bound by the court's orders.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

769.

BUILDING OF COUNTY COURT HOUSE—CHANGES MADE BY CONTRACTOR WITHOUT AGREEMENT WITH COMMISSION CANNOT BE RECOVERED FOR—COMMISSION MAY NOT PAY.

Section 2340, General Code, provides that changes or alterations of buildings constructed under Section 2333, et seq., General Code, cannot be made without agreement in writing between the commission and the contractor, as provided by Section 2340, General Code, and when improvements are made by a contractor without such agreement he cannot recover for such changes.

The commission is without power to allow compensation for such extras.

COLUMBUS, OHIO, December 19, 1912.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your letter of December 12, 1912, in which you inquire:

> "1. This county has just completed the building of a court house under the provisions of Section 2333, et seq., of the General Code. Can a claim by the contractor for extras be enforced against the county where such changes or additions were made without any agreement in writing between the commission and the contractor as provided for in Section 2340, of the General Code?
>
> "2. If the claim cannot be enforced against the county, would the commission be authorized in its discretion to allow such extras if they considered that such changes were necessary and that the county had received full value of such changes or extras?"

Section 2340, General Code, reads:

> "When approved by the building commission, plans, drawings, representations, bills of material, specifications of work and estimates of cost thereof shall be filed by the county auditor in his office and shall not be altered, unless such alteration shall first be drawn, specified and estimated as required by law for the original plans and approved by the building commission. No such changes shall be made until the price to be paid therefor shall have been agreed upon in writing between the commission and the contractor."

Attention is called to the sentence, "No such change shall be made until the price to be paid therefor shall have been agreed upon in writing between the commission and the contractor." Inasmuch as a "change" may not be made until a written agreement as above provided is entered into, it necessarily follows that payment cannot be made for a change in the plans or contract not so entered into.

I am further of the opinion that the commission is not authorized to make payment of claims which cannot be enforced against the county.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

770.

COSTS OF TRANSCRIPT OF TESTIMONY BEFORE GRAND JURY, ORDERED BY PROSECUTING ATTORNEY CANNOT BE TAXED AGAINST DEFENDANT.

A transcript of testimony taken before the grand jury, ordered by the prosecuting attorney, under Section 13561, *General Code, is not included in Section* 1552, *General Code, providing for the taxing as costs, transcripts made in criminal cases by request of the prosecuting attorney and there is no authority elsewhere in the statutes permitting the costs of a transcript so taken before the grand jury to be taxed against a defendant.*

COLUMBUS, OHIO, December 19, 1912.

HON. THEO. H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—In your letter of December 9, 1912, you inquire:

> "In your opinion, can the expense of making a transcript of testimony of witnesses before a grand jury, such transcript being ordered by the prosecuting attorney be properly included as part of the costs to be taxed against a defendant convicted of an offense in which the transcript of said testimony was used by the prosecuting attorney."

I think there is quite a broad distinction between cost of transcripts of testimony taken on a trial and before a grand jury.

Section 13561, General Code, reads:

> "The official stenographer of the county, at the request of the prosecuting attorney, shall take shorthand notes of the testimony and furnish a transcript thereof to him and to no other person, but the stenographer shall withdraw from the jury room before the jurors begin to express their views or give their votes on a matter before them. The stenographer shall take an oath, to be administered by the court after the grand jurors are sworn, imposing an obligation of secrecy to not disclose any testimony taken or heard except to such jury or prosecutor, unless called upon in a court of justice to make disclosures."

This section precludes transcripts being given to any person other than the prosecuting attorney, except the same be brought out on the trial, in which event the same becomes a part of the testimony going before the trial jury.

Section 1552, General Code, provides *inter alia:*

> "The compensation for transcripts made in criminal cases by request of the prosecuting attorney or the defendant and transcripts ordered by the court in either civil or criminal cases shall be paid from the county treasury and taxed and collected as other costs."

The language "or by the defendant" cannot be held to apply to transcripts of testimony taken before the grand jury, for the reason that under Section 13561, the stenographer is prohibited from making the same.

I think a fair construction of these statutes is to the effect that transcripts of testimony before the grand jury cannot be charged or taxed to the defendant as part of the costs of the case.

Section 1553, provides *inter alia*:

> "* * * * When the testimony of witnesses is taken before the grand jury, they shall receive for such transcript as may be ordered by the prosecuting attorney the same compensation per folio and be paid therefor in the manner herein provided."

That is clearly a provision for payment of expense of making a transcript of testimony before a grand jury, and does not make the same a part of the costs but says the same shall be paid in the manner "herein" provided, thus leaving the question to rest upon the provision of Section 1552, and from which it is reasonable to conclude that transcripts of testimony taken before the grand jury were not thought to be included in the language "transcripts made in criminal cases by request of the prosecuting attorney," as used in Section 1552.

There still remains to be considered what is meant by the language "paid as herein provided." An examination of the act of April 20, 1904, where the language was first used, will develop the fact that the language there used was,

> "When the testimony of witnesses is taken before the grand jury in any county by such stenographer, in pursuance of Section 7193, of the Revised Statutes, they shall receive the same compensation per folio for such transcript as may be ordered by the prosecuting attorney, and be paid therefor in the manner herein provided."

A careful examination of the act fails to disclose any provision for the payment of these transcripts, unless it be held to come within the terms of Section 5 (97 O. L., 178), where the language is identical with that now found in Section 1552, General Code.

The testimony taken before the grand jury is taken in the absence of the person charged, and he is precluded from being present.

I would be inclined to question the power of the legislature to charge such transcript to the party indicted, but until it does so in express terms, I will hold that the cost of such transcript cannot be charged to a defendant as part of the costs in a criminal case nor included in costs to be paid by the state in the event of conviction and sentence to the penitentiary.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the City Solicitors)

8.

CHIEF OF POLICE—CANNOT BE SUMMARILY DISMISSED BY MAYOR —POWER OF SUSPENSION SUBJECT TO JUDGMENT OF CIVIL SERVICE—CLASSIFIED SERVICE.

Mayor of a city may not remove a chief of police and appoint a successor unless charges are filed and the same sustained by the civil service commission.

The words "as provided by law" as employed in Section 4484, of the General Code, establish a connection with Section 152, of the Municipal Code, which limits the powers of the mayor with reference to the chief of police to those of suspension for specified causes.

It is unquestionable that a mayor may suspend a chief of police only for specified causes and that such suspension is subject to the review and final judgment of the civil service commission. It is contrary to the intent of the legislature that the mayor's powers of suspension should be limited to certain specified causes and subject to supervision and review, whilst the same official's powers of summary removal should be unlimited, absolute and final. So long as the greater includes the less the victim of a minor wrong should not be accorded greater rights nor privileges than are granted to a like victim of a greater one."

Chiefs of police are now members of the unclassified service.

COLUMBUS, OHIO, January 3, 1912.

HON. A. E. JACOBS, *City Solicitor, Wellston, Ohio.*

DEAR SIR:—Your favor of December 28, 1911, received. You inquire whether I have issued an opinion in reference to the chief of police of cities being removed only for cause.

Your inquiry touches a subject of vast importance to the municipalities of the state, and I have, therefore, given the matter considerable investigation and careful consideration, arriving at the conclusion that the mayor of a city may not remove a chief of police and appoint a successor unless charges are filed and sustained by the proper tribunal as hereinafter pointed out.

It is sometimes advantageous to first state the position of the adverse side, and having at hand the brief of one of the leading law firms of the state in support of the claim that a mayor of a city may remove the chief of police and appoint a successor under the municipal code of the state, as amended, I shall now give copy of that brief, and then point out wherein I think the brief so fully covers the claim of those who take the view opposite from myself that I think little could be added to it on said proposition in favor of removal without cause.

COPY OF BRIEF.

"Can a mayor of a city remove a chief of police and appoint a successor under the Municipal Code of the state of Ohio, as amended?

"Section 129 of the Municipal Code, as originally enacted provided:

"The mayor shall be elected for a term of two years and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. The mayor shall be the chief conservator of the peace within the corporation and shall have such other powers and perform such other duties as are conferred and required in Sections 1746,

1747 and 1748, of the Revised Statutes of Ohio; such as are provided in this act, and all other acts or parts of acts applying to all cities of the state and not inconsistent herewith.

"The directors and officers provided in this act shall have the exclusive right, subject to the limitations herein prescribed to appoint all officers, clerks and employes, in their several respective departments or offices, and shall likewise, subject to the limitations herein prescribed, have sole power to remove or suspend any of such officers, clerks, or employes.

"As the subject matter of Sections 1746, 1747 and 1748 is not in any wise germane to the proposition under consideration, we shall not give them consideration. There are, however, two distinctive features of the statute above that should be noted:

"First, the mayor has no power either of appointment or of removal; the power of appointment and removal or suspension being lodged exclusively in the directors and officers provided in the act.

"Second, the statute by its wording makes a distinction between 'removal' and 'suspension' of officers, and this is plain from the disjunctive 'or' in the last line 'power to remove or suspend.'

"Section 129, of the Municipal Code of Ohio, remained as given above until 1908, when it was amended to read as follows:

" 'The mayor shall be elected for a term of two years and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. The mayor shall be the chief conservator of the peace within the corporation. He shall appoint and have the power to remove the director of public service, the director of public safety and the heads of the sub-departments of the departments of public service and public safety, and shall have such other powers and perform such other duties as are conferred and required in Sections 1746, 1747 and 1748, of the Revised Statutes of Ohio; such as are provided in this act, and all other acts or parts of acts applying to all cities of the state and not inconsistent herewith.

" 'The directors and officers provided for in this act shall have the exclusive right, subject to the limitations herein prescribed to appoint all officers, clerks and employes in their several respective departments or offices and shall likewise, subject to the limitations herein prescribed, have sole power to remove or suspend any such officers, clerks or employes.'

"Two very important features of this amendment are worthy of note:

"First, the power of removal of heads of sub-departments is vested in the mayor, and this power is an unqualified power in so far as any limitation prescribed by this section is concerned.

"Second, as in the original section the distinction between 'removal' and 'suspension' is preserved with the same clearness as in the original section. In fact, if there is any difference between the sections in this respect it is a clearer expression of legislative intent in the latter to emphasize the distinction between removal and suspension. In the latter section the disjunctive is used as in the former, and in addition to this the power of *removal is vested in the mayor,* but *nothing* is said about *suspension* in referring to his powers.

"The last section above quoted—Section 129—as amended (99 O. L., 562), in so far as the duties and powers of the mayor are concerned, is carried into the General Code of Ohio, as Sections 4249 and 4250.

"It now becomes necessary to inquire, first, as to the power of the mayor to suspend chiefs of the police and fire departments, and second, as to whether or not there are any other provisions that would limit the power of the mayor in removing such chiefs.

"As to the first, Section 152 of the original Municipal Code, prescribed his powers as follows:

"'The mayor shall have the exclusive right to suspend the chief of police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by proper authority or for any other reasonable or just cause. In the event that either the said chief of police or chief of the fire department shall be suspended as herein provided it shall be the duty of the mayor to forthwith certify such fact, together with the cause of suspension, to the board of public safety, which shall within five days from and after the date of the receipt of such notice proceed to hear said charges and render its judgment thereon, which shall be final.'

"The above section as amended is now Section 4381, of the General Code of Ohio; the amendment, however, not being of such a nature as to warrant quoting of the same herein.

"The feature of this statute that becomes important in this discussion is the *setting* forth the *causes* of suspension, whereas the statute on removal of chiefs by the mayor is *silent as to cause.*

"As to the second proposition as to whether or not there are other provisions of law that would limit the power of the mayor in the removal of chiefs, we observe that Section 162, of the Municipal Code, as amended (99 O. L., 567), provides:

"'Nothing in this act shall prevent the dismissal or discharge of any appointee by the removing board or officer, except the chiefs and members of the police and fire departments shall *be dismissed only* as provided in Section 152 of this act, and the appeal therein provided to the board of public safety shall be made to the civil service commission as is therein provided and under such rules as the commission may adopt.'

"The above section, which became Section 4484 of the General Code of Ohio, is amended in 102 O. L., 45, where it is amended and *all reference to Section* 152 *omitted;* and, since this amendment is important, it is essential that it be quoted in full.

"'Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments and the sanitary police shall be dismissed *only as provided by law,* and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt.'

"This having been passed March 11, 1911, would seem on the face of it to settle this controversy, and that no chief could be dismissed without the power or right, rather of appeal. And it could not be contended within reason that the word dismissal did not include removal.

"However, Section 166, of the Municipal Code, as amended (99 O. L., 567), throws light upon this proposition:

"'No officer, secretary, clerk, sergeant, patrolman, foreman, or employe serving in the police or fire departments of any city of this state *at the time this act goes into effect shall be removed or reduced in rank* or pay, except in accordance with the provisions of Section 152, of this act.'

"This section limiting the power to remove to chiefs appointed after this act—1908—read in connection with Section 4249 and 4250, of the General Code of Ohio, would clearly indicate that the mayor has the power to remove chiefs appointed after the Paine law became effective.

"In fact there can be no question about this as the supreme court in the case of The State ex rel. vs. Roney, 82 O. S., 376, so decided.

"The only question that remains then is whether or not Section 4484, as amended (102 O. L., 48), and given above, limits the power and makes it necessary to effect the removal only in such manner as to give the removed chief the right of appeal.

"It would seem that the intent of such amended section is to so limit the power. But when from a review of all statutes governing this power and all authorities construing the same, we find that nowhere is this power limited to cause, it would be difficult to see just how an appeal could be effected.

"If the statutes giving the power to remove give the power unlimited and unqualified and without making it necessary to assign a cause, it is difficult to perceive just how Section 4484 could be followed; in other words without amending former sections giving this power, we submit that the provisions of Section 4484 in so far as removal of chiefs is concerned, is nugatory.

"Viewing the matter as we do we are of the opinion that the chief of police of this city appointed January 1, 1910, is subject to removal, and the newly elected mayor may remove and appoint a successor. (Signed.)"

It will be noted that counsel writing the brief say:

"As to second proposition as to whether or not there are other provisions of law that would limit the power of the mayor in the removal of chiefs, we observe that Section 162, of the Municipal Code, as amended (99 O. L., 567), provides:

" 'Nothing in this act shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that chiefs and members of the police and fire departments shall be dismissed only as provided in Section 152 of this act and the appeal therein provided to the board of public safety shall be made to the civil service commission as is therein provided and under such rules as the commission may adopt. * *'

"The above section which became Section 4484 of the General Code of Ohio, is amended in 102 O. L., 45, where it is amended *and all reference to Section 152 omitted;* and, since this amendment is important it is essential that it be quoted in full.

'Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments and the sanitary police shall *be dismissed* only as provided by law, and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt.'

"This having been passed March 11, 1911, would seem on the face of it to settle this controversy, and that no chief could be dismissed without the power or right, rather, of appeal. And it could not be contended within reason that the word dismissal did not include removal.''

It is here conceded, and I think properly, that the word "dismissal," as con-

tained in the amendment, includes "removal." At first glance it might appear that because all direct reference to Section 152, of the Municipal Code, is left out of Section 4484, of the General Code, therefore, the provisions of Section 152 do not apply. In other words, that there is a link out of the chain connecting Section 4484 of the General Code with Section 152 of the Municipal Code, *but such connection is nevertheless there.* It will be kept in mind that the codifying commission sought to change the verbiage so as to express the laws in the best legal way, and in Section 4484 they, therefore, in lieu of the expression "shall be dismissed only as provided in Section 152 of this act" (to be found in Section 162 of the Paine law, which passed into Section 4484, General Code) used the expression *"shall be dismissed only as provided by law."* This makes the connection plain between original section 152, of the Municipal Code, which is as follows:

> "The chief of the police and the chief of the fire department shall have exclusive right to suspend any of the deputies, officers or employes in his respective department and under his management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause.
>
> "If any such employe be suspended as herein provided, the said chief of police or the chief of the fire department, as the case may be, shall forthwith in writing, certify such fact, together with the cause of such suspension, to the mayor, who shall within five days from the receipt of the same, proceed to inquire into the cause of such suspension and render his judgment thereon and his judgment in the matter shall be final, except as otherwise provided in this act.
>
> "The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority or for any other reasonable and just cause. In the event that either the said chief of police or chief of the fire department shall be suspended as herein provided, it shall be the duty of the mayor to forthwith certify such fact, together with the cause of such suspension, to the board of public safety, which shall within five days from and after the date of the receipt of such notice proceed to hear said charges and render its judgment thereon, which shall be final."

And its successor, Section 4381, General Code, which is as follows:

> "The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority or for any other reasonable and just cause. If either the chief of police or chief of the fire department is so suspended, the mayor forthwith shall certify such fact, together with the cause of such suspension, to the civil service commission, who within five days from the date of receipt of such notice shall proceed to hear such charges and render judgment thereon, which shall be final."

On the one hand, and Section 4484, General Code, on the other hand, the latter section being as follows:

"Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments shall be *dismissed only* as provided by law, and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt."

The latter section was amended by the act of March 15, 1911, the amended act being as follows:

"Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except the chiefs and members of the police and fire departments and of the sanitary police shall be dismissed only as provided by law, and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt."

It will be noted that the last amendment does not affect the question at hand, because it simply adds to the provision of the statute the words "the sanitary police." This would seem to make the connection complete and to disclose that by legislative interpretation itself the action taken under the provisions of Section 152, of the Municipal Code, is one that may lead to permanent removal as well as temporary suspension. In other words, "suspend" is used in the broad sense in Section 152, of the Municipal Code, otherwise the word "dismissal" would have no place in either Section 4484, General Code, or the amendment thereto found in 102 O. L., 45.

Referring again to the brief of counsel, he says:

"However, Section 166, of the Municipal Code, as amended (99 O. L., 567), throws light upon this proposition:

"'No officer, secretary, clerk, sergeant, patrolmen, foreman, or other employe serving in the police or fire departments of any city of this state at the time this act goes into effect shall be removed or reduced in rank or pay, except in accordance with the provisions of Section 152 of this act.'

"This action limiting the power to remove to chiefs appointed after this act—1908—read in connection with Sections 4249 and 4250, of the General Code of Ohio, would clearly indicate that the mayor has the power to remove chiefs appointed after the Paine law became effective.

"In fact there can be no question about this, as the supreme court in the case of The State ex rel. vs. Roney, 82 O. S., 376, so decided."

The principle of the Roney case, in my judgment, settles the matter at hand against the right of removal of chiefs without cause, and counsel have put just the opposite construction upon it that it properly bears. The question in dispute there was as to when Section 162, of the Paine law, went into effect. It will be kept in mind also that Section 162, of the Paine law, is still in full force and effect, it passing into Section 4484, supra, and the latter as aforesaid into the act of March 15, 1911. The fourth syllabus in the Roney case is as follows:

"Between July 31 and January 2, 1910, the exercise of the power of appointment and of removal of the chief of police of a city was at the pleasure of the mayor, excepting that the appointee must be an elector of the city."

Judge Summers, speaking for the court, page 382 said:

"As already stated, the repeal of the sections providing for a board of public safety was in effect on August 1, 1909, so that there was no classified list from which to appoint a chief of police; and Section 162 providing that the chief of police shall be dismissed only as provided in Section 152 did not take effect until from and after January 1, 1910, and Section 186 does not apply to the chief of police because as to him special provision is made, so that on August 1, 1909, and from then until from and after January 1, 1910, the only limitation or regulation of the mayor's power of appointment and removal of a chief of police was that the appointee must be an elector of the city. This raises the questions, when did Section 162 take effect, and was the relator removed before the section took effect? The act declares that Section 162 shall take effect and be in force from and after January 1, 1910. The terms of office of mayors expired on December 31, 1909, and new terms commenced and new mayors came into office on January 1, 1910, but there is nothing in that fact or in the act to show that the legislature intended the act to take effect on that date, or that its selection of a date was not purely arbitrary, so that the question is, what is meant by the words from and after January 1, 1910? The word 'from' is a word of exclusion, and excluding January 1, the section was in effect on January 2. In some cases a distinction is made between computations of time from an act done and those from the date and day of the date, including the day of the act done in the former and excluding the day of the date in the latter. I. Lewis' Sutherland Statutory Construction (2 ed.), Section 185. In Minnesota the day of the passage is excluded where the act provides it shall take effect 'from and after its passage.' Parkinson vs. Brandenburg, 35 Minn., 294. And in Wisconsin, where an act takes effect from and after its passage and publication, the day of publication is excluded. O'Connor vs. Fon du Lac, 109 Wis., 253. In this state the distinction referred to in Sutherland seems to be made. A law made to take effect from and after its passage is in effect on the day of its passage. (State ex rel. vs. O'Brien et al., 47 Ohio St., 464), while in computing time under a statute making an act unlawful from a day named to another day named, the first is excluded and the last included. The State of Ohio vs. Elson, 77 Ohio St., 489. But whether or not the day of an act done should be included, there can be no doubt that the day named from which the act is to be in effect should be excluded, and that the section was not in effect until January 2, 1910.

"This brings us to the question whether the removal of the relator was valid. Section 168 having gone into effect after the mayor declared the relator removed but before notice to the relator of the removal. The removal without notice and without a hearing, being authorized at the time the power was exercised, was accomplished, although it was not complete until notice to the relator. It was held in Fitz's Case, Cro. Eliz. 12, that a sheriff is not discharged from his office until the new patent is shown to him, and in Boucher vs. Wiseman, Cro. Eliz. 440, that the office of sheriff continues until he has regular notice of his discharge. These cases and others are reviewed by Allen J., in Holley vs. Mayor, etc., of New York City, 59 N. Y., 166, and then says: 'Public policy and justice to the superseded official may require that he shall not be treated as a trespasser, and that his acts shall be valid until he has notice that his authority has been revoked, but further than this, no case

has, as yet gone, so far as reported decisions have come under my notice.' In The State ex rel. Kuhlman vs. Rost, 47 La. An. 53-60, it is said by Nicholls, C. J.: 'If the governor had the power to remove him, there was no necessity for official notification to him of the removal to bring it about. The removal of itself operated a divestiture of the office, at least for the purposes of this suit. Had intermediate action taken place before notice in which Cambre had participated in ignorance of his removal, and were the validity of the action taken at that time and under these circumstances contested, a different question would arise.'

"From these considerations it follows that the removal of the relator and the appointment of the defendant was authorized, and the question as to whether the relator was an elector is immaterial."

It will, therefore, be seen that the court in reviewing its conclusion did so expressly on the ground that Section 162 was not in effect on the day that the removal of the chief of police of Marietta was made. This case, it seems to me, settles the matter at hand. It will be noticed that Judge Summers gives expression to the proposition that where special provision is made the general provisions do not apply. It certainly would be an unreasonable interpretation to hold that a mayor might remove a chief of police summarily, and without cause, and yet would be called upon to prove his case when suspending. It is true that ordinarily suspension means deprivation of the right to perform the duties of an office for a specified time, but in that case suspension is but a preliminary step and removable, and surely the power of suspension in its limited sense is absolute. That suspension may properly be followed by a judgment of suspension, reduction or dismissal from the department is disclosed by the legislature itself. Note the language of Section 4390, General Code, as found in 101 O. L., 297:

"If any such employe is suspended as herein provided, the chief of police or the chief of the fire department, as the case may be, forthwith in writing, shall certify such fact, together with the cause for such suspension to the director of public safety, who within five days from the receipt thereof, *shall proceed to inquire into the cause of such suspension and render judgment thereon, which judgment,* if the charge be sustained, may be either suspension, reduction in rank or dismissal from the department, and such judgment in the matter shall be final except as otherwise provided in this sub-division. Said director, in any investigation of charges against a member of the police or fire department shall have the same powers to administer oaths and to secure the attendance of witnesses and the production of books and papers as are conferred by this sub-division upon the mayor."

Note also Section 4487, of the General Code, found likewise in 101 O. L., 297:

"The director of public safety may suspend any of the employes of the police or fire department who are by law his exclusive management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause, and shall forthwith notify such employe of the charges against him, and within five days thereafter, shall proceed to inquire into such charges and render his judgment thereon, which judgment, if the charge be sustained, may be either suspension, reduction in rank or dismissal from the department,

and such judgment in the matter shall be final except as otherwise provided in this sub-division."

It seems to me that it is almost an absurd proposition to hold that a mayor may summarily remove a chief of police, and yet when it comes to suspension for a limited time require him to have as a ground therefor, and to be proven before the civil service commission, the fact that such chief is incompetent or has been guilty of gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authorities or for any other reasonable or just cause. Can it be said for a moment that the legislature intended a *locus penitentiae* for a habitual drunkard? It might with reference to himself but certainly not with reference to the public. The very seriousness of the charges referred to in Section 4381 indicate the power of absolute removal through the mayor and the civil service commission for cause.

Quoting again from the brief of counsel:

> "The only question that remains then is whether or not Section 4484, as amended (102 O. L., 48), and given above, limits the power and makes it necessary to effect the removal only in such manner as to give the removal chief the right of appeal.
>
> "It would seem that the intent of such amended section is to so limit the power. But when from a review of all statutes governing this power and all the authorities construing the same, we find that nowhere is this power limited to cause, it would be difficult to see just how an appeal could be effected."

The answer to all of which is that Section 162, of the Paine law, has been in effect since January 2, 1910; that under its provisions the chief and members of the fire and police departments shall be dismissed as provided only in Section 152 of this act, and the appeal therein provided to the board of public safety shall be made to the public service commission as therein provided. Could anything be plainer than the language used therein, "shall be dismissed only as provided in Section 152?" The language now being, "shall be dismissed only as provided by law," the exact equivalent.

Quoting again from the brief of counsel:

> "If the statutes giving the power to remove give the power unlimited and unqualified and without making it necessary to assign a cause, it is difficult to perceive just how Section 4484 could be followed; in other words, without amending former sections giving this power, we submit that the provisions of Section 4484 in so far as removal of chiefs is concerned, is nugatory."

The helplessness of a court to declare nugatory the last act of a legislature when the same is not unconstitutional is so well stated by Judge Summers as to not merit discussion here. If there was anything contradictory between Section 4484, General Code, and the former statute, 4484, being the last act of the legislature, would control and would impliedly repeal the former section in so far as the former section was inconsistent, leaving it stand to give its full scope, except so far as supplanted by the latter section.

Some mention has been made as to whether or not the chief of police is within the civil service. In my judgment, that question is not material here. Suffice it to say that in the original Municipal Code, Section 149, it was expressly provided that the chief of police shall be appointed from the classified list of each

department, but the statute was changed, and Section 149, of the Municipal Code, passed into Sections 4374 and 4375 of the General Code, and the provision that the chief of police should be appointed from the classified list was omitted. Now, however, by virtue of Section 4479, General Code, the chief of police is within the unclassified department of the civil service.

The foregoing makes very clear what will be hereinafter said and the hereinafter part is really all that need be gone into to decide the matter at hand.

By virtue of Section 129, Municipal Code, Vol. 96, the exclusive right of the appointment and removal of officers, clerks and employes was in the directors and officers mentioned in said Section 129. The last mentioned section was amended by Section 129, of the Paine law, and the power of the appointment and removal of the director of public service, the director of public safety and the heads of the subdepartments of public service and public safety, was lodged in the mayor, and was absolute, except as hereinafter stated.

Section 129, of the Paine law, passed into Sections 4249 and 4250, of the General Code, leaving the same absolute power, except this: Section 162, of the Paine law, being the same law that granted the power of appointment and removal in the mayor, says:

> "Nothing in this act shall prevent the dismissal or discharge of any appointee by the removing board or officer (leaving up to this point absolute the power of removal); except that the chiefs and members of the police and fire departments shall be dismissed only as provided in Section 152 of this act, and the appeal therein provided to the board of public safety shall be made to the civil service commission as is therein provided and under such rules as the commission may adopt."

So that Sections 4249 and 4250, of the General Code, must be read in connection with Section 162, of the Paine law, or Section 4484, of the General Code, as amended 102 Ohio Laws, 45.

Since writing the foregoing, I find an opinion of Judge Foran in the case of Collwitzer vs. The City of Cleveland et al., 11 N. P., n. s. 449, wherein Judge Foran says on page 457:

> "The two sections of the General Code, 4484 and 4485, seem to be carved out of this original Section 162, as amended, of the Municipal Code of 1902. This section will be found on page 567 of 99 O. L., and the following extract is significant: 'Nothing in *this* act shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments shall be dismissed only as provided in Section 152 of this act.' If the Paine amendment to the Municipal Code of 1902 is to stand by itself, the phrase 'Section 152 of this act' is incomprehensible, because the amendatory Paine act does not contain any such section. The language refers plainly and explicitly to Section 152 of the act of October 22, 1902, of the Municipal Code act of 1902; and the Paine act being merely amendatory of the act of October 22, 1902, Section 158, of the Municipal Code of 1902, as thus amended, clearly and equivocally extends the merit system to all departments of the public service, the sanitary police included."

So that by the language of Judge Foran, the Paine act is directly connected with the original Municipal Code act, of which it is amendatory, and all provisions are in pari materia and living statutes, except in so far as repealed.

Suspension and removal or dismissal are not equivalent terms, the distinction being that while each results in the same thing, the one is permanent while the other is merely temporary, and it would be doing violence to reason to hold that an officer who was temporarily dismissed should have rights not accorded to one from whom his office was permanently taken away. So long as the greater includes the less, the victim in a minor wrong should not be accorded greater rights nor privileges than are granted to a like victim of a greater one.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

16.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—TAXING DISTRICTS—PROPORTIONATE SHARE OF SHORTAGE—DISCRETION OF BUDGET COMMISSION—INJUNCTIONS.

In general, a city or any other taxing district cannot be made to bear more than its proportionate share of a shortage made necessary to bring the total levy for all purposes within the limitations of the Smith one per cent. tax law. The abuse of discretion, however, on the part of the budget commissioners must be clearly apparent before the courts will substitute their judgment for that of the budget commission.

2. *The direction of the supreme court in State vs. Sanzenbacher, stating that it is the duty of the budget commission in revising and reducing levies "to have due regard to the proportions of the total amount that each taxing board or taxing officers are authorized to levy" is not to be construed strictly. The words imply a discretionary power on the part of the commission.*

3. *A clear, arbitrary and considerable violation of this discretion may be remedied by injunction or mandamus.*

COLUMBUS, OHIO, January 3, 1912.

HON. W. R. WHITE, *City Solicitor, Gallipolis, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 21, 1911, submitting therein for my opinion thereon the following question:

> "Can an appeal of any kind be taken from the adjustment and certification of the budget to the auditor by the budget commissioners—especially if any improper adjustment has been made?
>
> "Can the estimates made by the city be cut down so as to take care of the shortage of the county generally—that is, can the city be compelled to bear more than its proportionate share of the shortage of the funds needed for county purposes?"

The duties of the budget commission are prescribed in Section 5649-3c, General Code, as enacted, 102 O. L., 271. This section provides in part as follows:

> "* * If the budget commissioners find * * the total amount of taxes to be raised therein * * to exceed such authorized amount in any * * taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners

> may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each * * taxing district, within the limits provided by law.
>
> "When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such * * taxing district, returned on the grand duplicate, and place it on the tax list of the county."

In the case of State ex rel. vs. Sanzenbacher, No. 13118, recently decided by the supreme court of this state, the foregoing provisions were construed as follows:

> "* * and whenever such levy exceeds either of said limitations, then it is the duty of the budget commission to revise and reduce said levies in manner and form as directed and authorized by Section 5649-3c, General Code, as enacted June 2, 1911, *having due regard to the proportions of the total amount that each taxing* board or taxing officers are *authorized* to levy, so that such aggregate of all taxes for all purposes in each taxing district shall not exceed ten mills on the dollar exclusive of sinking fund and interest purposes as aforesaid, and shall not produce for the year 1911 a greater amount of taxes than levied in the year 1910, as provided in paragraph 3 of this entry * * *"

In holding that the budget commission in the discharge of its duties under the section above quoted must "have due regard to the proportions of the total amount that each taxing board or taxing officers are authorized to levy," the supreme court, in my opinion, did not intend to lay down a hard and fast rule to be binding upon the budget commission. Rather, in my opinion, the intention of the supreme court was to indicate what might in a given case amount to an abuse of the discretion reposed in the budget commission. That is to say, while the budget commission is not obliged to preserve strictly the proportions of Section 5649-3a in reducing the various budgets so as to bring the total within the limitations of the one per cent. law, yet any considerable or arbitrary deviation from these proportions will be presumed to be an abuse of discretion. Such an abuse of discretion may, of course, be remedied by proceedings of a judicial nature either in injunction or in mandamus directing the budget commissioners properly to exercise their discretion and enjoining them from making a certificate which will amount to an improper exercise of such discretion. Such a proceeding, in my judgment, would constitute the only "appeal" from the adjustment and certification of the budget by the commissioners to the auditors. It would seem to afford an adequate remedy available to any taxing district aggrieved by the action of the budget commissioners, and could be pursued in any case in which there has been a clear abuse of the discretion of the commissioners.

Yet it must not be forgotten that the power of the budget commissioners is, in every sense of the word, a discretionary power. The supreme court's decision is not, as I have already indicated, to be taken as laying down the principle that courts will substitute their discretion for that of the budget commissioners. So long as the courts cannot say there has been an abuse of discretion, the action of the budget commission will not, in my opinion, be interfered with.

The one per cent. law, so-called, does not provide for any direct appeal to the courts or to any other authority from the certification of the budget commissioners.

The remedy which I have described is the only one, in my judgment, available for the correction of an improper exercise of power on the part of the budget commission.

Your second question cannot be categorically answered. In general it may be said that a city or any other taxing district cannot be made to bear more than its proportionate share of a shortage made necessary in order to bring the total levy for all purposes within the limitations of the act. Yet if it does not appear that the failure of the budget commissioners to observe the proportions set forth in Section 5649-3a amounts to an abuse of discretion, the courts would not, in my judgment, interfere.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

23.

CITY SOLICITOR—COMPENSATION AS PROSECUTOR—GERMANE OR INCIDENTAL DUTIES—OFFICES DEPENDENT AND INDEPENDENT—CHANGE OR INCREASE OF COMPENSATION DURING TERM OF OFFICE.

If the purpose has been set forth in the annual budget, and the appropriation is within the amount fixed by the budget commissioners as provided by Section 5649-3d, General Code, and the council has not fixed the allowance for compensation of a city solicitor for services performed as prosecutor in the police or mayor's court, it may fix such allowance during the incumbency of such offices.

The duties of the prosecutor are not so germane or incidental to those of city solicitor as to make a fixing of compensation for one of the offices a change or increase in the compensation of the other.

COLUMBUS, OHIO, January 12, 1912.

HON. JOHN E. SCOTT, *City Solicitor, Salem, Ohio.*

DEAR SIR:—Your favor of January 2, 1912, is received in which you ask an opinion of the following:

> "I was elected city solicitor at the last general election and am now serving as such solicitor. Has the council authority under Section 4307, General Code, to make an allowance to me, for prosecuting in the mayor's court, or would such action upon the part of council at this time be contrary to Section 4213, General Code? I will appreciate the favor very much if you will kindly favor me with a prompt reply. Council wishes to make the necessary appropriation for the present half year if permitted."

I assume from your letter that no compensation has ever been fixed or allowed for the service of the city solicitor, performed as prosecutor in the mayor's court.

Section 4213, General Code, provides:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

Section 4305, General Code, prescribes the general duties and powers of a city solicitor as follows:

> "The solicitor shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this title as legal counsel and attorney."

Section 4306, General Code, as amended in 102 Ohio Laws 131, provides that the solicitor shall act as prosecutor in the police and mayor's court, as follows:

> "The solicitor shall also be prosecuting attorney of the police or mayor's court. When council allows an assistant or assistants to the solicitor, he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court. The person thus designated shall be subject to the approval of the city council."

Section 4307, General Code, as amended in 102 Ohio Laws 131 prescribes the duties of the prosecutor in the police and mayor's court, and the manner of fixing his compensation, as follows:

> "The prosecuting attorney of the police or mayor's court shall prosecute all cases brought before such court, and perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county. The city solicitor or the assistant or assistants whom he may designate to act as prosecuting attorney or attorneys of the police or mayor's *court shall receive for this service such compensation as council may prescribe,* and such additional compensation as the county commissioners shall allow."

The question arises, are the offices of city solicitor and prosecuting attorney of the police and mayor's court, separate offices, filled by the same person, or are they separate functions of one and the same office?

Section 4305 prescribes the general duties and powers of a city solicitor. Section 4306 places a further duty upon him of acting as police prosecutor, where no assistant is assigned to that work. Section 4307 sets forth the duties of the prosecuting attorney of the police and mayor's court. These duties are different from those prescribed for the solicitor. Both positions pertain to legal services, that of solicitor has to do with civil and governmental duties, while that of prosecutor pertains to criminal law.

The salary of the solicitor, as solicitor, is fixed by council by virtue of the statute granting it the power to fix the salaries of city officers. The compensation of the solicitor, when he acts as prosecuting attorney of the police or mayor's court is allowed by council by authority of Section 4307, General Code, supra.

When an assistant performs the duties of prosecutor in the police or mayor's court there is no question but that the positions of city solicitor and of such prosecuting attorney are two separate offices. Does the rule change when the city solicitor performs the duties of both positions? In a great many of the cities the city solicitor can easily perform the duties of both positions. Rather than to have two officials in all cases it has been thought advisable to have the same person fill these positions where that is practicable. It will be further observed that the solicitor is made ex-officio prosecutor in the mayor's court.

The syllabus in case of Lewis vs. State, 11 Cir. Dec. 647, is as follows:

"The services performed on the decennial county board of equalization, under the Hendley-Royer law, by the auditor, county surveyor and county commissioners are without the scope of their official duties as such, and are not so 'incident' or 'germane' to the regular duties of the offices to which they have been respectively elected, as to make the provision for compensation contained in the Hendley law, in contravention of the act of the legislature, 94 O. L., 396, or of the constitution, Art. 2, Section 20."

On page 694, Jelke, J., says:

"An incident or germane duty cannot be larger and more important than the essential or prescribed duties of an office. It seems to us that this duty is so large and important that the legislature did wisely in not imposing it upon any county officer as such, and in confiding it to a separate board; and although the auditor acts as a member of the board, the board's action is so superior to the auditor, and controlling upon him is his official capacity as auditor, that his position on the board cannot be considered as an incident or germane duty.

"It was said in White vs. East Saginaw, 43 Mich., 567, 6 N. W., 86, in a somewhat different inquiry: 'The imposition of new duties not "incidental" or "germane" to the regular duties of his office upon an officer, does not change his office, but invests him with a new office.'

"We therefore are of opinion that the compensation of five dollars per day, provided for the auditor in the Hendley law is not in contravention of any other legislative provision or of the constitution.

"This conclusion follows with even greater certainty as to the surveyor and county commissioners."

In the lower court, in the same case, reported as State vs. Lewis, 10 Low. Dec. 537, the second and fourth syllabi read:

"The provisions of Section 20, Article 2, of the Constitution, that the salary of a county official cannot be increased during his term of office, apply only to compensation for duties germane to his office or incidental or collateral thereto, and do not apply to services rendered in an independent employment to which he is appointed by an act of the state legislature.

"Under the foregoing rules, a county surveyor who is required by law to perform the duties of a member of the county board of equalization, is entitled to compensation therefor, independent of and without regard to the compensation which he may receive as county surveyor."

On page 539, Dempsey, J., says:

"* * * A compensation has been fixed by law for his services as a member of the county board of equalization. There is no doubt that an officer who receives a stated salary cannot recover further compensation for extra duties imposed upon him by the legislature germane to his office, or even for incidental or collateral services which properly belong to or form a part of his main office. But this rule has its limit. As Judge Potts (24 N. J. L. R., 768) says:

"'It does not follow from the principles laid down that a public officer is bound to perform all manner of public service without compensation, because his office has a salary annexed to it, nor is he, in consequence of holding an office, rendered legally incompetent to the discharge of duties which are clearly extra-official, outside the scope of his official duty.'"

On page 540, Dempsey, J., further says:

"The rule, therefore, may be stated as follows: 'When a public officer is employed to render services in an independent employment not germane or incidental to his official duties, to which the law has annexed compensation, he may receive for such services additional compensation.'"

The same principle is applied in case of State vs. Coughlan, 18 Low. Dec., 289, and additional authorities are quoted in the opinion in support of the rule.

On page 296, Roberts, J., says:

"It was held by supreme court of California, Ellis vs. Tulare Co., 44 Pac. Rep. 575, that county surveyors and ex-officio road commissioners whose compensation as such supervisors is fixed by statute, are in addition entitled to pay as such supervisors."

Applying the rule laid down in the above cases. Are the duties of prosecuting attorney of the police or mayor's court "germane" or incident" to the duties of a city solicitor? They cannot be said to be incident, because the duties of one position are as important as the duties of the other. The duties of the prosecutor prescribed in Section 4307, General Code, are not in any way incidental to the duties prescribed in Section 4305, General Code, for the solicitor. The duties of each office pertain to a different and distinct phases of legal service. The word "germane" means closely related. Although the duties of each office are legal services, the duties of one office cannot be said to be closely related to the duties of the other. The respective duties grow out of entirely different transactions and concern a different set of persons.

The statute has recognized a distinction between the duties of each office. The duties are separately prescribed. Compensation for each position is fixed by authority of different statutes. The positions of solicitor and prosecutor in the police or mayor's court are separate and distinct offices, although they may be filled by the same person.

Coming then to the question asked. Council has fixed the salary of the solicitor in his capacity as solicitor, but has not fixed any allowance for his services as prosecutor. This latter position occupies the same situation as an office for which no compensation is fixed.

On page 558, in case of State vs. Kennon, 7 O. S., 547, Brinkerhof, J., says:

"Again, it is said that no fees, salary, or other compensation, is annexed to the discharge of the duties devolving by statute upon these defendants. This is true; and it is also true that compensation to them hereafter is nowhere by these statutes prohibited or precluded. That they shall not hereafter receive any compensation for services by them rendered and expenses incurred under these acts, is nowhere made a condition of their acceptance of the trusts reposed in them. *There is nothing to prevent their applying to the legislature for compensation, nor to prevent the legislature from awarding it.*"

In case of State vs. Carlisle, 16 Low. Dec. 263, the syllabus reads:

> "While an officer cannot attack the constitutionality of a statute under which he has received compensation for his official acts, yet where such statute has been held unconstitutional in another proceeding and such officer enjoined from receiving the salary provided thereunder, he will be entitled to the compensation provided by an act passed to take the place of such unconstitutional statute; *and such amendatory act will not come within the constitutional inhibition forbidding the legislature to change the salary of an officer during his existing term.*

On page 266, Evans, J., says:

> "If there is no salary at all, or none definitely fixed, then legislation providing a salary during his term could not affect any change, for there is none existing to affect."

The rule is that where there is no compensation definitely fixed for an office the compensation therefor may be fixed during the incumbency of an officer.

It is my conclusion that where council has not fixed the allowance for compensation of a city solicitor for services performed as prosecutor in the police or mayor's court, it may fix such allowance during the incumbency of such officer.

In making the appropriation, however, for such allowance I desire to call your attention to the limitation contained in Section 5649-3*d*, General Code, 102 Ohio Laws, 272, which provides:

> "At the beginning of each fiscal half year the various boards mentioned in Section 5649-3*a* of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, *but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive* of receipts and balances."

The facts submitted do not permit me to pass upon this phase of the case.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

35.

DIRECTOR OF PUBLIC SERVICE—POWER TO CREATE SUBDEPARTMENTS AND OFFICES—POWER AND DUTIES OF COUNCIL—MUST FIX SALARIES OF APPOINTEES.

The director of public service is the sole judge of the number of subdepartments to be created and the number of superintendents, deputies and employes he shall appoint.

The council however, through the exclusive right given it under Section 4214 *of the General Code, to fix by ordinance the salaries and compensation of such offices, has a power of check over the director of public service.*

The council may be compelled by mandamus to provide a salary for each office or employe so appointed.

COLUMBUS, OHIO, December 29, 1911.

HON. CLIFFORD L. BELT, *City Solicitor, Bellaire, Ohio.*

DEAR SIR:—I am in receipt of your communication wherein you state:

> "Has the director of public service the right under Section 4327 of the General Code to arbitrarily establish subdepartments in the department of service and determine the number of superintendents, deputies, etc., therefor? If so, may the council be compelled by mandamus proceedings to provide a salary for each officer or employe appointed for such subdepartment?"

Section 4327 of the General Code is as follows:

> "The director of public service may establish such subdepartment as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers, and other persons, necessary for the execution of the work and the performance of the duties of this department."

Section 4214 of the General Code provides:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

You inquire whether a department of public service has the right under Section 4327 of the General Code to *arbitrarily* establish such subdepartments in the department of service and determine the number of superintendents, deputies, etc., therefor? The department of public service under authority of said Section 4327 of the General Code has the right to establish such subdepartments as he deems necessary and he, under authority of the said section, can determine the number of superintendents, deputies, inspectors, employes, harbor masters, clerks, laborers and other persons that he needs for the execution of the work and

the performance of the duties of his department. However, the director of public service should be governed by the needs of the department in the establishment of subdepartments and the employment of persons to do the work enjoined upon him by the statutes. He should also keep in mind the principles of public economy and should only create departments and employ deputies and inspectors when the efficiency in his department demands it, and he should never *arbitrarily* create departments, appoint deputies, etc., just because he has the power so to do. However, he is the sole judge of the number of subdepartments he creates and the number of the superintendents, deputies and laborers, etc., he shall appoint; but council, under authority of Section 4214 of the General Code, has the *exclusive* right to fix by ordinance the salaries and compensation of each officer and employe selected by the director of public service, and in case the director of public service acts *arbitrarily* and without necessity, the council can act as a check upon the department by fixing the salaries commensurate with the service to be performed by any appointee by the department of public service.

However, in case the department of public service has created any office or department or has appointed any deputy or employed any person or persons for work in his department, it is mandatory upon council to provide a salary for each officer, department or employe appointed. In case of refusal mandamus will lie to compel council to act, but the amount to be paid to each officer or employe rests in the discretion of council.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

29.

COMPENSATION OF ASSISTANT CLERK FOR SERVING NOTICES—APPOINTMENT BY CLERK—POWERS OF COUNCIL TO APPOINT—DUTY OF CITY AUDITOR.

An assistant clerk appointed by the clerk for the purpose of serving notices cannot be compensated by the council if the council had neither created the position of assistant clerk nor elected a person to fill such position, even though money had been appropriated by the council for that purpose.

The city auditor cannot honor a bill authorized by council drawn for the purpose of such compensation.

COLUMBUS, OHIO, November 27, 1911.

HON. C. W. JUNIPER, *City Solicitor, Nelsonville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 18th, requesting my opinion upon the following question:

"Section 52 of the Municipal Code provides:

"A notice of the passage of the resolution required in the last preceding section shall be served by the clerk of council or an assistant, upon the owner of each piece of property to be assessed in the manner provided by law for the service of summons in civil action, etc.

"Our council has fixed the salary of the clerk at $180.00 per year, payable monthly. There is nothing said about the allowance of fees for serving the notices above referred to. At the beginning of each fiscal

half year, our council has been appropriating money to pay the clerk's salary for the half year, and has also made an appropriation under the subdivision of the clerk of council for serving notices. This was done this year, as well as formerly.

"Recently, our council passed resolutions for the improvement of two streets to be paid for by special assessments, and the clerk of council employed an assistant to serve the notices required in Section 52 of the Municipal Code. The bills for these services were presented to the council, allowed by them, and were ordered paid by an ordinance of council duly passed. The auditor is now holding up the bills as he is in doubt as to whether it is legal to pay them, as he has received a ruling from the state bureau of accounting, that it is not legal to pay such bills unless the council provides by ordinance that the clerk of council may employ an assistant to serve such notices."

Section 52 of the Municipal Code is Section 3818 of the General Code, and you have quoted enough of it for the purpose at hand.

Permit me to call your attention to the provisions of Sections 4210 and 4214, General Code, which are in part as follows:

"Section 4210. Within ten days from the commencement of their term the members of council shall elect a president pro tem., a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation * * *.

"Section 4214. Except as otherwise provided in this title council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation * * *."

If the assistant to the clerk of council be regarded as an officer of council, then, he must be elected by council itself, and council cannot, in my opinion, delegate the authority to select him to the clerk. If, on the other hand, the assistant to the clerk be regarded not as an officer of council, but as an employe in a department of the city government, to wit: the legislative government, and the department of the clerk of council, then, his position must be created by ordinance of council.

It is insufficient authority, in my opinion, for the employment by the clerk of an assistant, for this or any other purpose, that the statute providing for the serving of notices refers to an assistant; and it is likewise insufficient authority for the employment by the clerk of an assistant that council has appropriated money for this service.

These points being established, it is my opinion that the auditor is within his duty in refusing to pay the bill in question, though approved by council.

I regret that what seems to be a meritorious case is complicated by a seeming technicality. The technicality, however, is one which has a necessary place in the scheme of government outlined in the Municipal Code, and is designed to guard against the real evils which might arise were it not therein incorporated.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

31.

BOARD OF EDUCATION—RULES AND REGULATIONS GOVERNING TEACHERS—POWER TO REGULATE COMPENSATION OF TEACHERS—REDUCTION OF SALARY DURING ABSENCE.

In the exercise of the unlimited discretion which Section 7690, General Code, grants to the board of education in the matter of the fixing and payment of the salaries of its teachers, they may adopt a rule under which a teacher's compensation is reduced during absence for just cause.

COLUMBUS, OHIO, December 14, 1911.

HON. DAVID G. JENKINS, *City Solicitor, Youngstown, Ohio.*

DEAR SIR:—Your favor of October 24, 1911, is received in which you submit the following inquiry:

> "The rules and regulations of the local board of education contain the following provisions:
>
> "Section 35. In all cases of absence on the part of any one connected with the teaching force, a proportionate reduction in the absentee's salary shall be made, unless otherwise ordered by the board, except:
>
> "First. In case of death in immediate family (father, mother, wife, sister, brother or any blood relation living in the same home with the teacher and buried therefrom); no reduction shall be made for four days for such cause from date of such death, including Saturday and Sunday.
>
> "Second. When a teacher is called away from the building during a session of school on account of illness or other emergency of which the principal shall be the judge, he or she shall be entitled to his or her salary for such session.
>
> "Third. When, owing to sickness, a regular teacher is absent a portion of any school month in which there is a holiday authorized by the board of education, said regular teacher shall be entitled to his or her regular salary for such holidays.
>
> "When, owing to sickness, a teacher is absent, he or she may be allowed full pay for not to exceed three days in any one term. If the sickness is prolonged, and a substitute is provided, the teacher shall be entitled to half pay.
>
> "Allowance shall in no case be for more than four weeks. The teacher must, in case of absence for more than a week, furnish a physician's certificate that such absence was caused by sickness.
>
> "There are no provisions in conflict with the above.
>
> "The local board desires an opinion as to whether said provisions are in conflict with law in that payment of salaries is made to teachers when no service is performed.
>
> "Section 7690, General Code, providees that 'each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made.' I find no other limitations applicable other than provisions that boards must pay teachers for time lost by reason of epidemics and for times spent at institutes. Section 7690 above quoted seems to me to be of sufficient breadth to validate the local rule I have quoted."

Section 7690, General Code, from which you have quoted, provides as follows:

> "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. If deemed essential for the best interests of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings, and such other employes as it deems necessary. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

It is a rule of law that an officer who is unable to perform the duties of his office on account of sickness, is nevertheless entitled to the salary incident to such office. The salary of a teacher is based upon the amount of service performed, and he is an employe and not an officer.

In case of Murphy vs. Board of Education, 84 N. Y. Supp. 380 (App. Div. of Sup. Ct.), rules and regulations similar to those of which you inquire, were adjudicated upon. The syllabi read:

> "Under Greater New York Charter, Section 1103 (Law 1897, p. 399, c. 378) authorizing the school boards in the respective boroughs in appoint all teachers and other members of the teaching staff on the nomination of the board of superintendents, etc., the position of a teacher in the school is that of an employe, resting on contract of employment, and not that of an officer of the city.
>
> "Greater New York Charter, Section 1070 (laws 1897, p. 384, c. 378) authorizes the board of education to enact by-laws, rules and regulations for the disbursement of the school funds, and Section 1100 provides that the school board in each borough shall by its by-laws provide for the payment of salaries of school teachers. Section 1091 p. 394, gives each school board power to adopt by-laws regulating the exercise of all powers vested in it, and regulating the exercise of powers by teachers, and for the regulation of all disbursements of the school funds. By laws 1901, p. 421, c. 186, a teacher's retirement fund was created, into which 'all money, pay or salary forfeited or withheld from any teacher for or on account of absence from duty for any cause was to be paid.' Held, that under such sections a borough school board has power to enact a by-law providing for the deduction of one thirtieth of a teacher's monthly pay for each day of absence without leave, and that the amount so deducted should be paid to such retirement fund."

On page 382, of the opinion, Ingraham, J., says:

> "* * * A teacher being an employe and his relation to the appointing power contractural, nothing stands in the way of a revisal of his compensation by the authorities having power to fix the salary to be paid the teacher at any time. The salary of an employe not being an incident to the office, but payment for services rendered, there would certainly be nothing illegal in a provision changing the condition under

which the salary is paid, so that it is payable only for the period for which the services are actually rendered. *The school board, therefore, has the power to reduce the salary of a teacher by providing that he is to receive no compensation for the days on which he is absent without leave. It is undoubtedly true that until the salary is reduced, or the employe is discharged, he is entitled to receive the compensation agreed upon."*

In this case the question was as to the right of the board of education to make reduction for the time a teacher was absent from duty without leave. While in your inquiry the board has passed a rule to make reduction in pay for absence from duty, except in certain cases, when for a certain length of time no reduction is made, and reduction of one-half of the salary is made when absent on account of sickness for not more than four weeks. It evidently was urged in the above case that the teacher was entitled to pay during absence for cause, and that the board could make no reductions therefor. The right of the board to make such reduction was recognized. The court further says, that until the salary is reduced or the employe is discharged, he is entitled to receive the compensation agreed upon.

In case of Loehr vs. Board of Education, the second syllabus reads:

"In the absence of a constitutional or statutory limitation, boards of education may exercise an unlimited discretion both in the employment and dismissal of teachers, and in their transfer and assignment."

Section 7690, General Code, grants to the board of education the management and control of all public schools; such board may make proper rules and regulations governing the appointment of superintendents of buildings and other employes. Each board is authorized to fix the salary of all teachers.

This statute grants to the board of education complete control over the fixing and payment of the salaries of its teachers. The board, under its provisions, is authorized to make rules and regulations, and to enter into contracts, for the employment of teachers. The rules and regulations which you submit are in my opinion a reasonable exercise of the discretion placed in the board of education for the government of the schools and of its right to fix the salaries of the teachers.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

38.

DIRECTOR OF PUBLIC SERVICE—SALARY—COMPENSATION FOR ADDITIONAL DUTIES — SUPERINTENDING STREET WORK, WATERWORKS, AND COLLECTING WATER RENTS—INITIATIVE AND REFERENDUM ACT—SEMI-ANNUAL APPROPRIATION ORDINANCE AS EMERGENCY MEASURE.

If the director of public service does not create subdepartments and subofficials as provided for in Section 4326 of the General Code, he is obliged to perform the duties himself. These duties, in such cases cannot be provided for as "expenses" of the various departments, as the provisions were intended to apply to such expenses as were incurred by the director in the appointment of the necessary officers and agents under Section 3956, General Code.

An ordinance fixing the compensation and salary of the director of public service, his foreman and clerks is an ordinance involving the expenditure of money and therefore, remaining inoperative for 60 days, cannot be deemed an emergency measure to take effect immediately.

The semi-annual appropriation ordinances do not come within Sections 2 or 3 of the initiative and referendum act.

COLUMBUS, OHIO, January 18, 1911.

HON. W. J. TOSSELL, *City Solicitor, Norwalk, Ohio.*

DEAR SIR:—Under date of December 15th you submitted for my consideration several inquiries which I shall take up in the order in which you submitted them.

Your first inquiries:

> "May a small city, of the size of Norwalk, for a fixed salary impose upon its director of public service, in addition to performing the statutory duties of his office, the duty of personally superintending street work, superintending municipal water works and collecting the water rents thereof; and if so apportion his salary to the service and waterworks funds in proportion to the services rendered each?"

The duties of director of public service are prescribed in Section 4326 of the General code as follows:

> "The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city; parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

It will be seen, therefore, that the law imposes upon the director of public service in the first instance the duty of managing the municipal water works.

Section 4327 of the General Code authorizes the director of public service to establish such subdepartments as may be necessary and to determine the number of superintendents, etc.

As I view this provision of the law it is purely optional with the director of public service as to whether he will establish any subdepartments or provide for any superintendents. Therefore, I am of the opinion that such director of public service if he decides not to appoint a superintendent of the municipal waterworks should perform the duties of such office himself.

Section 3956 of the General Code provides:

> "The director of public service shall manage, conduct and control the waterworks, furnish supplies of water, collect water rents, and appoint necessary officers and agents."

Section 3958 of the General Code provides that for the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water.

Section 3959 of the General Code provides for the disposition of the surplus after paying the expenses of conducting and managing the water works.

Section 3960 of the General Code provides:

> "Money collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council, it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund."

The director of public service, as I view it, is primarily a city officer generally for the reason that Section 4323 of the General Code states that in each city there shall be a department of public service which shall be administered by a director of public service.

Under the provisions of Section 3959 of the General Code it is made a part of his duties as such city officer to manage, conduct and control the waterworks, and, therefore, if he should personally conduct and control the waterworks he would do so as a part of his general duties as such director of public service, and should be paid from the salary appropriated for such office, and, consequently, in so performing such duties as a part of his general duties there would be no expense of conducting and managing the waterworks as I view it, within the meaning of such words, in Section 3958, General Code, supra. The words "for the purpose of paying the expenses of conducting and managing the waterworks" would seem to me to mean such expenses as are created by the public service director himself by the appointment of the necessary officers and agents under Section 3956 of the General Code, supra.

Under Section 3960 of the General Code, supra, the moneys derived from water rents are kept as a separate and distinct fund, and when appropriated by council are subject to the order of the director of public service who shall sign all orders drawn on the treasury against such fund. This method of using the water rents would seem to me to mean solely that such expenses of conducting and managing the waterworks other than any part of the salary of the service director, as a city officer, shall be paid from the water rents, but I do not believe that a part of such water rents may be used in the payment of the salary of the director himself.

Furthermore, I do not believe that the director can appoint himself to any office which he has created by virtue of Section 4327 of the General Code, as the duty in the first instance devolves upon him under his general power as city officer, and it is only when he does establish subdepartments that appointments can be made thereto.

You next inquire:

> "May not an ordinance fixing the compensation and salary of a director of public service and his foreman and clerks, to be passed by three-fourths of the members of a council taking office January 1, 1912, be deemed an emergency measure and take effect immediately upon passage, subject however to subsequent referendum."

While the initiative and referendum law is not specific in its provisions, but very general, yet I am of the opinion that an ordinance fixing the compensation and salary of the director of public service, his foreman and clerks, being an ordinance involving the expenditure of money and therefore remaining inoperative for sixty days cannot be deemed an emergency measure, and take effect immediately upon passage. Such conclusion I reached in an opinion rendered to Hon. H. W. Houston, city solicitor, Urbana, Ohio, under date of December 29, 1911, and herewith enclose copy of such opinion.

You next inquire:

> "May not the semi-annual appropriation ordinance be declared and passed as an emergency measure?"

I have heretofore held in an opinion to Hon. C. C. Middleswart, solicitor for the village of Matamoras, Marrietta, Ohio, under date of November 3, 1911, that such an ordinance is not one involving the expenditure of money as contemplated in the initiative and referendum act since although such an ordinance divides the money in the general treasury into various funds and sets them apart for the various departments of the municipal government, yet it does not of itself expend the money. Therefore, it is not within the second paragraph of Section 2 of the initiative and referendum act as found in 102 Ohio Laws 522, nor do I believe that it is within the first paragraph of such section for the reason that it cannot be considered as within the wording "any other power delegated * * * by the general assembly." My reason for coming to this conclusion is that Section 3797 of the General Code which provides for semi-annual appropriations states that council shall make appropriations for each of the several objects for which the corporation has to provide. In other words, it seems to me that it is a duty devolving upon council rather than a power given it.

Section 3 of the initiative and referendum act provides:

> "All other acts of *city* council not included among those specified in Section 2 of this act, shall also remain inoperative for sixty days after passage and may be submitted to popular vote in the manner herein provided, except that any act, not included within those specified in Section 2 of this act, as remaining inoperative for sixty days, and which is declared to be an emergency measure, and receiving a three-fourths majority in council of such municipal corporation may go into effect immediately and remain in effect until repealed by city council or by direct vote of the people as herein provided."

Having stated my opinion to be that the semi-annual appropriation ordinance is not within the provisions of Section 2 of the initiative and referendum act it becomes necessary to consider whether it was within Section 3 as above set forth.

I am inclined to the view that it is not for the reason that if it were considered as an act of a city council not included among those specified in Section 2 it would remain inoperative for sixty days after the passage of such ordinance unless it were declared to be an emergency measure. If it were declared to be an emergency measure it would go into effect immediately and remain in effect until repealed by the city council or direct vote of the people. Being an ordinance in full force and effect the repealing of such ordinance would have to be proposed to the city council by thirty per cent. of the qualified voters and submitted to the council for its action at its next meeting, and if within sixty days after such submission such proposed ordinances, repealing the semi-annual appropriation ordinance, was not passed it would be the duty of the clerk to certify said proposed ordinance to the officer having control of elections who shall cause the question of the passage of such ordinance to be submitted to vote at the next regular election, which if the vote be favorable shall become a valid ordinance from the date of the determination of the vote. This would continue the semi-annual appropriation ordinance in effect during the entire life of such ordinance, and, therefore, it would seem to me such ordinance could not be considered as within the third section of the initiative and referendum act.

You next inquire:

"Do ordinances involving emergency measures require publication?"

Section 4227 of the General Code provides that ordinances of a general nature, or providing for improvement, shall be published before going into operation.

Section 3 of the initiative and referendum act provides that an emergency measure may go into effect immediately.

Although Section 3 provides, as above, that an emergency measure may go into effect immediately, I am inclined to the opinion that such word "immediately" is used in contradistinction to the provision that ordinances shall remain inoperative for sixty days after passage, and that, therefore, they should be published in the same manner as has been done prior to the passage of the initiative and referendum act. Especially is this true when we consider that the object of the referendum is that the electors in a municipality may, should council pass ordinances, cause the same to be referred to them for approval or disapproval. The object of publication is to advise the electors of the municipality of ordinances and resolutions passed by council, and should an emergency ordinance of a general nature or providing for improvement, wherever it is of that nature, be passed, the publication thereof would, in many instances, be the only knowledge that the electors could have that such ordinance had been passed.

Therefore, I am of the opinion that any ordinance of a general nature or providing for improvement, passed as an emergency ordinance, would require publication.

You next inquire:

"In view of the initiative and referendum act when is the proper time, if any, for publication of municipal ordinances generally and not emergency measures?"

In this connection I herewith enclose you copy of opinion heretofore rendered by me on that subject to Hon. Elmer T. Boyd, city solicitor of Marion, Ohio, under date of October 4, 1911.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

39.

CIVIL SERVICE—CHIEFS OF POLICE AND FIRE IN CITIES—CHANGE OF VILLAGE TO CITY— APPOINTMENT BY MAYOR—OTHER EMPLOYES—CLASSIFIED AND UNCLASSIFIED SERVICE—SCHOOL DISTRICT AND EMPLOYES OF SCHOOL BOARD.

The chief of police and the chief of the fire department of cities are appointed by the mayor and need not be selected from the classified service and such appointments are not subject to civil service regulations.

It is the intention of Section 3499, General Code, when a village becomes a city that a complete new organization be effected. The positions under the village government are not the same positions as those under the city government though their duties be substantially the same. Under this rule, members of the fire and police departments other than the chiefs thereof appointed under the village government, are not entitled, without examination, to the same position in the city government. Such positions enter into the classified service.

The same principle governs under Section 4686, General Code, when a village school district becomes a city school district, with regard to employes of the school board whose positions under the new district are included within the classified service.

COLUMBUS, OHIO, January 9, 1912.

HON. ELMER E. BODEN, *City Solicitor, Barberton, Ohio.*

DEAR SIR:—Your favor of January 2, 1912, is received, in which you make inquiry of this department as follows:

> "Will you kindly give me your opinion as to the following matters pertaining to the new city government of the city of Barberton, Ohio:
>
> "1. The chief of police and the chief of the fire department come within the unclassified service of the civil service. Do these officers pass the civil service examination and appear upon the registered list of the civil service commission, or how are these appointments made?
>
> "2. Must the members of the first police department and fire department under the city government (except the chiefs) be appointed from the registered list of the civil service commission, or would it be possible to provide a saving clause in the ordinance organizing said departments whereby the old members would hold over without examination?
>
> "3. In relation to the school board, will the present employes, such as janitors, etc., come under the civil service rule without examination, or must they take the examination and be placed upon the registered list? If they must take the examination, would this also apply to men who have been in the service continuously since a time prior to the enactment of the civil service rule (1902)?"

Barberton is one of those municipalities which passed from a village to a city by the recent federal census.

Your first inquiry covers the appointment of the chiefs of the police and fire departments.

Section 4479, General Code, divides the employes of a city into classified and unclassified service as follows:

"The civil service shall be divided into classified and unclassified service. The unclassified service shall include the positions of officers elected by the people or appointed to fill vacancies in offices filled by popular election, or whose appointment is subject to confirmation by the council, or who are appointed by any state officer or by any court, employes of the council, persons who by law are to serve without remuneration, persons who are appointed to positions requiring professional or technical skill as may be determined by the civil service commission; persons appointed or employed to give instruction in any educational institution, persons appointed by any board or officers supervising elections; persons who as members of a board or otherwise, have charge of any principal department of the government of any city, the head or chief of any division or principal department relating to engineering, waterworks, street cleaning, of health, *the chief of the police department, the chief of the fire department,* the superintendent of any workhouse, house of refuge, infirmary, or hospital, the librarian of any public library, private secretaries, deputies in the office of the city auditor and city treasurer, unskilled laborers, and such appointees of the civil service commission as they may by rule determine. The classified service shall comprise offices and places not included in the unclassified service."

Section 4480, General Code, prescribes for examinations, as follows:

"*Applicants for admission into the classified service shall be subjected to examination* which shall be competitive, public and open to residents of the city, with such limitations as to age, residence, health, habits and moral character as the commission prescribes. The commission shall prepare rules and regulations adopted to carry out these purposes with reference to the classified service of the city, which rules and regulations shall provide for the grading of offices and positions similar in character in groups and divisions so as to permit the filling of offices and positions in the higher grades as far as practicable through promotions, and for public examinations to ascertain the fitness of applicants for appointment in the classified service. Such applicants shall take rank upon the register as candidates in the order of their relative standing without reference to priority of examination. The result of the examination shall be accessible to all persons."

The chief of the police department and the chief of the fire department are specifically placed in the unclassified service by Section 4479, supra. Section 4480, General Code, prescribes that applicants for admission to the classified service shall be subject to examination. As the chiefs of the police and fire departments are not in the classified service, they are not required to take an examination for appointment.

Section 4250, General Code, provides:

"The mayor shall be the chief conservator of the peace within the corporation. He shall appoint and have the power to remove the director of public service, the director of public safety *and the heads of the subdepartments of the departments of public service and public safety,* and shall have such other powers and perform such other duties as are conferred and required by law."

The police and fire departments are subdepartments of the department of public safety. The mayor has the appointing power of the heads or chiefs of these departments.

Section 149 of the Municipal Code, 96 Ohio Laws 70, contained this provision:

> "The chief of police shall be appointed from the classified service of such department."

Section 150 of the Municipal Code, 96 Ohio Laws 70, contained this provision:

> "The chief of the fire department shall be appointed from the classified list of such department."

In carrying these sections into the General Code these provisions were omitted? The statutes do not prescribe any restrictions upon the mayor requiring him to make such appointments from the classified service.

The chief of police and the chief of the fire department are appointed by the mayor and such appointments are not subject to civil service rules and regulations and need not be made from the classified service.

Your next inquiry is as to the right of the incumbents of certain offices, who were appointed under the village form of government, to hold over without examination, when such village passes to a city by reason of increase in population, and such positions pass into the classified service of such city.

The statutes which placed certain positions in the classified service did not require an examination of the incumbents of such positions and such incumbents held their positions without examination.

On page 10 of the opinion in the case of State vs. Wyman, 71 O. S., 1, Summers, J., says:

> "It seems to have been the purpose of the legislature in the enactment of the code, so far as possible, to provide that officers and employes in the police and fire departments, in office when the new code went into effect, should not be disturbed in their office or employment, and that thereafter these departments should be under the so-called merit system, and that appointments thereto could be made only in the manner provided by the code. But it was not the intention of the legislature that appointments to any vacancies that might exist in any of the offices or employments in the classified service could be made only from the list of incumbents of offices and employments in the classified service. It is not difficult to understand why the legislature, in adopting the merit system, should provide that those already in office might remain without examination, but it does not appear why it also should be provided that a vacancy in the highest office could be filled only from their number."

The fourth syllabus in case of State vs. Hall, 15 Cir. Dec. 361, is as follows:

> "Section 159 et seq. (1536-695 Rev. Stat.), requiring every applicant for appointment to the new police department to submit to an examination by the board of public safety, has no application to those who were in office or members of the old department at the time the new Municipal Code went into effect."

These authorities cover positions which were filled under the city form of government, and where such positions were afterwards placed in the classified service by statute.

That is not the situation which is now presented. The positions now occupied by the members of the police and fire departments, were created and filled under the village form of government, and are village positions, although the incumbents are now acting as such officers for the city. The positions which are to be created and filled are city positions and are to be filled under the city form of government. Can a village officer, who holds over, be considered as an incumbent of a similar city position?

Section 3499, General Code, prescribes as follows:

> "Officers of a village advanced to a city, or of a city reduced to a village, *shall continue in office until succeeded by the proper officers of the new corporation at* the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed."

The officers of the village are continued in office "until succeeded by the proper officers of the new corporation at the next regular election." In other words the old form of government is continued until the new form of government can be put in operation. The statute calls the city a "new corporation." It further provides that the old officers shall hold over until succeeded by the proper officers. It is evident from these provisions that it was the intent that a complete new organization should be effected. The positions under the village form of government, although similar in name and having similar duties, are not the same positions as those under the city form of government. One is a village office, the other is a city office.

It is my conclusion, therefore, that the members of the fire and police departments appointed under the village form of government, are not entitled without examination to the same positions in the city form of government, where such village passes to a city and such city positions are in the classified service. Neither can council provide a saving clause in the ordinance organizing such departments whereby the old members would be entitled to the positions without examination.

Examinations should be held for applicants for these positions and they should be filled in accordance with the civil service rules and regulations.

Your third question covers the civil service in schools. As in the fire and police departments, civil service is applicable only to cities and to city school districts. The civil service was not extended to city schools until April 30, 1910, when Sections 7690-1, et seq., General Code, were enacted as shown in 101 Ohio Laws, 154.

Section 4686, General Code, provides for the advancement of a village school district to a city school district as follows:

> "When a village is advanced to a city, the village school district shall thereby become a city school district. When a city is reduced to a village, the city school district shall thereby become a village school district. The members of the board of education in village school districts that are advanced to city school districts, and in city school districts that are reduced to village school districts shall continue in office until succeeded by the members of the board of education of the new district, who shall be elected at the next succeeding annual election for school board members."

The provisions as to continuance in office applies to the members of the board of education only. This section also refers to the city district as a "new district."

Section 7690-5, General Code, 101 Ohio Laws, 155, provides:

> *"No officer or employe within the classified service* who shall have been appointed under the provisions of this act or who *shall have been continuously in the employment of the board of education for a period of three years shall be removed, reduced in rank or* discharged except for some cause relating to his moral character or his suitableness and capacity to perform the duties of his position, though he may be suspended from duty without pay for a period of not exceeding thirty (30) days pending the investigation of charges against him. Such cause shall be determined by the removing authority and reported in writing with a specific statement of the reasons therefor to the commission, but shall not be made public without the consent of the person discharged. Before such removal, reduction or discharge shall become effective the removing authority shall give such person a reasonable apportunity to know the charges against him and to be heard in his own behalf, and if such charges be not sustained by the commission he shall be reinstated in his position."

This latter section contains a provision different from those found in the regulations for city employes. It provides that no officer or employe within the classified service, "who shall have been continuously in the employment of the board of education for a period of three years shall be removed," etc.

While this section is for the protection of the employes who have served three years, it is my opinion that the board of education herein referred to and for which such employe must be employed for three years, is the board of education of the district by which he is employed, and its predecessors. The city school district of Barberton has not been in existence for three years and this provision cannot apply to it. The village district is succeeded by the city district.

I am therefore of the opinion that the same rules govern the city school district as apply to the city positions and that all positions in the classified service must be filled after examination of applicants and in accordance with the civil service regulations.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

41.

INITIATIVE AND REFERENDUM—"CLERK OF THE MUNICIPAL CORPORATION" IS CLERK OF COUNCIL IN CITIES FOR FILING OF PETITIONS—CITY AUDTOR.

In cities the "clerk of council" is the proper clerk of the municipal corporation, with whom should be filed the various petitions specified in the initiative and referendum act (102 *O. L.* 521) *notwithstanding Section* 224 *of the Municipal Code which provides that for certain purposes "city clerk" shall be construed to mean "city auditor."*

COLUMBUS, OHIO, January 20, 1912.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—Under date of January 13th you submitted for my opinion the question as to what officer is meant under the term "clerk of such municipal corporation" as found in the initiative and referendum act found in 102 Ohio Laws 521 as the party with whom the various petitions shall be filed.

As the clerk of a village is likewise the clerk of the village council there can be no question in so far as villages are concerned as to proper party with whom to file an initiative or referendum petition.

In cities there is now no officer properly designated as city clerk, the duties formerly devolving upon the city clerk being now divided between the clerk of council and the city auditor.

The question, therefore, arises in reference to filing of initiative and referendum petitions in regard to ordinances, resolutions and measures of a city whether the "clerk of the municipality" in this instance refers to the clerk of council or city auditor.

Prior to the adoption of the Municipal Code the clerk of the municipality was charged with all of the duties now comprised within the duties of the clerk of council and the duties of city auditor, except that in certain cities of certain grades and classes had in addition to a city clerk, also a city auditor (or in some instances a city comptroller). There was, therefore, before the adoption of the Municipal Code in each and every municipal corporation an officer duly designated as "city clerk." In some of said municipal corporations such officer performed the duties which in other of such municipal corporations devolved upon the city auditor. The term "city clerk," however, was retained even in those cities in which there was either a city auditor or a city comptroller as the case may be.

At the adoption of the Municipal Code a uniform rule was established and for those cities which prior to the adoption thereof did not have a city auditor, a city auditor was provided and the duties devolving upon the city auditor were the same generally which pertained to the office of city auditor in those cities which prior to the adoption of the Municipal Code had such an officer. The rest of the duties of city clerk were transferred to what is known as the clerk of council and the provision of the Municipal Code covering such point is as follows:

> "The members of council shall * * * elect a * * * clerk, who shall also perform the duties of city clerk unless otherwise specified in this act * * *."

The duties which pertained to the office of city clerk prior to the adoption of the Municipal Code and which were otherwise specified in the Municipal Code

were the duties which were transferred to the city auditor under such code, and generally the same duties which pertained to the city auditor in those cities having a city auditor prior to the adoption of such code.

The duties which were transferred to the clerk of council as the duties of city clerk not otherwise specified in the Municipal Code were such duties as were found in Section 1755 Revised Statutes prior to the adoption of the Municipal Code as follows:

> "The clerk shall attend all the meetings of the council, and make a fair and accurate record of all its proceedings, and of all rules, by-laws, resolutions and ordinances passed by the council, and the same shall be subject to the inspection of all persons interested."

As prior to the Municipal Code the city clerk was required to keep a fair and accurate record of all the proceedings of council even in such cities in which there was a city auditor and the title of "city clerk" was retained even in such cities having a city auditor, I am of the opinion that the clerk of council would be the proper party to be considered as the city clerk at the time of the adoption of the Municipal Code.

When the statutes were codified the codifying commission omitted the words "who shall also perform the duties of city clerk unless otherwise specified in this act." The omission of this language, however, does not seem to me to have changed in the least degree the duties of the clerk of council, and by reference to the language so omitted it will be seen that the clerk of council was charged with the duties, which prior to the adoption of the Municipal Code, devolved upon the city clerk, in all instances whether there was a city auditor in such municipal corporation or not.

There being no such officer as city clerk at the present time, and the clerk of council having been charged with the duty of keeping a fair and accurate record of all proceedings of council, and all rules, by-laws, resolutions and ordinances passed by council, which duties generally devolved upon the city clerk when there was such an officer, and such duties devolving upon him in all instances whether the city had a city auditor or not, I am of the opinion that the provision of the initiative and referendum act that the petition shall be filed "with the clerk of such municipality" means in reference to cities, the clerk of council.

In reaching the conclusion that the clerk of council is the officer meant as the clerk of the municipality under the provisions of the initiative and referendum act I have not disregarded the provisions of Section 224 of the Municipal Code which provides as follows:

> "With respect to oaths of office and official bonds and the effect of the failure to take or give the same, Sections 1737, 1738, 1739, 1740, 1741, 1742 and 1743, of the Revised Statutes of Ohio, were not inconsistent with this act, shall be and remain in full force and effect; and where the words 'city clerk' appear in said sections they shall be construed to mean, in a city, the auditor, and in a village, the clerk."

As said section was intended, as I view it, not to constitute the city auditor provided for in said code; the city clerk as such city clerk existed prior to the adoption of said code, but said section was solely to provide for the oaths and bond of the auditor on whom had devolved part of the duties which had theretofore been those of a city clerk in municipal corporation for which no city auditor was provided.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

48.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—ROAD DISTRICTS—LIMITATION ON LEVIES—STATUTORY CONSTRUCTION—MUNICIPAL CORPORATION IN TOWNSHIP—IMPROVEMENT OF PUBLIC HIGHWAY WITHIN CORPORATE LIMITS—TOWNSHIP LEVIES.

As a general rule, the tax limitation act of 1911 *by implication repeals all provisions in the pre-existing law to the general effect that a particular levy shall be in addition to all other levies authorized by law.*

Under this rule and also from the terms of the act itself, the levies for road improvements under 6956-149, *General Code, are not outside of any of the limitations of the Smith one per cent. law. These are purely township levies and for the purpose of the act in which Section* 6956-149 *is found, the township or townships do not constitute a "special district."*

Under Sections 7095-7136, *General Code, which provide for road districts, such road district may be composed in part of a township containing a municipal corporation or part thereof, but if so composed, the whole township including the municipal corporation, must be regarded as a part of the road district.*

Under the aforesaid section, after a road district has been organized by a vote of the people, it is not required that the question of the issue of bonds shall be submitted to a vote of the electors.

The commissioners have uncontrolled discretion as to the creation of a bonded indebtedness except as to statutory limitations on the amount thereof.

The limitation of the Smith act is not upon the amount levied by a taxing district but upon the total amount which may be levied by all taxing authorities upon the property in a taxing district in the year 1910, *so that the fact that the districts in question did not exist in* 1910 *would not prevent the levy, under the Smith law provision.*

The practical result of the establishment of such road district would be to deprive the city, county, township and other divisions the amounts they might otherwise be allowed.

A levy for road purposes under Sections 7095-7136, *inclusive, General Code, is quite independent of any municipal or township levy made in the road district, except so far as both are to be affected by the fact that the limitations of fifteen mills, ten mills and the* 1910 *tax must apply to and include them both.*

No public highway within the corporate limits of a city or village in such road district shall be improved unless such road extends through such road district continuously.

COLUMBUS, OHIO, December 28, 1911.

HON. CUSTER SNYDER, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 18th enclosing an advertisement published by the commissioners of road district No. 2, Lorain county, Ohio, notifying the qualified electors of said district, which is composed of three townships in Lorain county, to assemble at the place appointed for holding elections in such townships, and the wards and voting precincts therein on the date for holding the general election, and then and there vote by ballot upon the question of the general improvement of the public roads of such road district by general taxation levied upon the property therein. You state that the city of Lorain is included within such road district, comprising a large part of two of the townships composing the same. You solicit my opinion upon the following questions:

"1. An interpretation of Section 6956-14, G. C., O. L. 101, p. 253, with especial reference as to whether or not the county commissioners have authority to levy a tax of ten mills or any part thereof in any one year, in addition to all other levies allowed by law for road improvements. If so, what is the procedure and is it restricted or prohibited by the Smith one per cent. taxation law, so called, and in what manner?

"2. Under Sections 7095 to 7136, inclusive, of the G. C., (2) can a township contiguous and adjacent to a township containing a municipal corporation, organize a road district composed of the adjacent township, or townships outside of the municipal corporation? (b) Under the sections above quoted, after a road district has been organized by a vote of the people, have the road commissioners authority to issue bonds for road improvements covering said district without another vote of the people authorizing the same? (c) Under this chapter and the provisions of the Smith one per cent. law, can there be a levy of any kind or amount for road improvements in said road district by the county commissioners, the proposed road district not being a taxing district in the year 1910, and no money whatsoever having been raised by taxation in said district during said year of 1910? This district was not organized in the year 1910, but is to be voted upon at the coming general election.

"3. Under Section 5649-3a, G. C., if five mills are levied by a municipal corporation on the taxable property of the corporation in any one year, can an additional levy for road purposes be made under authority of Section 7095 to 7136, inclusive, and if so, what is the procedure?

"4. Under the enclosed notice of election will it be possible to improve as a part of the road district in which a municipality is included the streets of such municipality?"

Section 6956-14 as enacted 101 O. L., 253, is a part of a road law which provides generally for the laying out, construction, repairing or improvement of any public road upon a petition of a majority of the owners of real estate who own lands within one mile in any direction from either side, end or terminus of the road or part thereof. The act provides that the expense of such improvement shall be borne in part by assessment upon the owners of real estate within such territory, in part by township levies and in part by general levy upon the duplicate of the county.

Section 6956-14 relates in particular to the county and township levies, and provides in part as follows:

"* * * for the purpose of providing by taxation funds for the payment of the county's proportion of the cost and expense of * * * the improvements * * * the county commissioners are hereby authorized to levy upon all the taxable property of the county a tax * * * not exceeding in the aggregate in any one year the sum of one mill upon each dollar of the valuation of the taxable property in the county. Said levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force. For the purpose of providing by taxation funds for the payment of said proportion of the cost and expense of all improvements made under the provisions of this act to be paid by the township or townships * * * the county commissioners are hereby authorized to levy upon all the taxable property of any township or townships in which said road improvement is situated, in whole or in part, a tax not exceed-

ing ten mills in any one year * * *. Said levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force."

Your first question relates to the effect of the Smith one per cent. law, so called, which imposes limitations upon township and county levies, upon this section, which is not expressly repealed thereby.

As a general rule the tax limitation act of 1911 by implication repeals all provisions in the pre-existing law to the general effect that a particular levy shall be in addition to all other levies authorized by law. With respect to the levies referred to in Section 6956-14, however, it is unnecessary to rely upon a repeal by implicaation. Said levies are expressly made exempt from the limitations *"now* in force." The word "now" must mean the date of the passage of Section 6956-14, viz., May 19, 1910. For this reason there can be no question but that the levies of Section 6956-14 are within the limitations of the Smith law, so far as its provisions, to the effect that such levies shall be in addition to all other levies by law, are concerned.

Indeed, I find no reason for holding that the levies under Section 6956-14 are outside of any of the limitations of the Smith law. The exclusions from those limitations are as follows:

1. Levies for sinking fund and interest purposes necessary to provide for indebtedness incurred prior to June 2, 1911, or thereafter by vote of the people, are exempt from the ten mill limitation but not from the limitation measured by the taxes levied in 1910 (Sections 5649-2 and 5649-3, 102 O. L., 269).

2. Emergency levies under Section 5649-4 and levies authorized by vote of the people as provided in Section 5649-5 are outside of the ten mill limitation but not outside of the limitation measured by the 1910 tax except as to the emergency levies, which seem to be outside of all limitations. (Section 5649-3, *supra.*)

3. Special levies provided for by vote of the electors, special assessments, levies for road taxes that may be worked out by the taxpayers, and levies and assessments in special districts created for road and ditch improvements are outside of the internal limitations of Section 5649-3a upon the levies of taxation for county, township, municipal and local school purposes respectively.

It is clear that neither of the levies of Section 6956-14 fall within any of these classes unless they are "levies for road taxes that may be worked out by the taxpayers" or "levies in special districts created for road or ditch improvements."

The township levies of Section 6956-14 are not levies in special districts created for road or ditch improvements. They are purely township levies and for the purpose of the act in which Section 6956-14 is found, the township or townships do not constitute a "special district." There seems to be considerable doubt as to whether or not the township levy under Section 6956-14 is a levy for road purposes which may be worked out by the taxpayer.

By section 5649, as amended (101 O. L., 113), it is provided in part that

> "Any person charged with a road tax may discharge the same by labor on the public highways."

By examining the context of Section 5649, as it appears in the General Code, it will appear, I think, that the section as a whole relates to township taxes. I do not believe, however, that the special levy of Section 6956-14 was intended to be included within those levies which might be worked out by the taxpayer. This question is probably doubtful, but I take it, it is not of great importance to you.

The exact effect of the tax limitation law of 1911 upon the authority to levy under Section 6956-14 is defined, in my opinion, by the first paragraph of Section

5649-3, 102 O. L., 269, which provides in effect that the maximum rate of taxation in any taxing district, for any purpose, shall be the amount that would have been raised under the pre-existing law upon the duplicate for the year 1910 in any taxing district, and in no event more than the maximum rate prescribed by the pre-existing law. That is to say, instead of the commissioners now being authorized to levy (always within the limitations of the Smith law, of course) one mill upon the county duplicate, and ten mills upon the township duplicate for the purposes mentioned in Section 6956-14, they may not levy more than an amount equal to one mill upon the 1910 duplicate and ten mills upon the 1910 duplicate of the township respectively, and they may not levy such amounts if such levy would produce a rate in excess of one mill or ten mills respectively on the 1910 duplicate, or if such a levy would exceed any of the other limitations of the act of 1911.

Under the procedure of the Smith law, which is fully set forth, I believe, in Section 5649-3a and succeeding sections of the General Code, the county commissioners must submit their needs under Section 6956-14 to the budget commissioners, who have authority to determine the amount of money which shall be raised for such purpose.

Answering the first sub-division of your second question, I beg to state that in my opinion under Sections 7095 to 7136, inclusive, General Code, being the sections which provide for road districts of the kind referred to in your general statement, such a road district may be composed in part of a township containing a municipal corporation or part thereof, but if so composed, the whole township, including the municipal corporation, must be regarded as a part of the road district. There is no authority of law for an election in a road district consisting of a part of a township. On the other hand, Section 7103, General Code, expressly provides that the question as to the creation of a road district for the purpose of improving the public roads thereof by general taxation levied upon the property therein shall be submitted to "the qualified electors thereof, including a village or city therein."

Under this peculiar language, the only question that could arise is as to whether or not a part of a city, which said city is located in more than one township, might be within a road district without the remainder of the city also being included in the same road district. The facts which you submit, however, do not raise this question.

Answering the second sub-division of your second question, I beg to state, the authority of the road commissioners of a special road district to issue bonds is defined by Sections 7123, etc., General Code. These sections do not require that the question of issuing such bonds shall be submitted to a vote of the electors. On the contrary, the commissioners have uncontrolled discretion as to the creation of a bonded indebtedness, except as to the amount thereof, which shall not exceed $250,000, except in a road district where a total tax valuation exceeds five million dollars, and in which such district the commissioners may issue and sell bonds in the additional sum of $25,000 for each million dollars of tax valuation in excess of five million dollars. (Section 7124.)

I might remark that the limitations of the Smith act certainly include and apply to levies for the purpose of retiring such bonds. That being the case, it will probably be difficult for any such bonds to obtain a market.

Answering the third sub-division of your second question, I beg to state that the fact that the taxing district to be created if the electors vote to establish the special road district to which you refer was not in existence in the year 1910, is immaterial. Section 5649-2, General Code, as enacted in 102 O. L., 268, does not, as seems to be popularly supposed, limit each taxing district as a levying authority, so to speak, to the amount of taxes which it had in the year 1910. The phraseology is as follows:

"* * * * the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district for the year 1911, * * * including taxes levied under authority of Section 5649-1, of the General Code, and levies made for state, county, township, municipal, school and all other purposes, shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such county, township, city, village, school district or other taxing district, for all purposes in the year 1910."

The limitation then is not upon the amount levied by a taxing district but upon the total amount which may be levied by all taxing authorities, including the state, upon the property in a taxing district in the year 1910. This limitation corresponds to the ten mill limitation of the same act, and not to the five, three and two mill limitations of Section 5649-3a.

From this it follows the practical result of the creation of a special road district, such as that described in your general statement will be to deprive the city, county and the townships of taxes which they otherwise might have had for municipal, county and township purposes respectively. The mere fact that the district did not exist in 1910 will in no wise affect the amount of taxes which it may have after it is created. This is rendered even clearer by the provisions of Section 5649-3a already quoted to the effect that levies in special road districts are not to be limited by any of the rates set forth in that section. There is, therefore, no limitation in the Smith act upon the amount that may be levied for road district purposes, save and except the fact that such levy together with the levy for state, county, township, school district and municipal purposes, must not exceed fifteen mills or ten mills, exclusive of interest and sinking fund levies, or the amount raised in the territory of the district or of any of the taxing districts therein in the year 1910.

Answering your third question, I beg to state that for reasons already pointed out, a levy for road purposes under Sections 7095 to 7136, inclusive, General Code, is quite *independent of any municipal* or township levy made in the road district, except in so far as both are to be affected by the fact that the limitations of *fifteen mills,* ten mills and the 1910 *tax must apply to* and include them both.

Answering your fourth question, I beg to state that Section 7108 expressly provides that "no public highway within the corporate limits of a city or village in such road district shall be improved unless such road extends through such road district continouusly."

This sentence itself would seem to be a complete answer to your fourth question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

49.

MUNICIPAL CORPORATION—POWER OF COUNCIL TO TRANSFER FUNDS—FUNDS RAISED BY TAXATION—SINKING FUND—FUNDS FOR SPECIFIC PURPOSES RAISED BY BOND ISSUE—PETITION TO COMMON PLEAS COURT.

The city council by virtue of 3799, *General Code, may transfer credit from one of a number of funds raised by taxation upon all property in the corporation when the purpose of such fund is accomplished or abandoned, to another or other funds of a similar nature.*

This power, however, does not extend to funds raised by bond issue or otherwise than by taxation on all personal and real property of the corporation.

Funds created by bond issue must be devoted first to the purpose of the specified improvemnts, second, to the sinking fund for the purpose of retiring the outstanding bonds and only after these purposes are accomplished may the balance of the bond be turned into the general fund of the corporation.

It is a grave question whether under Section 2296 *upon petition to the common pleas court provided therein, the court could find it within its power to make any change in the effect of the aforesaid rules.*

COLUMBUS, OHIO, January 16, 1912.

HON. E. H. WILCOX, *City Solicitor, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of a letter, under date of January 9, from Hon. Thomas Coughlin, city auditor, of Cleveland, requesting my opinion upon a question of interest to the administration of your city. Mr. Coughlin, doubtless, is not familiar with the invariable rule of this department, namely, that official advice will not be given to city officers, other than the city solicitor. Inasmuch as the matter concerning which he inquires seems to be one of immediate and general interest in Cleveland, I am presuming to address the opinion direct to you, with the request that you communicate the holding thereof to the city auditor and such other officers as may be interested therein if you agree therewith.

The question as submitted is as follows:

> "During the past three years, the city of Cleveland sold a large number of bonds for various enterprises. The improvements have not gone forward as rapidly as was expected, and as a result the money derived from the sale of these bonds has earned a considerable interest, the amount at this time being in excess of $100,000.
>
> "It is suggested that this accrued interest is subject to appropriation by the city council, and can be used for any purpose to which it (the council) may desire to apply the fund.
>
> "I am writing this letter to ask your official opinion as to whether it is legal and proper for us to appropriate the accrued interest on bond money, to be applied to paying the ordinary expenditures of the municipal government, or for such other purposes as the council may deem expedient."

I have heretofore held, in an opinion addressed to the bureau of inspection and supervision of public offices, that depository interest received from moneys realized from the sale of bonds for special improvements goes into and is to be treated as a part of the improvement fund. The query of the bureau was as to whether or not such money would be credited to the sinking fund; your query

raised the question, in the first instance, as to whether or not such money belongs in the general fund of the city. As above indicated, my opinion is that it belongs neither in the sinking fund nor in the general fund, but in the improvement fund.

The question as to the availability of such fund for appropriation by the council of the municipal corporation to the general uses and purposes of the municipality is affected, it seems to me, by Section 3799, of the General Code, which provides as follows:

> "By the votes of three-fourths of all the members elected thereto, and the approval of the mayor, the council may at any time transfer all or a portion of one fund or a balance remaining therein, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, nor until the subject of the fund from which the transfer is to be effected has been accomplished or abandoned."

This section indicates that moneys not raised by taxation—or more accurately, funds not produced in the first instance by taxation—are to be treated separately and apart from funds raised by taxation, for appropriation purposes. This is, in my judgment, because all such funds, not raised by taxation, are to be regarded in a qualified sense, at least, trust funds. So, in the case of a fund for a specified improvement, the body of the fund is to be regarded as devoted, with or without appropriation, to the uses and purposes of the specified improvement. This conclusion is made the more evident by a consideration of Section 3802, of the General Code, which provides, in effect, that cash balances existing in funds other than funds created for improvements shall be transferred to the general fund, and by Section 3804, G. C., which provides as follows:

> "When any unexpected balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustee of the sinking fund to be applied in the payment of the bonds."

All these sections are in *pari materia,* and, read together, they establish the following conclusion:

Funds created by bond issues cannot be devoted in whole or in part to the general purposes of the municipality, but must be applied, first, to the specified improvement; second, to the retirement of outstanding bonds, and interest thereon, and third (and only in the event that there are no outstanding bonds to be provided for), the fund may become a part of the general fund of the corporation. It is to be noted, however, that the contingency upon which such money may become a part of the general fund is a very remote one. So remote is it, indeed, that the general assembly has not seen fit to provide any express authority for transferring an unexpended balance in a fund created by an issue of bonds when the bonds themselves are all provided for, to the general revenue fund, as it has done in the case of moneys other than those in funds created for particular improvements, by Section 3802, above referred to. Nevertheless, because there is no other place for moneys to go to under such circumstances, it is my opinion that they may lawfully be credited to the general revenue fund, at least under authority of a transfer of funds made by the court, as I shall hereinafter point out, when no longer needed for the purpose of the improvement and its expense, or for the purpose of retiring bonds. In other words, while it is true that the general revenue fund has what may for convenience be termed a residuary interest

in the proceeds of the sale of an issue of bonds, including the depository interest thereon, the claim of the sinking fund is, by virtue of Section 3804, above quoted, prior to such interest of the general revenue fund.

By Section 296 and succeeding sections, G. C., authority is given to the council of municipal corporation to transfer any fund under their supervision from one fund to another, by applying to the common pleas court, which is given power to order such transfer. Transfers under these sections are not limited to those among funds raised by taxation, nor is the power of the court limited by the requirement that the fund thus to be transferred is no longer needed for the purpose for which it was levied, or for the object to which it was originally devoted, as is the case with transfers made directly by the city council. It is simply required that if the council desires to transfer any fund to another fund it shall file a petition in the manner set forth in the statutes; and "if, upon the hearing the court finds * * * that the petition states sufficient facts, that there are good reasons, or that a necessity exists for the transfer, and that no injury will result therefrom, it shall grant the prayer of the petition * * *" (Section 2300, G. C.)

It would perhaps be presumptuous for me to attempt to define the power and jurisdiction of the court of common pleas in a proceeding of this kind. For this reason I express no opinion as to whether a court could or could not hold that "no injury will result" from a transfer of moneys from an improvement fund, in the face of Section 3804, above quoted, which seems to require that unexpended balances in such improvement fund shall be devoted to the payment of the bonds outstanding and interest thereon, so long at least as bonds were actually outstanding and unprovided for. If the court does have this power over funds raised by bond issue for the purpose of constructing a public improvement, it has virtually the power to set aside Section 3804. Whether or not this was the intention of the general assembly in enacting Section 2296 and the succeeding sections of the General Code, has not been judicially determined.

For the reasons above suggested, I hesitate to express any opinion thereon.

I am clearly of the opinion, however, that so long as the bonds remain unpaid the depository interest in question may *not* be appropriated without a transfer of funds.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

65.

CONTRACTS OF DIRECTOR OF PUBLIC SERVICE — PROCEDURE — NECESSITY FOR AUTHORIZATION OF COUNCIL AND APPROVAL OF BOARD OF CONTROL.

In the case of a contract by the director of public service for a year's supply of coal involving the expenditure of more than five hundred dollars, first, the council must authorize; secondly, the director must advertise for bids; and thirdly, the award must be approved by the board of control. After the council has first authorized the contract, it has nothing further to do with the matter.

COLUMBUS, OHIO, January 19, 1912.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—I have carefully examined the opinion of the circuit court of Lorain county in the case of Railway Company vs. Elyria, 14 C. C., N. S., 365, re-

ferred to in your letter of January 3d, receipt whereof is acknowledged, and I have come to the following conclusion respecting that decision:

This decision does not hold, as you seem to fear, that all contracts for any period of time made by the director of public service of a municipal corporation must be approved by the city council. The question in the case related to a contract between a city and a railroad company whereby the city agreed to sell water to the railroad company during a considerable period of time in the future. General Code, Section 3973, expressly provides that such contracts shall be approved by council, and it was upon the language of this section that the court based its holding that

> "The contract here involved * * * cannot be sustained, because it was not approved by the city council." (Opinion, page 367.)

Contracts for the purchase of a year's supply of coal for the use of the waterworks and the like are governed by the provisions of Section 4328, General Code, which requires contracts involving the expenditure of more than five hundred dollars to be *first* authorized by council, and by Section 4403, General Code, which requires that such contract involving an expenditure of more than five hundred dollars to be awarded subject to the approval of the board of control.

In the case, then, of a contract for a year's coal supply involving the expenditure of more than five hundred dollars, such contract must first be authorized to be entered into by the city council. The director of public service must then advertise for bids; upon opening them he must seek the approval of the board of control as to the award he will make; under the direction of the board of control, he must award the contract to the lowest and best bidder. After council has once authorized the contract it has nothing further to do with the matter.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

74.

CIVIL SERVICE—CITY ENGINEER IN UNCLASSIFIED SERVICE—APPROPRIATIONS—TRANSFER OF FUNDS—SMITH ONE PER CENT. LAW—APPROPRIATIONS OF MONEYS NOT IN TREASURY.

When there is such a position as that of city engineer it must be deemed in law to be the head of a sub-department of the city within the department of public service, the incumbent of which by Section 4250, *General Code, shall be appointed by the mayor. In any event, the position of engineer being one that requires professional or technical skill, is taken from the classified service by Section* 4479, *General Code.*

When an amount has been appropriated for a certain purpose, it can be neither increased nor decreased nor diverted from its specified purpose.

Prior to the enactment of the Smith one per cent. law, 102 *O. L.* 272, *council could anticipate revenues expected to come into the treasury during the succeeding half year. By that act, however, council is limited in its appropriations to the money known to be in the treasury.*

COLUMBUS, OHIO, January 25, 1912.

HON. ALBERT S. FENZEL, *City Solicitor, Middletown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 15th, requesting my opinion upon the following questions:

"Who appoints the city engineer?

"After council appropriates a certain sum of money to be used during the last half year (for 1911) for the purpose of lighting the city, did any official have the right to divert any of this money to any other fund?

"Can council appropriate money for purposes allowed by law, when there was no money to appropriate?"

The following provisions of the General Code are applicable to the first question submitted by you:

"Section 4250. * * * He (the mayor) shall appoint and have the power to remove * * * the heads of the sub-departments of the departments of public service and public safety, * * *

"Section 4327. The director of public service may establish such sub-department as may be necessary and determine the number of superintendents, * * * engineers * * * and other persons, necessary for the execution of the work and the performance of the duties of this department.

"Section 4479. * * * The unclassified service shall include the positions of * * * persons who are appointed to positions requiring professional or technical skill as may be determined by the civil service commission; * * * the head or chief of any division or principal department relating to engineering, * * *"

No section of the General Code provides for the office of city engineer. That is to say, unless this office is established as the head of a sub-department within the department of public service, as provided in the above quoted section, it has no existence whatever. Certain provisions of the sections relating to the making of assessments for improvements seem to require that there be a position known as city engineer. Whether or not it is practically necessary that the position of city engineer be established as the head of a sub-department within the department of public service is a question which need not be determined. Suffice it to say, however, where there is such a position as that of city engineer, it must be deemed in law to be the head of a sub-department within the department of public service. This being the case, it follows, from the provisions above cited, that the mayor has the right to appoint a city engineer when the position of city engineer is so created. If, however, the position of city engineer has not been created as the head of a sub-department within the department of public service, then the engineering work of the city may be done by engineers who are simply employes of that department. That is to say, in such event there would be no separate sub-department of engineering, and the engineering force of the city would consist of one or more employes of the department of public service who would secure their positions by appointment or employment, as the case may be, by the director of public service. Inasmuch as the position of an engineer is one requiring professional or technical skill, it would seem that in any event an engineering position would not be within the classified or civil service.

Answering your second question, I beg to state that this department has repeatedly held that there is no authority for making transfers among appropriation accounts, residing either in council or in any other officer or department of the city government. When an amount has been appropriated for a certain purpose, the amount of such appropriation may be neither increased nor diminished. Money so appropriated may lawfully be used only for the purposes for which the appropria-

tion was made by council. At the end of the appropriation period the balance in the account lapses, of course, to the fund from which it was appropriated and may be reappropriated by council for any purpose for which the fund itself may be lawfully appropriated.

Answering your third question, I beg to state that since the enactment of Section 5649-3d, General Code, as a part of the Smith one per cent. law, so called, 102 O. L., 272, council is limited in its appropriations to the money known to be in the treasury. That section provides in part as follows:

> "At the beginning of each fiscal half year the various boards mentioned in Section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, * * *"

Heretofore, as you know, council might anticipate revenues estimated to come into the treasury during the succeeding half yearly period. This, by reason of the above quoted provision, is no longer the case.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

76.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LEVY BY SCHOOL BOARD FOR LIBRARY PURPOSES—"INTERIOR LIMITATIONS"—CONTRACT WITH LIBRARY ASSOCIATION NOT AN INDEBTEDNESS—NO IMPAIRMENT OF CONTRACT.

A levy of one mill by the board of education imposed annually for the purpose of reimbursing a library association for services to the public in pursuance of a contract between the board and the association, is within the interior limitations of the Smith law and is not a "levy for, sinking fund and interest purposes necessary to provide for indebtedness created prior to the passage" of the Smith law.

The obligation which rests upon the board is not an indebtedness within the meaning of the statute nor is there an "impairment of the obligation of contract" in the effect of the Smith law upon such procedures.

COLUMBUS, OHIO, January 9, 1912.

HON. HARRY D. SMITH, *City Solicitor, Xenia, Ohio.*

DEAR SIR:—In answering your letter of September 6th, I beg again to apologize for the delay which has ensued in this office in respect to the same, caused, however, by the fact that a part of your letter was personal in its nature, which fact led me to lay it aside in deference to business of an official nature as is always my custom.

You inquire what, if any, effect the enactment of the Smith one per cent. law, so-called, has upon the operation of Section 7641, General Code.

Said Section 7641, General Code, provides as follows:

> "The board of education in any city, village or special school district may contract annually with any library corporation or other organization owning and maintaining a library, for the use of such library by the residents of such district, and it annually may levy a tax not exceeding one mill on the taxable property of such district to pay therefor. Such board of education shall require an annual report in writing from such library corporation or other organization."

It appears from the letter enclosed in your communication that the board of education of the city school district of Xenia, prior to the enactment of the Smith one per cent. law, so-called, entered into a contract with the Xenia library association under which the board of education has levied for the support of the association a certain amount of money.

At the time this contract was entered into and until the Smith law became effective, this contract imposed upon the board of education of the school district a valid and existing obligation equal in dignity to the obligation of any other contract entered into by the board. Yet this obligation being contingent, did not create an "indebtedness" within the meaning of that word as used in Section 5649-2, and in Section 5649-3 of the Smith law, 102 O. L., 269. That is to say, the contract did not impose upon the school district a fixed and liquidated indebtedness necessitating the creation of a sinking fund, but the duty of the board of education to make the levy was dependent upon the continued existence of the library and the discharge by the library association of the obligation assured by it under the contract. This being the case, the levy provided for by Section 7641 is not, in my judgment, "a levy for sinking fund and interest purposes necessary to provide for indebtedness created prior to the passage of" the Smith one per cent. law within the meaning of the sections above referred to of that law.

In the case of State ex rel. vs. Sanzenbacher, unreported, recently decided by the supreme court of this state, the court construed Section 5649-3*a*, which provides what may be termed the "interior limitations" applicable to levies for local purposes, including levies which may be made by boards of education, as if the same exceptions were made therein as are expressly made in Section 5649-2 and 5649-3, as above referred to. For reasons similar to those above expressed, however, levies like those authorized to be made under Section 7641 are not to be regarded as exclusive of the limitations of five, three and two mills respectively imposed by Sections 5649-3*a*.

For all of the above reasons, then, the Smith one per cent. law in its entirety, including all the limitations thereof, must be regarded as applicable to levies made under authority of Section 7641.

Section 7641 provides expressly that the contract entered into between the board of education and the library association must be made "annually." It is apparent, therefore, that in any event the only subsisting obligation in existence at the time of the passage of the Smith one per cent. law under contract of this sort would be the obligation to make a levy for the current year. Such an obligation is not, in my judgment, directly impaired by the enactment of the Smith law. To hold that the Smith law would in any way interfere with the obligation of such contract would be to give to that law the effect of impairing the obligation of a contract—a thing prohibited, of course, by the constitution of this state and by that of the United States.

If the obligation of the board of education under the contract was simply to pay a certain amount to the library association, then, in my opinion, the board of

education would be obliged to pay that amount to the library association out of the proceeds of its levy as determined by the budget commission (under the facts stated by you, a levy of three mills). This would follow because the board of education had not bound itself to make a levy, but merely to pay a certain amount.

Hereafter, the power of the board of education annually to contract with the library association will remain under Section 7641 unimpaired, excepting the board of education may not now levy one mill for that purpose, nor may any levy which it makes be made, irrespective of any of the limitations of the Smith law. That is to say, by virtue of the first paragraph of Section 5649-3 of the Smith law, the maximum rate of one mill prescribed by Section 7641 is reduced so as not to produce any more money than would have been produced in the year 1910 by a levy of one mill upon the duplicate for that year—assuming, of course, that the duplicate of the school district of the city of Xenia was increased between the years 1910 and 1911. The amount which would have been raised by a levy of one mill upon the duplicate of 1910 is then the amount which may be levied by the school district for this purpose for the year 1911 or any year thereafter; but such a levy when made must be taken into consideration with the other levies of the board of education in ascertaining whether or not the limitation of five mills prescribed by Section 5649-3*a* has been exceeded.

From what I have said you will observe that it is not my opinion that Section 7647 is repealed by the Smith one per cent. law. It is simply amended by implication, so to speak, and the power of the board of education to enter into the contract therein provided for still exists.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

81.

OFFICES COMPATIBLE—CITY SOLICITOR AND MEMBER OF BOARD OF REVIEW—"HOLDING OF OTHER PUBLIC OFFICE OR EMPLOYMENT."

A city solicitor may hold the office of member of the board of review if there is no conflict in the duties of the offices.

The provision of Section 5621 *to the effect that "no member thereof shall be engaged in any other business or employment during the period of time covered by the session of the board" merely has the effect of making the work of the solicitor's office subordinate to that of the board.*

COLUMBUS, OHIO, January 25, 1912.

HON. MARK L. THOMSEN, *City Solicitor, for Newburgh, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 17, 1912, which is as follows:

> "The writer is city solicitor for the city of Newburgh and has been for a year and two months. Previous to my appointment as solicitor of the city of Newburgh, I was appointed a member of the board of equalization and board of review of Newburgh city for a term of five years and on organization of the board was elected president thereof. The city of Newburgh has a population of about six thousand and con-

sequently not much time is needed for the position as president of the board. We met last summer and worked for about thirty days and finished the work for the year. For the time we met I gave my entire time to the work, this in no way interfering with my position as city solicitor.

"The county auditor approved my voucher for pay for this period, amounting to about $160.00, but I purposely did not draw the amount, desiring an opinion from your office as to whether or not I could do so in view of my position as city solicitor. While I do not personally think there is any legal objection to this, I have felt as the matter concerned myself I should have a ruling from an outside party, and I should appreciate very much a ruling from your office on that point mailed to my address."

Section 5618 of the General Code provides as follows:

"Upon the written application of a county auditor to the state board of appraisers and assessors for laying excise taxes for the appointment of a board of review for a municipal corporation of such county, for the equalization of real and personal property, moneys and credits within such municipal corporation, said state board may appoint such board of review, to be composed of three citizens, freeholders of such municipal corporation not more than two of whom shall belong to the same political party."

Section 5619, General Code, provides that:

"One member of the board of review shall be appointed for the term of one year, one member for the term of three years, and one member for the term of five years. Thereafter at the expiration of the term of a members, there shall be appointed by the state board of appraisers and assessors, a freeholder of such municipal corporation as successor to such member for the term of five years, and all vacancies in the board shall be filled for the unexpired term in the manner as the original appointment. The state board of appraisers and assessors for laying excise taxes may remove any members of the board."

Section 5621, General Code, provides:

"The county commissioners shall fix the salary of the members of the board of review, which shall not be less than three dollars and fifty cents per day for each day the board is in session, and not to exceed two hundred and fifty dollars per month for the time such board is in session. Such salary shall be payable monthly out of the county treasury upon the order of said board and the warrant of the county auditor. The board shall meet in rooms provided by the county commissioners, and when in session, shall devote their entire time to the duties of their office. *No member thereof shall be engaged in any other business or employment during the period of time covered by the session of the board.*"

Section 4303, General Code, provides as follows:

"The solicitor shall be elected for a term of two years commencing on the first day of January next after his election, and shall

serve until his successor is elected and qualified. He shall be an elector of the city."

Section 4304, General Code, provides as follows:

"No person shall be eligible to the office of solicitor of a municipal corporation who is not an attorney and counselor at law, duly admitted to practice in this state."

It seems to me there can be no question of your right to hold both of these offices, as, in my opinion, they are not incompatible. The only possible conflict is one contemplated by the law itself, it seems to me, in the last sentence of Section 5621, which I have underlined; and this would require that during the time when the board of review is in session the duties of the office of city solicitor, if there were any to be performed at that time, be subordinated to your duties as member of the board of review. This question, however, does not arise in your particular case, as you expressly state that during the time your board met you gave your entire time to your work. I can, therefore, see no objection to your drawing the amount of salary properly due you for this work.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

83.

MAYOR—POWER TO MAKE APPOINTMENT—TIME LIMITS—TERM OF OFFICE OF APPOINTEES.

Under Section 4251, General Code, the new mayor may not make appointments earlier than the second Monday in January, in those offices under this power which have incumbents.

When there are vacancies, however, he may appoint at any time, and his appointees hold office until their successors are elected and qualified.

COLUMBUS, OHIO, January 23, 1912.

HON. CLYDE C. PORTER, *City Solicitor, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 6th, wherein you state:

"At the request of Walter K. Keppel, mayor of our city, we are asking you for an interpretation of Section 4251 of the General Code.

"Mr. Keppel wishes to known whether or not the appointment made, made his appointments, and the appointees have already entered upon the discharge of their duties, the old officers having resigned at the end of the last year.

"Mr. Keppel wishes to know whether or not the applicants made, will be good for the entire year, or only until the second Monday in January or February."

Section 4250 of the General Code provides:

> "The mayor shall be the chief conservator of the peace within the corporation. He shall appoint and have the power to remove the director of public service, the director of public safety and the heads of the subdepartments of the departments of public service and public safety, and shall have such other powers and perform such other duties as are conferred and required by law."

Section 4251, General Code provides:

> "The director of public service, director of public safety, directors of the university, street commissioner, or any board or officer whose appointment is required herein shall be appointed not earlier than the second Monday in January and not later than the first Monday in February, and shall hold their respective offices until their successors are appointed as herein required."

I take it that your inquiry refers to the appointment of the director of public service and the director of public safety. From a cursory reading of the sections above quoted, it is apparent that the mayor has the power of appointing and removing such directors at will. Section 4251 provides that the directors, as well as the other heads of departments and boards and officers, whose appointment is required therein, shall be appointed not earlier than the second Monday in January and not later than the first Monday in February, and that such officers shall hold their respective offices until their successors are appointed, as therein required.

Section 4252 provides that in case of death, resignation, etc., of any officer or director of any department of a city, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed.

It appears from your inquiry that the mayor made his appointments on the first day of January, 1912, the prior incumbents having all resigned on that date. These appointees, under the statute, would hold until successors were duly appointed. So, as far as the continuation in office of appointees of the mayor, made January 1st, is concerned, they would hold until the mayor would make other appointments to the same positions.

It strikes me that it is a matter of indifference whether the mayor, following the direction of Section 4251, makes his appointments between the second Monday in January and the first Monday in February, or whether he does not do so, so long as he intends the same persons to fill the places, and makes no other appointments; the additional appointment would give them no further or added powers. Still, to be regular, and if the mayor should desire, he might reappoint the persons whom he has already appointed as public service and public safety directors.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

88.

MOVING PICTURE SHOWS—"BUSINESS"—VIOLATION OF SUNDAY LAWS AND EMPLOYMENT OF MINOR PROVISIONS—PICTURES OF THEATRICAL PERFORMANCES.

The operation of a moving picture show is such an opening of a place for the transaction of business as to come within the prohibitions of Section 13044, *General Code, prohibiting the employment of minors and the transaction of business on Sunday.*

Such an entertainment is also intended by the terms of 13049, *General Code, as amended* 102 *O. L.* 72, *as it is an exhibit of pictures of performances forbidden on Sunday.*

COLUMBUS, OHIO, January 29, 1912.

HON. D. F. DUNLAVY, *City Solicitor, Ashtabula, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your communication of January 8, 1912, wherein you inquire as follows:

> "The mayor of this city, Mr. I. H. Pardee, has requested me to solicit your opinion in reference to Section 13044 of the General Code, as to whether or not a moving picture show would be considered a place for the transaction of business, also whether or not a moving picture show would come within Section 13049 of the General Code as revised in 102 O. L., at page 92?"

In reply thereto would say Section 13044 of the General Code provides as follows:

> "Whoever, being over fourteen years of age, engages in common labor or opens or causes to be opened, a building or place for transaction of business, or requires a person in his employ or under his control to engage in common labor on Sunday, on complaint made within ten days thereafter, shall be fined twenty-five dollars, and for each subsequent offense, shall be fined not less than fifty dollars nor more than one hundred dollars and imprisoned not less than five days nor more than thirty days."

Section 13049 of the General Code, as amended 102 O. L., page 92 provides as follows:

> "Whoever, on Sunday, participates in or exhibits to the public with or without charge for admittance, in a building, room, ground, garden or other place, a theatrical or dramatic performance or an equestrian or circus performance of jugglers, acrobats, rope dancing or sparring exhibition, variety show, negro minstrelsy, living statuary, balooning, base ball playing in the forenoon, ten pins or other game of similar kind or participates in keeping a low or disorderly house of resort or sells, disposes of or gives away, ale, beer, porter or spirituous liquor in a building appendant or adjacent thereto, where such show, performance or exhibition is given, or houses or place is kept, on complaint within twenty days thereafter, shall be fined not more than one hundred dollars or imprisoned in jail not more than six months or both."

Webster defines the term "business" as follows:

> "That which busies, or that which occupies the time, attention or labor of one, as his principal concerns, whether for a longer or shorter time. Employment, occupation or employment for a livelihood or gain, as agriculture, trade, mechanical, art or profession."

The operation of a moving picture show is an employment or occupation for the purpose of amusing and entertaining those who patronize or attend such show. The purpose of operating such picture shows is for financial gain on the part of the operator or owner, and the place wherein such occupation or employment is followed would, in my judgment, be a place of business or a place for the transaction of business, and comes within the provisions contained in Section 13044 of the General Code above quoted.

In answer to your second question I desire to say that this department held, in an opinion rendered early in the year, that a moving picture show comes within the provisions of Section 13049 of the General Code, and I am of the opinion that such shows are also within the provisions of said section as amended 102 O. L. page 92, for the reason that the scenes exhibited at such shows are pictures either of theatrical or dramatic performances and the exhibition of the same on Sunday is in violation of Section 13049 of the General Code as amended 102 O. L. page 92, which is above quoted.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

91.

INTOXICATING LIQUORS—PETITIONS FOR WET AND DRY ELECTION—LOCAL OPTION—QUALIFIED ELECTOR—SIGNERS OF PETITIONS, QUALIFICATIONS OF.

The signer of a petition for wet and dry elections, under Section 6127, General Code, need not have actually cast his ballot at the last preceding general election. It is sufficient if he is a qualified elector at the time of signing the petition.

COLUMBUS, OHIO, February 2, 1912.

HON. WALTER S. STEVENSON, *City Solicitor, Leipsic, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 1st, wherein you state:

> "In determining who are qualified electors under Section 6127 of the General Code of Ohio, we find in Re South Charleston Election, 3 N. P., 373; 50 B. 173, the court used this language, or rather the court is quoted as follows 'forty per cent. of those Who Cast Votes at last preceding election,' etc.
>
> "This would indicate that to be counted as being a qualified elector the person signing this petition must necessarily have cast his ballot at the last preceding election for municipal officers. What is your opinion in this matter? This is to be used by the undersigned in determining who are qualified electors upon the presentation of a petition on Monday, February 5th."

Section 6127 of the General Code provides:

> "When, in a municipal corporation divided into wards, qualified electors in a number equal to forty per cent. of the number of votes cast therein at the last preceding general election for state and county officers, or when, in any other municipal corporation, qualified electors in a number equal to forty per cent. of the votes cast therein at the last preceding general election for municipal officers, petition the council thereof for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such municipal corporation, such council shall order a special election to be held at the usual place or places for holding elections therein in not less than twenty days nor more than thirty days from the filing of such petition with the mayor of such municipal corporation or from the presentation of such petition to the council thereof. Thereupon such petition shall be filed as a public document with the clerk of such municipal corporation and preserved for reference and inspection."

This section is made up of parts of Sections 4364-20*a* and 4364-20*e*. You will notice there has been a change, and while Section 4364-20*e* stated:

> "* * * and in other municipalities forty per cent. of the qualified electors at the last preceding election * * *."

the provisions in Section 6127, supra, read:

> "* * * in any other municipal corporation qualified electors in a number equal to forty per cent. of the votes cast * * *."

so now the jurisdiction of fact for council to find is whether or not in a municipality a petition is signed by the "qualified electors in a number equal to forty per cent. of the votes cast therein at the last preceding general election for municipal officers;" i. e. when the corporation is not divided into wards.

In the case to which you call my attention—In Re South Charleston Election 3 N. P., 373, while the court used the language you quote in your letter, it was in stating the contention of the contestors. Judge Geiger, in his opinion in this case, at page 376, used the following language:

> "The contestors claim further that the term 'forty per cent. of the qualified electors at the last preceding municipal election' required that the petition be signed by forty per cent. of those individuals who appeared and cast their ballots at the said election; and that it is not sufficient to have forty per cent. of the number; but the very individuals who voted at the last preceding municipal election should sign the petition to the extent of forty per cent. *This position is not tenable.* The intention of the legislature was not to give to the voters who cast their ballots at the preceding election any advantage over those who, by reason of absence, sickness or other cause, did not. The body of the electors, as it may have existed at the last preceding election, may have changed considerably at the time of the filing of the petition, by reason of death, or otherwise. The plain intention of the statute is that when the petition is signed by as many qualified electors as shall equal forty per cent. of those who cast their votes at the last preceding election, then the petition shall be sufficient."

I think this would be decisive of the question even if the General Code had not made the matter plain beyond all doubt.

The function of the council when a petition under Section 6127 of the General Code is presented, is to determine whether the petitioners on the said petition are qualified electors of the municipal corporation at the time of the action of the council in ordering the election and whether or not the number of said petitioners so found, as aforesaid, is equal to forty per cent. of the vote cast in the municipal corporation at the last preceding general election for municipal officers. So, the question of whether the petitioner actually voted at the last election is immaterial. *He is a qualified petitioner if he is a qualified elector of the municipality at the time council seeks to act on the petition.*

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

94.

CIVIL SERVICE—DEPARTMENTS OF ELECTRIC LIGHT AND WATER-WORKS—EMPLOYES—CLERKS IN DIRECTOR OF PUBLIC SERVICE OFFICE—CLASSIFIED AND UNCLASSIFIED SERVICE—NO EXAMINATION OF INCUMBENTS—DUTIES OF CITY AUDITOR.

All employes in either of the departments of electric light or waterworks of a city, come under the civil service control except the single individuals at the heads of departments and the incumbents of such positions as the commission have determined under Section 4479, General Code, to require professional or technical skill.

A clerk in the office of the director of public service is subject to the civil service, but a private secretary is not.

When an office, by reason of the creation of a statute, enters into the jurisdiction of the civil service commission or passes from the unclassified to the classified service, the incumbent is not required to take an examination.

The civil service commission must provide for examinations for all positions in the classified service and make rules governing the same.

The directors of public service must comply with civil service statutes without notice.

The appointing board or officer must certify all appointments and vacancies in the classified service to the auditor, and the latter official is burdened with the responsibility of allowing no claims for services in violation of the civil service regulatons.

COLUMBUS, OHIO, December 29, 1911.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—Under favor of December 14, 1911, you ask an opinion of this department upon the following:

> "I transmit to you a copy of a resolution passed by the civil service commission of this city December 11, 1911, and also a copy of a letter transmitted to me at the same time.
>
> "My personal opinion is that all of the employes, except the superintendent and chief engineer, come under the head of civil service.
>
> "The opinion has been expressed also that the clerks appointed in the office of the director of public service are also under civil service.

"With the exception of the police and fire departments, civil service has been a dead letter in this city, because of the hostility of the administration."

The letter enclosed states as follows:

"We herewith transmit to you copy of resolution passed at a meeting of this board at its office on Monday evening, December 11, 1911.

"It is contended by the director of public service that none of the employes in either of the departments of electric light or waterworks come under the jurisdiction of the civil service board. If that be true, this board may as well disband, for only the police and firemen would be under any rules made by this board, and in this little city it would be a farce.

The resolution enclosed states the facts as follows:

"That the electric light plant is owned and operated by the city of Troy, and has in its employ for its operation the following employes:

"One superintendent.

"One chief engineer.

"Two assistant engineers.

"One electrician.

"One trimmer.

"Three linemen, repairers.

"That the waterworks is owned and operated by the city of Troy, and has in its employ for its operation the following employes:

"One superintendent.

"One chief engineer.

"Two assistant engineers.

"One inspector.

"It is conceded that the superintendent of each of these plants, and the chief engineer do not come under the operation of Section 4479, G. C., and belong in the unclassified service.

"If the remainder of said employes belong to the classified service, an answer to the following questions is desired:

"First—Shall all the employes, except the above officers, admitted to be in the unclassified service now in the employ of the city, be directed to appear before this board for examination?

"Second—Shall the board by authority of Section 4479, provide for the examination of engineers, firemen and electricians, under rules made by this board?

"Third—If the present employes are found to be competent and qualified for their positions, shall this board report the fact to the director of public service that the employes are under civil service, and that in the future employment of men in the classified service in these departments, shall be governed by Section 4481, General Code?

"Fourth—Shall the full list of said officers, salaries, etc., be certified to the city auditor, as required by Section 4604, General Code?"

Section 4479, General Code, divides the employes of a city into classified and unclassified service, as follows:

"The civil service shall be divided into classified and unclassified service. The unclassified service shall include the positions of officers

elected by the people or appointed to fill vacancies in offices filled by popular election, or whose appointment is subject to confirmation by the council, or who are appointed by any state officer or by any court, employes of the council, persons who by law are to serve without remuneration, *persons who are appointed to positions requiring professional or technical skill as may be determined by the civil service commission;* persons appointed or employed to give instruction in any educational institution; persons appointed by any board or officers supervising elections; persons who as members of a board or otherwise, have charge of any principal department of the government of any city, *the head or chief of any division or principal department relating to engineering,* waterworks, street cleaning, or health, the chief of the police department, the chief of the fire department, the superintendent of any workhouse, house of refuge, infirmary, or hospital, the librarian of any public library, private secretaries, deputies in the office of the city auditor and city treasurer, unskilled laborers, and such appointees of the civil service commission as they may by rule determine. *The classified service shall comprise offices and places not included in the unclassified service."*

Under the Municipal Code as passed in 1902, the civil service covered only the department of public safety. The civil service was extended to the other departments by act in 99 Ohio Laws, 562, and this part of the act became effective January 1, 1910. At that time employes of the city should have been placed in the classified and unclassified service.

The superintendents of the electric light plant and of the waterworks have charge of a principal department of the government of the city and are in the unclassified service.

It appears that the city of Troy has a "chief engineer" in the waterworks, and also a "chief engineer" in the electric light plant. The statute exempts from civil service regulations the "head or chief of any division or principal department relating to engineering." The mere fact that the title of an employe is that of chief engineer does not make him the head or chief of the department of engineering. Each of these may be the chief engineer in the electric light plant or in the waterworks department. But that fact does not make either of them the head of the engineering department of the city. There could not be two heads of such a department. It appears further that each of them are subordinate to the superintendent of the department in which he is employed. They cannot, therefore, be at the head of any division or principal department.

Unless the city of Troy has an engineering department, and one of these employes known as "chief engineer" is at the head of such department, I am of the opinion that both are subject to civil service regulations, unless, however, it has been determined by the civil service commission that they occupy positions requiring professional or technical skill, as provided in said Section 4479.

The other employes of these departments do not come under any of the positions enumerated as the unclassified service and are therefore subject to civil service regulations.

You further inquire as to clerks in the office of the director of public service. The position in the unclassified service which might fit this position is that of private secretary. A private secretary would hardly be known as a clerk. The position of clerk is subject to civil service regulations.

It appears that civil service has not been put into operation in your city. The civil service commission asks in regard to the examination of the present incumbents.

In passing from the unclassified to the classified service the statutes do not require an examination of the incumbents.

On page 10, of the opinion, in the case of State vs. Wyman, 71 O. S., 1, Summers, J., says:

> "It seems to have been the purpose of the legislature in the enactment of the code, so far as possible, to provide that officers and employes in the police and fire departments, in office when the new code went into effect, should not be disturbed in their office or employment, and that thereafter these departments should be under the so-called merit system, and that appointments thereto could be made only in the manner provided by the code. But it was not the intention of the legislature that appointments to any vacancies that might exist in any of the offices or employments in the classified service could be made only from the list of incumbents of offices and employments in the classified service. It is not difficult to understand why the legislature, in adopting the merit system, should provide that those already in office might remain without examination, but it does not appear why it also should be provided that a vacancy in the highest office could be filled only from their number."

The fourth syllabus in case of State vs. Hall, 15 Cir. Dec., 361, is as follows:

> "Section 159, et seq. (Sec. 1536-695 Rev. Stat.), requiring every applicant for appointment to the new police department to submit to an examination by the board of public safety, has no application to those who were in office or members of the old department at the time the new Municipal Code went into effect."

The statutes do not require that the incumbent of an office shall take an examination when the position which he holds is placed in the classified service.

The employes of the city of Troy who were subject to civil service regulations should have been placed in the classified list on January 1, 1910. All appointments to fill vacancies since said time in the classified service should have been made from the list certified by the civil service commission after examination of the applicants. Any person appointed to one of these positions since January 1, 1910, and who has not been appointed in the manner prescribed for the classified list, except one appointed under Section 4488, G. C., has not been legally appointed to the position and a vacancy should be declared and filled in the proper manner.

Section 4481, General Code, provides:

> "Appointments shall be made in the following manner: The appointing board or officer shall notify the commission of any vacancy to be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest in the respective lists as shown by the result of such examination. Such board or officer shall thereupon appoint one of the three so certified. Grades and standings so established shall remain the grades for a period of six months, or longer if the commission so determines, and in succeeding notifications of vacancies, candidates not selected may be dropped by the commission after having been certified a total of three times."

Answering the questions of the civil service commission, my conclusions may be summarized as follows:

First—Persons in the classified service who were in the employ of the city on January 1, 1910, are not required to take an examination. Examinations should be held for all positions in the classified service, which are vacant, or which have been vacant since January 1, 1910, and have been filled without compliance with the civil service regulations.

Second—The civil service commission should provide for examinations for all positions which are in the classified service and make rules governing the same.

Third—It is the duty of the director of public service, without notice, to comply with the statutes governing the civil service. Under the circumstances which exist in your city it might be well to notify the director as to what positions are in the classified service.

Fourth—Section 4504, General Code, to which reference is made, provides:

> "No clerk, auditor or accounting officer of any city shall allow the claim of any officer for services of any deputy or other person in violation of the provisions of this title."

This statute does not require a certification to the city auditor, nor does any other statute require such a certificate from the civil service commission.

Section 4491, General Code, requires a certification from the appointing board or officer, as follows:

> "The appointing board or officer shall certify to the auditor all appointments to offices and places in the respective departments of the classified service of such city, and all vacancies occurring therein, whether by dismissal, removal, resignation or death, and the date thereof."

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

100.

BONDS, AUTHORIZED BY ELECTORS—TAXATION LIMITATIONS—POWER OF MAYOR TO REMOVE AND APPOINT AND POWER OF COUNCIL TO CHANGE SALARY OF A CITY ENGINEER—SUSPENSION OF THREE READINGS RULE OF COUNCIL.

Bonds issued under Sections 3939-3952, *General Code, when authorized by a favorable vote of the people, within the principle established in* 83 *O. S.,* 482, *are not to be considered in arriving at the 2½ per cent. limitation prescribed under such sections. These sections, however, have been subjected to several changes in* 102 *Ohio Laws.*

The official known as city engineer at the head of a sub-department in the department of public service, is by reason of the Paine law subject to the control of the mayor who may at any time remove him and appoint a successor.

The salary may be changed by council at will, as that official is not the holder of a statutory term of office.

There is no exception to the rule that council may by a three-fourths vote, suspend the rule requiring three readings.

COLUMBUS, OHIO, February 9, 1912.

HON. G. B. FINDLEY, *City Solicitor, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 24, requesting my opinion upon the following questions:

"1. Whether or not bonds issued under authority of Sections 3939 to 3952, inclusive, when authorized by a favorable vote of the people, are to be considered in arriving at the two and one-half per cent. limitation prescribed under such sections?

"2. Whether or not the mayor of a city can remove the city engineer and appoint another engineer to his place, and the city council then raise the salary of the new engineer so appointed, all of this being done during the term for which the mayor makes the appointment?

"3. If the raise in the engineer's salary, indicated above, is legal, can the city council under a suspension of the rules, pass the ordinance increasing the pay of the newly appointed engineer? Or must this have the three readings?"

Your first question is answered in the negative by the holding of the supreme court in the case of the city of Cleveland vs. Cleveland, 83 O. S., 482, unreported. That was the precise question involved in that case, and the holding of the court was that, bonds issued upon the approval of the electors were not to be counted in ascertaining the (then) limitation of four per cent. imposed by the Longworth act. In this connection permit me to call your attention to the fact that Sections 3939 to 3953, inclusive, have been repealed and re-enacted twice in the 102 O. L.

Answering your second question, I beg to state that there is no such office in the city government as that of "city engineer," excepting as same exists as a head of a sub-department within the department of public service. As such the incumbent thereof may be removed at will by the mayor under favor of Section 4250, General Code. This being the case, I am of the opinion, as to this position, there is no "term of office" within the meaning of Section 4219, which prohibits a change in the compensation of any office during the term for which an incumbent may have been elected.

Some confusion arises by virtue of the conflicting provisions of Sections 4251 and 4252, General Code. The first of these sections requires the mayor to make his appointments within a certain definite period of time, and the second of the two, which authorizes the mayor to fill vacancies, speaks of "the unexpired term." Both of these sections were passed as parts of the original Municipal Code. The scheme of that plan of government, as enacted into law in 1902, contemplated an elective board of public service. A radical change was made in the law by the enactment of the so-called "Paine Law," 99 O. L., 562. The controlling purpose of this scheme is found embodied in Section 4250, above cited. By this law, the mayor is made the responsible head of the entire city administration, with virtual power to dictate the policy of every department therein. It was in the Paine law that the power of the mayor to remove and appoint at will the heads of the sub-departments in the department of public service first appeared. In my opinion the existence of this power is quite inconsistent with the provisions of Section 4251 and Section 4252. It is not necessary in discussing the present question to determine whether or not these two sections were impliedly repealed as a whole by the enactment of the Paine law. Suffice it to state, that as to the offices over which the mayor is given absolute control by what is now Section 4250, General Code, the provisions of Sections 4251 and 4252 cannot, in reason, apply. Inasmuch as Section 4250 is one of later enactment it follows that it must control.
trol.

For all the foregoing, then, I am of the opinion that the mayor may at any time remove a city engineer and reappoint his successor, and that the salary of the engineer is subject to such change as council may choose to make, and that at any time, inasmuch as the city engineer has no term whatever.

Answering your third question, I beg to state that Section 4224, General Code, expressly authorizes the rule for three separate readings, to be suspended by three-fourths vote of council. There is no exception to this rule.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

101.

NO NECESSITY FOR ENCLOSED BLANK VOTING SQUARE IN COUNTY LOCAL OPTION ELECTION BALLOTS—GENERAL BALLOTS—DIRECTORY AND MANDATORY PROVISIONS.

Section 6111, General Code, providing for the form of ballot to be used in county local option elections does not provide for a "blank enclosed space" for the marking of the voter's cross, as does Section 5021 providing for election ballots generally, and for this reason and also for the reason stated in 46 Cal., 398, that the law is merely directory as to those things over which the voter does not have control, a ballot in a county local option election which fails to have said space enclosed, is not illegal.

COLUMBUS, OHIO, February 7, 1912.

HON. C. W. WHITE, *City Solicitor, Gallipolis, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 25, wherein you ask for a ruling as to whether or not the form of ballot used at the special local option election under the Rose county local option law was legal or illegal, and you say the form of ballot used was as follows:

	The sale of intoxicating liquors as a beverage shall be prohibited.
	The sale of intoxicating liquors as a beverage shall not be prohibited.

Your contention is that the form of ballot as used, and diagrammed above, was illegal because it did not "leave a square in which the negative choice might be indicated."

While it is true that Section 5021, providing for the form of election ballots generally, requires that "ballots be so printed as to give each elector a clear opportunity to designate by a cross mark in a blank enclosed space * * * on the left and before the name of each candidate his choice of particular candidates," that is not the section under which a ballot under the so-called Rose county local option law would be formulated. The ballot to be used in the county local option elections is provided for in Section 6111, General Code, which provides as follows:

> "The ballots at a special election held under the provisions of Sections 6108 and 6109, shall be printed with an affirmative and negative statement, to wit: 'The sale of intoxicating liquors as a beverage shall

be prohibited,' 'The sale of intoxicating liquors as a beverage shall not be prohibited,' with a blank space on the left side of each statement in which to give each elector an opportunity to clearly designate his choice by a cross mark as follows:

"_____The sale of intoxicating liquors as a beverage shall be prohibited.

"_____The sale of intoxicating liquors as a beverage shall not be prohibited."

A comparison of the two sections shows that while Section 5201 provides for "a blank *enclosed* space," Section 6111 merely provides for a "blank space on the left side of each statement in which to give each elector an opportunity to clearly designate his choice by a cross mark.''.

While, without a doubt, the ballot would have had a more finished appearance and would have been a better job mechanically and typographically if it had the line under the negative statement similar to the one under the affirmative statement, I am inclined to the belief that the elector had the opportunity of marking the ballot as printed equally as well as if the finished product had been placed before him. The general proposition governing is thus stated in McCrary on Elections, Par. 538, in referring to a California case—Kirk vs. Rhoads, 46 Cal., 398:

"* * * The court held, and we think upon the soundest reason, *that as to those things over which the voter has control, the law is mandatory, and that as to such things as are not under his control, it should be held to be directory only.* The conclusion of the court was that the purpose and object of the statute was to secure the freedom and purity of elections, and to place the elector above and beyond the reach of improper influences or restraint in casting his ballot, and that it should have such a reasonable construction as would tend to secure these important results. And so construing the statute, *the court concluded that a ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector has no control; such as the exact size of the ticket, the precise kind of paper or the particular character of type or heading used.*"

I am, therefore, of the opinion that the use of a ballot, like the one submitted, at a county local option election *would not render the election void* by reason of a claim that the arrangement was illegal in form.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

116.

MUNICIPAL CORPORATION—FUNDING INDEBTEDNESS—EXISTING OBLIGATIONS—"EXPENDITURE"—SMITH ONE PER CENT. LAW—INITIATIVE AND REFERENDUM ACT.

When a municipal corporation has not sufficient funds to make an appropriation from which to meet obligation due upon a legal contract with an electric light company for public lighting purposes, the council under Sections 3916 *and* 3917, *General Code, may fund such indebtedness by issuing bonds therefor.*

Such an issue is not an "expenditure" within the comprehension of Section 5649-3*d of the Smith one per cent. law and as it does not create a new charge upon the municipality, is not within the restrictions of the initiative and referendum law so as to require the measure authorizing the same to be suspended for* 60 *days or to be subject to the vote of the electors.*

COLUMBUS, OHIO, February 6, 1912.

HON. HOWARD E. MACGREGOR, *City Auditor, Springfield, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 15th, submitting for my opinion thereon, the following question:

> "The city of Springfield has contracted with an electric light company for lighting the streets and public places of the municipality. The money in the treasury at the time the first semi-annual appropriation ordinance for the fiscal year 1912, was passed was insufficient to meet the obligations of the city, accruing from time to time under this contract. Accordingly, no appropriation for this purpose was made in said ordinance. May bonds lawfully be issued under Section 3916, General Code, for the purpose of funding the indebtedness of the city arising under its said contract, and thus meeting this obligation thereunder?"

The following section of the General Code are applicable to the solution of the question above stated:

Section 5649-3*e*, 102 O. L., 272:

> "Unexpended appropriations or balances of appropriations remaining over at the end of the year, and the balances remaining over at any time after a fixed charge shall have been terminated by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the general fund, and shall then be subject to other authorized uses, as such board or officers may determine."

Section 3982 of the General Code:

> "The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. * * *"

Section 3983 of the General Code:

"If council fixes the price at which it shall require a company to furnish electricity or either natural or artificial gas to the citizens, or public buildings or for the purpose of lighting the streets, alleys, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years, and the company or persons so to furnish such electricity or gas assents thereto, by written acceptance, filed in the office of the auditor or clerk of the corporation, the council shall not require such company to furnish electricity or either natural or artificial gas, as the case may be, at a less price during the period of time agreed on, not exceeding such ten years."

Section 3809 of the General Code:

"The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or company therein situated, for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract * * *."

Section 3916 of the General Code:

"For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such lengths of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually."

Section 3917 of the General Code:

"No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. * * *"

Your letter does not so state, but I assume from the manner in which your question is phrased that the contract between the city and the electric light company was made prior to the enactment of what is known as the "Smith one per cent. law." Upon this assumption, I am of the opinion that, under the related sections above quoted, council may lawfully issue bonds and fund the indebtedness of the municipality as it accrues from time to time under the contract above referred to. Provision for valid prior indebtedness is, in my opinion, to be regarded as impliedly accepted from the language of Section 5649-3*d* to the effect that,

"All expenditures within the following six months shall be made from and within such appropriations and balances thereof."

This sentence, in my judgment, operates as a limitation upon the powers of the municipality to expend moneys in its treasury, but not upon its power to borrow money and expend the proceeds. The word "expenditure" itself refers, in my opinion, not to the mere withdrawal of the money from the treasury, but to the making of a contract under which money is to be withdrawn from the treasury. Section 3809 having expressly provided that the certificate that the money is in the treasury and not appropriated for any other purpose shall not be necessary in case of contracts like that concerning which you inquire, it follows that the obligation itself is valid and continuous, and that the municipal corporation must discharge the same regardless of statutes like Section 5649-3*d*, which, in this respect, is precisely identical with former statutes applicable to municipal corporations.

In other words, it is my opinion that no "appropriation" is necessary to apply the proceeds of an issue of bonds for the purpose of discharging a valid pre-existing indebtedness of the corporation.

It appears from your statement of facts that the inability of the city to meet this obligation arises from the fact that the limits of taxation now applicable to the city do not permit council at this time to appropriate money for that purpose. Thus the case is brought squarely within that provision of Section 3916, which requires that a municipal corporation find itself unable to pay the debt at maturity. Even if this were not so, said section permits bonds to be issued whenever a debt is due and unpaid and it is deemed by the council to be for the best interests of the municipality so to fund the same.

In short, the situation presents, in my judgment, every essential prerequisite to the exercise of the power of council under Section 3916 and 3917, above quoted.

You ask further as to whether or not an ordinance issuing bonds under these circumstances is within the initiative and referendum law, and accordingly does not become effective until the expiration of the period therein provided for. In my judgment this question is to be answered in the negative. As I construe the intiative and referendum law, so called, it applies to all legislation which has the effect of imposing a new and distinct charge upon the municipality, or creating a new and distinct right as against the municipality. In the case of refunding bonds the debt is already in existence and must be a valid and existing obligation of the city before the bonds can even be issued. The only additional burden to the city created by the issuance of such bonds is that of the interest thereon. Inasmuch, however, as the municipality is already liable upon its contract, and cannot evade meeting the obligations thereof, I am of the opinion that the method which I have already held may be taken to accomplish this result, is not one subject to the approval or disapproval of the electors under the initiative and referendum law.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

117.

PUBLIC OFFICER—INTEREST IN CONTRACTS OF MUNICIPALITY—CIVIL SERVICE COMMISSIONER AS OFFICER AND STOCKHOLDER OF A CORPORATION DEALING WITH MUNICIPALITY.

If a member of the civil service commission of a city, who is the secretary and treasurer of a corporation is also a stockholder in such corporation, he has such a pecuniary interest in the contracts of the corporation as to bring that official within the prohibitions of Section 3808 *and* 12912, *General Code, against the officer of a corporation having interest in the profits, of a contract, job work, etc., which may be negotiated between such corporation and such municipality.*

COLUMBUS, OHIO, February 9, 1912.

HON. GEORGE C. STIENEMAN, *City Solicitor, Sandusky, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 17th, requesting my opinion upon the following question:

> "Can a municipality legally pay a claim for printing legal notices, ordinances, job work, etc., for the city by a corporation whose secretary and treasurer is a member of the municipal civil service commission?

I also acknowledge receipt of your subsequent letter of January 24th, expressing your view of the question and citing certain authorities.

No time need be spent in discussing the proposition that a member of the municipal service commission is an officer of the city.

This being the case, the following sections of the General Code are applicable.

> "Section 3808. No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."
>
> "Section 12912. Whoever, being an officer of a municipal corporation * * * is interested in the profits of a contract, job work or services for such corporation * * * shall be fined, etc. * * *"

The contract thus being made illegal are, in my judgment, to be treated as such for all purposes. It follows, upon familiar principles, that no action can be maintained upon such a contract by either party thereto.

Two questions of law are presented in your query, as follows:

1. Is a contract for public printing one of those to which either or both of these sections, above quoted, apply? The answer to this question must be in the affirmative, it having been held in the case of McCormick vs. Niles, 81 O. S., 246, that the liability of the municipality to pay for such public printing, even, as is required by law to be inserted in a newspaper of general circulation in the corporation, must rest upon an express contract made between an authorized officer of the municipality and the proprietor of the newspaper. If liability must rest upon ex-

press contracts, and if the express contract in question is void for illegality, then there is no obligation whatsoever upon the city to pay for such printing, and such work is no different in this respect from casual or job work.

2. Has the secretary and treasurer of a corporation such an interest in its contracts as is prohibited by either or both of these sections? While the language of these sections is very broad, I am of the opinion that, both being penal in a sense at least, they must be held to apply only to a pecuniary interest, dependent upon the success of the contractor in securing the municipal contract. An employe of a corporation whose conpensation consists of a regular salary in no direct way dependent upon the amount of business which the corporation succeeds in getting, has no such interest as that inhibited by these statutes. Dunlap vs. City, 13 Weekly Notes of Cases, 98, cited with approval by Summers, J., in delivering the opinion of the court in State ex rel. vs. Egry, 79 O. S., 416.

If the person concerning whom you are inquiring is a stockholder of the corporation as well as the secretary and treasurer thereof, a different rule applies. A stockholder has an actual, though minute, interest in every contract of the corporation.

This rule is laid down or recognized in the following cases, among others:

"Commonwealth vs. DeCamp, 177 Pa. State, 112.
"Kennett Elec. Lt. Co., vs. Kennett Square, 4 Pa. Dist. 707.
"Stroud vs. Water Company, 56 N. J. L., 422.
"Foster vs. Cape May, 56 I. D., 78.
"Broken Bow vs. Waterworks Co., 57 Neb., 548."

I am aware of no adjudicated case in this state pertaining to the question as to whether or not a stockholder's interest is sufficient under these statutes. I have been told that a common pleas court has adopted a rule contrary to that which I have above defined. The case is not, however, so far as I am able to ascertain, reported, and for this reason as well as because the question is not fully adjudicated in this state, I cannot do otherwise than follow the rule which has become settled by the weight of authority in other jurisdictions under statutes substantially identical with those under consideration.

For the foregoing reasons, then, and upon the above cited authorities, I am of the opinion that if the secretary and treasurer of a corporation is also a stockholder thereof and such person occupies the position of member of the civil service commission of a city, contracts between the city and such corporation are illegal and void, though such contracts may have been made on behalf of the city by a department of the city government other than the civil service commission.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

124.

POLICE RELIEF FUND—RULES OF TRUSTEES—POWER TO COMPEL CONTRIBUTION— MAINTENANCE BY TAXATION

As the police relief refund is intended by the statutes to be maintained by taxation, though provision is made for voluntary contributions and although power is given to the trustees of such fund to make regulation, nevertheless, a rule by them, to the effect that policemen who refuse to contribute, cannot partake in the fund, is illegal.

COLUMBUS, OHIO, February 7, 1912.

HON. DAVID G. JENKINS, *City Solicitor, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 9, 1912, wherein you inquire as follows:

> "The trustees of the police relief fund of this city desire an opinion as to the legality and enforcibility of the following rule of their by-laws:
>
> "'All members of the police department desiring to participate in the relief fund as herein provided shall pay the following monthly contributions thereto; chief of police, seventy-five (75) cents; captains, sixty-five (65) cents; lieutenants and detectives, sixty (60) cents; patrolmen, clerks, operators, turnkeys, patrol drivers and wagonmen, fifty (50) cents. The moneys derived from said monthly contributions shall be placed in fund Number 1, or what is known as the reserve fund of the police relief fund. These payments shall be due and payable by the members to the secretary of the police relief fund on the fifth (5th) day of each month, commencing with the fifth day of July, 1911. The secretary shall give each member a receipt for the amount so paid in. Members of the police department failing to make and pay the monthly contributions as above specified shall not be members of the police relief fund association, and shall not participate in said fund, nor in the pensions as herein provided for members of said police relief association.'
>
> "The trustees contend that they have power to make and enforce the above rule under Section 4628, General Code, which provides that 'such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of the fund shall be paid and the amount thereof.' They further claim that mere membership in the police department does not entitle one to participate in the pension funds, but that compliance with the rules as laid down by the trustees and of which the above is one, is a prerequisite. Kindly advise me of your ruling thereon as soon as convenient."

In reply to your inquiry would say Section 4616 of the General Code provides for the appointment of trustees of the police relief fund as follows:

> "In any municipal corporation, having a police department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a police relief fund. Thereupon a board of trustees, who shall be known as 'trustees of the police relief fund' shall be created, which in cities shall consist of the director of public safety, and in villages of the marshal,

and five other persons, members of such department. But upon petition of a majority of the members of the police department, such director or marshal may designate a less number than five to be elected trustees."

Section 4621 of the General Code provides that a tax may be levied for maintaining such fund as follows:

"In each municipality availing itself of these provisions, to maintain the police relief fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, may levy a tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property as listed for taxation in the municipality. In the matter of such levy, the board of trustees of the police relief fund shall be subject to the provisions of law controlling the heads of departments in such municipality, and shall discharge all the duties required of such heads of departments."

Section 4625, General Code, provides that the members of the police department may make voluntary contributions to such police relief fund as follows:

"The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the police department, a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries, or in the discretion of such trustees money derived from such monthly deductions shall be used to relieve members of the force who contribute thereto when sick or disabled from the performance of duty, for funeral expenses, relief of their families in case of death or for pensions when honorably retired from the force."

Section 4628, General Code, provides that such trustees shall make all rules and regulations for the distribution of such fund as follows:

"Such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of the fund shall be paid and the amount thereof, but no rules or regulations shall be in force until approved by the director of public safety or the marshal of the municipality, as the case may be."

Under Section 4625 of the General Code, above quoted, the members of the police department may contribute to such police relief fund such an amount each month as is uniform and as voluntarily agreed upon by the members of the department to be deducted from their monthly pay. It is apparent by the provisions contained in Section 4621 of the General Code, above quoted, that the police relief fund is primarily created and maintained by a general tax levied on the real and personal property of the municipality. Under the rule which is proposed to be adopted and enforced by the trustees of the relief fund of your city, if the members of the police department fail to pay the monthly contributions therein specified, then such member shall not participate in the police relief fund created by law.

Under the authority of Section 4628 of the General Code, above quoted, the trustees of the police relief fund can make rules and regulations for the distribution of the fund and also prescribe the qualifications of those to whom the fund shall be paid. However, I am of the opinion that such trustees cannot legally adopt such

rules and regulations as would entirely deprive the members of the police department from sharing in the relief fund for the reason as above stated, that such fund is created and maintained by general taxation upon all the real and personal property of the municipality, availing itself of the provisions to create and maintain a police relief fund.

Therefore it is my conclusion that the trustees of the police relief fund of your city are without legal authority to adopt and enforce the rule above quoted.

Yours truly,

TIMOTHY S. HOGAN,
Attorney General.

125.

OFFICES INCOMPATIBLE—MEMBER OF CIVIL SERVICE COMMISSION AND CLERK OF THE COMMISSION.

Under Section 4478, General Code, providing that civil service commissioners "shall hold no other position in the public service" and also under Section 3808, General Code, providing that "no commissioners of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation," a member of a civil service commission may not act at the same time as its clerk and receive the salary for both positions.

COLUMBUS, OHIO, February 14, 1912.

HON. W. S. JACKSON, *City Solicitor, Lima, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter of January 13, 1912, wherein you state the following facts:

> "The civil service commission of Lima, Ohio, is composed of three members as provided by law.
>
> "The city of Lima provides by ordinance for each commissioner's salary at $50.00 per year. Also, there is provided a clerk and salary for said clerk in the following manner as Section 2 of the ordinance:
>
> " 'That said commission be and it is hereby allowed one clerk, and said clerk shall receive a salary of $100.00 per year, payable quarterly.'
>
> "The small allowance for clerk hire makes it exceeding difficult to find a clerk for the commission. Therefore, one of the members of the commission has signified his willingness to perform the clerk's work, providing that he can receive the compensation allowed for a clerk."

And inquire as follows:

> "Is it legal for a memer of the civil service commission drawing a salary of $50.00 a year to assume the clerkship of same commission and draw the additional compensation allowed for clerk hire of $100.00 per year?"

In reply, to your inquiry, I desire to say that Section 4478, of the General Code, provides for the appointment of a civil service commission composed of three members, as follows, to wit:

"In cities, the president of the board of education of the city school district in which the city is located, the president of the board of trustees of the sinking fund, and the president of the council shall constitute a commission which shall appoint three resident electors of the city to be known as civil service commissioners. They shall be appointed for terms of three years and shall hold office until their successors are appointed and qualified, and may be removed by the appointing commission. The appointing commission shall fill any vacancy caused by removal, by appointment for unexpired terms. The civil service commission first appointed hereunder shall be appointed one for one year, one for two years and one for three years. They shall hold no other positions in the public service, excepting in schools and libraries."

It will be noted that the last clause of the above cited section provides that the *commissioners so appointed shall hold no other position in the public service.* Furthermore, I desire to cite Section 3808, of the General Code, which provides that no officer or commissioner of the corporation shall have any interest in the expenditure of money on the part of the corporation except their fixed compensation as follows, to wit:

"No member of council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such actions, and if in office he shall be dismissed therefrom."

In the statement of facts above quoted you state that the respective commissioners each receive a salary of $50.00 per year, and also that the clerk of said civil service commission is allowed $100 per year as provided by ordinance of the municipality. As I view the matter, if a member of the commission, receiving $50.00 per year for his services as such member were to also act as clerk of the commission at an annual salary of $100.00, it would constitute such an interest on the part of such commissioner in the expenditure of money on the part of the corporation as to disqualify said commissioner from acting as clerk of the commission as provided in Section 3808, General Code, above quoted, and in addition to the foregoing disqualifications said Section 4478, as above quoted, specifically provides that the members of the civil service commission shall hold no other position in the public service. Therefore, in direct answer to your inquiry, I am of the opinion that it is not legal for a member of the civil service commission drawing a salary of $50.00 a year to assume the clerkship of said commission and draw an additional compensation allowed for clerk hire, to wit, the sum of $100.00 per year.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

127.

BOARD OF HEALTH—POWERS OF COUNCIL TO ABOLISH REPEALED —INVALID ORDINANCE ABOLISHING BOARD—EFFECT UPON TERMS OF NEW APPOINTEES.

Where an ordinance intended by a village council to abolish the board of health and place its duties upon the board of public service, under Section 1536-723, *Revised Statutes, the taking effect of which ordinance was suspended by the mayor's veto until after the passage of the General Code and the consequent repeal of said Section* 1536-723, *the ordinance was null and void, and the board of health was not abolished.*

When the former members of the board had resigned, appointment of new members to the board of health by an ordinance mistakenly presumed to effect a re-establishment of the board was a mere filling of vacancies and not an establishment of new offices. The appointees, therefore, serve for the unexpired terms of the members whom they respectively succeeded.

COLUMBUS, OHIO, February 13, 1912.

HON. BEN L. BENNETT, *City Solicitor, East Liverpool, Ohio.*

DEAR SIR:—Under date of January 9, 1912, you ask an opinion of this department upon the following:

> "I desire to submit for the consideration of your department a question concerning the board of health of this city and will appreciate receiving from you your valued advice.
>
> "On March 18, 1910, the city council of this city passed an ordinance abolishing the city board of health and naming the service director as supervisor of said department; on March 28, 1910, this ordinance was vetoed by the mayor; on April 14, 1910, and while said ordinance was inoperative, the entire board of health resigned, said ordinance being inoperative on account of mayor's veto. On April 28, 1910, council reconsidered said ordinance and passed it over the mayor's veto. On July 14, 1910, council re-established the board of health and repealed the ordinance of abolishing same and on the ninth day of August, 1910, the mayor appointed five men to act as such board.
>
> "The question to be determined is, did council have the right on March 18, 1910, to abolish the board of health, as at that time there was but one service director. If they did not have such right, then are not the appointees of the mayor, made on August 9, 1910, merely filling vacancies of the members of said board, who had resigned?
>
> "The question is one of vital importance to the city, upon which I would solicit your advice."

The action of council upon said ordinance was started before the adoption of the General Code, and its action thereon was not completed until after the General Code became effective. The General Code was passed by the general assembly on March 23, 1910, and was approved by the governor on March 29, 1910, upon which latter date it became effective.

The ordinance was passed by council on March 18, 1910; was vetoed by the mayor on March 28, 1910, and on April 28, 1910, it was passed by council over the veto of the mayor. The final act of passage was taken on April 28, 1910, and in

order to be legal, council must have had on said April 28, 1910, the power to abolish the board of health, and to place the director of public service in charge of the department of health of the city.

Section 4404, General Code, provides:

> *"The council of each municipality shall establish a board of health, composed of five members to be appointed* by the mayor and confirmed by council, who shall serve without compensation, and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health, who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

In addition to the above provisions, Section 1536-723, Rev. Stat., contained the following provision after the word quorum:

> "Provided, that whenever the council of any city shall declare by ordinance that it will be for the best interests of said city that the board of service act as a board of health for the city, then upon the passage of said ordinance the board of public service of said city shall be the duly authorized board of health thereof, and shall have all the powers and perform all the duties prescribed by law for boards of health."

No doubt the action of council on March 18, 1910, to abolish the board of health was attempted to be passed by virtue of the foregoing provision. This provision, however, was not carried into the General Code, and said Section 1536-723, Rev. Stat., was specifically repealed by the General Code by Section 13767, subdivision (43).

Section 4234, General Code, provides for the veto power of a mayor of cities as follows:

> "Every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval. The mayor, if he approves it, shall sign and return it forthwith to council. If he does not approve it, he shall within ten days after its passage or adoption return it with his objections to council, or if council is not in session, to the next regular meeting thereof, which objections council shall cause to be entered upon its journal. The mayor may approve or disapprove the whole or any item of an ordinance appropriating money. If he does not return such ordinance or resolution within the time limited by this section, it shall take effect in the same manner as if he had signed it, unless council, by adjournment, prevents its return. When the mayor disapproves an ordinance or resolution, or any part thereof, and returns it to the council with its objections, council may, after ten days, reconsider it, and if such ordinance, resolution or item, upon such reconsideraton is approved by the votes of two-thirds of all the members elected to council, it shall then take effect as if signed by the mayor. The provisions of this section shall apply only in cities."

The veto of the mayor on March 28, 1910, prevented the ordinance from going into effect. All steps had not been taken for its legal passage, if council had power to pass the same, until April 28, 1910, and at that time the General Code was in effect The General Code does not authorize council to abolish a board of health and to place the same in charge of any other officer or board. On April 28, 1910, the power of council to pass such an ordinance had been repealed, and the ordinance was therefore, illegal and null and void. The board of health was not thereby abolished. The action of July 14, 1910, to re-establish the board of health was not necessary as the board of health was still in existence, although there were no members to fill the positions.

In case of State vs. Massillon, 14 Cir. Dec. 249, it is held that the establishment of a board of health is mandatory. Voorhees, J., says on page 253:

> "This law and the establishment of a board of health is a police regulation, and may be so characterized. It is mandatory, and the legislature has imposed this duty, and the council of each city is required to establish such a board."

The terms of office of the members of the board of health is prescribed by Section 4406, General Code, which provides:

> "The term of office of the members of the board shall be five years from the date of appointment, and until their successors are appointed and qualified, except that those first appointed shall be classified as follows: One to serve for five years, one for four years, one for three years, one for two years, and one for one year, and thereafter one shall be appointed each year."

It appears that the entire board of health resigned on April 14, 1910, and on August 9, 1910, the mayor appointed a new board. The appointees should have been appointed to fill the unexpired terms of the members who resigned on April 14, 1910. A question might arise as to who are filling the respective unexpired terms, as they are of different duration. The facts submitted do not permit me to pass upon that question.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

129.

INITIATIVE AND REFERENDUM — ORDINANCE APPROPRIATING MONEY FOR BOARD OF HEALTH EXPENDITURES—NOT AN "EXPENDITURE OF MONEY."

An ordinance of the village council appropriating moneys to pay expenses incurred by the board of health is not such an "expenditure of moneys" as to come within the initiative and referendum act."

COLUMBUS, OHIO, February 8, 1912.

HON. TELLIS T. SHAW, *City Solicitor, Defiance, Ohio.*

DEAR SIR:—On January 3rd you stated that there have been a large number of smallpox cases in the city of Defiance; that the board of health has obligated

itself to the payment of bills of various kinds by reason thereof to the amount of $2,000.00 or more, and that council has appropriated money for the payment of these bills.

You desire our opinion as to whether the ordinance appropriating money for the payment of the above bills is within the initiative and referendum act, 102 Ohio Laws, 521, and, therefore, whether the city auditor should draw warrants for the bills so allowed and the city treasurer pay the same before the expiration of sixty day.

Section 4451, General Code, being a section under the sub-title "Dangerous Communicable Diseases" under the chapter relating to board of health, provides when expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified.

Paragraph 2, of Section 2, of the initiative and referendum act, provides that no ordinance involving the expenditure of money shall become effective in less than sixty days.

In an opinion rendered to the Hon. W. J. Tossell, city solicitor, Norwalk, Ohio, under date of January 18, 1912, I have held that the semi-annual appropriation ordinance passed by city council is not within the provisions of the initiative and referendum act, for the reason that the same cannot be considered to come under the first paragraph of Section 2, of said act, as one of the powers delegated to municipal corporation because it is a duty not a power so delegated. I have further held that it is not an ordinance involving the expenditure of money, as such ordinance does not expend the money itself, but simply makes applicable the fund for the purpose, and further I have held that it is not within Section 3, of said act, for the reasons stated in said opinion.

Under the provisions of the sections of the General Code relating to the board of health, they are given full power to incur such bills as are necessary thereunder, and under the provisions of Section 4451, above quoted, it is made the duty of council to pass the necessary appropriation ordinances to pay the same.

I am, therefore, of the opinion that since such ordinance being similar to the semi-annual appropriation ordinance, is not an ordinance involving the expenditure of money, and that, therefore, it is not within the provisions of the initiative and referendum act.

In your letter of January 3d you ask a further question in reference to the salary ordinance passed by council, and in reply thereto I mailed you on January 5, 1912, a copy of an opinion heretofore rendered to the Hon. H. W. Houston, city solicitor, Urbana, Ohio.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

130.

ELEVATOR IN CITY BUILDING—APPROPRIATION FOR REPAIR FROM WATERWORKS FUND NOT LEGAL—OTHER FUNDS—DIRECTOR OF PUBLIC SERVICE.

When an ordinance has been passed authorizing the director of public service to enter into a contract for the construction of an elevator in the city building which is largely for the accommodation of the waterworks department, council may not appropriate the amount for this purpose from the waterworks funds for the reason that such a purpose is not within Sections 3958 and 3959, General Code, authorizing the uses to which said fund may be applied.

The elevator's use however, by changes in the location of the waterworks department, might readily be directed to other city purposes, and the appropriation made without difficulty from the general fund or some fund for repair of public buildings.

COLUMBUS, OHIO, February 13, 1912.

HON. HOWARD E. MACGREGOR, *City Solicitor, Springfield, Ohio.*

DEAR SIR:—Your favor of January 11th received. You state in your communication that:

> "On the 9th inst., the city council of Springfield passed an ordinance authorizing and directing the director of public service to enter into a contract and to expend a sum not to exceed fifteen hundred dollars $1,500.00), for the purposes of replacing and repairing the elevator in the city hall, for the use and benefit of the waterworks department.
>
> "I enclose a copy of the ordinance herewith, and would be pleased to have you render me an opinion as to the right of council to appropriate money out of the waterworks department for the purpose herein set forth.
>
> "The present elevator, which it is desired to be replaced, has been in operation in the city building for a long period of time, probably twenty years, and is run by hydraulic pressure, and is now unsafe, needing repairing badly. With each ascent of the elevator, enormous quantities of water are used and wasted and is a drain on the waterworks department, and the superintendent of the department has so stated that matter to council and has explained to that body that it is a matter of economy in the use of water, to install a different type of elevator. About nine-tenths of the passengers using the elevator are people who enter the building for the purpose of settling water bills."

You request my opinion as to the right of the city council of Springfield to appropriate money out of the waterworks department for purposes set forth in the ordinance. A copy of such ordinance is as follows:

> "An ordinance authorizing and directing the director of public service to enter into a contract and to expend a sum not to exceed fifteen hundred ($1,500.00) dollars for the purpose of replacing and repairing the elevator in the city hall of Springfield, Ohio, for the use and benefit of the waterworks department of the said city.
>
> "Be it ordained by the council of the city of Springfield, state of Ohio, three-fourths of all members elected thereto concurring:

"Section 1. That the director of public service be and he is hereby authorized to enter into a contract after advertisement according to law in a sum not to exceed fifteen hundred ($1,500.00) dollars, for the purpose of repairing and replacing the elevator in the city hall of Springfield, Ohio, for the use and benefit of the waterworks department of said city, said sum to be expended only upon proper voucher aforesaid and for no other purpose whatever.

"Section 2. This ordinance shall take effect and be in force from and after earliest period allowed by law."

Section 3958, General Code, provides as follows:

"For the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessments therefor are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes."

Section 3959, General Code, provides in part as follows:

"After paying the expenses of conducting and managing the waterworks, any surplus therefrom may be applied to the repairs, enlargement or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt."

The only purposes for which the waterworks funds, collected under authority of said Section 3958, General Code, can be used, are set forth in said Sections 3958 and 3959. They are:

1st. Expenses of conducting and managing the water works.

2nd. For the repairs, enlargement or extension of the works or of the reservoirs; payment of the interest of any loan, etc.

The expenditure of fifteen hundred dollars for the repair of this elevator is not authorized under the second head, because the only repairs that could be made from funds collected under Section 3958 are repairs of the waterworks or reservoirs.

The only question remaining is as to whether, because the elevator sought to be repaired is used by patrons of the waterworks who go to the city hall for the purpose of settling water bills, the expense of repairing such elevator is properly chargeable under the head of "expenses of *conducting and managing the waterworks.*" I am of the opinion that it cannot be done. The city building is used for the general business of the city; no doubt, all the departments of the city government are located there; and the fact that one portion of it is used by the waterworks department cannot, under the most favorable construction, bring the expense of repairing this portion, or maintaining it, under the head of "expenses of conducting and managing the waterworks." The city building is maintained as an entirety for city purposes; the waterworks department is properly located there; and the fact that users of water make use of this elevator in entering the building for settling water bills does not prevent its use by other citizens, entering the building to transact business with other departments. The room now occupied by the waterworks department and the elevator used by patrons in reaching said rooms

may be used, in the future, for some other purpose; there is no reason why the proper authorities cannot change the location of the waterworks department in the city building. So that the repair of this elevator is not properly chargeable to the expense of conducting and managing the waterworks, but to the general fund, or fund appropriated for repairs of city buildings.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

131.

ASSESSMENTS—THREE-FOURTHS PETITION OF PROPERTY HOLDERS—ASSESSMENT OF MORE THAN ONE-THIRD OF VALUE—CONCURRENCE OF THREE-FOURTHS AND MAJORITY OF COUNCIL.

The general rule is that in making assessments for improvement on abutting properties, council shall be limited to one-third of the actual value of the property after the improvement is made. Under Section 3836, *General Code, however, when a petition for an improvement is subscribed by three-fourths in interest of the owners of abutting property, the entire cost may be assessed against the signers of the petition in the manner indicated in the petition. Abutting property holders who did not sign the petition, however, may be assessed only to the extent of one-third of the value after improvement is made.*

Three-fourths of the members of council must concur in passing a resolution providing for such improvement except when a majority of the property holders petition the same, in which case a concurrence of a majority of the council shall suffice.

COLUMBUS, OHIO, January 29, 1912.

HON. JONATHON TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 19th, requesting my opinion upon the following question:

> "Directing your attention to Section 3836, on a three-fourths petition, does it indicate that there is absolutely no limitation on the amount of assessments, or is it limited by the language of Section 3819, which provides that it shall not exceed one-third of the actual value of the property after the improvement is made? Again, Section 3836 seems to provide that on a three-fourths petition, the remaining one-fourth is limited to 33 per cent. of the tax value. Is not this in conflict with Section 3819, as above referred to?
>
> "For the sake of being definite, let me suppose several cases which might reasonably occur in the city:
>
> "1. Council decides to improve on its own initiative without a petition. We all agree, I believe, that in this event under Section 3835 a three-fourths vote of the council is necessary. Now then, is the limitation of assessment under this proceeding 33 per cent. of the tax value, as set forth in Section 3836, or is it one-third of the value of the property after the improvement is made?
>
> "2. An improvement is made on petition of the owners of a

majority of the foot frontage as set forth in Section 3835, thereupon council proceeds with its legislation. Now, again, is the limitation of the 33 per cent. of the tax value, or is it one-third of the tax value after the improvement is made. With reference to the situation last stated, if it is true that Section 3836 applies so as to limit the assessment to 33 per cent. of the tax value because there was not a three-fourths petition filed, then is there any way of assessing the property owners that Section 3819 seems to contemplate? In other words, is not Section 3819 abrogated by Section 3836 insofar as providing for an assessment of one-third of the actual value after the improvement is made?"

The three sections of the General Code to which you refer in your letter are as follows:

"Section 3836. When a petition subscribed by three-fourths in interest of the owners of property abutting upon a street or highway of any description between designated points, in a municipal corporation, is regularly presented to the council *for that purpose, the entire cost of any improvement of* such a street or highway, *without reference to the value of the lands of those who subscribed such petition,* may be assessed and collected in equal annual installments, proportioned to the whole assessment, in a manner to be indicated in the petition, or if not so indicated, then in the manner to be indicated in the petition which may be fixed by the council. * * * When the lot or land of *one who did not subscribe the petition is assessed, such assessment shall not exceed thirty-three per cent. of the tax value of his lot or land* * * *.

"Section 3819. The council shall limit all assessments to the special benefits conferred upon the property assessed, and *in no case* shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, *to exceed thirty-three and one-third per cent. of the actual value thereof after improvement is made* * * *.

"Section 3835. No public improvement, the cost or part of cost of which is to be specially assessed on the owners of property, shall be made without the concurrence of three-fourths of the members elected to council, *unless the owners of a majority of the foot frontage to be assessed,* petition in writing therefor, in which event the council, a majority of the members elected thereto concurring, may proceed with the improvement in the manner herein provided."

The answer to all of the questions which you suggest is supplied by the establishment of a single principle, namely; Section 3836, General Code, provides a special method of assessment, and is to be regarded in all respects as an exception to the general rule defined by Section 3819 and 3835, General Code. These sections were all enacted at the same time as parts of the Municipal Code of 1902, and no one of them is to be regarded as inconsistent with another of them, unless such inference is irresistible.

Former statutes similar to Sections 3819 and 3836, respectively were construed and the inter-relation thereof pointed out in the case of Hays vs. Cincinnati, 62 O. S., 116. From this case, as well as from the language of the two statutes above referred to, it is clear, I think, that the limitation of Section 3819 upon the amount of any assessment or assessments within a period of five years constitutes the general rule binding upon council in all cases, excepting those specifically enumerated in Section 3836. When, however, under Section 3836 a

petition subscribed by three-fourths in interest of the owners of property abutting upon a street or highway is presented to council and the petition itself prays that the entire cost of the improvement may be assessed upon the owners of property abutting thereon, council then may act as to the subscribers of the petition without any regard to limitation whatever. As to those who do not subscribe the petition, however, council is in such cases strictly limited to assessing within thirty-three per cent. of the tax value of each separate lot or tract of land as prescribed in said section. In order, then, to allow council to act under Section 3836, not only must the petition containing the signatures of the owners of three-fourths of the abutting property be presented to council, but the prayer of the petition must be specifically that the entire cost of the improvement may be paid for by special assessment. This proceeding is a special one, constituting the sole exception to the rule of Section 3819, and its procedure must be strictly followed in order to authorize council to assess the entire cost of the improvement upon the owners of abutting property. And when council does proceed to assess the entire cost upon the abutting property, it may not assess all owners alike, but in assessing the owners of property who have not signed the petition must keep within the limitation above referred to.

Section 3835 has no bearing whatever upon the manner of making the assessment. Its effect is limited solely to the vote by which council may order a public improvement involving the assessment of a portion of the costs thereof upon the owners of abutting property. The petition of which it speaks is not the petition referred to in Section 3836, and the procedure of the latter section is an exception to the rule of Section 3835 in precisely the same manner as it constitutes an exception to the rule of Section 3819.

Answering your specific questions, I beg to state there is no limitation whatever upon the amount of an assessment which may be levied by council upon the property of one who signs a petition under Section 3836; that there is no conflict between Sections 3836 and 3819, the former section providing for a separate and distinct procedure from that to which the latter applies; that when council improves on its own initiative without a petition, the limitation of all assessments is one-third of the actual value after the improvement is made, as set forth in Section 3819; that when the owners of a majority of the foot frontage of property upon a street petitioned for an improvement as set forth in Section 3835, council may act by a majority vote but is limited precisely as in the case just supposed, in making its assessment; that is to say, the limitation in such case is one-third of the actual value after the improvement is made; and that finally the only case in which council is limited in its assessing power to one-third of the tax value is that of an owner of property abutting upon a proposed improvement which has been petitioned for under Section 3836 when the owner has not signed the petition.

Very truly yours,

TIMOTHY S. HOGAN.
Attorney General.

139.

INITIATIVE AND REFERENDUM ACT—DESIGNATION OF NEWSPAPERS FOR LEGAL ADVERTISING, NOT WITHIN—COMPLIANCE BY MUNICIPAL CORPORATION WITH MANDATORY LAW—"EXPENDITURE"—DUTIES OF COUNCIL.

Action of the council in designating certain papers to receive the legal advertising of the city for the year is not within the provisions of the initiative and referendum, providing for sixty days suspension and for the right of electors to vote thereon. Such action is an obligatory fulfillment of positive law and not an exercise of a power delegated to a municipality. Neither is it an expenditure of moneys as intended by the aforesaid act.

COLUMBUS, OHIO, February 23, 1912.

HON. STUART R. BOLIN, *City Solicitor, Columbus, Ohio.*

DEAR SIR:—Under date of February 21st you wrote me to the following effect:

> "By recent action of the council of the city of Columbus, three newspapers published in the city, one Republican, one Democrat and a German publication, were designated as the papers to receive the legal advertising of the city for the year 1912 and the city clerk has executed written contracts with each of the several papers covering said period upon the basis of bids theretofore received pursuant to action of the committee on rules, printing and revision of said council."

You then request our opinion as to whether or not such action of council would be within the provisions of the initiative and referendum act 102 Ohio Laws 521.

Section 4227, General Code, provides that ordinances of a general nature or providing for improvements *shall* be published before going into operation.

Section 4228, General Code, requires that such ordinances and resolutions *shall* be published in two newspapers of opposite politics, published and of general circulation in the municipality if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide circulation of not less than one thousand copies.

It will thus be seen that the law makes it the positive duty of council to advertise ordinances of a general nature or providing for improvements, and failure so to do would, of course, invalidate such ordinance or resolution.

Council in the case has attempted to carry out this positive provision of law by designating the newspapers and authorizing the clerk to enter into contracts with such newspapers, a contract therefor being necessary under the decision of Niles vs. McCormick 81 Ohio State 246.

I am of the opinion that said acts of council could not be considered under Section 2 of the initiative and referendum act for the reason that it cannot be considered as the exercising of any power delegated to municipal corporations, as it is an absolute duty of council and not a power which it may or may not exercise in its judgment. Nor do I believe that it is within the term "involving the expenditure of money." While it is true that the action of council in designating the newspapers and authorizing the clerk to make a contract therefor will cause the expenditure of the money in the printing of the ordinances, yet the designation of the newspapers simply directs to whom the money expended for printing ordinances

shall be paid. The statutes governing the actions of council direct the expenditure of the money. It would absolutely block the administration of municipal affairs if the referendum provided for in the act in question were to be construed as including the designation by council of the proper newspapers in which legal advertising should be placed. This may be readily seen by the fact that until the proper newspapers are designated and a contract entered into said papers cannot under the decision of Niles vs. McCormick supra recover for such legal advertising, and the ordinances requiring advertising would not receive such advertising as is required by statute and would consequently, be of no force and effect. If a referendum petition was proper in relation to such act of council the mere filing thereof would prevent council until such action was submitted to the people from passing any ordinance or resolution of a general nature or providing for improvement.

I am, therefore, of the opinion that the words "involving the expenditure of money" is not to be so construed as to include the action of council in designating certain newspapers for legal advertising and authorizing the clerk to enter into contracts with such papers.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

140.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—MUNICIPAL CORPORATIONS—NO NECESSITY FOR APPROPRIATION FOR PURPOSE OF EXPENDITURES OF PROCEEDS OF BOND ISSUE—HUMANE OFFICER—CIVIL SERVICE—APPOINTMENT AND DISMISSAL BY MAYOR AND HUMANE SOCIETY.

Moneys belonging to a municipality, which have been acquired through an issue of bonds, may be expended for their specific purpose even though an appropriation of such funds has not been made for such specific purpose.

A humane officer is not an officer of a municipality but an officer of the humane society and as such is not subject to the regulations of civil service and therefore upon dismissal, is not entitled to a right of appeal to the civil service commission.

The humane officer is appointed by the mayor and humane society jointly, holds subject to the will of both appointing powers and can be dismissed only by the action of both.

COLUMBUS, OHIO, February 15, 1912.

HON. ALBERT S. FENZEL, *City Solicitor, Middletown, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of February 1st, upon the following questions:

> "1. Last year the council of this city passed two bond issues for the purpose of improving existing streets, there is still the larger part of the money from this bond issue in the city treasury; the question being whether or not any provision whatever should be made in the appropriation ordinance, for the first six months of this year, for the disposal of this money receiving from the sale of these bonds?

"2. Has the humane officer the right to appeal to the civil service commission upon dismissal?

"3. After the humane officer has been chosen by the humane society, and the mayor of the city has signed his commission as humane officer, can the mayor recall his signature to the humane officer's commission at any time he declares, thus revoking this officer's commission?"

Section 5649-3*d*, General Code, as amended 102 O. L., 272, provides in part that, at the beginning of each half-yearly period appropriation shall be made from the moneys known to be in the treasury for each of the purposes for which the municipality has to provide; and further, that,

"* * *all expenditures within the following six months shall be made from and within such appropriations and balances thereof. * * *"

In spite of this seeming all-inclusive language, I am of the opinion that the expenditure of moneys raised by the issuance of bonds is not governed thereby. Similar language has been in the Municipal Code ever since its adoption in 1902. Yet the practice has been, I believe, to regard the proceeds of bond issues as not subject thereto. This practice has never been challenged, and in my judgment, it should be regarded as having been in the mind of the general assembly when it enacted Section 5649-3*d*.

Strength is lent to this conclusion by the fact that said Section 5649-3*d* further provides that no appropriation shall be made for any purpose not set forth in the annual budget. Inasmuch as the purpose for which bonds are issued would in scarcely any case be a purpose for which taxes would have to be levied and for which accordingly an estimate would have to be incorporated in the annual budget made up under Section 5649-3*a*, it would seem that this provision is of itself evidence that the legislature did not intend that any part of the section should apply to the proceeds of bonds issued.

For the foregoing reasons, then, I am of the opinion, as to your first question, that proceeds of bond issues need not be appropriated by council in order to be available before expenditure.

Your second and third questions may be considered together, inasmuch as both of them involve the status, as an officer of the city, of the agent of the humane society.

The following sections of the General Code must be considered in connection with these two questions:

"Section 10067. Societies for the prevention of acts of cruelty to animals may be organized in any county, by the association of not less than seven persons. The members thereof, at a meeting called for the purpose, shall elect not less than three of their members directors, who shall continue in office until their successors are duly chosen.

"Section 10070. Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. * * *.

"Section 10071. All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of the

city or village, appointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments.

"Section 10072. Upon the approval of the appointment of such an agent by the mayor of the city or village, the council thereof shall pay monthly to such agent or agents from the general revenue fund of the city or village, such salary as the council deems just and reasonable. * * * The amount of salary to be paid monthly by the council of the village to such agent shall not be less than five dollars, by the council of the city not less than twenty dollars, and by the commissioners of the county not less than twenty-five dollars. * * *"

The status of the humane society agent appointed for a municipal corporation is peculiar. Assuming the validity of the law which is not called into question by your queries, it appears, I think, that this agent is not an officer of the municipal corporation at all, although his compensation is to be paid by the municipality. In the first instance, he is an officer or agent of the society. Clearly he is an appointee of the society and not of the municipality. The power of the mayor, to be exercised in connection with his appointment, is not that of appointment itself, but that of confirmation.

Now, the tenure of office of such an agent is not prescribed by any provision of law. Upon elementary principles, then, such agent holds his office at the pleasure of the appointing authority. (Mechem on Public Officers, Section 445.) Inasmuch as the appointing power consists of both the humane society and mayor, that is, the concurrence of both is necessary to effect an appointment, I am of the opinion that a like concurrence is necessary to effect removal. That is to say, the mayor can, by no act of his, create a vacancy in the position of agent of the humane society, nor, on the other hand, could the humane society itself by any act of the society, create such a vacancy. In short, that a removal under these sections may be complete, the humane society must act in the first instance, and the mayor must either approve the action, or signify his approval thereof by approving the appointment of a successor to the agent.

From what has been said it follows, of course, that the humane officer is not an officer of the municipal corporation. Accordingly no question could arise as to such an officer's being in the civil service. I am accordingly of the opinion, in answer to your first question, that upon proper removal in the manner just described, the humane officer has no appeal to the civil service commission of the city.

I am also of the opinion, for the reasons above stated, that the mayor of the city may not by recalling his signature to the humane officer's commission, or by any other single act, revoke such commission and thus effect the removal of the officer.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

141.

MUNICIPAL CORPORATIONS—ASSESSMENT FOR SEWERS—POWERS OF COUNCIL TO REASSESS AND TO COMPROMISE ILLEGAL ASSESSMENTS—POWER TO ASSESS PROPERTY ALREADY DRAINED —IRREGULARITY IN PROCEEDINGS—ILLEGALITY OF ASSESSMENT FOR BENEFITS.

When premises are supplied with local drainage of a permanent nature which is sufficient for the usual and necessary purposes of sewerage, an assessment for an additional sewer is illegal.

The foot frontage of a lot is an element which may be taken into consideration in assessing for benefit and where such an assessment has been materially effected by reason of the assumption of a foot frontage which is larger than the reality, the assessment would be unjust and illegal.

Reassessments may be made by council upon two grounds only:

First—When the proceedings have been informal or irregular and

Second—When the assessment has been adjudged illegal by a court of competent jurisdiction.

When objections are made to an assessment on the ground of illegality, however, the claim becomes such a disputed one as the corporation has the power to adjust and settle or compromise, which is an incident to the corporation's power of financial control and its powers to sue and be sued.

In this connection, the council should bear in mind that in a compromise settlement, the entire municipality bears the burden of the reduction of the assessment while in reassessment procedure, the burden falls on the remaining directly benefited property holders.

COLUMBUS, OHIO, February 19, 1912.

HON. CARL J. GUGLER, *City Solicitor, Galion, Ohio.*

DEAR SIR:—Under favor of January 31, 1912, you ask an opinion of this department upon the following:

> "In the past few years there have been a large number of sanitary sewer laterals built in this city and they were all built on the benefit plan, and the assessments for same were all made after the work was completed and no objections were filed before the assessments were made in the time required by law. Under this statement of facts I would like to have your opinion on the following propositions:
>
> "First—M. built a private sewer some years ago with the consent of council and at his own expense, later on the city built a sewer, and he helped to pay for this, still later on and at the present time he is being assessed for another sewer, this latter sewer is two feet higher on the inlet on the premises and cannot be used by him. He took this matter up with the former solicitor and was assured right along that he would not be assessed, nevertheless he was assessed, and relying on the statements of the former solicitor he made no protests, the assessing ordinance was confirmed and duly published.
>
> "Query: Is there any manner in which this member can be relieved of this wrong by council without having the assessment set aside by court, and if so, how?
>
> "Second—When right of way was obtained for the city for the main trunk line sewer, the city in a number of instances paid money as

part consideration to right of way and also agreed by the city grantors should have inlets to the trunk line sewer, the city furnished these inlets. The board that secured the right of way promised the grantors that they would not be assessed for the sewer laterals, but this was not contained in a written agreement and the board had no authority so to do, but there is no question but the grantors thought that this was a part of their consideration, nevertheless they were assessed. These grantors are now objecting to the assessments levied against them; first, because being connected with the trunk line sewer they have sufficient sewerage and feel that they should not now be assessed, and secondly, because the board promised them that they would not be assessed for lateral.

"Query: In your opinion, should these parties be relieved of these assessments, and if so, how can it be accomplished?

"Third—In estimating the benefits the boards took into consideration the foot frontage as one of the elements upon which to determine benefits, and in a number of instances they inadvertently took into consideration more foot frontage than the parties had. In one instance they considered the front as 99 feet when the real frontage was only 60 feet.

"Query: Can this error be remedied, and if so, how?"

Each of the three state of facts which you submit call for an answer to practically the same questions of law, to wit, the right of council to remit all or part of a special assessment, which is illegal or exceeds the special benefits? Also the right of council to make a reassessment.

Section 3812, General Code, provides three methods by which special assessment may be levied, as follows:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of an expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, water courses, water mains or laying or water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or water course, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkheads, culverts, approaches, flood gates or waterways or drains incidental thereto, which the council may declare conducive to the public health, convenience or welfare, by any of the following methods:

"First—By a percentage of the tax value of the property assessed.

"Second—*In proportion to the benefits which may result from the improvement, or*

"Third—By the foot front of the property bounding and abutting upon the improvement."

In cases submitted council has made the assessment in accordance with the special benefits derived therefrom.

In your first and second propositions it appears that assessments were made against property which was already supplied with local drainage.

This is covered by Section 3819, General Code, which provides:

> "The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent. of the actual value thereof after improvement is made. Assessments levied for the construction of main sewers shall not exceed the sum that in the opinion of council would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement, *nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith.*"

What shall constitute sufficient local drainage is set forth in the following authorities:

The sixth syllabus in case of Hildebrand vs. City of Toledo, 17 Cir. Dec., 427, reads:

> "Lots are not provided with adequate local drainage, such as will exempt them from paying their share of an assessment levied to pay the cost of a sewer improvement, unless the right exists to dispose of sewage as it is at the time being disposed of, and the right to so continue is one that cannot be interfered with; the present right must include not only the idea of permanency of structure, but also control. Hence, a claim of adequate local drainage, based upon the right to allow sewage to drain into a natural water course running through a municipality, is not sustained, where such drainage will pollute the stream and create a nuisance, and imperil the health of other riparian owners."

The first and second syllabus in case of Ford vs. City of Toledo, 64 Ohio St., 92 reads:

> "Section 2380, of the Revised Statutes, and the exemptions of property from assessments for sewers as therein provided, are applicable where the assessment is levied for the construction of a main sewer in a city of the third grade of the first class.
>
> "The 'local drainage' contemplated by that provision, is that which provides the lot or land with adequate drainage for the necessary and usual purposes of sewerage; and it is not enough to entitle a lot or land to exemption from assessment, that it is provided with sufficient surface drainage, or does not need drainage of that kind."

In order to be exempt from a special assessment for sewers the premises must be supplied with a local drainage of a permanent nature. It must be sufficient to supply the premises with adequate drainage for the usual and necessary purposes of sewerage. If any of the premises that have been assessed are provided with such local drainage they cannot be assessed for an additional sewer. Each case must be determined by its own particular facts.

It appears further in your second proposition that in consideration of securing a right of way, the city granted to the land owners the right to use the sewer. This right of way was secured, no doubt, over private property which had not been dedicated to such public use that it might be used by the city for a sewer line without compensation therefor. Where it is necessary to appropriate or purchase a right of way for a sewer line, an agreement to permit the use of the sewer as a part of the consideration for such right of way would be a valid consideration, if the contract was otherwise legally entered into. You do not state by what board the promise was made that these land owners should not be liable for future assessment for lateral sewers. You do state, however, that it was unauthorized, and if so, it can have no bearing upon the present situation. The people have been granted the use of the sewer by the city, and if the use of such sewer has the effect of providing the premises with sufficient local drainage, as herein defined, such premises cannot be assessed for another sewer.

In your third proposition it appears that in estimating the benefits the assessing board took into consideration the foot frontage of the lots, and in some cases figured on a greater frontage than the lot had. In levying assessments by the foot frontage rule, the frontage of the lot is the controlling factor. In levying by the special benefit rule, the benefits conferred is the controlling factor. However, in ascertaining the benefits the size of the lot would be one of the elements to be considered. It is reasonable to suppose that the benefit of a sewer is greater to a large lot than it is to a small lot. However, this is not the controlling factor and other elements must be taken into consideration. But where all the other elements are substantially the same, the larger lot would be benefited to a greater extent than the smaller lot. In such case, if a mistake has been made in estimating the size of the lot, the assessment levied by reason of such mistake would not be equitable and would subject the premises to a greater or lesser burden than other lots similarly situated would bear. It is the purpose of the law that the burdens and benefits should be borne and received equally.

By applying the foregoing principles to each particular case you should have no difficulty in determining the legality or justness of the particular assessment levied.

The following sections of the General Code provide the method by which the assessments shall be made when levied in accordance with the benefits conferred.

Section 3847, General Code, provides:

> "When it is determined to assess the whole or part of the cost of an improvement in proportion to the benefit which may result therefrom, as provided for herein, the council may appoint three disinterested freeholders of the corporation to report to it the estimated assessment of such cost on the lots and lands to be charged therewith, in proportion as nearly as may be, to the benefits which may result from the improvement to the several lots or parcels of land so assessed, a copy of which assessment shall be filed in the office of the clerk of the corporation for public inspection."

Section 3848, General Code, provides:

> "If any person objects to an assessment, he shall file his objections, in writing, with the clerk, within two weeks after the expiration of such notice, and thereupon the council shall appoint three disinterested freeholders of the corporation to act as an equalizing board."

Section 3849, General Code, provides:

"A concurrence of two-thirds of the members of the council shall be necessary to appoint the equalizing board and to confirm its assessment."

Section 3850, General Code, provides:

"On a day appointed by the council for that purpose, the equalization board, after taking an oath before the proper officers, to honestly and impartially discharge their duties, shall hear and determine all objections to the assessment, and shall equalize it, as they think proper, which equalized assessment they shall report to the council, which may confirm, or set it aside, and cause a new assessment to be made and appoint a new equalizing board possessing the same qualifications which shall proceed in the manner above provided. *When the assessment is confirmed by the council it shall be complete and final, and shall be recorded* in the office of the clerk of council."

You do not state whether or not the requirements of the foregoing statutes have been complied with. It is alleged in a communication to this department by the attorney of some of the parties interested that they have not been complied with in every particular. If this is true, and such omissions are sufficient to cause said assessment to be invalid, by reason of some informality or irregularity in the proceedings, council may act under Section 3902, General Code, and make a reassessment. Until such facts are properly submitted through the city solicitor they will not be passed upon. The provisions of said section will, however, be considered.

Section 3902, General Code, provides:

"When it appears to the council that a special assessment is invalid, by reason of informality or irregularity in the proceedings, or when an assessment is adjudged to be illegal, by a court of competent jurisdiction, the council may order a reassessment, whether the improvement has been made or not."

There are two grounds when a reassessment may be made. First, when the special assessment is invalid, by reason of informality or irregularity in the proceedings, and second, when an assessment is adjudged to be illegal by a court of competent jurisdiction. The second does not apply, as it is your desire to avoid litigation, if possible.

The first power has not been construed by the courts of Ohio, as far as we have been able to find. In several cases, however, assessments have been held illegal without prejudice to the right of council to make a reassessment.

The eighth syllabus in case of Upington vs. Oviatt, 24 Ohio St., 232, reads:

"In a case arising under the statute referred to, when it appears that the assessment placed upon the county duplicate for collection was made upon a wrong basis, by omitting property which ought to have been assessed, the collection of the assessment will be enjoined, but without prejudice to the right of the city to make a reassessment, and collect the same in accordance with the provisions of the statute."

In this case, as in the other cases examined, the assessments were held illegal by a court of competent jurisdiction, and the right of council to make a reassessment was recognized.

The first and third syllabus in case of Dean vs. Charlton, 27 Wis., 522, read:

> "While it is probably too late to question the right of the legislature to authorize municipal corporations to reassess and relevy special taxes void for irregularity in the proceedings, yet such statutes, being in derrogation of individual rights, should be strictly construed.
>
> "The reassessment of the tax in this case would be authorized by Section 1, Ch. 132, Laws of 1868, if the tax had been adjudged void for any irregularity in any of the proceedings in levying it, or for any omission to comply with the forms of the law under which it was assessed; and by Ch. 316, P. & L. Laws of 1869, if it had been adjudged void for want of power in the city to order the work, or 'for a non-compliance with any of the provisions of the city charter in ordering or letting of the work, or making the contracts in relation thereto.' But these statutes strictly construed, do not apply to the tax here in question, which was set aside for a palpable misfeasance—a violation of a plain provision of the law, in fraud of plaintiff's rights and unlawfully increasing his taxes."

The first syllabus in case of Martin vs. City of Oskaloosa, 99 N. W., 557 (Supt. Ct. of Iowa, 1904), reads:

> "Code, Section 836, providing that when by reason of non-conformity to any law or ordinance, or by reason of any omission, informality, or irregularity, any special assessment is invalid, the city council shall have power to correct the same by resolution or ordinance and may reassess and relevy the same, *authorizes the correction of informalities and irregularities in procedure only, and cannot* be resorted to for the purpose of curing defects or covering omissions jurisdictional in character."

The rule of construction as to the power of municipal corporations is set forth by the supreme court.

Wright, J., in case of Bloom vs. Xenia, 32 Ohio St., 461, says at page 465:

> "While, therefore, the policy of our law is to concede power to the legislature and to recognize that which has been done as rightly done, with regard to municipal corporations they must make their power apparent, and show regularity in their acts."

On page 466 he further says:

> "We think, therefore, that it may be said that the policy of our jurisprudence is to require of municipal corporations a strict observance of their powers, and that in the exercise of these powers they should observe the forms the law has directed. All tribunals of special and limited jurisdiction must show the authority under which they act, and act in the manner pointed out."

The first syllabus in case of Ravenna vs. Penna. Co., 45 Ohio St., 118, reads:

> "Municipal corporations, in their public capacity, possess such powers and such only, as are expressly granted by statute, and such as may

be implied as essential to carry into effect those which are expressly granted."

The act of reassessing a special assessment would affect all those whose assessments are changed. The power to reassess carries with it the power to increase as well as to decrease a special assessment. Where a reassessment is made, as in your case, to relieve from an excessive assessment, it would mean the raising of the assessments of others in order to make up the amount that would be reduced. In order to sustain such additional assessment council would have to show the power to make such reassessment and the rule of strict construction would be applied.

The first power granted to council by Section 3902, General Code, is that it shall have the power to make a reassessment when the assessment is invalid, by reason of informality or irregularity in the proceedings. Applying the rule of strict construction, the power thus granted council cannot be exercised in any cases other than those specified, to wit, those which are invalid, by reason of informality or irregularity in the proceedings. The informality or irregularity must be sufficient to make the assessment invalid. If the proceedings have been regular and all formalities of the law have been complied with, council cannot order a reassessment until the assessment has been declared illegal by a court of competent jurisdiction. This rule would apply under the statute, even though council was satisfied that the assessment was illegal upon other ground than that of informality or irreguarity.

The fact that premises had been charged with an assessment for a sewer, when they had sufficient local drainage, would not be due to any informality or irregularity in the proceedings. This would go to the merits of the assessment. It would be due to an error of the assessing board, or by council, or by a mistake of the law. The proceedings may be regular in every respect and still such an error occur. The same is true in the case where a mistake was made in estimating the benefits by taking into consideration a wrong frontage. A reassessment can be made in such case only after the assessment has been held illegal by a court of competent jurisdiction.

However, council has other powers:

Section 4240, General Code, grants to council the management and control of the finances of the corporation as follows:

> "The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

Section 3615, General Code, provides:

> "Each municipal corporation shall be a body politic and corporate, which shall have perpetual succession, may use a common seal, sue and be sued, and acquire property by purchase, gift devise, appropriation, lease or lease with the privilege of purchase, for any municipal purpose authorized by law, and hold, manage and control it and make any and all rules and regulations, by ordinance or resolution, that may be required to carry out fully all the provisions of any conveyance, deed or will, in relation to any gift or bequest, or the provisions of any lease by which it may acquire property."

Section 821, of Dillon on Municipal Corporations, 5th Ed., reads in part as follows:

"Growing out of its authority to create debts and to incur liabilities, a municipal corporation has power to settle disputed claims, against it, and an agreement to pay these is not void for want of consideration."

Section 822, of same, reads in part:

"As a general proposition municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as other indebtedness."

The third and fourth syllabi in case of Agnew vs. Brall, 124 Ill., 312, are as follows:

"A municipal corporation has the power, however, to settle doubtful and disputed claims against it or in its favor. This power results from the capacity and power of suing and being sued, and to prosecute and defend suits.

"A judgment in favor of a city is not to be regarded final so long as the defendant therein has the right of appeal and at any time before the right of appeal expires, the city council may lawfully compromise the case, and settle the claim by the acceptance of a less sum than that of the judgment, and the city will be bound by such settlement."

Justice Craig, on page 315, says:

"But a municipal corporation has power to settle disputed claims against it. (Dillion on Municipal Corporations, Section 398). It may prosecute suits in favor of the corporation and defend actions brought against it. It may sue and be sued, and the right to settle matters in litigation follows logically from the right to maintain or defend actions. This doctrine is well stated in town of Petersburg vs. Moppin, 14 Ill., 195, where it is said 'The power to prosecute suits in behalf of the corporation includes the power to settle the same. So the power to defend suits brought against the corporation, gives them the same power of adjustment. They may compromise doubtful controversies to which the corporation is a party either as plaintiff or defendant.'"

Municipal corporations in Ohio can sue or be sued. This power carries with it the right of the corporation to settle and adjust disputed claims.

By Section 4240, General Code, council has the management of the finances of the corporation. Where payment of a special assessment is resisted or objection is made thereto, it is a claim in favor of the city which is in dispute. The city would have a right to compromise and settle such claim, and the council, having charge of the finances of the corporation, would be the proper body to make such compromise, in such manner as it sees fit and proper.

Where the council may either compromise or make a reassessment, this should be taken into consideration. When a compromise is made the amount of the reduction must be borne by the city at large, while in a reassessment, the amount reduced upon certain premises is charged to other premises.

In conclusion: Where there are informalities or irregularities in the proceedings by reason of which a special assessment is invalid, council may make a reassessment.

In cases where an excessive assessment has been made and the excessive part is illegal and collection thereof may be enjoind by a court of competent jurisdiction, council may release the illegal part of such assessment.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

142.

CIVIL SERVICE—CLASSIFIED SERVICE—NIGHT OPERATOR OF TELEPHONE AND TELEGRAPH POLICE PATROL SYSTEM.

A night operator of the telephone and telegraph signal police patrol system is within the classified service and therefore, subject to civil service rules and regulations and cannot be discharged except as therein provided.

COLUMBUS, OHIO, February 14, 1912.

HON. ROY N. MERRYMAN, *City Solicitor, Steubenville, Ohio.*

DEAR SIR:—Your favor of January 17, 1912, is received, in which you ask an opinion of this department upon the following:

> "The new administration in this city, being desirous of dispensing with the services of the present night operator of the telephone and telegraph signal police patrol system, and he having been placed on the classified list by the local civil service commission, I write to ask your opinion as to whether or not he is rightfully on the classified list. It is true he is under the safety department and under the supervision of the chief of police."

Section 4479, General Code, provides for the classified and unclassified service as follows:

> "The civil service shall be divided into classified and unclassified service. The unclassified service shall include the positions of officers popular election, or whose appointment is subject to confirmation by the council, or who are appointed by any state officer or by any court, employes of the council, persons who by law are to serve without remuneration, persons who are appointed to positions requiring professional or technical skill as may be determined by the civil service commission; persons appointed or employed to give instruction in any educational institution, persons appointed by any board or officers supervising elections; persons who as members of a board or otherwise, have charge of any principal department of the government of any city, the head or chief of any division or principal department relating to engineering, waterworks, street cleaning, or health, the chief of the police department, the chief of the fire department, the superintendent of any workhouse, house of refuge, infirmary, or hospital, the librarian of any public library, private secretaries, deputies in the office of the city auditor and city treasurer, unskilled laborers, and such appointees of the civil service commission as they may by rule determine. The classified service shall comprise offices and places not included in the unclassified service."

The positions and classes of positions enumerated by the foregoing statute are placed in the unclassified service. All others are placed in the classified service and are subject to civil service regulations.

The position of night operator of the telephone and telegraph signal police patrol system, does not come within any of the positions or classes enumerated in said Section 4479, General Code, and is therefore in the classified service.

The occupant of the position is subject to civil service regulations and cannot be discharged, except as provided by said regulations.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

145.

MUNICIPAL CORPORATIONS—POWER OF COUNCIL TO TRANSFER FUNDS—APPLICATION TO COMMON PLEAS COURTS—BUDGET COMMISSION—"RECEIPTS AND BALANCES"—ASSESSMENTS ON STREET OF DIVERSIFIED WIDTHS.

When the budget commission has appropriated for the library of a city, a certain sum for maintenance and it later develops that such fund will not be necessary during the period for which appropriated, the council may not, of its own power, transfer such fund to the safety fund, under Section 3799, General Code, because that section requires as a condition precedent to such power, that the object of the fund to be transferred has been accomplished or abandoned.

Sections 2296, et seq., General Code, afford a remedy, by authorizing council to apply to common pleas court for permission to transfer funds when "there are good reasons, or a necessity exists" and when "no injury will result therefrom."

Such transfer is not precluded by Section 5649-3d, General Code, stipulating against appropriations for purposes, or amounts, not set forth in the annual budget, for the reason that the terms "exclusive of receipts and balances" employed in this section excepts moneys derived from sources other than taxation, or available beforehand, or as in this case transferred from other funds.

When a street is wider in one part than in another part, the improvement may, in the discretion of the council, be subdivided into two sections and the cost of each section assessed against the property abutting thereon, or it may be assessed uniformly upon all abutting property holders.

COLUMBUS, OHIO, February 13, 1912.

HON. ALBERT S. FENZEL, *City Solicitor, Middletown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 29th, requesting my opinion upon the following questions:

> "(1) The budget commission of this county has appropriated for the library of this city the sum of about $2,300.00; as the library building is now in the course of construction, and will not be completed until the first of next July, and as this sum is only applicable to maintenance of the library, we would like to know whether or not the money could be diverted from the library fund into the safety fund at the time council passes the appropriation ordinance for the first half of this year; there is now on hand in the library fund, outside of the $2,300.00, above mentioned, the sum of about $3,100.00, which is sufficient to maintain the library for the last six months of this year.

"(2.) A certain street of this city has been paved, and we are having some difficulty in making assessments, owing to the fact that half of this street is very narrow and the other half very wide; the question being whether, as the ordinance of necessity makes provision for front foot, the abutting property owners on the narrow part of the street must pay in the same proportion as those owning on the wider part of the street."

The object sought to be obtained by the council of Middletown, as described in your first question, could only be achieved through a transfer of the funds. The power of council to transfer funds is defined in Section 3799, General Code, which provides as follows:

"By the votes of three-fourths of all the members elected thereto, and the approval of the mayor, the council may at any time transfer all or a portion of one fund or a balance remaining therein, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, nor until the object of the fund from which the transfer is to be effected has been accomplished or abandoned."

It is to be observed that the power herein created does not exist unless the object of the fund from which the transfer is to be effected has been accomplished and abandoned. This does not seem to be the case with respect to the library fund described in your question. It is my opinion, therefore, that council may not by a three-fourths vote and with the approval of the mayor make the transfer desired.

I call your attention, however, to the provisions of Sections 2296, et seq., General Code, which authorize council by application to the common pleas court to transfer public funds under their supervision from one fund to another. Here the only requirement is: "There are good reasons, or that a necessity exists for the transfer, and that no injury will result therefrom." (Section 2300, General Code.)

It is my opinion, therefor, that this method of transfer is available in the case presented by you.

A further question arises as to whether or not, under Section 5649-3*d*, the sum thus transferred may be made available for appropriation to the safety department. That section, as enacted 101 O. L., 272, provides in part, that

"No appropriation shall be made for any purpose not set forth in the annual budget or for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of the receipts and balances. * * *"

In an opinion to the bureau of inspection and supervision of public offices, I have held that the phrase, "exclusive of the receipts and balances," modifies the last preceding phrase of the clause above quoted. From this I have concluded that the amount fixed by the budget commissioners is a limitation upon the power of council to appropriate only as to the proceeds of taxation for the specific fund. That is to say, that the budget commission has determined that a certain sum shall be allowed for a certain fund, and levied upon the duplicate for that purpose, council may not appropriate from the avails of taxation more for this specific purpose than the sum so fixed, but that moneys in the treasury to the credit of the fund produced from sources other than taxation, or consisting of balances in the fund at the time the proceeds of taxation became available, may be appropriated for any

purpose set forth in the budget regardless of the amount fixed by the budget commissioners. In my opinion funds made available for expenditure by transfer from other funds not needed are to be treated as "receipts and balances" within the meaning of Section 5649-3*d*.

I am, therefore, of the opinion that when the transfer of funds has been made by the order of court, as above suggested, the amount thus transerred to the safety fund may be appropriated to the uses and purposes of that department.

Answering your second question, I beg to state that where a street to be improved is not of the same uniform width throughout, the council may subdivide the improvement into sections, without necessarily providing for as many separate improvements as there are sections, and assess the cost of each section upon the property abutting thereon.

Finley vs. Frey, 51 O. S., 390.

This method of assessment is optional with council and not compulsory, and if council assesses all lots abutting upon the improvement uniformly for the cost of the entire improvement, the assesment will be valid.

Smith vs. Cininnati, 6 N. P., 175.

It will thus be seen that council is vested with discretion to determine the most just and equitable method of adjustment in cases like that described in your second question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

154.

BOARD OF EDUCATION—SEMI-ANNUAL APPROPRIATIONS— LIMITATION TO MONEY IN TREASURY—SMITH ONE PER CENT. LAW.

Section 5649-3d provides that appropriations shall be made "from the moneys known to be in the treasury" and omits the former language of the code "or estimated to come into it during the six months next ensuing." The latter verbiage may not be reread into the statutes and the board of education must be governed accordingly.

COLUMBUS, OHIO, February 13, 1912.

HON. THOMAS J. SUMMERS, *City Solicitor, Marietta, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 31st, requesting my opinion upon a question submitted to you by the board of education of the Marietta city school district. The question is as follows:

> "May the board of education, in making its semi-annual appropriation under Section 5649-3*d*, General Code, as enacted 102 O. L., 272, anticipate the proceeds of tax collections not then in the treasury but coming into it during the six months, the appropriation being for the purpose of erecting a new school building?"

I have, in several opinions, construed Section 5649--3*d*. You will observe that the section provides that appropriations shall be made, "from the moneys

known to be in the treasury," and that it omits the language found in Section 3797, General Code, "or estimated to come into it during six months next ensuing, etc."

Upon familiar principles, this language omitted cannot be read into the new section. In my opinion the provisions of Section 5649-3*d* apply to all expenditures from revenues raised by taxation. The only implied exception to its provisions, of which I am able to conceive, is that of the expenditure of the proceeds of a bond issue. I am accordingly of the opinion that an appropriaation may not lawfully be made under Section 5649-3*d* of moneys estimated to come into the treasury during the six-months period, and that this rule applies as well to appropriations for the erection of buildings as to other objects for which appropriations must be made.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

159.

INITIATIVE AND REFERENDUM ACT—SEMI-ANNUAL APPROPRIATION ORDINANCE NOT AN EXPENDITURE—"EMERGENCY MEASURE"—ORDINANCE FIXING SALARY OF POLICE INVOLVES "EXPENDITURE"—READING ORDINANCE THREE DAYS AT ADJOURNED MEETINGS.

Section 4224, General Code, requiring ordinances to be read on three different days, is satisfied if read on different days in the course of a single meeting adjourned from day to day.

The semi-annual appropriation ordinance does not involve an "expenditure" within the meaning of the initiative and referendum act and is therefore not subject to its provisions.

In order to constitute an ordinance an emergency measure, a statement of the fact that it is so intended must be incorporated in the ordinance itself for the reason that council speaks only by record and cannot therefore, "declare" as provided by statute except by ordinance.

Council cannot declare an ordinance to be an emergency measure which, under the definition of emergency could not be considered such.

An ordinance reorganizing the police force, specifying the number, rank, salary and bond of its members involves an "expenditure" and is subject to the initiative and referendum act.

COLUMBUS, OHIO, February 15, 1912.

HON. H. STANLEY MCCALL, *City Solicitor, Portsmouth, Ohio.*

DEAR SIR:—Under date of January 5th you submitted for my opinion several questions which I shall take up seriatim:

You first state:

> "The General Code prescribes that municipal ordinances shall be read three times on separate days. Council held its initial meeting here January 3rd, and an ordinance was read for the first time. The meeting was adjourned to meet the following day, January 4th, which meeting being had, the said ordinance was supposed to be given its second reading then. Was or was not the reading at the adjourned meeting a second reading on a separate day within the meaning of the code?"

Section 4224, General Code, in part provides:

> "No by-law, ordinance or resolution of a general or permanent nature or granting a franchise, or creating a right, or involving the expenditure of money, or the levying of a tax, or for the puchase, lease, sale or transfer of property, shall be passed, unless it has been fully and distinctly read on *three different days,* and with respect to any by-law, ordinance or resolution, there shall be no authority to dispense with this rule, except by a three-fourths vote of all members elected thereto, taken by yeas and nays on each by-law, resolution or ordinance and entered on the journal."

The question submitted by you is as to the meaning of "three different days." While it is true that an adjourned meeting of a council is but a continuation of the meeting from which it is adjourned, yet as I construe the words "three different days" they refer to the ordinary meaning of days and does not mean three regular meetings of council as provided for in Section 4239 which provides:

> "The council shall not be required to hold more than one regular meeting in each week, and the meetings may be held at such time and place as is prescribed by ordinance, and shall, at all times, be open to the public."

I am confirmed in this view by the case of Cutcomp vs. Utt, Mayor, 60 Iowa, 156, the first syllabus of which is as follows:

> "1. Cities and towns; passage of ordinances; reading at adjourned meetings. At a meeting of the council of a city, an ordinance was offered and passed to its first reading by a majority. The council then adjourned till the next day, when the ordinance was passed by a majority to its second reading. The council then adjourned to the next day but one, when the ordinance was read a third time, and passed by a majority. HELD, that the ordinance was not void because the second and third readings were at adjourned meetings, and that it was read on "three different days" as contemplated by Section 489 of the code."

The court on page 157 says as follows:

> "It is contended that the new ordinance is void, because the adjourned meetings of the council at which it was read a second and third time and passed, without there being at any time a majority vote of three-fourths of the council, was illegal, and that the adjourned meetings were nothing but a continuation of the regular meeting, and authorities are cited which appear to hold that an adjourned meeting of the trustees or council of a municipal corporation is but a continuation of the regular meeting from which it was adjourned. But the question under consideration cannot be affected by adjudged cases, because it must be determined by our statute. Section 489 of the Code provides that ordinances shall be read on three different days, unless three-fourths of the council shall dispense with the rule. This is just what was done by the council in passing upon this ordinance. The idea that 'three different days' means three general meetings of the council finds no support in the statute."

I am, therefore of the opinion that the reading of the ordinance referred to by you in your question at the adjourned meeting was a second reading on a separate day within the meaning of the code.

Second. You next ask whether the semi-annual appropriation ordinance is within the initiative and referendum act 102 Ohio Laws 521.

In answer thereto I beg to state that in an opinion rendered to Hon. W. J. Tossell, city solicitor, Norwalk, Ohio, under date of January 18, 1912, I advised him as follows:

> "You next inquire:
>
> "'May not the semi-annual appropriation ordinance be declared and passed as an emergency measure?'
>
> "I have heretofore held in an opinion to Hon. C. C. Middelswart, solicitor for the village of Matamoras, Marietta, Ohio, under date of November 3, 1911, that such an ordinance is not one involving the expenditure of money as contemplated in the initiative and referendum act since although such an ordinance divides the money in the general treasury into various funds and sets them apart for the various departments of the municipal government, yet it does not of itself expend the money. Therefore, it is not within the second paragraph of Section 2 of the initiative and referendum act as found in 102 Ohio Laws 522, nor do I believe that it is within the first paragraph of such section for the reason that it cannot be considered as within the wording 'any other power delegated * * * by the general assembly.' My reason for coming to this conclusion is that Section 3797 of the General Code which provides for semi-annual appropriations states that council shall make appropriations for each of the several objects for which the corporation has to provide. In other words, it seems to me that it is a duty devolving upon council rather than a power given it.
>
> "Section 3 of the initiative and referendum act provides:
>
> "'All other acts of *city* council not included among those specified in Section 2 of this act, shall also remain inoperative for sixty days after passage and may be submitted to popular vote in the manner herein provided, except that any act, not included within those specified in Section 2 of this act, as remaining inoperative for sixty days, and which is declared to be an emergency measure, and receiving a three-fourths majority in council of such municipal corporation may go into effect immediately and remain in effect until repealed by city council or by direct vote of the people as herein provided'
>
> "Having stated my opinion to be that the semi-annual appropriation ordinance is not within the provisions of Section 2 of the initiative and referendum act it becomes necessary to consider whether it was within Section 3 as above set forth.
>
> "I am inclined to the view that it is not for the reason that if it were considered as an act of a city council not included among those specified in Section 2 it would remain inoperative for sixty days after the passage of such ordinance unless it were declared to be an emergency measure. If it were declared to be an emergency measure it would go into effect immediately and remain in effect until repealed by the city council or direct vote of the people. Being an ordinance in full force and effect the repealing of such ordinance would have to be proposed to the city council by thirty per cent. of the qualified voters and submitted to the council for its action at its next meeting, and if within sixty days

after such submission such proposed ordinance, repealing the semi-annual appropriation ordinance, was not passed it would be the duty of the clerk to certify said proposed ordinance to the officer having control of elections who shall cause the question of the passage of such ordinance to be submitted to vote at the next regular election, which if the vote be favorable shall become a valid ordinance from the date of the determination of the vote. This would continue the semi-annual appropriation ordinance in effect during the entire life of such ordinance, and, therefore, it would seem to me such ordinance could not be considered as within the third section of the initiative and referendum act."

You next desire an opinion as to whether it is necessary to incorporate in an ordinance itself a statement that it is an emergency measure.

Section 3 of the initiative and referendum act states that:

"Any act not included within those specified in Section two of this act as remaining inoperative for sixty days and which is *declared* to be an emergency measure and receiving a three-fourths majority in council of such municipal corporation may go into effect immediately."

The provisions that the ordinance must be declared to be an emergency measure would require, as I view it, a statement in the ordinance itself that it is an emergency measure as I know of no way in which council could *declare* such ordinance to be an emergency measure without a statement in such ordinance that it is an emergency measure since council must speak by its records.

You next inquire whether a passage by a three-fourths vote in the absence of any declaration of its being an emergency measure would be in compliance with Section 3.

Since I have given it as my opinion above that in order to constitute an emergency measure it is necessary that the same be declared in the ordinance as such emergency measure the mere passage of such an ordinance by a three-fourths vote of council would not be in compliance with Section 3 constituting such an ordinance an emergency measure.

You then inquire as to the meaning of an emergency measure. In this regard I herewith quote from an opinion which I have heretofore rendered to the Hon. N. M. Greenberger, city solicitor, Akron, Ohio, under date of October 27, 1911, and which is as follows:

"While it is true that Section 3 of the initiative and referendum act foregoing set forth declares that certain acts may take effect immediately, provided they be declared by council to be an 'emergency measure,' yet I do not believe that council can declare an act to be an emergency measure which could not be considered under the definition of 'emergency' to be such. In other words, I do not believe that council by mere declaration that a measure is an emergency measure can so constitute it if the definition of 'emergency' did not apply to such measure.

"'Emergency' is defined by the Century dictionary as follows:

"A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances.'

"Again, 'A sudden or unexpected occasion for action; exigency; pressing necessity.'

"Again, 'Something not calculated upon; an unexpected gain.'

"'Emergency' is defined by Webster to be:

"'A condition of things happening suddenly or unexpectedly; an unforeseen occurrence; a sudden occasion.'

"Again, 'Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency.'

"The facts stated in your letter do not give rise, as I view it, to any emergency, and, consequently, an ordinance thereunder could not be considered as an emergency measure."

Finally, you submit the following:

"Would an ordinance reorganizing the police force, specifying the number, rank, salary and bond of its members (if no compliance with Section 3) be inoperative for sixty days after its passage and would it come under Section 2 or 3 of the above-mentioned act?"

In an opinion heretofore rendered to Hon. John T. Blake, city solicitor, Canton, Ohio, under date of December 22, 1911, I have given it as my opinion that an ordinance increasing the number of regular patrolmen of the city as the employment of such patrolmen necessarily involved the payment for their services, such ordinance is to be considered as an ordinance involving the expenditure of money, and, therefore, will not become effective in less than sixty days after its passage.

As the ordinance reorganizing the police force specifying the number, rank, *salary* and bond of its members would undoubtedly involve the expenditure of money in payment for their services, I am of the opinion that such ordinance is within the second paragraph of Section 2 of the initiative and referendum act and, would therefore not become effective in less than sixty days after its passage.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

165.

SMITH ONE PER CENT. LAW—APPROPRIATION FOR INCREASED CLERK'S SALARY FROM GENERAL FUND, EXCEEDING ESTIMATE MADE BY BUDGET COMMISSION—"RECEIPTS AND BALANCES."

When the council has legally increased the salary of the clerk from two hundred to three hundred dollars after the budget commission had made an allowance for the purpose of only two hundred dollars, the council may in an appropriation ordinance for the next period, provide funds for the increase out of excess moneys in the general fund providing the estimates for other purposes is not thereby affected.

Section 5649-3*d limiting appropriations to the purpose set forth in the annual budget and to the amounts fixed by the budget commission relates to moneys raised by taxation only, and expressly excludes moneys designated as "receipts and balances" such as those of the general fund derived for the transfer of balances left in other funds at the close of the preceding fiscal years.*

COLUMBUS, OHIO, February 26, 1912.

HON. J. J. BROWN, *City Solicitor, Alliance, Ohio.*

DEAR SIR:—Your favor of December 19, 1911, is received, in which you ask an opinion of this department upon the following:

"I herewith submit for your valuable opinion the following proposition: Section 5649-3*d*, as set forth in 102 Ohio Laws, page 272, among others, contains the following: 'but no appropriation shall be made for any purpose not set forth in the annual budget, nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances.'

"The clerk of council in this city has been receiving an annual salary of $200.00. At a recent meeting, our council increased this salary to $300.00 per year. It appears that the annual budget as prepared for the year 1912, contains an appropriation only in the amount of $200.00 to pay the salary of the clerk of council for the year 1912.

"Query: Will the application of that part of said section above quoted, prevent the clerk of council's receiving the benefit of such increase in salary for year 1912, if the council shall, in the appropriation ordinance to be passed in January, 1912, provide funds for said increase from balances in the general fund at the end of year 1911?"

Section 5649-3*d*, General Code, 102 Ohio Laws 272, provides:

"At the beginning of each fiscal half-year the various boards mentioned in Section 5649-3*d* of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, *but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances.*"

This department has recently passed upon the meaning of the clause in the above section now under consideration. This section is part of the Smith one per cent. tax law. The budget commission provided for in said law have nothing to do with the revenues of a city, which come to it from other sources than that of taxation. The balances in the treasury of the several funds and the other receipts are submitted to the budget commission in order that they may determine the amount to be raised for such city by taxation.

If the levies necessary to meet the various annual budgets submitted by the taxing authorities in a particular taxing district, including the levy of the state, does not exceed the limitations provided in the Smith tax law, the budget commission cannot change any of the items in the annual budgets. It is only when the amount to be raised by taxation, or the levies therefor, exceed the limitations of the Smith tax law, that the budget commission has any right to make changes in the annual budgets. The power of the budget commission is limited to the amount of money to be raised by taxation, and the levies therefor. The city has other revenues besides those raised by taxation.

The amount fixed by the budget commission is the amount which is to be raised by taxation. The limitations, then, in Section 5649-3*d* that no appropriation shall be made for a greater amount for such purpose than the total amount fixed by the budget commissioners, applies only to the amount of money to be raised by taxation. That is, that no appropriation from the money raised by taxation shall be greater than the total amount fixed by the budget commission for any certain purpose.

The words "receipts and balances" at the end of said section refer to the receipts other than those received from taxation and to the balances which may remain in a fund at the end of any half fiscal year.

The effect of the words "exclusive of receipts and balances" is that an appropriation for a certain purpose may be greater than the total amount fixed by the budget commission for such purpose, provided the excess is appropriated from the receipts from sources other than taxation and from the balances in the funds from which such appropriation is made.

The question arises: Can the increase in the salary of an officer of a municipal corporation, be provided for by an appropriation from the balance in the general fund at the end of the fiscal year.

In your case the annual budget contained an estimate of $200.00 for the salary of the clerk of council for 1912. Since the making of the annual budget council has increased the salary of the clerk to $300.00. Can this increase for the year 1912 be provided for from the balance in the general fund at the end of the fiscal year of 1911?

At the end of the fiscal year all balances revert to the general fund in accordance with Section 5649-3*e*, General Code, 102 Ohio Laws 272, which provides:

> "Unexpended appropriations or balances of appropriations remaining over at the end of the year, and the balances remaining over at any time after a fixed charge shall have been terminated by reason of the object of the appropriation having been satisfied or abandoned, *shall revert to the general fund, and shall then be subject to other authorized uses,* as such board or officers may determine."

Section 3802, General Code, provides:

> "When a cash balance exists at the end of such fiscal year, in a fund, other than a fund created for a public improvement, and for any reason such cash balance can no longer be lawfully used for the purpose for which it was created, *the auditor or other accounting officer thereof shall transfer such balance to the general fund of the corporation.*"

Section 3803, General Code, provides:

> "When money so authorized to be transferred to the general fund of a municipal corporation has been so transferred, *it shall be available for the general purposes of the corporation, as other moneys in the general fund.*"

In making up the annual budget, itemized estimates are required by Section 3790, General Code, which provides:

> "To enable the mayor to make up his annual budget, each director or board and each officer, provided for in this title, on or before the last Monday in March of each year, shall make and file with the mayor, and also with the auditor, a *carefully prepared and itemized estimate of the amount of money needed in such* department or office for all purposes for the ensuing fiscal year, such estimate to be given for each month."

Section 5649-3*a*, General Code, 102 Ohio Laws 270, provides:

> "On or before the first Monday in June, each year, the county commissioners of each county, the council of each municipal corporation, the trustees of each township, each board of education and all

other boards or officers authorized by law to levy taxes, within the county, except taxes for state purposes, shall submit or cause to be submitted to the county auditor an annual budget, *setting forth in itemized form an estimate stating the amount of money needed* for their wants for the incoming year and for each month thereof. Such annual budgets shall specifically *set forth.*

The fourth and fifth syllabi in case of Ampt vs. Cincinnati, 8 Ohio Dec., 475, read:

"The appropriations above referred to must be detailed, specific and explicit for the several objects for which the city has provided, apportioned to each month; and in every case in which it is practicable must classify and subdivide the expenditures for any particular object; and if such classification and subdivision are not observed in the appropriating ordinance the same will be null and void.

"Where the estimate as to any particular object has been agreed upon by the officers and boards whose duty it is to make such estimate, the amount of such expenditure cannot be increased by means of the appropriating ordinance; *and an attempt to expend an amount above the estimate is illegal.*"

In case of Stem vs. Cincinnati, 9 Ohio Dec. 45, the third syllabus reads:

"The estimates required by Sections 2690*a* to 2690*q*, Rev. Stat., relating to municipal funds and expenditures, and the appropriations therein provided for, are mandatory so far as any municipal expenditure is concerned. Whether the failure to observe them would affect the the validity of a tax levy. Quaere?"

The syllabi in case of State vs. Lewis, 8 Ohio Dec. 575, are as follows:

"The provisions of Section 1005, Rev. Stat. requiring the county auditor to furnish the commissioners a detailed estimate of money needed for county purposes, and Section 1007, Rev. Stat. providing that the county commissioners shall make detailed and specific appropriations for the several objects for which the county has to provide, are mandatory and the failure of such officers to comply with the provisions of the aforesaid sections invalidates their acts, and an expenditure intended to be made in the absence of such compliance will be enjoined.

"The auditor is not relieved by the fact that the salaries of officers are absolutely fixed by law, from including the same in his estimates, nor are the commissioners thereby relieved from making detailed and specific appropriations. Such estimates and appropriations are necessary for the purposes of advising the public and inviting criticism."

The foregoing decisions construe statutes similar to those under consideration. By virtue of these decisions, the requirement of the statutes that estimates shall be made is mandatory. But in your case there was an estimate and the question now is can council appropriate an amount greater than the estimate for this purpose?

In the case of Ampt vs. Cincinnati, 8 Ohio Dec. 475, supra, it is specifically held that no expenditure can be made above the estimate. The statute under con-

sideration in that case contained a provision which is not found in the present statutes, and which will distinguish that case from the present situation.

On page 481, the court says:

> "* * *the comptroller, board of legislation and the board of supervisors each in turn then revises such estimates, and if deemed proper reduces them 'so as to prevent unnecessary expenditure and to bring them within fair limits to the other expenditures required by the city.' Sec. 2690-9 Rev. Stat."

The provision in Section 5649-3*d*, supra, that "no appropriation shall be made for any purpose not set forth in the annual budget," does not prevent council from increasing an appropriation for such purpose above that provided by the estimate in the annual budget for such purpose. Nor do I find any provision of statute which specifically limits the power of council to make an appropriation greater than that provided in the annual budget, provided there is money in the treasury to meet such increase not otherwise appropriated or needed to meet the other estimates of the annual budget.

Council has a right to increase salaries. They may make such increase at any time before the officers whose salary is changed takes the office. The annual budget for the coming year is to be submitted to the county auditor on or before the first Monday in June. From this time until the new officers take their seats in January, council may increase the salary of such officers. This right has not been taken away or limited by statute.

At the end of the fiscal year all balances of appropriations revert to the general fund, and by virtue of Section 5649-3*e* it shall then be subject to other authorized uses. Section 3803 provides that when money is transferred to the general fund as provided in Section 3802, "it shall be available for the general purposes of the corporation, as other money in the general fund."

In case of Higgins vs. City of San Diego, 131 Cal. 294, the tenth syllabus reads:

> "The payment of the legal salary of a city justice out of the general fund, instead out of the salary fund, is not an illegal payment which can be complained of by a water company in an action for the reasonable value of water used by the city."

In case of Burlington, etc., Railroad Co., vs. Board of County Commissioners, 12 Neb., 324, Labech, J., says on page 327:

> "The 'general fund' of a county as its name implies is one devoted to a variety of uses, and its expenditure is left mainly to the discretion of the board of county commissioners."

Barnes, C., says on page 645, in case of Kelly vs. Broadwell, 92 N. W., 643, as follows:

> "* * * It was proper for the city to provide a miscellaneous fund to be called a 'general fund' for the payment of claims which would arise and for which it was impossible to estimate the exact amount which would be required."

The general fund of a corporation, as defined in the foregoing decisions, is a fund used for general and miscellaneous purposes of the corporation.

Section 5649-3*e*, the latest enactment of the legislature, says that the balances reverting to the general fund "shall be subject to other authorized uses." It is my opinion that an increase in salary would be an authorized use, which can be appropriated from the balance in the general fund at the end of the fiscal year. This appropriation, however cannot be made at the expense of lessening the other estimates provided in the annual budget.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

181.

OFFICES INCOMPATIBLE—COUNCILMAN AND HIGH SCHOOL PRINCIPAL OR HIGH SCHOOL JANITOR.

A councilman by express provisions of statute may hold no other public office or employment, except that of notary public or member of the state militia, and therefore neither a principal of a high school nor a janitor in a public school building may hold the office of councilman.

COLUMBUS, OHIO, March 8, 1912.

HON. CARL ARMSTRONG, *City Solicitor, Steubenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 10, 1912, wherein you submit the following statement of facts and inquiry:

> "H. B. Galbraith, an elector of Mingo Junction, Ohio, is and has been for four years, principal of the high school of Mingo Junction, Ohio, which village is part of a special school district; W. B. Lisle also an elector of said village is employed by the board of education of said special school district as janitor or superintendent of the building in which the high school is located. Both Galbraith and Lisle were, on November 7, 1911, regularly elected members of the village council of Mingo Junction, Ohio, and took their seats as such councilmen in January, 1912,
>
> "Your opinion is desired by them as to their eligibility as such members of council."

In reply thereto I desire to cite Section 4218, General Code, which provides as follows:

> "Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. *No member of council shall hold any other public office or employment,* except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office."

Said Section 4218 applies to villages. Section 4207, General Code, which applies only to cities provides as follows:

> "Councilmen at large shall have resided in their respective cities, and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

Both statutes provide the qualifications of members of council in both villages and cities respectively and their provisions are exactly alike, at least insofar as they provide that each member of council shall be an elector of the respective municipality and shall not hold any other public office or employment except that of notary public or member of the state militia, etc.

In the case of State vs. Gard, 19 Circuit Decisions 426 (29 C. C. 426) which you cite in your inquiry, the court in the syllabus of said case holds as follows:

> "The election to the office of councilman of a person who holds the office of county school examiner and is also a teacher in the schools of the city contravenes the provisions of Sec. 120 of the Municipal Code (Rev. Stat. 1536-613; Lan. 3098) and is therefore a nullity."

In this case the court construed Section 4207, General Code, above cited and which applies to cities, but inasmuch as the provisions of said section are exactly similar to the provisions of Section 4218 of the General Code the principles enunciated by the court apply alike to both villages and cities and would therefore apply to the village of Mingo Junction. In the opinion the court speaking, *obiter dictum*, refers to the superintendent of schools as holding a position of public employment. The court further says that,

> "We are of the opinion that inhibition against persons holding public office or employment is not limited to office in or employment by the municipality, but extends to all public office and employment. This is evidenced by the exception of notaries public and members of the militia."

If the position of superintendent of public schools is a position of public employment then it necessarily follows by analogy that the position of principal of public schools is a position of public employment, and likewise the position of janitor.

Therefore, it is my opinion that the parties, to wit, H. B. Galbraith, as principal of the Mingo Junction high school and W. B. Lisle as janitor of the high school building are both holding positions of public employment, and they are, therefore, ineligible as members of the council in and for the village of Mingo Junction.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

188.

BANKS AND BANKING—DEPOSITORY FOR MUNICIPAL CORPORATIONS—STOCKHOLDERS ACCEPTABLE AS SURETIES OF BANK.

An incorporated bank is a separate entity from its stockholders and the latter may be accepted as a surety for such bank, when selected as a depository for municipal funds.

COLUMBUS, OHIO, March 6, 1912.

HON. J. D. T. BOLD, *City Solicitor, Canal Dover, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 28, 1912, in which you request my opinion upon the following question:

> "Eight men own all, or nearly all, the stock in a bank incorporated and existing under the laws of this state, with a capital stock of $50,000.00 all paid in. This city advertises for bids for the highest rate of interest for the deposit of the 'public moneys' of the city. When the bids are opened, it is found that the said bank has offered the highest rate of interest and is accordingly awarded the contract, etc., etc. The bank offers a bond as security for said 'public moneys' signed by the aforesaid 'eight men' and all of whom are jointly reputed to be worth more than the amount of the bond they offer.
>
> "What I would like to know is: Would that be a strictly legal bond, eight or any other number of men becoming their own bondsmen, as it were?"

The deposit of moneys belonging to municipalities is provided for by Section 4294, etc., General Code, and the deposit to be made by your city is, as I take it, under Section 4295. This section is as follows:

> "The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the county, as offered, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by deposit of bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; bonds of the state of Ohio or any other state of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States and as to which there has been on default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible, providing the issuing body politic has not defaulted at any time since the year 1900, in the payment of the principal and interest of any of its bonds, said security to be subject to the approval of the proper municipal officers, in a sum not less than ten per cent. in excess of the maximum amount at any time to be deposited, but there shall not be deposited in any one bank an amount in exess of the paid in capital stock and surplus of such banks, and not in any event to exceed one million dollars. And whenever any of the funds of any of the political sub-divisions of

the state shall be deposited under any of the depositary laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits."

And by Section 4296 it is provided that in the ordinance authorized by Section 4295, council may determine, among other things, the authority which shall determine the sufficiency of the security offered for such deposits. The bank which made the bid referred to in your letter being an incorporated institution must be treated as any other corporation, that is, as an artificial person or entity, and as such it can deal with its stockholders individually. The stockholders are interested in it and liable for its debts only to the extent of the stock they own. In this case the corporation being a bank a stockholder can borrow money from it, and the bank can enforce collection of the debt against the stockholder.

The fact that eight men own all of the stock, and that these eight men sign the bond given by the bank to secure its deposit, it seems to me, has no bearing upon the question, for the same question would arise if one of the stockholders of the bank was possessed of sufficient property to qualify him as surety, and he should sign the bond individually. That is, your real question is, whether the stockholder of a bank can be accepted as surety for the bank. There is no rule of law of which I am aware that would prevent this. The object in requiring a surety bond is, of course, to furnish an additional protection to the assured, that is, some person or corporation to whom he may look for reimbursement in case default is made by the principal; and the test is in any case whether there is an additional liability to that of the principal.

As stated above in case of the bank, the stockholders, as such, are only liable to the extent of the stock owned by them for the debts of the bank, but when they sign the bond of the bank as individual sureties they thereby become liable to the full extent of the sum named in the bond in addition to their liability as stockholders of the bank. Really they make themselves doubly liable; first, as stockholders, to the extent of the stock owned by each, and, second, as sureties on the bond, each to the amount named on the bond. The only question to be determined, therefore, is as to the sufficiency of the surety. That is, in qualifying the signers of this bond as sureties, the amount of stock they own in the bank, if considered at all in estimating their assets, should be considered as a liability rather than an asset. This matter of the sufficiency of the security is to be determined as provided by ordinance.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

192.

ELECTIONS, SPECIAL—TAXES AND TAXATION—DISTRIBUTION OF EXPENSES AMONG TAXATION SUB-DIVISIONS—CITY SCHOOL DISTRICT IN REGISTRATION CITY—PAYMENT FROM CITY AND COUNTY.

As a uniform and strictly just system of distribution of taxes is admittedly impossible, the legislature, though generally placed under such limitations as it is possible to justly define, is permitted a discretion with respect to the distribution of the expense of elections.

As a general rule, elections held in the various sub-divisions are of general benefit to the county. Special elections are generally only of benefit to the district in which they are held, yet the law authorizing such elections is of general application and open to all sub-divisions.

Under Section 5052, *General Code provision is made for the payment of school elections by the county, and there is no authority to charge back such expense against the special school district wherein such a special election is held.*

The statutes expressly provide further, that in a registration city, the cost of registration, and the rent and furnishings of voting places, and the cost of poll books for precincts in the city, shall be paid by the city. Therefore, such expenses will be borne by a registration city when a city school district consisting of territory within such city holds a special school election and the balance of the expenses of said election will be paid by the county.

COLUMBUS, OHIO, March 9, 1912.

HON. RODERIC JONES, *City Solicitor, Newark, Ohio.*

DEAR SIR:—Under date of February 16, 1912, you ask an opinion of this department upon the following:

> "The board of education of the Newark city school district, which largely consists of territory within the corporate limits of the city of Newark, has taken such steps for a special election upon the question of issuing the bonds of the school district as will under the law require the deputy state supervisor of elections of the county to order an election not later than March 16th.
>
> "I am asked for advice by both the city auditor and the board of education as to who will be compelled to pay the expense of this special election, which is estimated will amount to about $1,000.00. I have been unable to find any authority on the subject, and do not know of any law requiring the school district to pay the expenses of the election, and upon this point I should like to be advised by you.
>
> "If your office agrees with me that there is no such law, then this situation further arises: The city council, in making its semi-annual appropriation, did not anticipate that this special election would be necessary and as a consequence thereof, there is no money appropriated to pay for it, and the state bureau of uniform accounting has recently instructed the city officials here that they are without authority to transfer funds, therefore, I am unable to see, if the expense of the election devolves upon the city, how it is to pay it. You will see the exigency of the situation is such that an early reply will be necessary."

This brings up the question of the payment of the expenses of holding a special election in a city school district.

Section 4946, General Code, provides:

"The additional compensation of members of the board of deputy state supervisors and of its clerk in such city hereinbefore specified, the lawful compensation of the deputy clerk and his assistants and all registrars of electors in such city, the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, including poll books for special elections, and the cost of the rent, furnishing and supplies for rooms hired by the board for its offices and as places for registration of electors and the holding of elections in such city, shall be paid by such city from its general fund. Such expense shall be paid by the treasurer of such city upon vouchers of the board, certified by its chief deputy and clerk and warrant of the city auditor. Each such voucher shall specify the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

The city of Newark is a registration city, and by virtue of the foregoing section the cost of registration for special elections is paid by the city. While this is not a special election for the city of Newark, it is an election of the city school district of the city of Newark. It is my conclusion that by the above section the poll books of such special election shall be paid by the city, that is for use of all precincts in the city. In the precincts outside the city, poll books and tally sheets should be paid by the county by virtue of Section 5048, General Code, which provides:

"The board of deputy state supervisors of each county shall furnish at the expense of the county and at least five days before the day of election, the necessary poll books and tally sheets required in each voting precinct in the county for presidential, congressional, state, county, township, municipal or other elections."

By virtue of the provisions of Section 4946, the rent and furnishings of voting places are paid by the city for all precincts in the city.

Section 4944, General Code, as amended in 101 Ohio Laws, page 344, provides:

"The registrars of each election precinct in such cities shall be allowed and paid for their services as registrars four dollars per day, and no more for not more than six days at any one election. In registration cities having a population of three hundred thousand or more by the last preceding federal census, the judges of election, including the registrars as judges and the clerks of election, shall each be allowed and paid ten dollars for each general election and five dollars for each special election, at which they serve and no more, either from the city or county. In all other registration cities, the judges of election, including the registrars as judges and clerks of election, shall each be allowed and paid five dollars for each election at which they serve and no more, either from the city or county. No registrar, judge or clerk shall be entitled to the compensation so fixed except upon the allowance and order of the board of deputy state supervisors made at a joint session, certifying that each has fully performed his duty according to law as such, and stating the number of days' service actually performed by each. Such allowance and order shall be certified by the chief deputy and clerk of the board to the *city or county auditor.*"

The foregoing section fixes the compensation of registrars and of precinct judges and clerks in registration cities, and how such compensation shall be paid. It does not specify what part shall be paid directly from the county and what part directly from the city.

Section 5052, General Code, provides:

> "All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

Section 5043, General Code, provides:

> "In November elections held in odd numbered years, such compensation and expenses shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county shall be retained by the county auditor from funds due such township, city, village or political division, at the time of making the semi-annual distribution of taxes. The amount of such expenses shall be ascertained and apportioned by the deputy state supervisors to the several political divisions and certified to the county auditor. In municipalities situated in two or more counties, the proportion of expense charged to each of such counties shall be ascertained and apportioned by the clerk or auditor of the municipality and certified by him to the several county auditors."

Section 5054, General Code, provides:

> "County commissioners, township trustees, councils, boards of education or other authorities, authorized to levy taxes, shall make the necessary levy to meet such expenses, which levy may be in addition to all other levies authorized or required by law."

The foregoing sections governing the payment of the *general expenses of elections apply to* school elections. Section 5052 authorizes the payment of such expense from the county treasury. Section 5053 authorizes the county auditor to charge back such expenses for the November election in odd numbered years to the political division in which such election was held. There is no authority to charge back such expense for special elections. Nor do I find any authority to charge the expense of a special election in a school district to such school district.

A question has been raised as to the constitutional right of the legislature to provide that the expense of a special election held in a school district for the benefit of such school district, shall be paid by the county. It is contended that county funds cannot be used for the purposes of a school district.

Elections are held in all parts of the county, whether for municipal, township, county or state purposes. They are of benefit not only to the political division for which such election may be held but of general benefit to all the people of the county. This is especially true of general elections held in November of each year. Whether the expense for such elections shall be paid by the county at large or by the particular political division is a matter of legislative control and discretion. In fact, payment under either plan would be substantially the same. The more populous communities have the larger election expense, they also pay the larger amount of taxes.

In special elections, however, the expense incurred is usually for the particular benefit of the political division in which such election is held. As in your case, the expense is for the benefit of the city school district, and the board of education by its act requiring a special election has created or authorized such expense. While it is for the benefit of this particular school district in this instance, the law providing for special elections can be brought in use by any school district in the county. It has general application. The fact that the county did not create the expense is not fatal to the law.

In State vs. Commissioners of Hamilton County, 2 Bull., 155, the district court of Hamilton county held:

> "An act of the legislature (74 O. L., 503), requiring county commissioners to levy a tax to raise a fund which is to be expended by the board of public works of a city within such county, for bridge purposes, and over which, therefore, they had no control does not violate the constitution."

In case of Baker vs. State, 2 Cir. Dec. 401, the syllabus reads:

> "The fees of judges and clerks of municipal elections must be paid by the county. The only exception in the statute is township elections, and that does not include municipal ones. (Sec. 2963, Rev. Stat., 84 O. L., 217.)"

This was an action in mandamus to require the county auditor to pay the compensation of the precinct judge of a municipal election. It does not appear that the constitutional question was raised or considered, but the court held that the county auditor should pay the compensation.

The courts and text writers hold that it is impossible to have exact equality in levying taxes and in apportioning the expenses and burdens of government. This is left to the legislature, although its power is not unlimited. Unless there is a clear abuse of power the act of the legislature should be upheld.

It is my conclusion that election expenses are of a general nature and of benefit to all parts of the county, and that the legislature is authorized to make provision for the payment of such expense, either by the county, or by the political division in which such election is held, or in part by each.

The legislature has provided that the general expense of special elections, including compensation of precinct judges and clerks, shall be paid from the county treasury, and it has not authorized the county auditor, or any one else, to charge back any part of such expense to the political division in which such election is held.

In the absence of statutory authority the county auditor cannot charge back and collect such expense from the school district, or from the city.

It is my conclusion that the expense of a special election for a bond issue in a city school district of a registration city should be paid as follows:

The cost of registration in the city should be paid by the city.

The rent and furnishings of voting places in the city and the cost of poll books for precincts in the city should be paid by the city.

All other expense of such election should be paid by the county.

You further inquire as to how the portion of such expense to be paid by the city can be met when council has failed to make an appropriation therefor.

Section 3800, General Code, provides:

"In making the semi-annual appropriations and apportionments herein required, council may deduct and set apart from any moneys, not otherwise appropriated, such sum as it deems proper as a contingent fund to provide for any deficiency in any of the detailed appropriations, which may lawfully and by any unforeseen emergency happen. Such contigent fund or any part thereof may be expended for any such emergency only by ordinance passed by two-thirds of all the members elected to council, and approved by the mayor. Any balance remaining in such contingent fund at the end of the fiscal year shall thereupon become a part of the general fund, to be again appropriated as other moneys belonging to the corporation. This section shall not interfere with the provisions of law authorizing the transfer of funds by the court of common pleas."

The eighth syllabus in case of Stem vs. Cincinnati, 9 Ohio Dec., 45, reads:

"The decision to hold the encampment in Cincinnati not having been reached until after the estimates for the year 1898 had been made, and after the appropriation for the first half of the fiscal year of 1898 had been made, whatever increase in the legitimate municipal expenditures will be required by reason of such event may be paid out of the contingent fund."

A special election called by a board of education after the semi-annual appropriation ordinance had been passed by the council of the city in which such election is to be held, would be, as to the city council, an unforeseen emergency and the expense thereof to be borne by the city could be paid out of the contingent fund provided in accordance with Section 3800, General Code, supra.

If for any reason this cannot be done, then Sections 2296, et seq., General Code, provide a remedy.

Section 2296, General Code, provides:

"The county commissioners, infirmary directors of a county or municipality, township trustees, the board of education of a school district, or the council or other board having the legislative power of a municipality, may transfer public funds under their supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereinafter provided, which shall be in addition to all other procedures now provided by law."

Section 2297, General Code, provides:

"A resolution of such officers or board shall be duly passed by a majority of all the members thereof, declaring the necessity therefor, and such officers or board shall file a petition in the court of common pleas of the county in which the funds are held. The petition shall set forth the name and amount of the fund, the fund or funds to which it is desired to be transferred, a copy of such resolution with a full statement of the proceedings pertaining to its passage, and the reason or necessity for the transfer."

By virtue of these sections application can be made to the court of common pleas for a transfer of funds.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

205.

TAXES AND TAXATION—EXEMPTION OF CERTAIN SOCIETIES—CONSTITUTIONALITY—TAXABLE SECURITIES NOT EXEMPT.

The greater part of Section 5364, General Code, providing for exemption from taxation of certain societies, is unconstitutional.

Such part thereof as is constitutional, however, intends as to societies therein included to exempt all properties, real and personal, except taxable securities, owned by such societies.

COLUMBUS, OHIO, March 15, 1912.

HON. DAVID H. JAMES, *City Solicitor, Martins Ferry, Ohio.*

DEAR SIR:—Some time ago you submitted to this department the following question for opinion:

> "Just what property and funds may certain societies named in Section 5364, of the General Code, hold exempt from taxation under the provisions of said section?"

I beg to apologize for the delay which has ensued in answering your letter, which has been occasioned by an unusual pressure of business in this office, and by the illuness of counsel to whom the question was referred.

Section 5364, General Code, is as follows:

> "Real or personal property belonging to an incorporated post of the Grand Army of the Republic, Union Veterans' Union, grand lodge of Free and Accepted Masons, grand lodge of the Independent Order of Odd Fellows, grand lodge of the Knights of Pythias, associations for the exclusive benefit, use and care of aged, infirm and dependent women, a religious or secret benevolent organization maintaining a lodge system, an incorporated association of commercial traveling men, an association which is intended to create a fund or is used or intended to be used for the care and maintenance of indigent soldiers of the late war, indigent members of said organizations, and the widows, orphans and beneficiaries of the deceased members of such organizations, and not operated with a view to profit or having as their principal object the issuance of insurance certificates of membership, and the interest or income derived therefrom, shall not be taxable, and the trustees of any such organizations shall not be required to return or list such property for taxation."

The greater part of this section is unquestionably unconstitutional; a part of it, however, is, equally without question, constitutional. As to such societies as to which the section constitutionally relates, it is my opinion that the exemption thereby created extends to all real and personal property by them owned, irrespective of the use to which same is put.

This holding is not inconsistent with that of the supreme court in the case of Library Association vs. Pelton, 36 O. S., 253. There the court relied, at least in part, upon the language, "not leased or otherwise used with a view to profit." No such language is found in the section under consideration. On the contrary, not only is the property itself exempt, but the interest or income derived therefrom." "Property" could not produce "income," unless it were "used with a view to profit."

Therefore, the general observations set forth in the latter part of the opinion in the case of Library Association vs. Pelton, supra., are not applicable to Section 5364. The rule of strict construction and all presumptions arising therefrom yield to plain language like that to which I have called attention. The express mention of the "interest and income derived therefrom" would seem to extend the exemptions to the moneys and credits of such organizations as well as to their tangible real and personal property. The only subject of taxation, therefore, upon which general levies may be made against the organizations to which Section 5364 constitutionally applies, is the investments thereof. Taxable securities, the property of such societies, may be taxed against them.

You do not inquire as to the constitutionality of the section. If you have a specific case or cases to which its application is questioned, I shall be pleased, on request, to state my views thereon.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

208.

VILLAGE ADVANCING TO CITY—ORDINANCE BY VILLAGE COUNCIL TO FIX SALARY OF VILLAGE CLERK NOT APPLICABLE TO CLERK OF COUNCIL ELECTED BY CITY COUNCIL.

The office of village clerk and that of city clerk are not the same, and an ordinance of a village fixing the salary of a village clerk, cannot, when such village advances to a city, serve for payment to the clerk elected by the council under the city regime for the purpose of serving as clerk of the council, for the reason that such ordinance is not consistent with the laws relating to the new corporation.

COLUMBUS, OHIO, March 13, 1912.

HON. CHARLES A. HEILKER, *City Solicitor, St. Bernard, Ohio.*

DEAR SIR:—Under date of February 21, 1912, you ask an opinion of this department upon the following:

> "The city auditor of St. Bernard, Ohio, informs me, that he has an opinion from your office that he cannot pay the salary of the acting city clerk, whose salary was fixed by ordinance of council passed on January 12th, 1912, because the ordinance is inoperative for sixty days.
>
> "Mr. B., the young man appointed as city clerk, under this ordinance has been engaged in that capacity since the assumption by the new council of the duties of their office. He took up the work of the former clerk who had been elected village clerk, but acted as city clerk, because subsequent to his election the village became a city.
>
> "Mr. Broerman acted as city clerk, since the first meeting on the motion of council, and at the first regular meeting the ordinance was passed appointing him and fixing his salary.
>
> "It seems to me that Mr. B., being the successor to the village clerk, is entitled to have that salary paid until the ordinance appointing him and fixing his salary goes into effect."

This is one of the municipalities which passed from a village to a city by the result of the last federal census.

Section 3499, General Code, provides:

> "Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, *and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed.*"

By virtue of the foregoing section the ordinances of the village of St. Bernard that are not inconsistent with the laws relating to the government of the city of St. Bernard, will continue in force until changed or repealed.

Is, then, the ordinance of the village of St. Bernard fixing the salary of the clerk of the village of St. Bernard inconsistent with the laws governing the city of St. Bernard?

Section 4210, General Code, provides:

> "Within ten days from the commencement of their terms, the members of council shall elect a president pro tem., a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

Section 4279, General Code, provides:

> "The clerk shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation."

In accordance with the provisions of the foregoing sections, the clerk of a village is elected by the voters of the village for a term of two years, and the clerk of the council of a city is elected by the council for a term of two years.

By virtue of Sections 4280, et seq., General Code, the village clerk performs the duties of the clerk of council. Under the laws governing the city the clerk elected by council performs the duties of the clerk of the council of the city.

In addition to his duties as clerk of the village council, the village clerk performs the duties which are prescribed for the city auditor and village clerk, by Sections 4283, et seq., General Code. In other words, the village clerk is not only the clerk of the council, but he is in effect, also the auditor of the village.

The respective duties of clerk of council and of auditor are placed upon two officers in the city form of government.

It is my conclusion that the positions of village clerk and of clerk of council of a city are not the same offices. The city auditor is as much the successor of the village clerk as is the clerk of council, and he would have the same right to claim the compensation fixed for the village clerk.

The ordinance of the village fixing the salary of the village clerk is inconsistent with the laws governing a city, and that the positions of clerk of a village and clerk of a city council are different offices.

Therefore, the salary fixed for the village clerk by the village council cannot be paid to the clerk of the city council, who is elected by city council in perfecting the change of government from a village to a city.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

227.

BOARD OF PUBLIC WORKS—CONTROL OF MIAMI RIVER—CONSTRUCTION OF BRIDGE ACROSS SAID RIVER BY PENNSYLVANIA RAILROAD COMPANY—NECESSITY FOR APPLICATION AND FILING OF PLANS WITH THE BOARD.

The great Miami River is under the jurisdiction and control of the board of public works and before the Pennsylvania Railroad Company may construct a bridge across said river, it should file an application with the board of public works for the approval or disapproval of the plans in accordance with procedure of Section 8775, General Code.

COLUMBUS, OHIO, March 25, 1912.

HON. D. S. LINDSEY, *City Solicitor, Piqua, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of March 11, 1912, in which you say that

> "The Pennsylvania Railroad Company has an ordinance pending before the council of this city for the elevation of its tracks through the city. Included in the proposed improvement is the erection of a bridge across the Miami River. The plans of the improvement show the placing of two piers in the channel of the river which has aroused considerable opposition from the residents of that part of the city which is more likely to be affected by high waters."

and request me to advise you as to what officer or board has jurisdiction over the Miami River, which is of record a navigable river.

In reply I desire to say that in the case of Walker and Fulton vs. Board of Public Works, 16 Ohio Report, page 540, the supreme court of this state recognized and held the great Miami River, the river passing through Piqua, in which the piers to the proposed bridge are to be built, to be a navigable stream; and the same lying wholly within the state, I am of the opinion that the state board of public works of Ohio has jurisdiction of the Miami River as to the erection of bridges thereover, under favor of Section 8775, General Code, which provides as follows:

> "When the line of the road crosses a canal or any navigable water, the company shall file with the board of public works, the plan of the bridge, and other fixtures therefor, which shall designate the place of crossing. If the board approves such plan, it shall notify the company, in writing, of such approval. If the board disapproves such plan, or fails to approve it within twenty days from the filing thereof, the company may apply to the court of common pleas, or a judge thereof in vacation, and upon reasonable notice being given to the members of the board, upon good cause shown, the court or judge shall appoint a competent, disinterested engineer, not a resident of a county through which the road passes, to examine such crossing, and prescribe the plan and conditions thereof, so as not to impede navigation. Within twenty days from his appointment, such engineer shall make his returns to the common pleas court of the county wherein such crossing is to be made, subject to exceptions by either party. At the next term after filing the return, the court shall examine, approve and confirm it, unless good

cause be shown against such approval. Its order of confirmation shall be sufficient authority for the erection, use and occupancy of such bridge, in accordance with such plans."

Under the provisions of law, and particularly the section of the General Code just quoted, the Pennsylvania Railroad Company, desiring to construct a bridge across the Miami River in the city of Piqua, Ohio, a navigable body of water, should file an application with the board of public works for its approval or disapproval of the plan for such bridge, and such matter should be determined by the board of public works prior to any action toward the erection thereof.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

239.

OFFICES INCOMPATIBLE—CITY AUDITOR AND CLERK OF SINKING FUND TRUSTEES — STATUTORY REMOVAL OF INCOMPATIBILITY.

The offices of city auditor and clerk of the sinking fund trustees are in their natures, incompatible for the reason that it is made the duty of the auditor to audit the books of the clerk of the sinking fund trustees, and only in the case where the council has not authorized a clerk or secretary of the sinking fund trustees does the statute remove the incompatibility and permit the city auditor to serve in that capacity.

COLUMBUS, OHIO, March 16, 1912.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—Under date of February 23, 1912, you state in part as follows:

"I have at hand the following letter from C. W. Douglas, chairman of the finance committee of the city council:

"'Will you kindly give me an opinion as to the legality of the city auditor drawing a salary for his work for the sinking fund commission in addition to his salary as city auditor, as authorized by the council? I understand he is now paid by the sinking fund commission about $90.00 per annum and that they want to increase his salary from them $200.00 per year.'

"The city council did provide a salary for a clerk of the trustees of the sinking fund, and the trustees elected the city auditor to that office."

Your further inquire if the city auditor can act as clerk or secretary of the trustees of the sinking fund where council has provided a salary for a clerk of such trustees.

Section 4509, General Code, provides:

"The trustees of the sinking fund, immediately after their appointment and qualification, shall elect one of their number as president and another as vice-president, who, in the absence or disability of the president, shall perform his duties and exercise his powers, and such secretary, clerks or employes as council may provide by an ordinance which

shall fix their duties, bonds and compensation. *Where no clerks or secretary is authorized, the auditor of the city or clerk of the village shall act as secretary of the board.*"

By virtue of the provisions of the foregoing section, council is authorized to provide for a secretary, clerks or other employes of the sinking fund commission and to fix their duties and compensation. The trustees of the sinking fund have no authority to fix the compensation of their secretary or other employes. This authority is vested in council.

Where no clerk or secretary is authorized by council the city auditor, or the clerk of the village shall act as secretary of the board. In your city it appears that the council has authorized a clerk, and provided a salary for such clerk. In such case the provision that the city auditor shall act as secretary of the board does not apply. The trustees are then empowered to appoint some one as its clerk or secretary.

It appears that the trustees have appointed the city auditor as their secretary, and the question arises, are the positions incompatible?

The legislature has provided that under certain conditions the same person may be city auditor and secretary to the trustees of the sinking fund, at the same time. In such case the legislature has determined that the positions are not incompatible.

The case of Commonwealth vs. Tate, 3 Leigh's Rep. 802, (30 Va.) is an authority that incompatibility at common law may be removed by legislative enactment.

The syllabus reads:

> "The office of deputy sheriff is incompatible with the office of justice of the peace, though by the statute law of Virginia the office of high sheriff is not so; and the acceptance of the office of deputy sheriff vacates the office of justice."

The opinion was rendered by a divided court, ten favoring and eight against the opinion rendered. All agreed, however, that the incompatibility existing at common law as to the positions of justice of the peace and high sheriff had been removed by the legislative act. The difference in opinion arose as to whether the removal of incompatibility between the high sheriff and justice of the peace, extended by implication to the position of deputy sheriff. The majority of the court held that it did not.

The trustees of the sinking fund serve without compensation, and the detail work is performed by its secretary or clerk.

Section 4284, General Code, prescribes certain duties for the city auditor as follows:

> *"At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments.* He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof. Upon the death, resignation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the indebtedness."

By virtue of this section the city auditor is required to audit the accounts of the trustees of the sinking fund and of their clerk or secretary.

The rule of incompatibility of office is laid down in the case of State ex rel. vs. Gebert, 12 Cir. Ct., N. S., 273, by Dustin, J., when he says on page 275 of the opinion:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

The city auditor is required to audit the accounts of the secretary of the sinking fund commission. He therefore acts as a check upon that position. The two positions, unless the statutes otherwise provide, are incompatible.

The statute does not authorize the trustees to appoint the city auditor as their clerk or secretary. The statute authorizes the city auditor to act as such secretary only when council has not authorized a clerk or secretary for the sinking fund commission. The authority to act as such secretary should be limited to the conditions prescribed in the statute and should not be extended to permit the city auditor to be appointed as such secretary or clerk where council had authorized a clerk or secretary.

The city auditor cannot, therefore, be appointed secretary or clerk of the sinking fund commission by the trustees of such commission when council has authorized a clerk or secretary.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

257.

DIRECTOR OF PUBLIC SERVICE—POWER OF COUNCIL TO INCREASE AND DECREASE SALARY DURING INCUMBENCY—"TERM OF OFFICE"—"FEDERAL" AND "BOARD" PLANS—PATENT AMBIGUITY IN STATUTE.

Section 4250, *General Code, providing for the powers of appointment and removal of a director of public service, by the mayor, and Section* 3252 *presenting the idea of a term of office, and Section* 3259, *requiring appointments to be made in a definite time, present a patent ambiguity.*

Inasmuch as Sections 4251 *and* 4252 *are carried down from the statutes relating to the old "board plan," which was succeeded by the "federal plan," of which Section* 4250 *is an essential provision, the latter statute should be allowed to control. Therefore, the director of public service has no "term of office" within the comprehension of Section* 4213, *General Code, and the council is therefore not prohibited from decreasing or diminishing his salary during his incumbency.*

COLUMBUS, OHIO, March 26, 1912.

HON. THOS. C. DAVIS, *City Solicitor, Massillon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 15th, in which you request my opinion upon the following questions:

> "First—Does the director of public service have a 'term' of office as that phrase is used technically?

"Second—Can the salary of the director of public service legally be increased while he is holding that office?"

These questions invite consideration of Sections 4250, 4251 and 4252, General Code. There are inconsistencies apparent upon the face of these sections as they stand. The power to remove the director of public service, the director of public safety and the heads of the sub-departments of public service and public safety, and to appoint them at will, clearly conferred by Section 4250, is inconsistent with the idea of a "term of office," indirectly referred to in Section 4252, and with the requirement that appointments be made within a specified period, as required by Section 4251. Here then, we have an excellent example of a patent ambiguity, created by conflicting provisions of a codified law. Under well established principles of statutory construction it is permissible to resolve such ambiguity by recourse to the pre-existing statutes. Such investigation establishes the fact that Sections 4251 and 4252 were originally enacted as Sections 223 and 228, respectively, of the Municipal Code of 1902, although subsequently amended, 97 O. L., 39 and 97 O. L., 78, respectively. Both at the time of the original enactment of these sections, and at the time they were amended in 1904, the directors of public service were independent of the mayor; instead of a single director of public service there was a board of three directors, elected by the people; and instead of a single director of public safety there was a board of public safety, the members of which were appointed for a definite term, and if the mayor failed to appoint within the specified period the vacancy was to be filled by the governor (Municipal Code, 1902, Section 146.)

Section 4250, on the other hand, was Section 129, of the Municipal Code, as fundamentally amended by the enactment of what was popularly known as the "Paine law," 99 O. L., 562. The amendments embodied in the Paine law constituted a radical change in the system of municipal government; instead of what was known as the "board plan," the "federal plan" was intended to be adopted thereby. Under this plan, as is apparent from a consideration of other sections of the code as then amended, the mayor became the responsible head of the entire city administration, excepting the legal department and that of the auditor.

Having regard, then, to the plain provisions and intentions of the Paine law, and to the date of its adoption, as compared with that of the provisions now embodied in Sections 4251 and 4252, I am of the opinion that in so far as Sections 4251 and 4252 relate to the director of public service, the director of public safety and the heads of sub-departments in these two departments of the municipal government, they were impliedly amended or repealed by the adoption of the Paine law, and especially that part now embodied in Section 4250, General Code. I therefore reach the conclusion that Section 4250 is the controlling section, and that the answer to your first question is in the negative; the director of public service has no term of office but holds his place at the pleasure of the mayor.

Your second question is rendered easy of answer by the discussion which has preceded. By Section 4213, General Code, council is prohibited from increasing or diminishing the salary of any officer "during the term for which he was elected or appointed." In order that this limitation shall be effective and applicable, it is necessary that the officer have a "term" for which he has been appointed.

In the case of State ex rel. vs. Moody, supreme court, unreported, affirming the same case decided by the circuit court of Lake county, 13 C. C., N. S., 577, this principle was recognized, and city officers and employes within the civil service were held protected by the provisions of the statute because their tenure, though indeterminate, was not dependent upon the will of the appointing power, but upon good behavior. The distinction is very sharply drawn, and it is impliedly conceded

in the opinion that if the appointing power has also an unqualified power of removal an appointee would not have a "term" within the meaning of the statute under consideration.

From all the foregoing it is my opinion that the salary of the director of public service may be increased or diminished so as to affect the director holding office at the time the ordinance making such change therein becomes effective.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

262.

ORDINANCES — SEMI-ANNUAL APPROPRIATION ORDINANCES NOT OF A GENERAL NATURE AND NEED NOT BE PUBLISHED IN ANY NEWSPAPER—ORDINANCE RENEWING FRANCHISE IS OF GENERAL NATURE.

The semi-annual appropriation ordinance is not an ordinance of a general nature and need not be published in any newspaper.

An ordinance granting a renewal of a street railroad franchise is a granting of certain rights which affect all citizens and in which the city as a whole is interested. It is, therefore, an ordinance of a general nature and should be published in two newspapers of opposite politics as required by Section 4228, General Code.

COLUMBUS, OHIO, April 3, 1912.

HON. GEO. C. VON BESELER, *City Solicitor, Painesville, Ohio.*

DEAR SIR:—Your favor of February 19, 1912, is received in which you inquire as follows:

> "The council of the city of Painesville, through me as their city solicitor, refer to you the following two questions for your consideration.
>
> "Question 1. We understand that the semi-annual appropriation ordinance is not an ordinance of a general nature and need not be published in two newspapers of opposite politics, but need it be published at all in some newspaper?
>
> "Question 2. The council of the city of Painesville in consideration of the extension of street car lines, such extensions lying entirely without the corporation, are granting a renewal of all franchises within the city of Painesville, although the present franchises would not expire for ten or fifteen years. Is this ordinance granting a renewal an ordinance of a general nature? Is it necessary that it be published in two newspapers of opposite politics; if not, need it be published in some newspaper?"

Under date of January 25, 1911, this department rendered an opinion to Hon. H. R. Schuler, city solicitor of Galion, Ohio, in which it was held that the semi-annual appropriation ordinance was not an ordinance of a general nature and need not be published in two newspapers of opposite politics. As it is not an ordinance of a general nature it need not be published in any newspaper.

You next inquire, is an ordinance granting a renewal of a franchise to a street railway company an ordinance of general nature which should be published?

Section 4227, General Code, provides:

"Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. *Ordinances of a general nature,* or providing for improvements *shall be published as hereinafter* provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

In stating your conclusion upon your second inquiry you cite the case of State vs. Railway, 20 Cir. Dec. 632, in which it is held:

"An ordinance extending a street railway grant, which relates to but one road and involves no expenditure of money belonging to the city, but is simply a contract between the railway company and the city, is not of general or permanent nature, and is not rendered invalid by reason of failure to read it on three different days or to suspend the rules requiring this to be done."

The next syllabus of this case, however, holds:

"The duty of publishing an ordinance rests upon the city, and in an action brought by the city solicitor to oust a street railway company from its franchise, it is encumbent upon the city to establish such an omission, and in the absence of proof to that effect a presumption arises that publication was regularly made."

On page 636, of the opinion, Sullivan, J., says:

"It is claimed by the relator that the ordinance was not published as required by the statute, and for that reason it is void. It was not incumbent upon the railway company to discharge this duty; it was upon the city. It seeks now to avail itself, to the prejudice of the company, of its own omission. Being incumbent upon the city, the burden of establishing this omission is upon it. We are of the opinion it has not discharged it; and, in the absence of testimony on the point, the presumption is, that the ordinance was published."

While this opinion does not directly state that such ordinance must be published, yet it is easily seen that that was the conclusion of the court. The opinion states that it was the duty of the city to see that the ordinance was published as required by statute. The court further presumed that the ordinance was published in the absence of evidence to the contrary. If no publication was required, the opinion of the court would have been different. Its opinion is based on the premise that publication was required.

Although the first syllabus quoted states that such an ordinance is not of a general nature, and although it appears that the decision was confirmed without report by the supreme court, yet that is not conclusive that publication was not required. The reasons of the supreme court in affirming the decision do not appear. The legality of the ordinance because it had not been read on three days might have been reached upon other grounds, for example, that the requirement that the ordinance should be read on three days was directory and not mandatory.

The granting or renewal of a franchise to a street railway company is of general interest to all the inhabitants of the city. It is a granting of certain rights in

which the city as a whole is vitally interested. It is my conclusion that an ordinance granting a renewal of a franchise is an ordinance of a general nature, and should be published as other ordinances of a general nature.

Section 4228, General Code, provides:

> "Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide paid circulation within such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council."

If there are two papers, published and of general circulation in the city of Painesville, of opposite politics, said ordinance should be published in each of said papers in the same manner as other ordinances of a general nature.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

275.

DIRECTOR OF PUBLIC SERVICE—MANDATORY DUTY TO IMPROVE STREET WHEN DIRECTED AND AUTHORIZED BY COUNCIL—LEGISLATIVE POWER.

The power to determine the necessity of a public improvement, is a legislative power which in contracts exceeding $500 *is not conferred upon the director of public service and when council authorizes and directs the latter officer to improve a certain street involving an expense of more than* $500, *it is mandatory upon that official to carry out the contract.*

COLUMBUS, OHIO, April 1, 1912.

HON. A. J. LAYNE, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of March 19th, requesting my opinion upon the following question:

> "If council authorizes and directs the improvement of a certain street, and the proceedings are regular in all respects, may the director of public service disregard the action of council and refuse to advertise and proceed with the improvement of the street?"

The following sections of the General Code furnish an answer to this question:

> "Section 4211. The powers of council shall be legislative only, and it shall perform no administrative duties whatever, and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be

entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

"Section 4325. The director of public service shall supervise the improvement and repair of streets * * * the construction of public improvements and public works except * * * as otherwise provided in this title.

"Section 4328. This director of public service may make any contract * * * for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department * * * exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service *shall* make a written contract * * *.

"Section 4403. No contract in the department of public service or the department of public safety in excess of five hundred dollars shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract.

"Section 3833. The contract for any such improvement (paid for in part by special assessment) shall be let by the director of public service in the same manner as other contracts, and in case all bids be rejected such director in cities and the council in villages may order a readvertisement for bids."

The precise question which you ask has strangely enough never been adjudicated under these sections. Apparently a case has never arisen in which a director of public service has refused to proceed with an improvement authorized by council. I confess that the question as it is thus raised in the purely argumentative way impresses me as being somewhat difficult.

By the first section above quoted the power of council is limited to that of a legislative character. It is expressly provided that after council has authorized the contract, it shall take no further action thereon. Whether or not the provisions of Section 4211 preclude council from directing or commanding the making of a given improvement as well as merely authorizing it, is on the face of that section at least a difficult question. On the other hand, the powers and duties of the director of public service are no more explicitly prescribed.

Section 4325 simply authorizes him to supervise public improvements, but does not define the extent of the supervision which he is to give to them in particular. Neither this statute nor Section 4211 on the face thereof prescribe who shall decide whether or not a given improvement shall be made.

Section 4328 sheds a little more light than is shed by either of the other sections already discussed. It provides that the director of public service may make any contract within his department involving not more than five hundred dollars, but that when an expenditure which is within the department does involve more than five hundred dollars it shall first be authorized and directed by ordinance of council. Here is inferential authority delegated to council to direct an expenditure of more than five hundred dollars.

Not solely on the authority of the last section above quoted, however, but upon the general principles of separation of powers as between the legislative and executive or administrative departments of the government, I am of the opinion that legislative power includes the power to determine the necessity of a given improvement and that such a question is not a question of administration. If coun-

cil has the power to direct the making of a contract, and if council's authority is necessary in order to authorize the making of a given improvement, then the action of council becomes the legislation of the city. It is as much an act of legislation to declare that a given improvement shall not be made as it is to authorize it. When the director of public service therefore refuses to proceed with an improvement authorized and directed by council and thus sets up his judgment against that of the council, he is attempting to exercise legislative power; more accurately, he is refusing to obey a law which is binding upon him. In spite, therefore, of the lack of explicit language in the statute, but in harmony with such explicit language as is found in the above quoted sections, I am of the opinion that it is the duty of the director of public service to carry into effect an ordinance of council authorizing and directing the making of a given improvement, and that the action of council is more than a grant of power to the director. It is a legislative mandate, the execution of which becomes his official duty.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

291.

SINKING FUND TRUSTEES—RULES FOR SALE OF BONDS—REFUNDING BONDS AND INVESTMENT BONDS—NECESSITY FOR ADVERTISEMENT—BELOW PAR.

Upon arguments based upon convenience as well as upon the fact that provisions relating to sale of bonds by the sinking fund trustees are special and should be construed as exceptions to general provisions, and particularly in the light of the fact that for the sale of refunding bonds by the sinking fund trustees in the same chapter, advertising requirements and other restrictions are made applicable, Section 4517 should be construed to permit the sinking fund trustees when selling bonds for the purpose of satisfying any obligation under their supervision, to sell the same without advertising and for any just and reasonable price obtainable even though it be less than par.

COLUMBUS, OHIO, April 8, 1912.

HON. STUART BOLIN, *City Solicitor, Columbus, Ohio.*

MY DEAR SIR:—I beg to acknowledge receipt of your letter of April 1, 1912, requesting a reconsideration of my opinion of December 1, 1911, to Honorable Jonathan Taylor, assistant city solicitor of Akron, construing Sections 3923 and 3924, of the General Code, which govern the sale of the bonds of municipalities, with respect to their application to sales by the sinking fund trustees.

In the former opinion I held that, under these sections, bonds of a municipality, when sold by its sinking fund trustees, for the purpose of satisfying an obligation arising under their supervision must be sold by competitive bidding after advertisement, and for not less than par. In so holding I followed the opinion of one of my predecessors, Hon. Wade H. Ellis, which opinion was founded upon the decision of the supreme court in the case of Cincinnati vs. Guckenberger, 63 O. S., 353. That decision, as may be ascertained by an examination of it, is seemingly in point in that it applies to Section 2709, Rev. Stat., the subject matter of which was subsequently incorporated almost verbatim in Section 97, Municipal Code, which, in turn, has become Sections 3922 to 3925, inclusive, General Code.

I confess that I was influenced to a considerable extent in my holding by the fact that the matter had already been passed upon by this department and by the assumption which I made that under these circumstances the ruling had been generally followed. Your advice to me is that Mr. Ellis' opinion has not been followed, but that the opposite practice has prevailed, and that trustees of the sinking fund have not been selling bonds of the municipality which they represent when held by them and when necessary to satisfy an obligation arising under their supervision, either after advertisement or at par.

I accordingly gladly undertake the reconsideration of my former opinion as if the question were now arising de novo.

On closer examination of the case of Cincinnati vs. Guckenberger, I find that the exact question presented therein was as to whether the trustees of the sinking fund of the city of Cincinnati might *issue* and sell refunding bonds of the city under a special statute, without complying with the provisions of 2709, R. S., aforesaid. The exact scheme contemplated by the trustees was the refunding of a number of outstanding issues of bonds of the Cincinnati-Southern Railroad, owned by the city of Cincinnati, which bonds were in the possession of the trustees, by the issuance and sale without competitive bidding of "consolidated sinking fund bonds." Such issue was to be made under authority of Section 2729-G (2), Revised Statute, quoted in the statement of the case, and in the opinion of the court. The decision of the court was that bonds so issued and sold by the trustees should be sold after advertisement by competitive bids and at par.

The point concerning this case with which I am now impressed is that the sale of the city's bonds in this instance was by the authority which had the power to and did issue them on behalf of the municipality. The case was not that of the sale of bonds of the city by the sinking fund trustees when held by them as investments and sold for the purpose of meeting obligations chargeable against the sinking fund.

This brings me to the consideration of the exact language of Sections 3923, et seq., of the General Code. The material portions of the related statutes are as follows:

> "Section 3922. When a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official capacity, or, in case there are no such trustees, to the officer or officers of such corporation having charge of its debts, in their official capacity. If such trustees or other officers of the sinking fund decline to take any or all of such bonds at par and accrued interest, the corporation shall offer for the board of commissioners of the sinking fund of the city school district such bonds, or so many of them, at par and accrued interest and without competitive bidding as have not been taken by the trustees of the sinking fund, and the board of commissioners of the sinking fund of the city school district may take such bonds, or any part thereof.
>
> "Section 3923. Only after the refusal of all such officers to take all or any of such bonds at par and interest, bona fide for and to be held for the benefit of such corporation, sinking fund or debt, shall the bonds, or as many of them as remain, be advertised for public sale. In no case shall the bonds of the corporation be sold for less than their par value, nor shall such bonds when so held for the benefit of such sinking fund or debts, be sold, except when necessary to meet the requirements of such fund or debt.
>
> "Section 3924. Sales of bonds, other than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking

fund of the city school district, as herein authorized, by any municipal corporation, shall be to the highest and best bidder, after thirty days' notice in at least two newspapers of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest and length of time the bonds have to run, with time and place of sale. * * *"

In the same connection regard ought to be had to the provisions of Section 4517, General Code, which is as follows:

"The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

As I now view it, the first three sections above quoted, considered by themselves, afford considerable ambiguity. In the first place, the first phrase of Section 3922 speaks of the issuance of bonds by "a municipal corporation." Now the bonds of a municipal corporation must be issued by some of its officers. Ordinarily this is done by the council, although under special statutes like that referred to in Cincinnati vs. Guckenberger, the authority to issue the bonds of the municipality may be imposed upon other officers of the city government. Again, the last sentence of Section 3923 is, on its face, very broad, and applies to any sale of the bonds of a municipal corporation. In its broadest scope, this section would preclude the commissioners of the sinking fund of the city school district from selling the bonds of a municipality at less than par. This, however, cannot be the proper interpretation of Section 3923, for the trustees of commissioners of the sinking fund of the school district are a body corporate quite distinct from the city government or any department thereof, and this section of the Municipal Code can scarcely be construed as a limitation upon the right of that body to dispose of its securities. The same observation is applicable to Section 3924. Here, however, the inference which I have drawn is made the clearer by a consideration of the second sentence of that section (not above quoted) which is as follows:

"Additional notice may be published outside of such county by order of the council, but when such bonds have been once so advertised and offered for public sale, and they, or any part thereof, remain unsold, those unsold may be sold at private sale at not less than their par value, under the direction of the mayor and the officers and agents of the corporation by whom such bonds have been, or shall be, prepared, advertised and offered at public sale."

Clearly this sentence refers to sales made by the municipal corporation as such.

The sections are then at least ambiguous. That being the case, I am satisfied that weight ought to be given to the provisions of Section 4217, supra. Here we find authority vested in the trustees of the sinking fund to sell securities in their possession whenever necessary to meet obligations payable out of the sinking fund. The exact language is as follows:

> "* * * For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

It will be observed that the sinking fund trustees are not only authorized to sell bonds for the purpose mentioned, but also to "use" them. The entire power pertains to the satisfaction of obligations arising under their supervision, and is not a general power to sell the bonds of the municipality. It is, therefore, to be regarded as a special grant of power and may fairly be made subject to the rule which governs the construction of special provisions inconsistent with general ones. Under favor of this rule the failure of Section 4517 to provide that the sinking fund trustees shall not proceed in any particular manner in the sale or use of the bonds for the satisfaction of obligations under their supervision, or be limited to any particular selling price in case of sale, precludes the conclusion that it was intended that the trustees should be subject to any such regulations or limitations in the exercise of their power.

There is one consideration, however, which I have not yet mentioned, which seems to me conclusive of the entire matter. In Cincinnati vs. Guckenberger, the reasoning of the court is broader, it seems to me, than the necessities of the case required. Thus on page 371, of the opinion, per Spear, J., the following language is found:

> "A sale being required, and no method of conducting it having been provided, it follows that we look to other sections for that detail, and it is given in Section 2709, by the requirement of a sale to the highest and best bidder after thirty days' notice by advertisement in newspapers."

This language, standing by itself, certainly justified Mr. Ellis' conclusion and that followed by me in my former opinion. This remark could just as well be made of Section 4517, General Code, as of Section 2729-a, et seq., R. S., which the court had before it. As a matter of fact, however, Section 2729-g (2), R. S., to which I have already referred, and which is partially quoted on page 368 of the report of the above entitled case, contained the following express provision:

> "Such bonds shall be sold as provided in Section 2709, of the Revised Statutes."

This provision of itself was sufficient ground for the decision in Cincinnati vs. Guckenberger. A similar provision is found in Section 4522, General Code, which is one of a series of sections, commencing with Section 4520, which authorize the issuance of refunding bonds by the sinking fund trustees, and are, therefore, essentially similar to those sections of the Revised Statutes under review in Cincinnati vs. Guckenberger. The provision of Section 4522 as to the sale of such bonds is as follows:

> "They shall be sold as provided by law for the sale of bonds by a municipal corporation."

It seems to me, as a matter of statutory construction, that two statutes like Sections 4517 and 4522, found in the same chapter, both pertaining to the powers of the trustees of the sinking fund, and therefore, strictly in pari materia, must be construed together for whatever light they may mutually shed upon each other. If that is the case, then I think it fair to conclude that a power to sell, conferred in unqualified terms by one section is to be deemed indeed an unqualified power if

a power to sell, conferred by the other section, is expressly qualified in the manner set forth in Section 4522. That is to say, the mere fact that bonds issued for refunding purposes by the sinking fund trustees are required to be sold in the manner prescribed for the sale of bonds issued by the municipal corporation, is itself strong evidence that securities sold by the sinking fund trustees under the special power to sell for the purpose of meeting obligations against the sinking fund, need not be so sold, even though they are the bonds of the municipality itself.

In addition to all of the foregoing considerations, there is a very strong argument of convenience in favor of the conclusion which I have reached. In a case like that under consideration, the argument of convenience may properly be used. Thus it appears that due regard for the purpose for which the board of sinking fund trustees was created, suggests the obvious fact that obligations payable out of the funds under their supervision should be promptly met. It is made the duty of the board to keep its funds invested in securities, and the board is encouraged to invest in the securities of the municipal corporation which it represents. Yet, from the fund represented by such investments, the board must meet the installments of interest and principal "of the public debts as they fall due, promptly, in order to preserve the city's credit; in like manner they may be called upon to pay large final judgments upon short notice.

Now, the funds of the sinking fund trustees need not necessarily be invested solely in the securities of the corporation itself. They may be invested in any municipal, state, or United States bonds. There is certainly no provision to the effect that in selling securities other than those of the municipal corporation, the trustees must advertise and sell at par. Convenience would suggest that the sinking fund trustees be governed by the same rules in disposing of any securities under their possession for the purpose of meeting obligations. This argument of convenience is particularly strong as to the question of requiring the trustees to sell at par. It is well known, of course, that there are times of financial stringency when securities are not salable except at a discount. Yet, the bonded indebtedness of an municipal corporation must be provided for and installments thereof met in such times as well as at other times. If this argument is valid as to sales at par, it applies equally to the necessity for advertisement, because under Sections 3923 and 3924, supra, a given construction as to one of these questions must necessarily be decisive of the other.

For all of the foregoing reasons, then, I am of the opinion upon such reconsideration as I have given to the question presented by your letter, that the trustees of the sinking fund of a municipal corporation selling securities of the municipal corporation in which their funds are invested, for the purpose of meeting obligations arising under their supervision, need not advertise such sale as provided in Section 3924, General Code, and may secure for such bonds any price which by the exercise of business judgment and diligence they may be able to secure, though less than the par value thereof.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

292.

MUNICIPAL CORPORATIONS—DIRECTOR OF PUBLIC SERVICE AND COUNCIL—POWERS OF, RESPECTIVE TO WATERWORKS, ELECTRIC POWER PLANTS AND CEMETERIES—DISCRIMINATORY CHARGES—METERS—SURPLUS POWER.

By express provision of Section 3958, General Code, the director of public service is vested with the power of fixing the rates and conditions for the supply of water from a municipal waterworks. The same authority, by provision of Sections 3956 and 3957, General Code, may compel users to furnish their own meters when it is decided to charge by that method.

If basis is made upon proper classification and upon equitable rates, different prices may be charged to different classes according as they use a greater or a less amount of water.

Municipal corporations have the undisputed power to establish electric power plants and to furnish light and power to consumers. As, however, the power to fix the rates is not expressly vested in the director of public service, such rates must be fixed by the council and that authority in this connection may charge different rates to different consumers under the same limitations as apply to the director of public service with reference to water rates.

If a municipal electric plant, by virtue of a lighter demand upon its power during certain parts of the day, is possessed of surplus power, the same may be furnished at a less rate than is charged during those hours when the demand is heaviest.

Under Sections 6165 and 6166, General Code, the director of public service of a city owning a cemetery, is vested with the absolute power to fix the rates and terms of payment for cemetery lots.

COLUMBUS, OHIO, April 1, 1912.

HON. C. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication in which you request my opinion as follows:

> "Certain questions of importance to this city have been propounded to me by the city officials, and being uncertain of my position in the matter, I am anxious to have an answer to the following questions:
>
> "The statement of facts is as follows:
>
> "This city is the owner of its own waterworks; part of the users pay on a flat rate basis, that is, by the number of openings, while others have meters that are furnished by the city, and pay a minimum charge for the use of water through the meter, but over 16,500 gallons of water is used each quarter, at 12 cents per thousand.
>
> "Question 1. Who has the authority and whose duty is it to fix the rate and conditions of the use of water?
>
> "2. If meters are required, shall the user of water be compelled to furnish their own meters, or shall the city furnish them as part of the equipment of the plant?
>
> "3. Can the authority authorized to fix prices, make one price to one class that use water and another price to another class; or must there be a common, uniform basis of charge, a fixed standard of use and charge?
>
> "The city is the owner of its own electric light plant, and from its

output furnishes the streets with light, and to its citizens light and power.

"Question 1. Who has the right, and whose duty is it to fix the rate charged consumers? Can the authority who has the power to fix rates charge for light and power, or either (all produced from one machine) to one class of customers one rate per K. W. and to another class charge a different rate on the quantity consumed?

"2. Can there be such a thing as a "surplus" in a plant owned by the people and all the power produced from the same plant for all the buyers of electric force, which can be sold for a less sum to one class of consumers. If there is any such thing as a surplus, where does the surplus begin, at the first part, middle, or end of the day?

"The city is the owner of a cemetery.

"Question 1. Who has the power and whose duty is it to fix the price at which lots or portions of lots can be sold?"

In answer to your first question under the statement of facts relating to your waterworks, I desire to say that Section 3956, General Code, provides that

> "The director of public service shall manage, conduct and control the waterworks, furnish supplies of water, collect water rents, and appoint necessary officers and agents."

and Section 3957, General Code, provides:

> "Such director may make such by-laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the waterworks Such by-laws and regulations shall have the same validity as ordinances when not repugnant thereto or to the constitution of laws of the state."

Section 3958 provides:

> "For the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. * * *"

Under the above quoted sections of the General Code and the decisions of the courts of this state, there can be no question but that the director of public service of cities in this state has the authority, and it is the duty to fix the rate and conditions of the use of water.

Replying to the second question under the statement of facts relative to your municipal water plant, I am of the opinion that under Section 3957, General Code, the director of public service may provide a by-law and regulation requiring all users of water to furnish and own meters, if he deems such action necessary for the safe, economic and efficient management and protection of the waterworks. Under the provisions of said section the administrative control of the waterworks of a municipality is given solely to the director of public service; and it seems to me that under that section the director of public service would have the authority to compel users of water, first, to use meters, and second, to furnish and own the same.

Answering the third question under said statement of facts, as to the authority to fix prices, making one price to one class that use water and another price to another class, or whether there must be a common, uniform basis of charge, a

fixed standard of use and charge, I desire to say that I have carefully examined the provisions of the Municipal Code, and the sections of the General Code as well, and I find therein no express provision respecting the manner of fixing rates for water furnished by a municipality to consumers therein; the only provision of the code relative thereto is Section 3958, which provides that

> "For the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. * * *"

and I am of the opinion, under said section, that the legislature intended to vest in the director of public service a discretionary power to fix or assess and collect, from the users of water, such amount as he deems most equitable. In supplying water there are generally two methods of charging which might be adopted; one by measure, installing meters; the other by charging a flat rate, estimated largely by the number and character of the taps; and in the absence of any limitation, fixed by statute upon the powers of the director of public service, to fix rates, it seems unquestionable to me that the director of public service could adopt either or both methods of charging for water furnished, so long as he would make the price of each claim uniform. Therefore, in answer to your question, I am of the opinion that the director of public service, being authorized to fix prices, may make one price to one class of water users and another price to another class, if the prices fixed for the different classes are upon an equitable basis, that is, according to the amount of water used. In other words, it is my opinion that such action on the part of the director of public service, under the powers granted to him by the above quoted section, would not be such a discrimination as would be a violation of law. It has been held repeatedly that a minimum rate may be charged for the use of water, although it operates in some cases somewhat differently than it does in others, on the ground that it is the nominal operation of a regulation; and while it may, therefore, be true that some applicants might be paying for a little more than others, upon a pro rata basis, the objection of discrimination could not be taken.

Answering your first question under the statement of facts relative to the electric light plant, I would say that I have carefully examined the provisions of the Municipal Code, both before and after its amendment by the Paine law, so called, and the corresponding sections of the General Code as well, and I find therein no express provision whatever respecting the manner of fixing rates chargeable for electric light and power furnished from a municipal plant. The only provisions relating to the matter are as follows:

> "Section 7, of the Municipal Code. * * * All municipal corporations shall have the * * * general power * * *.
>
> "Section 15. * * * to establish and maintain municipal lighting, power and heating plants * * *.
>
> "Section 2486, Revised Statutes. The council of any city or village shall have power * * * to erect * * * electric works at the expense of the corporation * * *."

That these provisions authorize a municipality to maintain an electric light plant from which electricity for lighting and power purposes may be furnished and sold to the inhabitants of a municipality as well as to use the current produced at such plant for purely municipal purposes, has always been the practical construction of this statute. Indeed, whatever may have been the exact extent of the pow-

ers of municipalities in this respect in the year 1907, the revision of such Section 7, of the Municipal Code by the general assembly of 1908 (99 O. L. 34, paragraph 7), resolved all doubts by expressly providing that every municipal corporation should have the power not only to establish and operate municipal lighting and power plants, but also to furnish the municipality and inhabitants thereof with light, power and heat.

Your question, however, presents a more difficult preliminary question, to wit: What department of the city government has the power to fix the rates chargeable for electric current furnished to citizens and inhabitants thereof? The director of public service, under the provisions of Section 4326, is vested with the power to manage municipal water, lighting, heating, power, garbage and other undertakings of the city, and, therefore, there can be no question as to the authority of the director of public service to manage the municipal lighting and heating plants and other property of the corporation not otherwise provided for. But whether such a general grant of power suffices to confer upon the department of public service authority to fix rates and make contracts relating to the price of electric current; or whether council, in pursuance of its general legislative authority, and especially under Section 127, Municipal Code, which provides that

> "* * * All powers conferred by this act upon municipal corporations shall be exercised by council, unless otherwise provided herein."

may fix such rates, is not exactly clear. It is my opinion, however, that Section 127, Municipal Code, governs and the council should fix rates and direct the director of public service to enter into contracts respecting electric current to be furnished to consumers from the municipal plant. The authority was directly conferred, by statute, upon the director of public service to fix the price to be charged for water furnished by the municipal water plant to consumers of water within the municipality but the statutes do not confer such power upon the director of public service in relation to electric current furnished by the municipality from a municipal plant to users of current within said municipality. I am, therefore, of the opinion that the holding of my predecessor, Hon. U. G. Denman, that the council of a municipality should fix rates to be charged for electric current to be furnished consumers from a municipal plant, rendered to Hon. E. C. Long, city solicitor of Bellefontaine, Ohio, under date of October 22, 1910, is correct upon the reasoning therein set forth; and I am also of the opinion that the council, having the authority to fix rates to be charged for light and power, is vested with the authority, as the legislative body of the municipality, to fix a certain rate to be charged to one class of consumers, and another rate to be charged another class of consumers, provided the rates fixed are based upon a graded calculation and uniform as to all consumers using the amount specified in the respective classes.

Replying to the second question under the statement of facts relating to the electric light plant, to wit:

> "Can there be such a thing as a 'surplus' in a plant owned by the people and all the power produced from the same plant for all the buyers of electric force, which can be sold for a less sum to one class of consumers? If there is any such thing as a surplus, where doees the surplus begin, at the first part, middle, or end of the day?"

I desire to say that this question is one of electrical engineering, except that part pertaining to the sale of such surplus, if there be any, and the sale thereof for a less sum to one class than to another; but I take it that there can be a surplus in any plant, either municipal or private, erected for the purpose of generating

electric current for lighting, heating and power purposes; and that surplus would be the difference between the capacity of the plant and that required to supply all customers being furnished current for lighting, heating or power purposes, by said plant. As to where the surplus begins, at the first part, middle or end of the day, would depend upon the time wherein the greatest load was to be carried in order to furnish the necessary current during the operation of the plant; and, in my opinion, might be at the first part, the middle or end of the day, according to the part of the day which required the greatest amount of power from said plant.

In conclusion, I am of the opinion, that if your plant did not need a surplus, for example, the power during the part of the day which is light which would be necessary in the dark season of the day to furnish arc lights or street lamps, your council could fix a rate which would be less for those hours which would not consume the surplus current than for the hours during which said surplus would be used.

Answering your question as to who has the power and whose duty it is to fix the price at which lots or premiums of lots in a cemetery may be sold, Section 4165, of the General Code, provides that

> "The director shall determine the size and price of lots, the terms of payment therefor, and shall give to each purchaser a receipt, showing the amount paid and a pertinent description of the lot or lots sold. Upon producing such receipt to the proper officer, the purchaser shall be entitled to a deed for the lot or lots described therein."

And Section 4166 provides:

> "No more shall be charged for lots than is necessary to reimburse the corporation for the expense of lands purchased or appropriated for cemetery purposes, and to keep in order and embellish the grounds, and provision shall be made for the interment in such cemetery of persons buried at the expense of the corporation."

Under the sections just quoted, it is my opinion that the director of public service of a city owning a cemetery is vested with the absolute power to fix the size and price, and terms of payment therefor, of lots or portions therein.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

296.

SEMI-ANNUAL APPROPRIATION ORDINANCE — PUBLICATION UNAUTHORIZED — PAYMENT OF, FROM CITY TREASURY, ILLEGAL.

As the semi-annual appropiation ordinance is not an ordinance of general nature, and there is, therefore, no authority in law for the publication of the same, payment for a publication thereof cannot be legally made out of the city treasury.

COLUMBUS, OHIO, April 15, 1912.

HON. Z. N. FAIR, *City Solicitor, New Philadelphia, Ohio.*

DEAR SIR:—Under date of March 20, 1912, you write us that your city auditor informs you that he has received a notice not to have the semi-annual appropria-

tion ordinance published, and that the payment of the same could not be legally paid out of the city treasury. You further state that the opinion was current in your city some time ago that the ordinance in question was passed as an emergency measure since you were allowed to pay city officials and current expenses without waiting for the expiration of sixty days, as provided for in the referendum act; also that the semi-annual appropriation ordinance was published under this impression, and that the payment of the same is now withheld by the city auditor. You, therefore, ask whether the payment for the publishing of the semi-annual appropriation ordinance can legally be paid out of the city treasury.

In an opinion rendered to the Hon. W. J. Tossell, city solicitor, Norwalk, Ohio, under date of January 18, 1912, I held that the semi-annual appropriation ordinance was not within the purview of the initiative and referendum act as found in 102 Ohio Laws, 521. This opinion is to be found in printed form in LVII No. 5, Ohio Law Bulletin 42, under date of January 29, 1912.

Under date of October 4, 1911, in an opinion to the Hon. Elmer T. Boyd, city solicitor, Marion, Ohio, I held that ordinances passed by the city council requiring publication should be published as heretofore.

In an opinon rendered to the Hon. Geo. C. Von Beseler, city solicitor, Painesville, Ohio, under date of April 3, 1912, I held as follows:

> "Under date of January 25, 1911, this department rendered an opinion to Hon. H. R. Schuler, city solicitor of Galion, Ohio, in which it was held that the semi-annual appropriation ordinance was not an ordinance of a general nature and need not be published in two newspapers of opposite politics. As it is not an ordinance of a general nature, it need not be published in any newspaper."

The initiative and referendum act does not involve the question of publication of ordinances, but leaves the law, as I view it, as it was prior to the passage of said act.

Having held that the semi-annual appropriation ordinance was not an ordinance of a general nature, and, therefore, that it was not necessary to publish such ordinance, there is, of course, no authority in law for the payment of the publication of such ordinance, and consequently, payment for the publication thereof cannot be legally made out of the city treasury.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

303.

INITIATIVE AND REFERENDUM ACT—CERTIFICATION OF FACT OF FILING OF PETITIONS FOR REFERENDUM BY CLERK TO BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—DUTY OF CLERK TO CANVASS NAMES ON PETITIONS.

When a petition for a referendum has been filed under the Crosser act, it is the duty of the clerk to certify within ten days, merely the fact of the filing of said petition to the board of elections. The board, therefore, does not get possession of the petitions, and it is the duty of the clerk alone to canvass the names on said petition, and said duty must be performed before the certification of the fact of their filing by the clerk to the board.

COLUMBUS, OHIO, April 16, 1912.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—Under date of February 12th you state that under favor of the Crosser act there has been filed with the city clerk a petition alleging to contain a sufficient number of names, which petition calls for a referendum on an issue of bonds by the city of Akron for the purchase of certain property for a city hall site. You then request my opinion as to whether or not the board of elections are authorized to canvass the names which have been attached to the petition.

The first paragraph of Section 4227-2, General Code, provides that if a referendum petition is filed, the clerk (of council) shall "certify such ordinance, resolution or other measure" to the board of elections, who shall submit the same to the vote of the electors at the next general election.

The second paragraph of Section 4227-2 provides that if a referendum petition is filed thereunder the clerk (of council) "shall certify the *fact* of the *filing* of such petition" to the board of elections, who shall cause the ordinance or resolution to be voted on at the next regular election. It would appear to me from a reading of said Section 4227-2, General Code, that under the first paragraph thereof after a referendum petition has been filed with the clerk, it is his duty to certify the ordinance to the board of elections, and not his duty to send over the petition which has been filed with him. The same is true in reference to the second paragraph of said section, as after a referendum petition is filed thereunder, it is the duty of the clerk to certify the *fact* of the *filing* of the petition to the board of elections. It would, therefore, appear that at no time does the board of elections obtain the possession of the petition itself, and, consequently, would be unable to canvass the names upon such petitions. It is the duty of the clerk (of council) to determine that the petition is signed by fifteen per cent. of the qualified electors of the municipality.

It is true that such clerk under the provisions of the act is to certify the ordinance within ten days after the filing of the petition, yet it is his duty in the first instance to satisfy himself that the requisite fifteen per cent. of the qualified electors have signed the petition, and he, therefore, is the proper party to canvass the names that are attached to such petition. It would, of course, have been well to have placed this duty upon the board of elections because of their peculiar knowledge of the various voters throughout the city, yet the legislature has not seen fit so to do, nor am I able to find any general provision of law that would authorize them to canvass such names.

I am, therefore, of the opinion that the board of elections is without authority to canvass the names signed to a referendum petition.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

305.

COUNCIL—CONTINUOUS BODY—POWER TO ACT BEFORE AND AFTER EXPIRATION OF TEN DAYS AFTER VETO BY MAYOR—INCREASE OF SALARY OF DIRECTOR OF PUBLIC SERVICE.

When council acts upon an ordinance fixing the salary of a director of public service within ten days after the same has been vetoed by the mayor, said action is null and void, and as Section 4234, General Code, provides that ten days after said veto, said ordinance may be reconsidered, a new council, since the council is a continuous body, may act upon said ordinance at any time.

COLUMBUS, OHIO, April 22, 1912.

HON. ALBERT S. FENZEL, *City Solicitor, Middletown, Ohio.*

DEAR SIR:—Under date of January 15th you submitted for my opinion the following facts:

> "The salary of the director of public service of this city is, and has been heretofore, one thousand dollars per year; on the 15th of last December, council passed, under suspension of rules, an ordinance fixing the salary of the service director at one thousand five hundred dollars, on December 22nd, the mayor returned this ordinance to council with his veto; council then (without waiting for the ten days required by law to elapse) took action on this ordinance, and on the vote failed to pass it over the mayor's veto."

You desire to know whether or not the present council can pass the ordinance mentioned over the veto of the mayor who has gone out of office.

Following the ruling in the well considered case of Smith vs. Railway 8 Nisi Prius 1, I am of the opinion that the council is a continuous body and that the business remaining unfinished at the termination of the terms of office of councilmen does not die thereby causing it to be taken up again entirely new by the incoming council.

Such being the fact, I am of the opinion that unless the action of the outgoing council was valid and complete upon the ordinance in question the present council can consider the same again and pass it over the mayor's veto.

Section 4234, General Code, states in part as follows:

> "When the mayor disapproves an ordinance or resolution, or any part thereof, and returns it to council with his objections, council may, after ten days, reconsider it, and if such ordinance, resolution or item, upon such reconsideration is approved by the votes of two-thirds of all the members elected to council, it shall take effect as if signed by the mayor. The provisions of this section shall apply only in cities."

From the statement above given by you it appears that council without waiting for the ten days required by law to elapse took action upon the ordinance in question and failed to pass the same over the mayor's veto. As Section 4234, General Code, above quoted, authorized council to reconsider it *after ten days* from its return to the council by the mayor, and as council did not wait in this instance for said ten days to expire, I am of the opinion that the attempted action of council was null and void and of no force and effect, as council was at the time it attempted to pass said ordinance over the veto of the mayor totally

without authority so to do. I am, therefore, of the opinion that the new council, since there is no limitation upon the time within which the same shall be considered after the ten days from the return of such ordinance to council can reconsider such ordinance and pass the same over the veto of the mayor in the manner provided in Section 4234.

We have considered the question as to whether or not a director of public service has a "term of office" and, therefore, whether the salary of such officer is within the inhibitions of Section 4213, General Code, which provides in part as follows:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed."

Our conclusions thereon are found in an opinion rendered to Hon. Thomas C. Davis, city solicitor, Massillon, Ohio, under date of March 26, 1912, copy of which opinion we herewith enclose.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

306.

CIVIL SERVICE—RESIGNATION OF FIREMAN—REQUIREMENTS FOR REGAINING POSITION.

When a fireman resigns his position, a vacancy is created and he may regain such position only by fulfilling requirements for examination and otherwise, in accordance with Section 7481, *General Code, providing for the filling of such vacancies.*

COLUMBUS, OHIO, April 27, 1912.

HON. J. F. NIELAN, *City Solicitor, Hamilton, Ohio.*

DEAR SIR:—Your favor of April 5, 1912, is received, in which you inquire as follows:

> "J. M. of this city, was formerly employed in the fire department of the city of H. for a period of about fifteen years. As a result of a misunderstanding, Mr. M. resigned from the fire department, and now wishes to be reinstated in said department, and at the request of the director of public safety I am writing to ask whether under the law the director of public safety has any authority to reappoint Mr. M. without an examination and having his name certified to the director of public safety as being eligible to appointment in said department."

The act of the employe is resigning his position severed his connection with the service of the city. He thereby terminated all the rights which he had to his position, including the protection which he had to his position by reason of being in the classified service.

The statute does not make any provision covering the question you ask.

Section 4481, General Code, prescribes how appointments shall be made in the classified service, as follows:

> "Appointments shall be made in the following manner: The appointing board or officer shall notify the commission of any vacancy

to be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest in the respective lists as shown by the result of such examination. Such board or officer shall thereupon appoint one of the three so certified. Grades and standings so established shall remain the grades for a period of six months, or longer if the commission so determines, and in succeeding notifications of vacancies, candidates not selected may be dropped by the commission after having been certified a total of three times."

When an employe resigns a vacancy is created. This vacancy, if the position is in the classified service, should be filled in accordance with the provisions of Section 4481, General Code. There is no other way to fill such vacancy. If there is no vacancy, the appointing officer has no power to make an appointment.

An employe in the classified service of a city, who resigns his position, cannot be reinstated after such resignation has become effective. In order to be reappointed he must take the examination as required by statute and his name certified to the appointing officer or board by the civil service commission.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

309.

INITIATIVE AND REFERENDUM ACT—ORDINANCE PROVIDING FOR DONATION OF LAND FOR ARMORY PURPOSES—SIXTY-DAY EXPIRATION—"EMERGENCY"—"RIGHT"—"EXPENDITURE."

A resolution or ordinance of council authorizing a deed to be made to the state of Ohio for the purpose of donating a site for armory purposes does not "involve an expenditure of money" nor does it "create a right" within the meaning of Section 2, of the initiative and referendum act and therefore, does not remain inoperative for sixty days.

As such a purpose does not come within the scope of the term "emergency," the same may not be declared such for the purpose of permitting the ordinance to go into effect immediately.

Such an ordinance, however, being the exercise of a power delegated to the municipal corporation, is within paragraph 1, of Section 2 of the initiative and referendum act and would become effective as prior to the passage of the act. The ordinance, however, should remain inoperative for thirty days in order to give the electors their right to file a referendum petition within that time.

COLUMBUS, OHIO, April 25, 1912.

HON. D. F. MILLS, *City Solicitor, Sidney, Ohio.*

DEAR SIR:—Under date of April 24, 1912, you state that the city of Sidney desires to donate a site to the state of Ohio for armory purposes, and that you desire an opinion on the following:

"1. Whether the resolution or ordinance passed by council authorizing a deed to be made to the state of Ohio for the purpose in question under the provisions of Section 3631, G. C., 102 O. L. 153 remains inoperative for sixty days under paragraph two of Section two of the initiative and referendum act, 102 Ohio Laws 521.

"2. If said ordinance does not come within the provisions of paragraph two of Section two of the initiative and referendum act would council be jusified in declaring said resolution or ordinance to be an emergency measure as provided in Section three of said act so that the same may go into effect immediately.

"3. If council so declares said ordinance an emergency measure what would be the holding on the question of the validity of the deed executed under an ordinance declaring this to be an emergency measure."

Paragraph one of Section two of the initiative and referendum act provides in part as follows:

"Any ordinance, resolution or other measure of a municipal corporation, granting a franchise, creating a right, involving the expenditure of money or exercising any other power delegated to such municipal corporation by the general assembly, shall be submitted to the qualified electors for their approval or rejection in the manner herein provided, * * *."

Paragraph two of Section two provides in part:

"No resolution, ordinance, or measure of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to use the streets, or regulating the use of the streets for water, gas, electricity, telephone, telegraph, power or street railways, or other public or quasi-public utility shall become effective in less than sixty days after its passage * * *."

Section three of the initiative and referendum act provides:

"All other acts of city council not included among those specified in Section 2 of this act, shall also remain inoperative for sixty days after passage, and may be submitted to popular vote in the manner herein provided, except that any act, not included within those specified in Section 2 of this act, as remaining inoperative for sixty days, and which is declared to be an emergency measure, and receiving a three-fourths majority in council of such municipal corporation may go into effect immediately and remain in effect until repealed by city council or by direct vote of the people as herein provided."

Section 3616 of the General Code provides:

"All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3631, General Code, as amended 102 O. L. 153, which is one of the powers mentioned in said chapter provides in part as follows:

"* * *to hold real estate or any interest therein and other property for the use of the corporation and to sell or lease it, or to donate the same by deed in fee simple to the state of Ohio as a site for the erection of an armory."

Your first question is as to whether or not a resolution or ordinance authorizing a deed to be made to the state for armory purposes under Section 3631 supra would remain inoperative for sixty days. Upon an examinaation of paragraph two of Section two of the initiative and referendum act the only question that can arise is whether or not such an ordinance or resolution would create a right or would involve the expenditure of money. As I view the question as the property is to pass from the city to the state by *donation* the ordinance providing therefor could under no circumstances be considered as an ordinance involving the expenditure of money. The word "donate" negatives the idea of expenditure. Does the ordinance create a right? The question as to what is meant by the term "creating a right" was considered in the case of State of Ohio ex rel. vs. Barr 5 O. N. P. 435. In such case the court says:

> "Passing now to the consideration of what is a 'right' within the meaning of the clause 'creating a right,' we find among others the following definitions:
>
> "'Right;' That which one has a legal or special claim to do or to exact; legal power; authority; as, a sheriff has the right to arrest a criminal.'
>
> "Webster's International Dictionary. 'Often used to designate power, prerogative and privilege, especially when applied to corporations; a capacity residing in one man of controlling, with the assent and assitance of the state, the action of others.' A. and E. Ency. of Law vol. 21, p. 406.
>
> "'A legal right may be said to be a claim which can be enforced by legal means against the persons or community whose duty it is to respect it.'
>
> "Blackstone, Book 1, p. 123, 'A power, privilege, prerogative.'
>
> "Anderson's Law Dictionary. The meaning given by these definitions must have been the meaning intended for this clause by the legislature. A franchise is sometimes termed a right, but that evidently is not the kind of right referred to here, since the section specially enumerates 'the granting of the franchise' in naming the classes of legislation by the council which require to be submitted to the mayor for approval. If 'franchise' and 'right' here mean the same thing, then the clause, 'or creating a right' is tautology, and the courts are always constrained to giving such force and effect to statutes as will avoid tautological expressions. In Pancoast vs. Ruffin, etc., 1 Ohio 386 the court says:
>
> "'Statutes should be so construed as to give effect to the intention of the legislature, and, if possible render every section and clause effectually operative.'
>
> "Besides franchises we know of no other class, or kinds of rights, except those comprehended in the definitions before given, which a city council has the power to create. The 'right' meant by the statute then, is a prerogative, authority, a legal power. * * *
>
> "In taking this view of the ordinance we follow the reasoning of the supreme court of New York, in the case of People against Dikeman, 7 Howard's Prac. R. 130, wherein the court says: 'In law it (the word "right") is most frequently applied to property in its restricted sense, but it is often used to designate power, prerogative and privilege, and especially when applied to corporations. Indeed, a large portion of the rights of political corporations consist of powers conferred upon them. Corporate powers are not generally exercised by the whole body.

> They are, to a great extent, delegated to its officers and in municipal corporations to the different departments; these are generally electoral, legislative and administrative.'"

Under the definitions as found in the above cited case I am of the opinion that an ordinance or resolution such as the one in question cannot be considered as an ordinance or resolution creating a right.

I, therefore, hold in answer to your first question that an ordinance or resolution passed by council authorizing a deed to be made to the state of Ohio for armory purposes under the provisions of Section 3631, G. C., 102 O. L. 153, does not remain inoperative for sixty days under paragraph two of Section two of the initiative and referendum act.

Answering your second question I have heretofore given it as my opinion that council cannot by mere declaration declare an ordinance or resolution to be an emergency measure unless the same would come within the term "emergency" as the same is defined. I so hold in an opinion to the Hon. Nicholas H. Greenberger, city solicitor, Akron, Ohio, under date of October 27, 1911, as follows:

> "While it is true that Section 3 of the initiative and referendum act foregoing set forth declares that certain acts may take effect immediately, provided they be declared by council to be an 'emergency measure,' yet I do not believe that council can declare an act to be an emergency measure which could not be considered under the definition of 'emergency' to be such. In other words, I do not believe that council by mere declaration that a measure is an emergency measure can so constitute it if the definition of 'emergency' did not apply to such measure.
>
> "'Emergency' is defined by the Century Dictionary as follows:
>
> "'A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances.' Again,
>
> "'A sudden or unexpected occasion for action; exigency; pressing necessity.' Again,
>
> "'Something not calculated upon; an unexpected gain.'
>
> "'Emergency' is defined by Webster to be: 'A condition of things happening suddenly or unexpectedly; an unforeseen occurrence; a sudden occasion.' Again,
>
> "'Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency.'"

I can conceive of no facts that could arise in reference to the passage of an ordinance or resolution donating property to the state of Ohio for armory purposes which could give rise to an emergency as the same is defined.

I am, therefore, of the opinion that council would not be justified in declaring said resolution or ordinance to be an emergency measure as provided in Section three of said act so that the same may go into effect immediately.

You next inquire if council so declares said ordinance an emergency measure what would be the holding on the question of the validity of the deed executed under an ordinance declaring this to be an emergency measure.

As I have heretofore held that I cannot conceive of any situation in which council could declare an ordinance or resolution donating property to the state of Ohio for armory purposes to be an emergency measure such a declaration in such ordinance or resolution would not have the effect of permitting the same to go into effect immediately.

The power to donate property is as before stated included in Section 3631, General Code among the general powers of a municipal corporation and an ordinance of resolution providing therefor, would, as I view the matter, come within paragraph one of Section two of the Crosser act in that it was the exercising of a power delegated to the municipal corporation by the general assembly, and, consequently, the qualified electors of such municipality would have the power to cause the same to be referred to them for approval under the provisions of said paragraph and section. In short, I am of the opinion that such an ordinance or resolution is within paragraph one of Section two of the act. It will be noted that paragraph one of Section two does not specify any time within which an ordinance shall become effective thereunder, and I, therefore, am of the opinion that the same would become effective as prior to the passage of said act, but as the electors of the municipality have the power by referendum petition filed within thirty days after the passage or adoption of such ordinance or resolution to cause the same to be referred to them at the next general election this department would insist that the ordinance or resolution in question should remain inoperative thirty days in order to give the electors an opportunity to file a referendum petition thereon before the making of a deed thereunder, and would disregard the fact that it was endeavored to pass the ordinance or resolution as an emergency measure.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

317.

SINKING FUND TRUSTEES—POWER TO INVEST MONEYS IN BONDS DOES NOT INCLUDE NOTES OF MUNICIPALITY.

Section 4514, *General Code, providing for the investment by the sinking fund trustees, of moneys held by them in "bonds" of the various subdivisions, does not confer the right nor power to invest said moneys in "notes" of a municipality.*

COLUMBUS, OHIO, April 19, 1912.

HON. CLYDE C. PORTER, *City Solicitor, Tiffin, Ohio.*

DEAR SIR:—I wish to apologize for the considerable delay which has ensued in answering your letter of February 27th. Your letter was unfortunately mislaid and did not come to light until a day or two ago.

You request my opinion as to whether or not the trustees of the sinking fund of a municipal corporation can invest the funds in *notes* of the municipality. Section 4514 of the General Code provides as follows:

> "The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be reinvested in like manner."

Authority of a municipal corporation to issue notes as distinguished from

bonds is found in Section 3915 and 3916 of the General Code which provide as follows:

> "Municipal corporations may borrow money and issue notes in anticipation of the collection of special assessments. Such notes shall be signed and sealed as municipal bonds are signed and sealed. They shall bear interest at a rate not to exceed six percent. per annum and be due and payable not later than five years from the date of issue. The notes shall not exceed in amount the estimated cost of the improvement, and shall recite upon the face the purpose for which they were issued. All assessments collected for the improvement, and all unexpended balances remaining in the fund after the costs and expenses of the improvement have been paid, shall be applied to the payment of the notes and the interest thereon until both are fully provided for. Council ordinances and proceedings relating to the issue of such notes shall not require publication.
>
> "Section 3916. For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council may deem proper, not to exceed six per cent. per annum, payable annually or semi-annually."

It is to be observed at the outset that *bonds* and *notes* are separately treated in the sections relating to the power of the municipality to borrow money. Unless a contrary intention appears, then it must be presumed that they are to be separately treated elsewhere in the Municipal Code and especially in sections dealing with the fiscal affairs of the municipality. So, in Section 4506, which relates to the creating of a sinking fund, it is provided that a sinking fund shall be created

> "for the extinguishment of all bonds and funded debts and for the payment of all judgments final except in condemnation of property cases * * *."

So, also, in Section 4511 it is provided that the city auditor or the village clerk shall report to the trustees of the sinking fund a statement of

> "the outstanding indebtedness of the corporation for bonds issued."

and Section 4513 provides that the trustees of the sinking fund shall certify to council

> "the rate of tax necessary to provide a sinking fund for the future payment of bonds issued by the corporation for the payment of final judgments, except in condemnation of property cases, for the payment of interest on bonded indebtedness, and the rents due on perpetual leaseholds, etc."

From these and other sections which I deem it unnecessary to quote, I have arrived at the conclusion that when the word "bonds" is used in the sections relating to the powers and duties of the trustees of the sinking fund, it cannot

be given a meaning broad enough to include the notes issued by a municipal corporation under either of the two sections above quoted. These notes are no part of the funded indebtedness of the municipality and are distinguishable from the bonds on that ground alone.

Section 4514 itself, the one especially called in question in connection with your inquiry, may not be given a construction more liberal than that of any other section of the same chapter which are in *pari materia* with it, and I am, therefore, of the opinion that under said section as it now stands, the trustees of the sinking fund are without power to invest the funds in notes issued by a municipal corporation.

In so holding I have followed my predecessor, Hon. U. G. Denman, who has rendered a similar opinion. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

319.

CONSTITUTIONAL LAW—COURTS—ACT ESTABLISHING CANTON AND YOUNGSTOWN CRIMINAL COURTS—SPECIAL LEGISLATION—TWO SUBJECTS IN ONE BILL—TWO-THIRDS VOTE.

By virtue of Article IV, Section 4, of the Constitution, which grants special legislative powers with reference to the organization of courts, the act establishing the Canton criminal court is not violative of the constitutional prohibition against special legislation.

The fact that the amendatory act refers both to the Canton court and to the criminal court of Youngstown, does not nullify said act by virtue of the constitutional provision against the treatment of more than one subject in a single bill. Said constitutional regulation is merely directory and not mandatory.

The fact that said original act did not receive a two-thirds vote of the general assembly would prevent the passage of the law. Since, however, the amendments to said act have received the required two-thirds vote, this legislative action has the effect of a valid confirmation of the act.

COLUMBUS, OHIO, April 27, 1912.

HON. FRANK N. SWEITZER, *Assistant City Solicitor, Canton, Ohio.*

DEAR SIR:—I herewith enclose report rendered to me by one of my special council in reference to the constitutionality of the Canton criminal court. I have carefully considered said report, together with the briefs submitted by yourself and Hon. John C. Welty, and find said report to be in all respects correct, and, therefore, have adopted the same as my opinion. It would seem to me that there was absolutely no doubt of the legality of the establishment of the Canton criminal court. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

(Enclosure.)

IN RE CANTON CRIMINAL COURT.

COLUMBUS, OHIO, March 20, 1912.

HON. TIMOTHY S. HOGAN, *Attorney General, Columbus, Ohio.*

DEAR SIR:—The question of the legality of the establishment of the Canton criminal court has been referred to me for investigation and report.

The act purporting to establish a criminal court in Canton is found in 99 Ohio Laws, page 607. The first section of this act was amended by act found in 100 Ohio Laws, 69.

It is contended that this court has not been legally established for the following reasons:

First—It is special legislation.

Second—The amendatory act in 100 Ohio Laws, 69, contained more than one subject.

Third—The act in 99 Ohio Laws, 607, did not receive two-thirds vote of the house of representatives.

I.

SPECIAL LEGISLATION.

Special legislation establishing courts was held constitutional in case of State vs. Bloch, 65 Ohio State, 370, the syllabus of which case reads:

> "The act to establish a court of insolvency in counties containing a city of the second grade of the first class and for the relief of the probate court in such counties (92 O. L., 475), and the acts conferring additional and concurrent jurisdiction on such court (93 O. L., 464, and 94 O. L., 353), are constitutional and valid."

This decision is based upon the provisions of Article I, Section 4, of the Constitution of Ohio. The court on pages 390 and 391, by Williams, J., says:

> "* * * But by Section 1, of Article IV, there is a special grant of legislative power upon a particular subject, which itself prescribes the rule for the government of the legislative body in the exercise of that power. It provides that: 'The judicial power of the state is vested in a supreme court, circuit courts, courts of common pleas, courts of probate, justices of the peace, and such other courts inferior to the supreme court, as the general assembly may from time to time establish.' The power is here undoubtedly granted to the general assembly to create courts other than those enumerated in the section; and the material inquiry is, what other courts may be so created? The answer is found in the language of the section, which is 'such' other courts 'as the general assembly may from time to time establish.' That language vests in that body full power to determine what other courts it will establish, local, if deemed proper, either for separate counties or districts, and to define their jurisdiction and powers. The only limitation placed upon the exercise of that power is that the courts so established shall be inferior to the supreme court, subject, of course, to the further qualification that no legislation can alter the judicial system established by the constitution, nor interfere with the courts designated by that instrument as the recipients of the judicial power."

The criminal court of Canton is inferior to the supreme court, and its establishment does not interfere with the courts established by the constitution. The legislature, therefore, has power to establish such courts in any city or district they may deem that such court is required.

It is contended that the foregoing case is distinguishable from the present case, in that the law in that case was of general application in that it applied to all

cities of a certain class, while in the present case the act specifically names Canton and cannot apply to any other city. It is well known that the classification of cities lately in vogue in Ohio, was made so that only one of the larger cities should be contained in a certain class. The decision above was rendered at about the same time that it was held that the classification of cities for other purposes was unconstitutional.

The decision in State vs. Bloch, supra, plainly applies to the case in question. The court says that the legislature may establish local courts, if necessary, or for separate districts or counties. The act in 99 Ohio Laws, 607, is not void as being special legislation.

II.

MORE THAN ONE SUBJECT IN BILL.

It is contended that the amendatory act in 100 Ohio Laws, 69, is invalid because said act purported to amend the act in reference to the criminal court of Canton and also the act in reference to the criminal court of Youngstown.

It is well established in Ohio that the requirement of the constitution that no bill shall contain more than one subject is directory and not mandatory. Even though this provision were mandatory, the act in question deals with but one subject, and that subject is criminal courts.

In case of Pim vs. Nicholson, 6 Ohio St., 177, the first syllabus reads:

> "The provision in the constitution, Article II, Section 10, that 'no bill shall contain more than one subject, which shall be clearly expressed in its title,' was incorporated into the constitution for the purpose of making it a permanent rule of the houses, and to operate only upon bills in their progress through the general assembly. It is directory only, and the supervision of its observance must be left to the general assemby. The act, therefore, of April 10, 1856 (53 Ohio L., 179), entitled 'an act in addition to the several acts in relation to the courts of justice, and their powers and duties,' cannot be impeached as a violation, in the title or subject, of the above mentioned permanent rule of the general assembly."

The same is held in State vs. Covington, 28 Ohio St., 102; Oshe vs. State, 37 Ohio St., 494; and in Will vs. State, 46 Ohio St., 450.

In the latter case, Williams, J., says, on pages 450 and 451, of the opinion:

> "It is first suggested, rather than contended, that the act is without force, because that clause of Section 16, of Article II, of the Constitution which provides that 'no bill shall contain more than one subject, which shall be clearly expressed in its title,' has been disregarded. If it were true, that in the enactment of this statute, the legislature failed to observe the constitutional provision referred to, the statute would not, on that account, be invalid."

The amendatory act in 100 Ohio Laws, 69, is not invalid, because it contains more than one subject.

III.

TWO-THIRDS VOTE.

House Journal, Volume 99, at page 790, of the house of representatives shows that the act found in 99 Ohio Laws, 607, received only seventy-four votes when it recites:

"The question being, shall the bill pass, the yeas and nays were taken, and resulted yeas 74, nays 0, as follows:"

Here follows names of those voting for the bill, being 74 in number. One hundred and twenty-one representatives were elected to the house, and a two-thirds vote would be 81. It is apparent that this act did not receive a two-thirds vote in the house of representatives.

Section 15, Article IV, of the constitution, provides:

"The general assembly may increase, or diminish, the number of the judges of the supreme court, the number of the districts of the court of common pleas, the number of judges in any district, change the districts, or the subdivision thereof, *or establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change,* addition, or diminution, shall vacate the office of any judge."

In case of State vs. Price, 4 Cir. Dec. 296 (8 C. C., 25), it is held:

"In determining the existence of a statute, the house and senate journals may be examined, notwithstanding the act appears in the annual laws with the required certificate of the speakers of each house, and the usual certificate of the secretary of state appended to the volume."

That the journals of the senate and house may be looked to in order to determine the passage of a bill is recognized in Fordyce vs. Goodman, 20 Ohio St., 1-17; and in State vs. Smith, 44 Ohio St., 3, 348-361.

The act in 99 Ohio Laws, 607, purported to establish a criminal court for Canton. Under the constitution such an act required a two-thirds vote of the members elected to the senate and house. The journal of the house of representatives shows that the bill did not receive a two-thirds vote. The bill was not legally passed.

The fourth syllabus in case of Miller vs. State, 3 Ohio St., 475, reads:

"No bill can become a law without receiving the number of votes required by the constitution, and if it were found, by an inspection of the legislative journals, that what purports to be a law upon the statute book was not passed by the requisite number of votes, it might possibly be the duty of the courts to treat it as a nullity. * * *."

The first syllabus in case of Attorney General vs. Joy, 55 Mich., 94, reads:

"A bill that has not been passed according to the conditions prescribed by the constitution does not become a law by receiving the governor's signature or by publication among the statutes."

On page 99 Cooley, C. J., says:

"A bill considered in the legislature, but not constitutionally passed, can never become a law by its being signed by the governor and published with the statutes. That is too plain a proposition to need argument or illustration."

The act found in 99 Ohio Laws, 607, did not become a law by the signatures of the presiding officers, and by the approval of the governor and its publication

in the laws of Ohio, as it did not receive the required number of votes in the house of representatives.

The next year, however, and before any steps had been taken under this act to institute the court by the election of a judge or otherwise, the first section of this act was amended as set forth in 100 Ohio Laws, 69.

The title to this amendatory act reads as follows:

> "To amend Section 1 of an act entitled, 'An act to establish a criminal court in the city of Canton, Ohio,' passed May 9, 1908, 99 Ohio Laws, pages 607 and 608 and to amend Section 1 of an act entitled 'An act to establish a criminal court in the city of Youngstown, Mahoning county, Ohio,' passed April 23, 1904, 97 Ohio Laws, page 623, and relating to the practice of law by the judges of said courts.

The first section of this act and the amended first section of the Canton criminal act, reads as follows:

> "Section 1. That Section 1, of an act entitled, 'An act to establish a criminal court in the city of Canton, Stark county, Ohio,' passed May 9, 1908, and appearing in 99 Ohio Laws, page 607, and Section 1, of an act entitled, 'An act to establish a criminal court in the city of Youngstown, Mahoning county, Ohio,' passed April 23, 1904, and appearing in 97 Ohio Laws, page 623, be and they respectively are hereby amended so as to read as follows:
>
> "Section 1. That there shall be, and is hereby established in the city of Canton, Stark county, a criminal court, held by a judge, which court shall be styled the criminal court and be a court of record, and shall have jurisdiction of any offense under any ordinance of the said city of Canton and of any misdemeanor committed within the limits of said city, to hear and finally determine the same and impose the prescribed penalty; but cases in which the accused is entitled to a trial by a jury, shall be so tried unless a jury be waived in writing by the accused. Provided, however, that nothing in this act contained nor in other laws of Ohio shall prevent a judge of such criminal court from practicing as an attorney and counselor at law in any other court in said state in any and all matters or business not originating or pending in said court hereby established."

This amendatory act received a two-thirds vote in each house and was thus legally passed.

It is contended that this amendatory act confirms the act in 99 Ohio Laws, 607, and carries with it the other sections not amended.

The case relied upon to sustain the contention is that of Attorney General vs. Joy, 55 Mich., 94, the fourth syllabus of which reads:

> "An act of legislation may be confirmed by the subsequent recognition of it; an express confirmation is unnecessary."

In this case the act did not receive the required two-thirds vote by one. The act had been amended and supplemented upon several occasions. The court held that the original act had been confirmed by the legislature.

On page 106, of the opinion, Cooley, C. J., says:

"But treating the questions as purely legal questions, unaffected by the considerations mentioned, we should still be of opinion that no case was made by the relator. If we concede that the act of 1855 was not constitutionally adopted, and that for that reason it was a nullity at the time, it will not follow that it has remained invalid to this time. What the legislature failed at that time to adopt in due form, it had ample power to affirm and validate afterwards if it saw fit to do so. It might have been confirmed by an act of legislation expressly declaring the intent of the legislature to that effect; but that would be only one method of confirmation. The indirect method, by recognizing and acting upon it as a valid law and inviting others to do so, might be equally effectual. The question of confirmation is not one of form, but of the expression of legislative will; and when we find the will expressed in any form of words, direct or indirect, it is sufficient."

In State vs. Cincinnati, 52 Ohio St., 419, it is held:

"An amended section of a statute takes the place of the original section, and must be construed with reference to the other sections, and they with reference to it; the whole statute, after the amendment, has the same effect as if re-enacted with the amendment, and hence, an unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others to confirm it to the requirements of the constitution."

The act of the legislature in passing the amendatory act in 100 Ohio Laws, 69, which was adopted by the required two-thirds vote in each house, was a confirmation and recognition of the act in 99 Ohio Laws, 607. It was an expression of the legislative will that this act should stand as a valid law, and this latter act was passed by a constitutional majority.

It is my conclusion that the criminal court of Canton is a legally established court and that it can exercise the jurisdiction and procedure prescribed in the act of 99 Ohio Laws, 607.

Respectfully,
NICHOLAS J. WEISAND,
Special Counsel.

320.

INITIATIVE AND REFERENDUM ACT—ORDINANCE PROVIDING FOR REFUNDING INDEBTEDNESS—"EMERGENCY"—SIXTY-DAY IN-OPERATION AND SUSPENSION OF EFFECT.

An ordinance providing for the refunding of an existing indebtedness of a municipality is not within paragraph 2, of Section 2, of the initiative and referendum act, requiring certain ordinances to remain ineffective for sixty days.

As such an ordinance, however, is an exercise of a power delegated to a municipality, it is within paragraph 1, of Section 2, of the said act, and is subject to a referendum petition within thirty days. As it is not provided otherwise, the ordinance shall take effect as prior to the act.

By provision of Section 3, of the act, this ordinance, if its nature justifies the same, may, within its terms, be declared an "Emergency" measure within the meaning of this section, and be permitted thereby to go into effect immediately.

COLUMBUS, OHIO, April 15, 1912.

HON. A. J. LAYNE, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—Under date of March 9th you wrote me as follows:

> "The question has arisen relative to whether an ordinance providing for the refunding of bonds comes under the referendum law, requiring sixty days to elapse before the ordinance goes into effect. As this ordinance does not provide for the expenditure of money, it is our opinion that if the ordinance provides specifically that this is an emergency measure that ten days is sufficient for the publication of the ordinance. In view of the fact that a difference of opinion on this question might interfere with the sale of the bonds, we would like to have your opinion on this matter before passing the ordinance."

Section 3916, General Code, provides as follows:

> "For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually."

Section 3917, General Code, provides as follows:

> "No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. Such resolution shall also state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of maturity, the rate of interest they shall bear and the place of payment of principal and interest."

The first paragraph of Section 2, of the initiative and referendum act, 102 Ohio Laws, 521, known as Section 4227-2, General Code, provides in part as follows:

> "Any ordinance * * * of a municipal corporation granting, a franchise creating a right, involving the expenditure of money or exercising any other power delegated to such municipal corporation by the general assembly, shall be submitted to the qualified electors for their approval or rejection in the manner herein provided, if within thirty days after the passage or adoption of such ordinance * * * by the council, there be filed with the clerk of such municipal corporation, a petition * * *."

The second paragraph provides:

> "No * * * ordinance * * * of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to use of the streets, or regulating the use of the streets for water * * * shall become effective in less than sixty days after its passage."

Section 3, of the initiative and referendum act, provides as follows:

> "All other acts of city council not included among those specified in Section 2, of this act, shall also remain inoperative for sixty days after their passage and may be submitted to popular vote in the manner herein provided, except that any act, not included within those specified in Section 2, of this act, as remaining inoperative for sixty days and which is declared to be an emergency measure and receiving a three-fourths majority in council of such municipal corporation may go into effect immediately and remain in effect until repealed by city council or by direct vote of the people as herein provided."

By a consideration of Section 3916, General Code, supra., it will be seen that the purpose of a refunding bond is to extend the time of payment of any indebtedness, or change the indebtedness, but that it is specifically provided that such indebtedness shall not be increased. I am, therefore, of the opinion that an ordinance providing for the refunding of bonds can in no sense be considered as an ordinance involving the expenditure of money as such term is used in the initiative and referendum act for the reason that such bonds are to take care of an existing, valid and binding obligation of the corporation theretofore incurred. Such an ordinance would not, therefore, be within paragraph 2, of Section 2 of said act as it would not come within any of the other classifications contained in said paragraph 2 of said Section 2.

Paragraph 1, of Section 2, of said act, provides that an ordinance "exercising any other power delegated to such municipal corporation by the general assembly." The power to fund or refund the indebtedness of a corporation is a power specifically delegated by Section 3916 General Code, supra., by the general assembly to a municipal corporation, and I am, therefore, of the opinion that an ordinance providing for the refunding of bonds would come within the first paragraph of said Section 2.

Upon an examination of said Section 2 of said act, it will be seen that there is no provision when the ordinances coming within said section and not coming within the second paragraph of said act shall go into effect, and although it pro-

vides that a referendum petition may be filed within thirty days after the passage thereof, yet I am of the opinion that such an ordinance would go into effect in the same manner as it would prior to the passage of the initiative and referendum act, subject, however, to be suspended in its operation upon the filing of a referendum petition within the required thirty days.

Section 3, of the initiative and referendum act, foregoing set forth, states that "all other acts not included among those specified in Section 2, shall remain inoperative for sixty days after passage, except that any act not included within those specified in Section 2 as remaining *inoperative for sixty days* and declared to be an emergency measure, and receiving a three-fourths majority in council, may go into effect immediately and remain in effect until repealed.

I am unable from your inquiry to determine whether or not there is any emergency, as the same is understood in law which could exist for the passage of an ordinance for the refunding of bonds.

An emergency has been defined as follows:

"Emergency" is defined by the Century Dictionary as follows:

> "A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances."

Again,

> "A sudden or unexpected occasion for action; exigency; pressing necessity."

Again,

> "Something not calculated upon; an unexpected gain."

"Emergency" is defined by Webster to be:

> "A condition of things happening suddenly or unexpectedly; an unforeseen occurrence; a sudden occasion."

Again,

> "Any event or occasional combination of circumstance which calls for immediate action or remedy; pressing necessity; exigency."

I have heretofore stated in an opinion that I do not believe that council can declare an act to be an emergency measure which could not be considered under the definition of "emergency" to be such.

If, however, an ordinance providing for the refunding of bonds could under the definition of "emergency" be considered as an emergency measure, it would be well to have the same so declared in such ordinance and the same could then go into effect, as it would have prior to the passage of the initiative and referendum act and remain in effect until repealed by council or by direct vote of the people.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

328.

ORDINANCE FOR SEWER IMPROVEMENT—RESOLUTION OF NECESSITY UNNECESSARY WHERE ALL COSTS ARE PAID BY CITY—VOTE OF ELECTORS ON CONTRACT WITH PRIVATE WATER COMPANY.

A city ordinance declaring it necessary and determining to proceed with a storm water sewer, and providing for the payment of the cost thereof by the city, is valid, the resolution of necessity not being required in such sewer improvements except where part of the cost of the improvements is paid by assessment on property holders.

Under Section 3981, *General Code, a contract entered into between a city and a water company for a supply of water to the city and its citizens, must be submitted to a vote of the electors of the city.*

COLUMBUS, OHIO, May 8, 1912.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 3d, enclosing copy of Ordinance No. 345, N. S., of the city of Chillicothe, which is in part as follows:

"AN ORDINANCE.

"Declaring it necessary and determining to proceed with the construction of a storm water sewer in Eighth and Ninth streets from the Honey Creek sewer in Caldwell street to Mulberry street, in Mulberry street from Ninth to Tenth street.

"Be it ordained, by the city council of the city of Chillicothe, Ohio, three-fourths of the members elected thereto concuring:

"SECTION 1. That it is necessary to improve Eight and Ninth streets from the Honey Creek sewer in Caldwell street to Mulberry street, and Mulberry street from Ninth to Tenth street by constructing therein a storm water sewer, together with all the necessary catch basins, manholes, etc., and that it is hereby determined to proceed with the construction of said storm water sewer in accordance with the plans adopted by council, October 10, 1911, and now on file in the office of the auditor of said city, which specifications are hereby approved, and of the materials set forth in the following approximate estimate of the proposed improvement:

"* * * * * * * * * * * * * *

"SECTION 2. That the whole cost of said improvement, including the cost of any real estate or interest therein, purchased or appropriated, and the cost of any appropriation proceedings therefor, and the damages awarded any owner of adjoining lands and interest therein, and the cost and expense of any such award, the cost of construction and all other necessary expenses shall be paid by the city of Chillicothe, state of Ohio, out of the proceeds of the sale of bonds to be issued by the said city for such purpose in the manner provided by law.

"SECTION 3. That the director of public service be and hereby is authorized and directed to make and execute a contract for said improvement with the lowest and best bidder after advertisement, according to law.

"SECTION 4. That the clerk be and he is hereby directed to cause this ordinance to be published in the manner provided by law."

You call my attention to the fact that the resolution of necessity and the ordinance determining to proceed are attempted to be included in the same act of council. You submit thereon the following question:

"1. Is the above ordinance valid as a whole?
"2. Is it valid as a resolution of necessity?"

You also submit the following independent question:

"Must a contract, entered into between a city and a private company for a supply of water to the city and its citizens, be submitted to a vote of the electors of the city?"

Your first question is somewhat novel; it is made so by the provisions of Section 2, of the ordinance, which is to the general effect that the entire cost of the proposed improvement shall be paid by the city of Chillicothe, no part thereof being assessed either upon the owners of abutting property or upon those of specially benefited property, or property lying within the bounds of any sewer district of the city. This fact becomes of importance in connection with Section 3814 and succeeding sections of the General Code. I quote such portions of these sections as are necessary to illustrate the point I have in mind.

"Sec. 3814. When it is deemed necessary by a municipal corporation to make a public improvement *to be paid for in whole or in part by special assessments,* council shall declare the necessity thereof * * *."

Sec. 3816, which provides for having on file, in the office of the director of public service, the plans and specifications, etc., of the proposed improvement, is qualified by the introductory clause "At the time of the passage of such resolution;" so that the remainder of the section only applies to cases covered by Section 3814.

Section 3823 provides in part as follows:

"An owner of a lot, or of land, bounding or abutting upon a proposed improvement, claiming that he will sustain damages by reason of the improvement, within two weeks after the service of the notice or the completion of the publication thereof, shall file a claim in writing with the clerk of the council, setting forth the amount of the damages claimed, with a general description of the property with respect to which it is claimed the injury will accrue. * * *"

It must be noted here that this section applies to all "proposed improvements," and not merely to those to be paid for in part by assessments.

Section 3825 provides for what is familiarly known as the ordinance determining to proceed. It is as follows:

"If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement, shall contain a statement of the general nature of that may be bid upon therefor, the mode of payment therefor, a reference to the resolution there-

tofore passed for such improvement with date of its passage, and a statement of the intention of council to proceed therewith in accordance with such resolution and in accordance with the plans, specifications, estimates and profiles provided for such improvement."

The chief office of this ordinance, as is apparent upon its face, is to furnish the necessary directions to the administrative officers of the city government; the rights of the public are not intended to be safeguarded by it; it notifies the treasurer as to his duty with respect to the collection of the assessment; and it notifies the director of public service as to his duty with respect to the terms of the contract for the improvement. It is made clear by Section 3824 that the council may determine to proceed with an improvement without determining the extent of the damages. That section is as follows:

"At the expiration of the time limited for so filing claims for damages, the council shall determine whether it will proceed with the proposed improvement or not, and whether the claims for damages so filed shall be judicially inquired into, as hereinafter provided, before commencing, or after the completion of the proposed improvements."

The procedure for carrying this section into effect is found in Section 3829, which I do not quote.

Section 3833 provides as follows:

"The contract for any such improvement shall be let by the director of public service, in the same manner as other contracts, and in case all bids be rejected, such director in cities and the council in villages may order a readvertisement for bids."

There might be some doubt, in view of the facts to which I have called attention, as to the application of this section to all improvements. This point is immaterial, however, in view of the statutes relating to the general powers and duties of the council and the director of public service, respectively, with respect to the making of contracts. I need not quote these sections.

Coming now to the more specific provisions relating to sewers, it is to be observed that Sections 3871, et seq., General Code, relate generally to the construction of sewers by sewer districts, according to a system devised by the engineer. The ordinance does not disclose, on its face, that the proposed proceeding is in accordance with a plan of sewerage which has been prepared; if it is, then, of course, it is governed by Sections 3878 and 3879, General Code, which require the passage of a resolution of necessity and a separate ordinance determining to proceed as in other cases, whenever the council deems it necessary to construct a part of the sewer provided for in the plan.

If this proceeding is independent of any plan but is, as it seems to be, an ordinance providing for the construction of a single storm water sewer, then I am of the opinion that the sections last above cited do not apply.

Section 3882 is of particular interest in connection with this question; it provides as follows:

"If in its opinion expedient, the council may provide for the construction of main drains and branch drains connecting therewith without previously adopting any plan of sewerage or division of the territory of the municipal corporation or any part thereof, into districts, and may assess the cost and expense thereof upon such lots or lands as shall be designated in the ordinance to improve, or they may be paid from the

sewer fund, or by the municipal corporation at large, as council determines, and such proceedings shall be had in respect to such improvements and assessments as are provided for herein for the construction of main or branch sewers according to a previously adopted plan."

The real problem presented by your first question arises out of the language of Section 3882. The question is as to whether or not this section, in enacting that "such proceedings shall be had in respect to such improvements and assessments as are provided for herein for the construction of main or branch sewers, according to a previously adopted plan," intends to make necessary the same proceedings when no assessment is to be made as when a part of the cost of the improvement is to be assessed upon specially benefited property. Under Section 3814 and succeeding sections, it has been held, in the case of The East End Banking and Trust Company vs. The City of Cleveland, 1 N. P., n. s. 493, affirmed by the supreme court without report, that the passing of a separate resolution of necessity an ordinance determining to proceed is not necessary where the whole cost of the improvement is to be borne by the municipal corporation. Lawrence, J., delivering the opinion of the common pleas court, points out that under former statutes, existing prior to the adoption of the Municipal Code of 1902, all municipal improvements were required to be made in this way; i. e., by the passage of a resolution of necessity and the adoption of an ordinance determining to proceed. Since that time, however, the provisions, as construed by the judge, are held applicable only to cases in which the improvement is to be paid for in whole or in part by special assessments. The exact question arose out of a controversy as to whether or not a property owner who failed to present his claim for damages within two weeks after the service of the notice or the completion of the publication thereof as prescribed in present Section 3823, General Code, was barred from asserting such a claim. The court held that he was not so barred because Section 3823, then Section 54, Municipal Code, in common with all the statutes in *pari materia,* related solely to the making of public improvements to be paid for in part by assessment.

Does, then, this reasoning, which seems to me to be absolutely correct, apply to Section 3882? That section, in common with the other sections which are quoted in this opinion, is found in the chapter which purports to relate to "assessments;" yet, in specific terms, it applies to the construction of drains which may be paid for by the municipal corporation at large, and requires that such improvement shall be made by following such proceedings as are prescribed for the construction of sewers, according to a previously adopted plan.

Careful analysis of Section 3882 is necessary in order to determine whether or not the rule of construction to which the other sections of the chapter are subject is to be applied to it. On the other hand, the considerations already mentioned seem to lead to the conclusion that although a branch sewer is being constructed without assessment, the procedure of making assessments must be followed. However, it does not seem reasonable that the general assembly should have intended that a paving improvement or a grade crossing elimination, or any other of the improvements, might be constructed by the city without going through with all the formalities incident to the making of an assessment; and yet, if a sewer is to be laid without assessment, these very formalities must be observed; that is to say, there does not seem to be any logical reason for making a special exception with respect to the construction of sewers.

It is possible to construe Section 3882, without doing any violence to its language, so as to make the last clause thereof applicable only to cases in which assessments are to be made; that clause provides that "such proceedings shall be had in respect to such improvements and assessments as are provided for herein for the construction of main or branch sewers, according to a previously adopted

plan." Now, the construction of sewers according to a previously adopted plan might be made in one of two ways; the sections relating to such plan provide, it is true, for the making of assessments by sewer districts, but there is nothing to prevent a municipal corporation from constructing a sewerage system according to a previously adopted plan without assessing any part of the cost thereof upon specially benefited property. Sanitation and sewage disposal are matters of public interest, not mere private services, and there is no reason whatever, as far as I am able to ascertain, why a municipal corporation should be deemed *obliged* to assess any portion of the cost of construction of any sewer against any property.

It follows from all this that when the legislature required that the same proceedings should be had in the case of the construction of a single sewer without assessment as provided for in the case of the construction of sewers according to a previously adopted plan, it might well have had in mind the possibility of the construction of a sewerage system without assessment.

To what end this reasoning might lead is perhaps immaterial in consideration of this question. In my opinion, whether or not all the procedure of assessment is, by reason of the peculiar language of the related statutes, necessary, in strict law, in the case of the construction of a sewer to be paid for by the city, the failure to pass a separate resolution of necessity and an ordinance determining to proceed is not fatal to any step of the procedure in such case. The sole office of the resolution of necessity is to afford to property owners, who will be damaged by the proposed improvement, opportunity to file their claims of damage. If notice were served under the ordinance which you present to me, and if the same was published as required by law for the resolution of necessity, each owner of property is duly charged with notice in the premises; inasmuch as there is no assessment to be made, such a claim for damages may be asserted against the municipal corporation at any time, and the sole question would be that raised in the Cleveland case, namely, as to whether or not the limitation of two weeks, within which to file claims for damages, would apply.

There are no property owners to be notified of the city's intention to assess their lands, because no assessment is to be made.

Waiving, then, the technical question which might be raised, I am of the opinion that the ordinance above quoted affords legal ground and sufficient authority to the director of public service to proceed with the improvement, and does not deprive any property owner, who may suffer special damage by reason of such improvement, of an opportunity to have the matter of his damages adjudicated as guaranteed by the constitution.

I have, as you will observe, answered both of your first two questions in the foregoing discussion, not categorically, it is true, but sufficiently, I think, for your purpose.

Coming now to your third question, I beg to advise that it is expressly provided by Section 3981, of the General Code that

> "A municipal corporation may contract with any individual or individuals or an incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares and other public places within the corporate limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as may be agreed upon. But such contract shall not be executed or binding upon the municipal corporation until it has been ratified by a vote of the electors thereof, at a special or general election, and the municipal corporation shall have the same power to protect such water supply and prevent the pollution thereof as though the waterworks were owned by such municipal corporation."

There seems to be no question as to the meaning of this section; it clearly requires that contracts, such as that concerning which you inquire, must be submitted to a vote of the electors.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

332.

PUBLICATION OF ORDINANCES—ASSESSING ORDINANCE—"GENERAL NATURE" AND "PROVIDING FOR AN IMPROVEMENT."

An assessing ordinance is not an ordinance of a "general nature" nor is it an ordinance "providing for an improvement" within the meaning of Section 4227, General Code, providing for the publication of such ordinances.

The fact that such ordinance had not been published would not prove an obstacle in an action for the collection of an assessment.

COLUMBUS, OHIO, April 24, 1912.

HON. F. G. LONG, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR:—Under date of February 1, 1912, you stated you desired my opinion as to whether or not an assessing ordinance must be published before becoming effective.

Section 4227, General Code, provides that ordinances of a general nature or providing for improvement shall be published before going into operation, and that no ordinance shall take effect until the expiration of ten days after the first publication of such notice.

The question arises, therefore, as to whether or not an assessing ordinance is:

(a) An ordinance of a general nature;

(b) An ordinance providing for improvement.

A. An assessment for street purposes has been defined:

> "As those special and local impositions upon property in the *immediate vicinity* of an improved street, which were necessary to pay for the improvement, and laid with reference to the special benefit derived from the expenditure of the money.
>
> "Hill vs. Higdon 5 O. S. 243,-247 cited with approval in Raymond vs. Cleveland 42 O. S. 522-527."

Since it has been determined that an assessing ordinance is purely a special and local imposition upon property, I am of opinion that such an ordinance cannot be considered as an ordinance of a general nature.

B. The next question to be determined is whether or not such an ordinance is one providing for improvement.

My predecessor, the Hon. U. G. Denman rendered an opinion under date of February 13, 1909, wherein he states:

> "I am of the opinion that the assessing ordinance is an ordinance 'providing for improvements' within the meaning of the statute as quoted above. The improvement is not provided for when the resolution declaring the necessity, and the ordinance determining to proceed with the improvement, are passed, but since the improvement is to be paid for by special assessments upon abutting or benefited properties, it is

> further necessary to, pass another ordinance to make such assessments, and thereby provide for the payment of the cost and expense of making the improvement."

This opinion proceeds upon the basis that the provision of statute that an ordinance providing for improvements shall be published means not only such ordinance as provide or authorize the improvement but likewise the payment for such improvement. In other words, this ruling extends the meaning of the words "providing for" to include everything necessary not only to fully authorize the improvement, but such other ordinances as are necessary to be passed in order to create the funds necessary for the payment thereof.

In my opinion this is entirely too broad a meaning to be given to the words "providing for." As I view the meaning of such words it is only such ordinances as are necessary to provide for the making of the improvement that are required to be published.

In the case of Kohler Brick Co., City of Toledo, 10 C. C. n. s. 137 the contention was made that the assessment ordinances in such case was not published as required by Revised Statutes 1695 (1536-621 R. S.) which contained the same provision as Section 4227, General Code, for the reason that it was not all published. Said ordinance referred to a report of the assessors, and it was urged that the report was thereby made a part of the ordinance, and should have been published with it which was not done. The court on p. 417 says:

> "But we are of the opinion that it was not necessary to publish this ordinance at all; so that we need not pass upon the question whether the schedule was made a part of the ordinance so that in case the publication of any part of it was required, the schedule should be published with it.
>
> "Revised Statute 1695 (Sec. 536-621) requires that:
>
> "'Ordinances of a general nature or providing for improvements shall be published in some newspaper of general circulation in the corporation.'
>
> "This ordinance was not an ordinance providing for an improvement; the improvement had been provided for; and it was not an ordinance of a general nature, but was of a special nature."

As I view the matter the ruling of the circuit court in the above case is the better one and I, therefore, hold that an assessing ordinance is not required to be published.

You ask for my opinion as to whether the collection of an assessment could be enforced if it was necessary to bring an action for the same if the assessing ordinance is not published. Having determined that the assessing ordinance does not require publication under the statute, I am of the opinion that the fact that the assessing ordinance is not published will not militate against the collection of an assessment if it is necessary to bring an action for the same.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

333.

"NEWSPAPERS OF GENERAL CIRCULATION"—PUBLICATION OF ORDINANCES AND RESOLUTIONS.

Whether or not a newspaper is of "general circulation" as intended by Sections 4228 and 4229, General Code, pertaining to publications of ordinances, resolutions, etc., is a question of fact.

The following elements, however, are essential:

1. *The circulation must not be confined to a particular class, but must have a substantial circulation outside of said class.*

2. *The circulation must not be confined to a particular territory but must reach substantially all parts of the city.*

The paper must contain general news but may be primarily devoted to special legal, scientific or religious topics.

Under these rules, it is possible that a newspaper with a paid up subscription of three hundred and forty, may be considered a newspaper of general circulation in a city with a population of 5,732, provided all elements are present.

COLUMBUS, OHIO, April 15, 1912.

HON. HARRY F. WITTENBRINK, *City Solicitor, St. Marys, Ohio.*

DEAR SIR:—Under date of January 23rd you call my attention to Section 4228-4229, General Code, which provides for the publication of ordinances and resolutions requiring publication in two newspapers of opposite politics *"of general circulation."*

You desire our opinion as to what should be the subscription list of a newspaper published in a city of 5732 population so as to be classed as a newspaper of general circulataion. As you state in your letter this is a question of fact and a matter to be determined by the jury, but that you desire some expression of opinion from this office of the subject.

Under date of February 2nd you restate your question as:

> "Can a newspaper with a paid up subcription of 340 be considered a newspaper of general circulation in a city with a population of 5,732, as is the case in St. Marys, Ohio."

It would be impossible for me to lay down any hard and fast rule in reference to the matter as it is one concerning which there can be a wide difference of opinion. The term "general circulation," as it appears to me, refers to two things:

(1) That the circulation must not be confined to a particular class;

(2) That it must not be confined to a particular territory within the municipality.

The great trend of authorities seems to be that a newspaper, as ordinarily understood, is a publication which contains what is called the *general current news* of the day, but that it is not essential that it be devoted exclusively to the dissemination of news of a general character and may be one devoted primarily to the discussion of religious, legal or scientific topics.

When we come, however, to a consideration of the term "general circulation," having determined that the publication in question is a newspaper, it would seem to me that if such publication were one devoted primarily to discussion of religious, legal, commercial or scientific topics it is necessary that such newspaper shall circulate beyond the particular class for which it is intended. Various cases have held that a newspaper devoted primarily to legal news but containing general current news of the day is a newspaper of general circulation when it is shown

that it circulates not only among lawyers, but business men, brokers and bankers as well, I do not undertake to say how great a circulation such newspaper should have outside of the particular class, but it should be a substantial circulation.

Second. It seems to me that a newpaper in order to be considered of general circulation would have to circulate in the municipality generally. I do not mean by that that it must have readers in each and every block in the city, or that it must circulate even in every part of the city, but it must circulate so generally as to reach substantially all parts of the city.

In your inquiry you state that the newspaper in question has 340 paid up subscriptions in a city with a population of 5,732.

If the newspaper in question circulates solely in one single portion of the municipality although it has 340 paid up subscribers I would not personally consider it as a newspaper of general circulation. If, however, the subscription list would disclose that it went into the various sections of the city I would consider, provided the other elements are present, that it was a newspaper of general circulation.

While I am well aware that what I have said establishes no definite and positive rule to guide you, yet it is solely a matter of fact and is one concerning which the legislature has not seen fit to determine by positive provision of law, I am unable to give you a more definite rule to follow.

I would call your attention to the case of state ex rel, Sentinel Co., vs. Wood Co. 33 O. C. C. 93 (Comrs.) wherein the court considered the question of what under the provisions of Section 2508 would be considered "general circulation" for a newspaper.

The third branch of the syllabus of said case is as follows:

> "A newspaper having a circulation of about 800 subscribers in a county of about 50,000 inhabitants, in fifteen of the twenty townships of which it had a circulation of thirty-six subscribers out of a population of 35,000 or more, and the remainder of its circulation being in a part of the county containing the other five townships, is a paper of general circulation within the meaning of General Code 2508."

This case was affirmed without report by the supreme court in the case of State vs. Sockman, 84 O. S. 447.

It would seem, therefore, that the supreme court of Ohio in affirming the circuit court has established the rule that a newspaper is of general circulation although said paper does not circulate in all parts of the particular district and in a greater part thereof has but an insignificant circulation, the major portion of the circulation of such newspaper being in but a small portion of such district.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

335.

RIPARIAN RIGHTS—LAKE ERIE AND CITY OF CLEVELAND— HARBOR LINE AND BREAKWATER ESTABLISHMENT—RIGHTS OF STATE, FEDERAL GOVERNMENT, CITY AND SHORE OWNERS.

The circuit court in the decision of White vs. City of Cleveland has recognized the right of the riparian owner to fill in and reclaim land from his shore line to the point of navigability as established by the state or by the national government in its regulation of interstate commerce, until such time as this right may be taken away by the state.

When land is so filled in and reclaimed, the title to the made lands is identical with and subject to the same rights and burdens as the title to the uplands. The state therefore, has only such rights of reference to the made lands as it could have exercised with reference to the former shore lands.

The following plans are submitted for an opinion with respect to their legality:

1. *By the river and harbor commission of Cleveland;*

To construct an island within the harbor as limited by the breakwater constructed by the U. S. government.

2. *By the river and harbor committee of the Cleveland chamber of commerce:*

By agreement of all parties concerned, to connect made land with the shore land reserving a right of way for public purposes.

Section 10 *of the act of Congress of March* 3, 1899, 30 *Statutes at Large,* 1121-1151 *provides that no obstruction not affirmatively authorized by congress to the navigable capacity of any waters of the United States shall be made; and further forbids the building of any obstruction outside of harbor lines or where no harbor lines have been established, except upon plans recommended by the chief of engineers and authorized by the secretary of war; and also forbids interference with the course or capacity of the waters within the limits of any breakwater unless a recommendation has been made by the chief of engineers and authorization made by the secretary of war.*

The United States in this case has established a breakwater but has not as yet established a harbor line.

The above statute has been construed however, to leave the right to the states and local authorities to pass such legislation as does not conflict with the U. S. legislation therein laid down, and therefore to leave to such authorities, the exclusive right to regulate obstructions within the U. S. harbor line and to determine to what extent lands may be filled in and new lands made so long as such determinations do not conflict with acts of congress upon the same subject.

As to the island plan:

Where an island springs up of itself or arises from natural causes, title to the same accrues to the submerged lands and not to the shore lands.

A shore owner is subject to both gains and losses which occur to his land by reason of natural causes. When artificial interference is made with his riparian rights however, he must be compensaated for losses occasioned thereby, to these rights of wharfage, egress to navigation, fishing facilities, etc.

Said island with the consent of federal and state authorities, may therefore, be constructed subject to these rules, the best plan seeming to be that of having the federal government establish the harbor line at a convenient place, outside of which with the consent of the federal and state officials, the island could be constructed.

As to the second plan:

The state has control of the harbor within the harbor line and subject to the riparian rights of the shore owner may regulate the filling in of land, and the right

of the state to lay out roads and rights of way over submerged lands is well established. There can be no objections to proceedings to which all parties agree. Until these plans have been effected, all encroachment upon the harbor should be opposed by the city.

COLUMBUS, OHIO, April 16, 1912.

HON. E. K. WILCOX, *City Solicitor, Cleveland, Ohio.*

DEAR SIR:—Your favor of February 9, 1912, is received in which you state as follows:

> "I am pleased to refer to a communication addressed to you by Mr. R. E. Collins, clerk, and enclosing a certified copy of resolution No. 23660, adopted by the council of the city of Cleveland, and I would greatly appreciate your opinion as therein requested."

The resolution referred to reads:

> "WHEREAS, the attorney general, in an opinion rendered some time ago, said that the title to the submerged lands near the shores of Lake Erie is in the state of Ohio, and that it is competent for the state to make such disposition of such lands as the public interest requires; and
>
> "WHEREAS, the Pennsylvania company has filled in over the submerged lands in front of its premises on the lake shore, and in the city of Cleveland, and between the shore line and the harbor line, as established by the national government; therefore, be it
>
> "*Resolved* by the council of the city of Cleveland, state of Ohio, that the attorney general be requested to report to the council his opinion, as to what rights the state of Ohio has or may now exercise with reference to the made lands over such submerged lands; be it further
>
> "*Resolved,* that the clerk be and he is hereby directed to forward to the attorney general a certified copy of this resolution."

Under date of November 1, 1911, in an opinion rendered by this department to the state board of public works it was held as follows:

> "While the authorities and text writers do not agree upon the right of the riparian owner to reclaim the submerged lands, the weight of authority is that the riparian owner has a right to fill in and reclaim the submerged lands, so long as he does not interfere with the rights of the public to use the waters for navigation; that this right is a license or franchise, revocable at the will of the legislature, but when the license has been exercised by filling in, the right is irrevocable.
>
> "The title to the made or reclaimed land attaches to the owner of the uplands.
>
> "In many states this is a subject of legislative control and the rights of the riparian owners are governed by statute."

Since rendering the above opinion the circuit court of Cuyahoga county has passed upon this question.

The first syllabus in case of White vs. City of Cleveland, 14 Cir. Ct. N. S., 369 (Ohio Law Rep. December 25, 1911), reads:

> "The city of Cleveland having, in 1872, appropriated for park purposes certain lands bordering on Lake Erie, thereby acquired an easement for park purposes in the shore and the riparian rights appurtenant thereto, *which include the right to wharf out and make land to the limit of navigability unless prevented by the state; having made land without interference by the state, the made land is affected by the same easement for park purposes with which the shore lands are affected,* as are also any piers built out in front of the made land."

This decision is a recognition of the right of a riparian owner to fill in and reclaim land from his shore line to the point of navigability as may be established by the state or by the national government in the regulation of commerce, unless such filling in of land is prevented by the state. It is also a recognition that the title to the made land attaches to, and is the same as, the title to the upland. If the owner of the upland has a title in fee simple, he takes a title in fee simple to the made or reclaimed land. In other words the title to the made land is the same and is subject to the same burdens as the title to the uplands.

This is the rule of title in those states which recognize the right of the riparian owner to build out and reclaim the submerged lands. In the states which do not recognize that right, the title remains in the state or in its grantee.

In case of Nieney vs. Nolan, 67 A., 1008, (Sup. Ct. of New Jersey, 1907), it is held:

> "Under the common law, if the owner of land bounded by the shore upon tide waters make improvements upon or reclaim the shore adjoining his lands, the part of the shore so improved or reclaimed belongs to him, and cannot be granted by the state."

In case of Sioux City vs. Chicago and Northwestern Railway Co., 129 Iowa 694, it is held:

> "The title to accreted or reclaimed land goes with the fee to which it is annexed."

Some of the cases cited in the opinion of November 1, 1911, hold to the same effect.

The case of White vs. City of Cleveland, 14 C. C. N. S. 369, supra, which is the only authority I find in Ohio directly upon this subject, has been taken on error to the supreme court of Ohio, and its decision is awaited with interest. In that case it is urged by the city of Cleveland that the title to the made land remains in the state, unless authority has been given by the state to reclaim such land. This contention, however, was not sustained by the circuit court and we can only await the decision of the supreme court for a final settlement of this question.

If the supreme court sustains the decision of the circuit court on this point, it will determine that the title to the made land attaches to the title in the uplands.

The decision of the circuit court, however, now stands as the highest authority on the question, and following that opinion, the title to the reclaimed or made land attaches to the title in the upland and the state can exercise only that authority over the made land which it can and does exercise over the uplands. This authority is that of a sovereign only. All other rights which the state had in the submerged lands, were divested by the exercise, by the riparian owner, of his license to fill in and reclaim the submerged lands.

In addition to the foregoing request for an opinion, two plans for the improvement of the harbor at Cleveland have been submitted.

The first, by the river and harbor commission of Cleveland, which involves the construction of an island within the harbor as limited by the breakwater constructed by the United States government.

The second, proposed by the river and harbor committee of the Cleveland chamber of commerce, which proposes by agreement with all the parties concerned to connect the made land with the shore land, and reserving a right of way over the same to be used for public purposes.

This department can only pass upon the legal principles involved in these proposed plans. It cannot pass upon the desirability of either plan. That must be 'worked out by those primarily interested in the question and are better able to determine the various conditions which present themselves.

The United States government has built a breakwater at great expense for the harbor and is about to establish a harbor line.

The following questions arise:

Does the fixing of a harbor line by the federal government, authorize the building of wharves, or docks and the filling in and making of land out of that line?

What is the extent of the jurisdiction of the state over the part of the harbor within the established harbor line?

What is the extent of the power of the legislature to regulate the filling in or reclaiming of submerged lands?

The title to an island constructed upon submerged lands in Lake Erie.

The United States government has full power to establish harbor lines under its constitutional grant to regulate interstate and foreign commerce.

Section ten of the act of congress of March 3, 1899, 30 Stat. at Large 1121, 1151, provides:

> "That the creation of any obstruction not affirmatively authorized by congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, wier, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the secretary of war; *and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the secretary of war prior to beginning the same.*"

This act superseded an act of September 19, 1890, which contained provisions substantially the same as in the above section.

The act of 1890 has been construed by the supreme court of the United States as to obstructions in navigable waters lying wholly within a state.

In case of Montgomery vs. Portland, 190 U. S. 89, it is held:

> "While Section 12 of the act of Congress of September 19, 1890, forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the secretary of war in navigable waters of the United States, 'except under such regulations as may be prescribed from time to time by him'

it does not follow that congress intended in such matters to disregard altogether the wishes of the local authorities. Under existing enactments the right of private persons to erect structures in a navigable water of the United States, that is entirely within the limits of a state, is not complete and absolute without the concurrent or joint assent of both the federal government and the state government."

Harlan, J., on page 106, says:

"While Section 12 of the act of 1890 forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the secretary of war in navigable waters of the United States, 'except under such regulations as may be prescribed from time to time by him,' it does not follow that congress intended in such matters to disregard altogether the wishes of the local authorities. Its general legislation so far means nothing more than that the regulations established by the secretary in respect of waters, the navigation and commerce upon which may be regulated by congress, shall not be disregarded even by the states. Congress has not, however, indicated its purpose to wholly ignore the original power of the states to regulate the use of navigable waters entirely within their respective limits. Upon the authority then of Cummings vs. City of Chicago and the cases therein cited to which we may add Wallamette Bridge Co. vs. Hatch, 125 U. S. 1 we hold that under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a state, cannot be said to be complete and absolute without the concurrent or joint assent of both the general and state governments."

In the above case the harbor line was established in 1892 by act of the national and state governments. In 1898, the federal government extended the harbor line and approved plans permitting Montgomery to build his wharf to the new line. The state authorities did not approve the plans and the construction of the wharf was enjoined.

While the foregoing opinion does not construe the act of March 3, 1899, as above quoted, the court in the opening statement said that it had in view the provisions of said act.

The same doctrine is set forth in the case of Cummings vs. Chicago, 188 U. S., 410; and in Lake Shore & Michigan Southern Ry. Co. vs. Ohio, 165 U. S., 365. This latter case was taken to the supreme court of the United States on error proceedings from the supreme court of Ohio.

The syllabus of the case reads:

"The provisions in Sections 4, 5 and 7 of the act of September 19, 1890, c. 907, conferring upon the secretary of war authority concerning bridges over navigable water ways, do not deprive the states of authority to bridge such streams, but simply create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce."

The supreme court of Ohio did not report its decision, but the case is referred to in 33 Bull., at page 169.

The foregoing cases arose in connection with waters lying wholly within the state.

In the case of Portland vs. Montgomery, as reported in 38 Oreg. 215, which is the same case reviewed by the supreme court of the United states in 190 U. S., 89, supra, the syllabus reads:

> "Act of congress, September 19, 1890, (26 Stat. 454, 455, Sec. 7) prohibiting the construction of a wharf outside the harbor lines of any port without the permission of the secretary of war, does not prohibit a state or a city having power to control the location of wharves within its limits, from enacting an ordinance restraining the construction of wharves beyond a wharf line adopted by the city, and which is within the harbor line fixed by the secretary of war, since the act of congress only prohibits the extension of the wharf beyond such line, and does not either expressly or impliedly give riparian owners the right to wharf out to the government line."

On pages 226 and 227, Bean, C. J., says:

> "But, as we construe the act of 1890, it was not designed to interfere with the power and authority of the several states over the location and construction of wharves, piers, and landing places unless they encroach upon the harbor lines established by the secretary of war. * * *
>
> "It provides that under certain circumstances the secretary of war may establish a line in harbors of the United States, beyond which no pier, wharf, etc., shall be extended, except by his permission, or under such regulations as may be prescribed from time to time. This is not equivalent, however, to a legislative declaration that they may be extended up to such line regardless of the local laws on the subject. The more reasonable construction is that congress, in the exercise of its paramount authority under the commercial clause of the constitution, has authorized the establishment of a line beyond which such structures shall not be extended except by permission of the secretary of war, but has left to the several states authority to determine whether local interests require that a larger space in the harbor shall be reserved for the use of ships and shipping than that outside of such line.
>
> "Congress has thus assumed jurisdiction over that part of a harbor outside of a line which the secretary of war may lawfully establish. But it has not, in our opinion, assumed jurisdiction or authority over the space between such line and the shore, nor has it made any provision, directly or indirectly, as to what use shall be made thereof. While wharves, piers and landing places are essential to commerce by water, they are nevertheless, in their nature local, attached to the soil, and require a diversity of rules and regulations. Full jurisdiction and control over them is vested in the state, in the absence of congressional legislation upon the subject; and such legislation cannot, we think, be inferred from mere authority given an executive officer to establish a line in the harbor beyond which it shall be unlawful to extend such structure without his consent.
>
> "* * * So long as the legislation of the state does not interfere with the duties of such officer, or conflict with the line established by him, it is controlling. Now, in this case, there is no conflict. The purpose of the city of Portland is not to interfere with the harbor line relocated by the secretary of war in September, 1898, but to prohibit the extension of wharves and piers beyond a certain line inside thereof. In our opinion, such power and authority still remain in the state, and congress has not by the act of 1890 assumed to exercise exclusive control over the matter."

The case of Rhea vs. Newport N. & W. V. R. Co., 50 Fed. 16, arose in connection with a bridge wholly in Kentucky, constructed over the Cumberland river which river did not lie wholly within the state. The syllabus reads:

> "The commercial power of congress is exclusive of state authority only where the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the states; and when the subjects within that power are local in their nature or operation or constitute mere aids to commerce, the states may provide for their regulation and management until congress intervenes and supersedes their action. C. Cardwell vs. Bridge Co. 113 U. S. 205 followed."

The above is taken almost verbatim from the opinion of Justice Field on page 210 of 113 U. S. 205, supra.

On pages 20 and 21 of 50 Fed. 16 supra, Jackson, Circuit Judge, says:

> "It is true that in most of the cases above cited the public or navigable waters were wholly within the limits of the state authorizing the erection of bridges or obstructions in or over the same, and that expressions are found in one or more of the opinions which apparently attach some importance to that fact. *The decisions did not, however, proceed or rest upon that ground, but upon the principle that such portion of navigable waters as lay or were embraced within the limits or territory jurisdiction of the state were subject to state authority, in* respect to bridges over the same, until congress exercised its superior and paramount authority of regulation and control. Navigable waters entirely within the limits of a state stand upon the same footing, and are subject to the same controlling authority of Congress as those extending through or reaching beyond the state. The right of the state, in the absence of congressional regulation to the contrary, to authorize the erection of bridges over such portions of navigable waters as may be embraced within its limits, does not depend upon the length of such waters, nor is the state's authority restricted or affected by the fact that some portion of the stream may extend beyond its territorial jurisdiction."

In construing the act of 1890, the attorney general of the United States, says:

> "The statute is revisory and defensive in its nature, it clears the way for interstate and foreign commerce, but does not assume the police power or local control. (1891) 20 Op. Atty. Gen. 101."

The foregoing is taken from Federal Statutes Annotated at page 808 of Volume 6.

The provisions of the act of congress of 1890, construed in the foregoing cases are substantially the same as the provisions of the later act of 1899. It is conclusively held that by this act the United States government has not taken exclusive control of harbors where it has established harbor lines. There are certain things of a local nature which are left to local control. The construction of wharves, docks and the making of land is subject to local regulations as they are local in their nature and affect local interests more than they affect interstate or foreign commerce.

In the opinion rendered by this department on November 1, 1911, this conclusion is reached:

> "The riparian rights of the owners of banks of navigable waters are to be determined by the state in which such land is situated."

The riparian rights are matters of local control and not of national regulation. The right to build out from the shore and make land is a right permitted or granted by the state and is under its control. Congress has not attempted to control the action of the state as to any riparian rights. But, in the exercise of its powers to regulate interstate and foreign commerce, congress has granted to the secretary of war, authority to prevent obstructions to navigation. It has not, however, authorized the secretary of war, to grant permission to make such obstructions. The act of congress is defensive, and is enacted to protect the right of navigation. It is not constructive legislation and cannot be construed as granting authority to build wharves or make land.

The act of congress in question does not make a distinction between navigable waters which lie wholly within a state and those which lie only partly within a state. Although some of the cases appear to make a distinction upon this ground, yet, as stated by Jackson, circuit judge in 50 Fed. 16, supra, the decisions were not based upon that ground. In as much as the act itself does not make any such distinction, the principles laid down in the foregoing decisions apply as well to the waters which are only partly within the state.

The harbor at Cleveland is wholly within the state of Ohio. The contemplated improvements are also wholly within the state. The right to make land is under state control. This right cannot extend, even with the consent of the state, beyond the harbor line to be established by the United States government, without the consent of the federal government. The United States government controls the part of the harbor beyond the harbor line, and the state, under the present law, has control of the harbor within the harbor line, with the condition that all structures therein must secure the approval of the secretary of war.

The state may fix a line within the line fixed by the federal government, beyond which no obstructions to navigation may extend.

In the Oregon case, passed upon in 190 U. S., 89, the secretary of war granted permission to build a wharf out to the federal harbor line. No permission therefor was granted by the state. The construction of the wharf out to the federal harbor line was enjoined. The court held that both the federal and state governments must concur in authorizing such construction. In the Oregon case, and in the other cases cited herein upon this proposition, the state legislature had enacted laws granting to some board or other authority the power to control harbors, or the building of bridges. The rule is that where the state has enacted legislation to control the building of structures in harbors, both the national and state governments must grant permission to build out into the harbor from the shore, before such building out will be legally authorized. In other words state and federal regulations must be complied with. This rule will especially apply to the making of land.

The extent of the legislative control: The courts and text writers do not attempt to limit or specifically define the extent of legislative control over navigable waters. The power of the legislature is based upon its right to regulate commerce and navigation, which is the paramount use to which navigable water is put. It has been seen that the state holds the title to the submerged lands of Lake Erie in trust for public uses. The principal public uses are those of navigation and fishing. It is the duty of the state as such trustees to protect public navigation and fishing. It is the right of the state through its legislative body, or

through its agents duly authorized by legislative enactment, to determine what is or what is not an interference with these rights. The shore owners have certain riparian rights, and it is the duty of the state as sovereign to protect these rights. The filling in of land by one shore owner may interfere with the riparian rights of another. The state may adjust these conflicting rights and determine how they shall be exercised.

It is well recognized that the state has full and complete power over public fishing and navigation. The extent of this power cannot be definitely limited or defined. In this respect it stands upon the same footing as the police power of the state.

At Section 138 of Gould on Water Rights, 3rd Ed., it is said:

> "It is competent for state legislatures to control the management and occupation of wharves and piers in navigable waters, even in the hands of private persons, to establish wharf or harbor lines, and to empower commissioners to license structures extending to such lines. Such statutes do not conflict with the commercial power of congress, so long as the latter remains unexercised. * * * The mere establishment of a harbor or dock line does not change rights of property, nor is it an abandonment of the right of the state to control and regulate the water within the lines.

In Lincoln vs. Davis, 53 Mich., 375, it is held:

> "Riparian rights upon the great lakes are, in theory, the same as upon navigable streams; and are not governed by any such proprietary division as high and low water marks. The submerged lands are appurtenant to the upland, so far as their limits can be reasonably identified; but in public waters the state law must determine how far rights in such lands can be exercised consistently with the easement of navigation. The state can forbid any erections in navigable waters, and on navigable streams and along the Great Lakes can fix the distance beyond which private erections cannot be maintained."

In case of Yates vs. Milwaukee, 10 Wall. 497, it is held:

> "The owners of land bounded by a navigable river have certain riparian rights, whether his title extend to the middle of the stream or not.
>
> "Among these are free access to the navigable part of the stream, and the right to make a landing, wharf, or pier for his own use, or for the use of the public.
>
> "These rights are valuable, and are property, and cannot be taken for the public good only when due compensation is made.
>
> "They are to be enjoyed subject to such general rules and laws as the legislature may prescribe for the protection of the public right in the river as a navigable stream.
>
> "But a statute of a state which confers on a city, the power to establish dock and wharf lines and to restrain encroachments, and prevent obstructions to such a stream, does not authorize it to be declared by special ordinance a private wharf to be an obstruction to navigation and a nuisance, and to order its removal, when in point of fact, it was no obstruction, or hindrance to navigation.

"The question of nuisance or obstruction, must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a city declare any particular business or structure a nuisance in such a summary mode, and enforce its decision at its own pleasure."

In state vs. Sargent & Co., 45 Conn., 358, the syllabi read:

"The owners of land bounded on a harbor own only to high water mark. They have a right to construct wharves upon the soil below that line, if they conform to such regulations as the state shall see fit to prescribe, and do not obstruct navigation.

"The duty of protecting the paramount right of navigation rests upon the legislature, and they are to determine for themselves by what methods and instrumentalities they will discharge it.

"They have power to vest in commissioners appointed by themselves authority to restrain such proprietors from extending structures into navigable waters.

"The enactment of such a law is in no sense an exercise of the right of eminent domain. The public do not appropriate or use any right of the land owner in the soil of the shore."

Farnham on Water Rights, at page 509 and 510 discusses the purposes of wharves and the control of the legislature over their construction, as follows:

"* * * But wharves are as much a necessity to navigation as is the harbor itself, and therefore the right to construct and maintain them is as great as to maintain the harbor. If the harbor is kept entirely free from wharves, it is useless for the purpose for which it is created. On the other hand, wharves and piers may be extended into the harbor is such a way as to occupy all its available space and destroy the harbor itself. Under such circumstances there must be some power which can fix the limits of the respective rights, and establish a line to which it can, but beyond which it cannot go. This power resides in the legislature, and may be exercised through commissioners, or such other appointees as it chooses. And the line may be fixed so as to permit the erection of wharves of different lengths if the configuration of the shore is such as to require it. But since the riparian owner has a right of access to the waters and to make such right available it must include a right of access to water which is deep enough to accommodate the shipping which resorts to the harbor, the harbor line cannot be fixed in such a way as to prevent the construction of wharves which will reach navigable water. The interest of the public will prevent the drawing of lines which will not permit the erection of efficient wharves in most instances, because, if the line should be drawn around the entire harbor, which would prevent the erection of any wharf which would reach navigable water, the harbor itself would be destroyed. The consequence of this is that there has been no general attempt to fix lines which would prevent all wharves from reaching navigable water, but a discrimination has been made against some land owners by drawing the lines in front of their property so as to cut them off from deep water. Such regulations are unjust, and contrary to the principles upon which the federal and state governments are founded, which require the laws to bear equally upon all citizens."

These authorities recognize the right of the state to control its harbors. The state may determine what shall or what shall not be built in its navigable waters, subject to the paramount right of congress. It may grant to commissioners, or to municipalities or other political divisions, the control of harbors and navigable waters.

In the exercise of its power to regulate navigation, and to carry out the trust which it holds in its navigable waters, the state of Ohio has full power to determine in what manner or to what extent the submerged lands may be filled and new land made, so long as such regulations do not conflict with any acts of congress upon the same subject. The state regulations must also keep in view the use of the waters by the shore owner for navigation purposes.

The island plan will now be considered.

There are numerous cases which determine the title to an island which is formed by natural causes in navigable waters. But I do not find any decision as to the title of an island which is constructed by artificial means as is proposed in the present plan.

The rule of ownership is stated in Farnham on Water Rights on pages 275 and 276 as follows:

> "If the title to the soil where the island springs up is in private ownership the island will belong to the owner of the soil. Therefore, where an island arises in a stream the title to the bed of which is in the state, it does not belong to the owner of either shore. An island formed upon the portion of the bed which belongs to the riparian owner becomes his property."

At Section 166 of Gould on Water Rights, 3rd Ed., it is stated:

> "When islands are formed by either the sudden or gradual action of tide waters within the territory of the nation, they belong to the crown at common law and in this country to the respective states. The same is true of the navigable fresh waters of this country belonging to the state, except that when shoals, sandbars, or islands form along the margin of the water, it is a question of fact for the jury whether they are the property of the state or of the riparian owners as accretions. In general, if an island growing out of the water has a fixed channel which separates it from the adjacent land, the owner of such land cannot claim the island as belonging to it by accretion."

In case of State vs. Fenn, 10 Nisi Prius, N. S. 325, Kinkead, J., approves the rule of ownership as stated in Cyc. when he says at page 334:

> "The ordinary rules of law which determine the ownership of islands, formed or created naturally in beds of streams or bodies of water, cannot be resorted to in solving the problem in this case. The rule is that 'ownership of an island follows the ownership of the bed of the water, so that if the state owns the land under water it belongs to the state.' 29 Cyc., 354."

In Sherwood vs. Commission, 113 Mich. 227; it is held:

> "The fee to an unsurveyed island in one of the Great Lakes, situated several hundred feet distant from the mainland, is in the state, and not in the riparian owner."

In this case the island was about six hundred feet from the shore. In the case Perkins vs. Adams, 132 Mo. 131, the syllabi read:

"The title of a riparian owner on the Missouri river does not extend to the center of the main channel but only to the water's edge.

"Such owner is not entitled to land formed by the river making an island by depositing sand on its bed and afterward connecting it with the shore by the receding of the intervening river, but only to such land as may be added to the original grant by the gradual process of accretion or reliction to his shore line.

"A riparian owner on the Missouri river is not the owner of an island which springs up in the river whether it be on the one side or the other of the main channel."

In Packer vs. Bird, 71 Calif., 134, it is held:

"Where a patent issued on a confirmed Mexican grant describes the land conveyed as bounded by a river navigable in fact, the title to the patentee extends no farther than the edge of the stream and does not include an island situated in the river opposite the mainland, notwithstanding the portion of the river between the island and the mainland is not navigable."

Thornton, J., at page 135, says:

"There is but one river, and that a navigable one. The waters on each side of the island constitute parts of one navigable stream."

The rule is well established that where an island springs up or is gradually formed in a navigable stream, the title to the island thus formed follows the title to the submerged lands and does not attach to the title of the owner of the shore. The rule of title is the same although the part of the stream lying between the island and the mainland is no longer navigable.

In building an island by artificial means, the rights of the riparian owner must be considered.

The shore owner may receive an increase in his land through natural causes, and he may suffer loss by the washing away of his land. These are incidents of his ownership. He is not required to give, nor can he receive compensation for the increase or loss caused by natural causes. In 71 Calif., 134, supra, it is seen that an island formed in a navigable stream belongs to the owner of the bed of the stream and not to the shore owner, even though the part of the stream lying between the island and the mainland is no longer navigable. In such case, if the island is large enough, a riparian owner may be entirely cut off from navigable water and thus be deprived of his riparian right to reach navigable water. This right would be cut off by natural causes. He cannot demand compensation for such loss.

But if an island were formed by artificial means, the right of the shore owner to reach navigable water, could not be taken away without compensation. Any island, artificially constructed, which would prevent the shore owner reaching navigable water from his shore would be a taking of his property, as such right is a property right in this state.

In building an island, therefore, in a harbor, the rights of the shore owner must be protected. What would be a sufficient channel to give the shore owner the beneficial use of the water and his land for purposes of navigation must be de-

termined by the facts of each particular case. The use to which the shore land is put, the nature of the shipping in the harbor, the facilities for reaching out to the water beyond the breakwater or limits of the harbor, as well as other conditions must be carefully considered.

In Atlee vs. Packett Co., 21 Wall., 389, Miller, Justice in defining the purposes of wharves, says at page 393:

> "The wharves or piers are generally located by lines bearing such relation to the shore and to the navigable water as to present no danger to vessels using the river, and the control which the state exercises over them is such as to secure at once their usefulness and their safety.
>
> "* * * Wharves and piers are as necessary almost to the successful uses of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect they must reach so far into deep water as to enable vessels used in ordinary navigation to float while they touch them and are lashed to their sides. They must of necessity occupy a part of the stream over which a vessel could float if they were not there."

In order to build an island in a harbor the plans must be approved as required by Section 10 of act of congress of March 3, 1899, by the officials of the federal government. As the island is to be constructed upon land held by the state the consent of the state through its legislature, or its duly authorized agents, should be secured. The island would have to be constructed so as not to deprive the riparian owner of his rights.

If the consent of the federal and state governments was secured and none of the rights of the riparian owner impaired, such riparian owner could not object to the construction of an island in front of his land.

The plan submitted shows a three hundred foot channel between the proposed line to which the shore owners may make land and the line of the proposed islands. The plan shows two islands with a three hundred foot channel separating the same. The plan also shows that in order to get from the harbor out into the lake ships must go to either end of the breakwater. The plan of the islands submitted would not require ships to go any greater distance to the east of west than they are required to go by reason of the breakwater.

If the channel between the islands and the shore is of sufficient width and depth to accommodiate all ships that now or may reasonably be expected to use this harbor, then the right of the shore owner to reach navigable water would be properly conserved.

In order, however, to obviate all doubt, it would appear best to have the federal government establish the harbor line at the line on the plans submitted to which it is proposed that shore owners may make land. Then by consent of the proper federal and state officials, authority could be granted to the city of Cleveland to construct an island beyond such harbor line, upon plans to be hereafter approved. The title to such an island would be in the state with full power to grant the same for any purpose.

The plan proposed by the river and harbor committee of the Cleveland chamber of commerce, is to be secured by agreement of all parties interested.

As the state has control of the harbor within the harbor line and may regulate the construction of wharves and docks and the filling in of land, it may enter into an agreement with the shore owners as to the terms and conditions upon which such land may be made. The legislature may, without agreement, prescribe how such land may be made, but cannot thereby injure the riparian rights.

The principal feature of this plan is the right of way for public uses. There are cases in which cities have laid out streets over submerged lands and the right to do so is sustained by the courts.

In case of Clement vs. Burns, 43 N. H., 609, it is held:

> "The selectmen of a town have jurisdiction to lay out a highway over land reclaimed from the sea or navigable river, by embankments or filling in, so as to raise it above high water mark."

In Henshaw vs. Hunting, 1 Gray (Mass.), 203, it is held:

> "A highway may be located, without special authority of the legislature, over flats, lying between high and low water mark, which have been lawfully filled up by the proprietor of the adjoining upland."

In this case part of the street laid out extended into the sea.

Through its power to lay out streets and to appropriate land for the same, the city could lay out a right of way through the part proposed to be filled in and this right of way would attach to the filled land when made.

As said above this latter plan rests upon agreement and there is no legal prohibition against such an agreement if all parties consent to such agreement.

The questions involved in the improvement of the harbors on the Great Lakes, and especially of the harbor at Cleveland, are of vast importance to the public interests of the state and especially to the people of the cities in which such harbors are located.

The legislature of Ohio has not enacted any law to regulate the construction of private wharves, or to control the filling in of land. The federal government has acted, and until the state legislature has acted all encroachments upon the harbor should be enjoined. The proper course to pursue would be for the city of Cleveland and its citizens to oppose the granting of any permission by the federal government to make land in the harbor that might interfere with the proper improvement of the harbor. Also, if possible, the establishment of a harbor line should be postponed until the question involved have been properly presented to the next legislature for its action.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

337.

CANTON CRIMINAL COURT—FEES OF CHIEFS OF POLICE SAME AS THOSE OF CONSTABLE IN JUSTICE OF PEACE COURTS—STATE CASE—FELONIES AND MISDEMEANORS.

Under Section 14700, *General Code, relating to fees in the city criminal court of Canton, Ohio, by provision of the words therein "other fees shall be the same as before the justice of the peace in like cases." Chiefs of police of Canton for serving processes in the criminal court are entitled to the same fees as are allowed a constable for like services before a justice of the peace.*

The city of Canton has no control over the fees charged for chiefs of police in state cases, and such fees shall be paid as provided for the recovery of fees in felonies and misdemeanors, in Sections 3016, 3017 *and* 3019, *General Code.*

COLUMBUS, OHIO, May 2, 1912.

HON. FRANK N. SWEITZER, *Assistant City Solicitor, Canton, Ohio.*

DEAR SIR:—Under date of March 18, 1912, you ask an opinion of this department upon the following:

> "At the request of our chief of police, I am writing for information with reference to your holdings on the question of the allowance of fees to chiefs of police in state cases in cities having a city criminal court.
>
> "As you know, our city criminal court is similar to the one in Youngstown, Akron and several other Ohio cities, and was created by a so-called special act of the legislature.
>
> "My query is this: Under your holdings, can an allowance be made to the chief of police as fees for state cases?"

It has recently been held by this department that the criminal court of Canton has been legally established, and that the act of 99 Ohio Laws, 607, was confirmed by the amendatory act in 100 Ohio Laws, 69. These acts are now known as Sections 14696 to 14706, inclusive, in the appendix of the General Code.

Section 14700, appendix of the General Code, provides:

> "The court shall have power to compel the attendance of witnesses, jurors and parties; jurors shall have the qualifications and be subject to the challenges of those in court of common pleas in like cases; they shall be selected, summoned and impaneled in accordance with an ordinance of the council; or if no such ordinance is in force, in accordance with a rule of the court and they shall receive the same fees as are allowed jurors and witnesses in courts of justice of the peace; *other fees shall be the same as before the justice of the peace in like cases.*"

There is no specific provision of statute requiring the chief of police to serve process in the Canton criminal court, nor is there any other statute than the above, which will authorize the charging of fees to him for service of process in such court.

In the case of Delaware vs. Mathews, 13 Cir. Ct., N. S., 539, Taggart, J., says at page 540, of the opinion:

> "The chief of police, in cities having a police court, were to receive like fees as constables and sheriffs in the probate court and before justices of the peace."

An examination of the statute upon which the above was based will show that the provisions thereof were similar to those covering the fees in the Canton criminal court.

Section 4581, General Code, provides:

> "Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, by ordinance, prescribes, not exceeding the fees for like services in state cases."

This section was in its present form when the foregoing decision was rendered. At that time there was no specific provision of statute that the chief of police should serve process in the police court, nor did any other statute authorize the charging of fees for services rendered by him.

If the words "other fees" as contained in Section 4581, General Code, authorize the charging of fees for process served in a police court by a chief of police, then it also follows that the words "other fees" as used in Section 14700, supra., referring to the Canton criminal court, will authorize the charging of fees for process served by the chief of police in such criminal court.

The chief of police of Canton, who serves process in the Canton criminal court, is entitled to the same fees as are allowed a constable for similar service before a justice of the peace.

The section under consideration does not provide who shall pay these fees, nor to whom they shall be paid. Your inquiry is only as to the fees in state criminal cases.

Section 3016, General Code, provides:

> "In felonies, when the defendant is convicted, the costs of the justice of the peace, police judge or justice, mayor, marshal, chief of police. constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

Section 3017, General Code, provides:

> "In no other cases whatever shall any cost be paid from the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police, or constable."

Section 3019, General Code, provides:

> "In felonies wherein the state fails, and misdemeanors wherein the defendant proves insolvent, the county commissioners at any regular session, may make an allowance to any such officer in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

The foregoing sections authorize the payment from the county treasury of the fees therein enumerated in state criminal cases.

Section 4213, General Code, provides:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

In the case of Portsmouth vs. Milstead and Portsmouth vs. Baucus, 18 Cir. Dec., 384, it is held:

> "The provisions of 96 O. L., Sec. 126 (Rev. Stat., 1536-633; Lan. 3228), requiring 'that all fees pertaining to any office shall be paid into the city treasury' has reference to municipal fees solely, or such fees as may be fixed by municipal authority.
>
> "Said section does not authorize cities to interfere with the fees of mayors or chiefs of police in state criminal cases; whether such authority can be delegated to municipalities, quaere."

This decision was affirmed without report by the supreme court as shown in 76 Ohio St., 597.

The city of Canton has no control over the fees charged for services of the chief of police in state criminal cases. These fees are subject to state control, and Section 4213, General Code, requiring all fees to be paid into the city treasury, does not apply to such fees in state criminal cases.

The chief of police is entitled to the fees to be paid by virtue of Section 3016, General Code, or to the allowance made by the commissioners under Section 3019, General Code, for services performed in state criminal cases before the criminal court of Canton, Ohio.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

345.

COUNCIL — ESTABLISHMENT OF GRADE CROSSINGS — METHODS OF PROCEDURE BY AGREEMENT WITH OR BY COMPULSION OF RAILROAD COMPANY—RESOLUTION DETERMINING TO PROCEED MUST BE PASSED.

Council may proceed to install grade crossings by two different methods, one prescribed by Sections 8863-8873, *General Code, by which action is taken through agreement with the railroad company and another method prescribed by Sections* 8874-8894, *General Code, by which council may require a railroad company to eliminate grade crossings.*

Section 8866, *General Code, providing that the resolution determining to proceed shall be passed not less than thirty nor more than ninety days after the resolution of necessity, applies only to proceeding taken by agreement, under the former statutes.*

When, therefore, council has acted under the latter statutes, the fact that the council had not passed the resolution determining to proceed within ninety days after the resolution of necessity, is immaterial, and the mere fact that the railroad company has approved the plans and specifications does not constitute such agreement to the establishment of the grade crossing as to make the procedure of the council such as prescribed by the former statutes, and thereby make the ninety-day restriction of 1866, *General Code, applicable.*

COLUMBUS, OHIO, May 1, 1912.

HON. WILLIAM M. ROACH, *City Solicitor, Alliance, Ohio.*

DEAR SIR:—Under date of April 4, 1912, you inquire of this department as follows:

> "The city of Alliance has in contemplation the abolishment of a certain grade crossing in the city, and to that end, the council has passed certain legislation under the provisions of Sections 8874 to 8894, inclusive, General Code, and I would be pleased to have your opinion on this question:
>
> "Where a municipality undertakes to abolish a grade crossing, proceeding under the provisions of Sections 8874 to 8894, inclusive, General Code, as amended 101 O. L., 377, is there a time limit within which council must pass the ordinance determining its intention to proceed with such work, after the passage of an ordinance declaring it necessary to make such improvemnts, or, in other words, is it necessary that the provisions of Section 8866, which provides that:
>
> "* * * * * * * * * * * * * * * * *
>
> be complied with in regard to the time within which such ordinance shall be passed by council?
>
> "The facts in this case are these:
>
> "On August 21, 1911, the council of the city of Alliance, passed an ordinance requiring The Pittsburgh, Ft. Wayne & Chicago Railroad, within three months to co-operate with the engineer of the city, to prepare and submit to the council, plans and specifications for the abolishment of the grade crossing at the intersection of North Arch avenue and The Pittsburgh, Ft. Wayne & Chicago Railroad.
>
> "The railroad evidently complied with this requirement, for on September 15, 1911, the council passed a resolution approving the plans and

specifications agreed upon by the engineer of the city of Alliance, Ohio, and The Pennsylvania Company, operating The Pittsburgh, Ft. Wayne & Chicago Railroad, for the elimination of the grade crossing at North Arch avenue, and ordered the same to be filed in the department of public service.

"On September 5, 1911, the council passed a resolution entitled:

> "'A resolution, declaring the necessity and the intention to abolish the grade crossing at North Arch avenue and The Pittsburgh, Ft. Wayne & Chicago Railroad, operated by The Pennsylvania Company, assignee of The Pennsylvania Railroad Company, lessee, in the city of Alliance, state of Ohio, pursuant to the provisions of Sections 8874 and 8894, inclusive, of the General Code of Ohio, as amended by the act of the general assembly, passed May 10, 1910. (101 O. L., 377.)'

"Now on January 29, 1912, being more than ninety days to wit, one hundred and forty, after the passage of this last resolution, the council passed an ordinance to proceed with the improvement; the ordinance being entitled:

"* * * * * * * * * * * * * * * *

"Was this last ordinance passed within the time prescribed by law, where the proceedings were had under Sections 8878-8894, inclusive?

"If you should determine that Section 8866 does not apply, and that there is no limit in time between the passage of the resolution of 'necessity' and the passage of the ordinance to 'proceed,' then I would be pleased to have you suggest the further proceedings to be pursued in carrying into effect the final agreement between the city and the railroad company."

The legislature of Ohio has passed two separate acts for the elimination of grade crossings. The first is found in 90 Ohio Laws, page 360. This act authorizes the council of a municipality or the commissioners of a county, upon agreement with the railroad to eliminate grade crossings. The provisions of this act are now known as Sections 8863 to 8873, inclusive of the General Code.

In 95 Ohio, Laws, page 356, is another act, by the provisions of which a municipal corporation may require a railroad company to eliminate grade crossings. This act is known as Sections 8874 to 8894, inclusive of the General Code. In passing this last act, no reference was made to the former act. The repealing clause provided:

> "All acts and parts of acts in conflict or inconsistent with this act are hereby repealed."

The purpose of each act is shown by the respective first sections thereof. The first section of the first act is now Section 8863, General Code, and the first section of the second act is now found in Sections 8874 and 8875, General Code.

Section 8863, General Code, provides:

> "If the council of a municipal corporation in which a railroad or railroads, and a street or other public highway cross each other at a grade or otherwise, or the commissioners of a county in which, outside of a municipal corporation, a railroad or railroads and public road or highway cross each other at grade, and the directors of the railroad

company or companies are of the opinion that the security and convenience of the public require alterations in such crossing, or the approaches thereto, or in the location of the railroad or railroads or the public highway, or grades thereof, so as to avoid a crossing at grade, or that such crossing should be discontinued with or without building a new way in substitution therefor, and if they agree as to the alterations they may be made as hereinafter provided."

Section 8874, General Code, provides:

"Any municipal corporation may raise or lower, or cause to be raised or lowered, the grade of any street or way, above or below railroad tracks therein, and may require any railroad company operating a railroad in such municipality to raise or lower the grade of its tracks and may construct ways or crossings above the tracks of any railroad, or require the railroad company to construct ways or crossings that are to be passed under its tracks. Any municipality may require such railroad company to erect permanent piers, abutments or any other appropriate supports, in the ways, crossings, streets, roads or alleys, whenever in the opinion of council, the raising or lowering of the grade of any such railroad tracks, or the raising or lowering of the constructions of such ways, crossings or supports, may be necessary, upon the terms and conditions hereinafter set forth."

Section 8863, General Code, contemplates an agreement between the municipality of the county, and the railroad company before any steps are taken by either to eliminate the grade crossing. The agreement comes first. This act does not provide how grade crossings shall be eliminated when there is no agreement.

Section 8874, General Code, authorizes a municipal corporation to eliminate grade crossings and gives council power to require the railroad company to join therein. The resolution requiring the railroad company to join in eliminating the grade crossing is passed before any agreement is entered into. It is adverse in its nature. Other sections of the later act authorize the railroad company to agree upon plans and specifications and to act with the municipal corporation.

Section 8876, General Code, provides:

"The council of such municipality, for the purpose of making or causing such an improvement to be made, by ordinance may require the railroad company, in co-operation with the engineer of the municipality, or the engineer designated in such ordinance, to prepare and submit to such council, within three months, unless longer time is mutually agreed upon in writing, plans and specifications for such improvement, specifying the number, character and location of all piers and supports, which are to be permanently placed in any street or way, therein, specifying the grades to be established for the streets, and the height, character and estimated cost of any viaduct or way above or below any railroad track, and the change of grade required to be made of such tracks, including sidetracks and switches. But in changing the grade of any railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high water mark."

Section 8877, General Code, provides:

> "If at the expiration of three months from the passage of such ordinance, the railroad company has refused or failed to co-operate in the preparation of such plans and specifications or if the engineer of the municipality or engineer designated in such ordinance by council, and the railroad company fail to agree upon the plans and specifications for such improvement, then either the railroad company or municipal corporation may submit the matter of determining the method by which the improvement shall be made to the court of common pleas having jurisdiction in the county in which the municipality is situated."

Section 8878, General Code, provides that either the municipal corporation or the railroad company may petition the court of common pleas, and Section 8879, General Code, prescribes the procedure therein, and the authority of the court.

Section 8880, General Code, provides:

> "If the court finds that the public security and convenience require such changes to be made, and that the plans presented by the petitioner or any of the parties answering thereto are reasonable and practicable, it shall order the changes to be made in accordance with the most reasonable and practicable plan presented to the court. The municipality shall be required to make such changes in the streets, roads or highways as may be necessary, and the railroad company or companies be required to make the changes necessary in the tracks and roadbed, in order to comply with the rulings of the court. If more than one railroad company own tracks on the crossing in question, the court shall apportion the part of the expense payable by the railroad companies between or among such companies. But if the court finds that the security and convenience of the public do not require that alterations be made in such crossing or crossings, or that none of the plans are reasonable or practicable, the improvement shall not be made upon such plans."

Section 8882, General Code, provides:

> "If a municipality, or railroad company refuses or neglects to comply with the orders or findings made by the court under the provisions hereof, the court may enforce its orders or findings by either mandamus or mandatory injunction or as for contempt of court, as the necessity of the case may require, upon the application of either party to such proceedings."

The first action of the council of Alliance to eliminate the grade crossing in question was taken in accordance with the provisions of Section 8874, General Code. No agreement had been entered into prior to the passage of the first resolution. It was not then known that the railroad company would agree to the plans and specifications, and that it would agree to the elimination of the grade crossing in accordance with such plans. It is apparent that the action of council was taken under Section 8874, so that the provisions of Sections 8879, et seq., General Code, could be followed if the railroad company failed to agree to the elimination of the crossing.

It appears that the railroad company has co-operated with the engineer of the city and has agreed upon the plans and specifications, but it does not appear that they have entered into an agreement with the city to eliminate the grade crossing in accordance with these plans and specifications.

The original act in 95 Ohio Laws, 357, as set forth in Section 3337-17b, Bates, Revised Statutes, contained this clause:

> "* * * and in the event that either the municipality or the railroad company shall not consent to the making of such improvements according to the plans and specifications submitted,"

then an appeal may be made to the court. This clause was eliminated when the section was amended in 100 Ohio Laws, 78, and was not replaced when carried into the General Code.

The mere making of plans and specifications and agreeing thereto, would not be equivalent to an agreement for the elimination of the grade crossing in accordance with such plans and specifications. Although the above clause is not now in the statute, nevertheless it is necessary, in order to eliminate a grade crossing by agreement, that the railroad company and the city enter into an agreement that such crossing shall be eliminated in accordance with the plans and specifications agreed upon. If either of them fail to consent then an appeal may be taken to the common pleas court. In other words, the agreement to the plans and specifications should also include an agreement that the grade crossing shall be eliminated in accordance with such plans and specifications, before such agreement would be complete.

You ask for a method of procedure when the parties have agreed as they have done in this case. Whether an appeal is made to the court, or whether the municipality and the railroad company agree, the steps to be taken are the same in each case. The authority of the court is to determine the method by which the improvement shall be made and to determine the plans and specifications therefor. When the court has so determined the city and railroad company are in the same position as if they had entered into a contract for such elimination. In the one case the manner of the elimination of the grade crossing is fixed by the court of common pleas; in the other by agreement of the parties. The provisions of Section 8883, et seq., General Code, are to be followed in each case. If these sections do not cover all the details, the general statutes in reference to public improvements by a city shall be followed.

In considering your inquiry so far, your first question has not been answered. You ask if the provisions of Section 8866, General Code, apply.

This section provides:

> *"In not less than thirty nor more than ninety days after the passage of such resolution the council or commissioners shall determine whether it or they will proceed with the proposed improvement or not.* If it is decided to proceed therewith, an ordinance by the council or resolution by the commissioners shall be passed, which ordinance or resolution must contain, in addition to the terms and conditions stated in such resolution, the plans and specifications of the proposed alteration and improvement, a statement of the damages claimed or likely to accure by reason thereof, and how their payment is to be apportioned between the municipality or county and the railroad company or companies; also who shall supervise the work of construction. Upon the acceptance of this resolution or ordinance by resolution by the railroad company or companies through their directors, it shall constitute an agreement, valid and binding on the municipality or county and the railroad company or companies, respectively. Such agreement shall thereupon be filed in the common pleas court of the county in which the crossing is located, for entry upon its records, whereupon it shall have the same force and effect as a decree of the court."

This section is a part of the act of 90 Ohio Laws, 360. As seen herein, this act contemplates that there should be an agreement before any steps are taken. In your case council acted under the later act, now known as Sections 8874 to 8894, General Code.

Section 8864, General Code, provides:

> "When it is deemed necessary by a municipality or a county to join with any railroad company or companies in the alteration or abolition of a grade or other crossing, the council of the municipality, by a two-thirds vote of all the members elected thereto, or the commissioners of the county, by a unanimous vote, by resolution, shall declare such necessity and intent, and state therein the manner in which the alterations in the crossing are to be made, giving the method of constructing the new crossing with the grades for the railroad or railroads and the public way or ways; also what land or other property it is necessary to appropriate, and how their cost is to be apportioned between the municipality or county and the railroad company or companies; also by whom the work of construction is to be done and how its cost is to be apportioned between the municipality or county and the railroad company or companies."

The words "such resolution" used in the first part of Section 8866, General Code, refers to the resolution provided for in Section 8864, supra., in fact the original act specified Section 2 of the act, that is the resolution therein provided for.

The provisions of Section 8866, General Code, apply only when the municipal corporation of the county and the railroad company or companies agree upon such elimination before any steps are taken, and does not apply when proceedings are started under the provisions of Section 8874, et seq., General Code.

In your case the proceedings were started before any agreement was entered into and were to that extent adverse. The fact that the railroad afterwards agreed to the plans and specifications did not change the situation. The improvement would still be made in accordance with the provisions of Sections 8874, et seq., and not under provisions of Sections 8863 to 8873, General Code.

The provisions of Section 8866, General Code, did not apply to your case. Council was not required to pass the resolution to "proceed," within ninety days after it had passed the resolution of "necessity" for the elimination of the grade crossing.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

348.

ORDINANCES SHALL NOT CONTAIN MORE THAN ONE SUBJECT—RESOLUTION OF NECESSITY FOR IMPROVEMENT OF SEVERAL STREETS.

A resolution of council declaring it necessary to improve several streets and alleys cannot be passed for the reason that each street involves a different situation with different considerations and such a resolution would therefore violate Section 4226, General Code, prohibiting the passage of any ordinance, resolution or by-law containing more than one subject.

COLUMBUS, OHIO, May 10, 1912.

HON. D. F. MILLS, *City Solicitor, Sidney, Ohio.*

DEAR SIR:—Your favor of April 29, 1912, is received, in which you inquire as follows:

> "The city council desires to pave certain alleys and streets in the city being parts of seventeen different streets and eighteen different alleys. I am enclosing herewith a title of a resolution which council has passed declaring it necessary to improve said streets and alleys, omitting the names of the streets. The original resolution has the names of each and all the streets and alleys set for in the title as well as in the body of the resolution.
>
> "I would like to have an opinion from the attorney general's office as to whether or not this resolution with the title expressed as I have it would violate the provisions of Section 4226, G. C., providing as follows:
>
> "'No ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title.'"

Section 4226, General Code, reads in full as follows:

> "No ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title. No by-law or ordinance, or section thereof, shall be revived or amended, unless the new by-law or ordinance contains the entire by-law or ordinance, or section revived or amended, and the by-law or ordinance, section or sections so amended shall be repealed? Each such by-law, resolution and ordinance shall be adopted or passed by a separate vote of the council and the yeas and nays shall be entered upon the journal."

The provision of this statute now under consideration is held to be mandatory in case of Heffner vs. City of Toledo, wherein Summers, J., says at page 423 of the opinion:

> "The requirement of Section 1694 that no by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title,' evidently was suggested by the provision of Section 16 of Article 2 of the Constitution that: 'no bill shall contain more than one subject, which shall be clearly expressed in its title.' The latter provision has been held to be directory (Pim vs. Nicholson, 6 Ohio St., 176), and if the former were so it would not require further consideration, but it has

been held mandatory (Bloom vs. City of Xenia, 32 Ohio St., 461; Campbell vs. City of Cincinnati et al., 49 Ohio St., 463."

The syllabi of this case lay down certain principles as to the purpose and construction of Section 4226, General Code, where it is held:

"The statutory requirement that 'no by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title,' was intended to prevent the uniting in one ordinance of diverse subjects or measures and effecting its passage by uniting in its support all those in favor of any, and to prevent the adoption or ordinances by the votes of councilmen ignorant of their contents.

"Whether an ordinance is violative of the statutory requirement that 'no by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title,' is to be determined not by its form, but in the light of the mischief the statute was intended to prevent.

"An ordinance to provide for the issuing of bonds to pay the city's part of the cost of thirty-two street and sewer improvements, entitled: 'An ordinance to provide for the issue of general street improvement bonds of the city of Toledo, state of Ohio, to pay said city's part of the cost and expense of improving sundry streets and alleys by paving, repaving, grading and macadamizing, and by constructing sewers therein and to pay the said city's part of the cost and expense of constructing such sewers,' is not in conflict with the statutory requirement that 'no by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title.'"

On page 425, Summers, J., says:

"The issuing of bonds to pay the city's part of the cost of such improvements is merely incidental to the making of the improvement, and council cannot provide for the making of the separate improvements without the concurrence of three-fourths of the whole number of members elected to council, unless the owners of a majority of the foot frontage to be assessed petition in writing therefor, and in that event the concurrence of a majority of the whole number elected is essential."

In the foregoing case the improvements had been determined upon and the liability of the city ascertained. The purpose of the ordinance was to issue bonds to pay the city's part of the cost of the improvements which included street and sewer improvements. This, as the court says, was incidental to the making of the improvement. This case is not therefore an authority for joining two or more distinct improvements in one ordinance.

In case of Elyria Gas & Water Co. vs. City of Elyria, 57 Ohio St., 376, the fourth syllabus reads:

"The purchase of water works, and the erection of new ones, are distinct measures, requiring different proceedings; and a resolution of council which combines both as one, and provides for the submission, in that form, of the question of the issue and sale of the bonds of the municipality for both purposes combined, is unauthorized, and ineffectual for either purpose; nor can it be made effectual for either, by the elimination of the other in the proceedings subsequent to the resolution.

It is the policy of the statute that each measure for which it is proposed to issue and sell the bonds of the corporation shall stand on its own merits, unaided by combination with others, and that it be voted upon as an independent measure, by the council and electors, uninfluenced by such combination."

On page 380 and 381, Williams, J., says:

"* * * And, it is the policy of the statute that the proposition for each separate improvement shall stand on its own merits, unaided by combination with any other measure, and be so acted upon by the council in the first instance, and then, if adopted, be so submitted for approval by the electors that each may be voted upon as a separate measure, uninfluenced by combination with others."

From the foregoing decision it is seen that each improvement should stand upon its own merits and not be aided by combination with others.

Under the chapter on assessments in the General Code there is a provision which specifically authorizes council to provide for sprinkling, sweeping, or cleaning more than one street or alley in the same ordinance.

Section 3842, General Code, provides:

"The council of a city upon the recommendation of the director of public service, or the council of a village, may provide by ordinance for sprinkling with water, sweeping, or cleaning of such streets or alleys, or parts thereof. For the purpose of carrying out the provision of this section and of the three next preceding sections, one ordinance may be made to include one or more streets or alleys, or parts thereof, and one or more of the powers granted by such sections."

This is an exception from the general statute. If it was legal and proper to provide for the improvement of more than one street in the same ordinance, the foregoing provision would be mere surplusage. It appears, therefore, that the legislature construed the provision of Section 4226, General Code, as preventing the improvement of more than one street in the same ordinance.

The improvement of one street is separate and distinct from the improvement of another street. It is not likely that the same conditions would exist as to all the streets to be improved. The streets may be of different widths; they may be improved by different materials; some may be improved after petition by the abutting owners and others upon the initiative of council; the elements of damages and benefits would likely be different on different streets.

The various conditions involved in the improvement of a street or alley make it more practical, and almost imperative, that each street should be improved by separate and distinct proceedings and that is the apparent purpose of the statute.

While the general purpose of the ordinance would be the improvement of streets, yet it is for the improvement of separate and distinct streets, and would thereby contain matter pertaining to two separate improvements.

Any ordinance which provides for the improvement of more than one street would be in violation of Section 4226, General Code, because it would contain more than one subject.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

351.

INITIATIVE AND REFERENDUM ACT—WITHDRAWING OF NAMES FROM PETITION AFTER FILING WITH CLERK NOT AUTHORIZED.

It is the duty of the clerk, after determining that 15 *per cent. of the electors have duly signed the referendum petition, and within* 10 *days after the filing thereof to certify the ordinance to the proper officers having control of the elections in the municipality.*

When the petition has once been filed with the clerk, there is no authority for the withdrawing of names therefrom.

COLUMBUS, OHIO, May 10, 1912.

HON. TOLLIS T. SHAW, *City Solicitor, Defiance, Ohio.*

DEAR SIR:—Under date of April 19th you advise us of the following state of facts:

> "The council of the city of Defiance recently passed an ordinance granting a certain franchise which comes under Section 2 of the initiative and referendum law passed May 31, 1911, volume 102, page 521 Ohio Laws. After the passage of the ordinance and within thirty days, a referendum petition was filed with the clerk, containing a sufficient amount of names to warrant the clerk certifying the ordinance to the board of elections. Afterwards, and within ten days of the filing of the petition with the clerk, certain signers of the original petition requested the clerk to withdraw their names from the petition. The number so withdrawn reduces the names in number to such a number which would be less than the number of signatures required authorizing the certificate to be made by the clerk. The clerk assumed to have the authority after the filing of the petition with him, to strike from the petition the names of such parties making such request."

You therefore, desire to know:

> *"First.* Whether or not, if after a proper number of signatures to the petition are signed, and the petition filed with the clerk, the parties so signing have a right to withdraw their names by request with the clerk, and whether or not the clerk has authority to withhold the certificate required by reason of this fact.
>
> *"Second.* Under the second paragraph of the section referred to, can a petition be filed any time within sixty days, and do the words 'during which time' mean sixty days?"

In answer to your second question we have heretofore referred you to an opinion rendered to Hon. Don J. Young, prosecuting attorney, Norwalk, Ohio, in our letter to you of April 23, 1912.

Section 4227-2, General Code, provides for referendum and states that if "within thirty days after the passage or adoption of" an ordinance "by the council there be filed with the clerk of such municipal corporation, a petition or petitions "ordering the submission of such ordinance * * * to the vote of the electors of such municipal corporation," such ordinance shall be submitted to the qualified electors for their approval or rejection.

It is made the duty of the clerk within ten days after the filing of such petition or petitions to certify such ordinance to the officer or officers having control of elections in such municipal corporation. There is no authority whatever in said statute permitting the withdrawal of names from a petition after said petition has been filed with the clerk. Upon the filing of a petition or petitions it is the duty of the clerk to determine whether or not there is the requisite fifteen per cent. of the electors duly signed to the petition. Such is his sole authority in the matter and if he finds that the same bears the names of fifteen per cent. of the electors it is his duty to certify the ordinance to the proper officers as provided in said section. If when the petition was filed there were the requisite number of names signed to the petition the statute in regard to referendum has been complied with and such being the case and there being no authority to withdraw the names after the filing of such petition, I am of the opinion that the parties so signing have not the right to withdraw their names by request with the clerk after the petitions are so filed with him, nor has the clerk the authority by reason of this fact to withhold the certifying of the ordinance to the proper officers having control of elections in such municipality for submission to a vote of the electors at the next general election.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

355.

CIVIL SERVICE—APPOINTMENT—CERTIFICATION BY CIVIL SERVICE COMMISSION OF *ONE* CANDIDATE TO APPOINTING BOARD—BOARD NOT OBLIGED TO APPOINT.

Section 4481, *General Code, providing for the appointment of members of the classified service in a city, by the appointing board from a list of three candidates which have been examined and certified by the civil service commission in investing said board with a power of "appointment" intends to confer a certain power of discretion and when therefore, only one candidate is certified by the commission, the board may appoint or reject him as it sees fit. When three candidates are certified however, the board is obliged to appoint one of the three.*

The civil service commission may drop from the eligible list, only such candidates as have been certified to the appointing board three times in a list from which the board is required to make a selection to wit: in a list of at least three candidates.

COLUMBUS, OHIO, April 29, 1912.

HON. ALLEN G. AIGLER, *City Solicitor, Bellevue, Ohio.*

DEAR SIR:—Under date of April 16, 1912, you inquire:

> "Recently the civil service commission of Bellevue held an examination for candidates for the position of patrolman in the police department. Only one candidate appeared and took the examination. The civil service commission passed the candidate and thereupon certified his name to the director of public safety for appointment to the office of patrolman. The civil service commission claims that the director of public safety is required to appoint the person so certified, there being a vacancy in the office of patrolman."

The manner of making apppointments to the classified service in a city is fixed by Section 4481, General Code, which provides:

> "Appointments shall be made in the following manner: The appointing board or officer shall notify the commission of any vacancy to be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest in the respective lists as shown by the result of such examination. Such board or officers shall thereupon appoint one of the three so certified. Grades and standings so established shall remain the grades for a period of six months, or longer if the commission so determines, and in succeeding notifications of vacancies, candidates not selected may be dropped by the commission after having been certified to total of three times."

This section requires the civil service commission to certify three names, and the appointing officer or board is required to appoint one of the three so certified. His discretion of appointment is limited to the three names certified.

The effect of certifying only one name and requiring the appointing officer or board to appoint the person certified would take from such officer or board the right of appointment and place it in the hands of the civil service commission.

In case of People ex rel. vs. Mosher, 163 N. Y. 32, it is held:

> "The provision of the civil service law that 'appointments shall be made * * * by appointment of those graded highest in open competitive examinations conducted by the state or municipal commission' is unconstitutional, since the right of appointment of necessity involves the power of selection and the exercise of discretion and judgment, and the limitation of the right of appointment to the person graded highest would transfer the real power of appointment from the local authorities to the civil service commission and thus completely nullify that provision of the constitution which confers the power of appointing city officers upon the local authorities of the municipality."

On page 40 of the opinion, Martin, J., says:

> "The decisions of this and other courts, state and federal, as to the meaning of the word 'appointment' and what constitutes an appointment under the law, are to the effect that the choice of a person to fill an office constitutes the essence of the appointment, *that the selection must be the discretionary act of the officer or board clothed with the power of of appointment;* that while he or it may listen to the recommendation or advice of others, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial. Thus it is seen that the authorities upon the subject and the opinion of those who have been connected with the civil service reform from its inception all agree in the conclusion that the power of selection for a public office is and should be vested alone in the officers or board authorized to appoint, although it be limited to persons possessing the qualifications required by the civil service statutes and rules, and that at least some power of selection is necessary to constitute an appointment, which should be exercised by the local authorities, independently of the civil service commission."

On page 42, Martin, J., further says:

> " * * * As we have already seen, the right of appointment, of necessity, involves the power of selection and the exercise of discretion and judgment. Without that power in no just sense can it be said that the right exists."

Under the laws of Ohio the civil service commission has no right of appointment. It can only limit the power of appointment by requiring the appointing officer or board to appoint one of the three candidates certified by it. The statute leaves the appointing officer or board a limited discretion and power of selection in making the appointments, but does not entirely take away the discretionary power. This power of selection is limited to the three who are certified. A further limitation of this discretion would be unauthorized. A certification of less than three names would not be a compliance with the statute and the appointing officer or board would not be required to appoint if less than three candidates were certified.

It appears that the civil service commission has certified the one name upon its list. Such person is qualified for the appointment and the appointing officer or board may appoint the person so certified, but is not required to do so.

A further question presents itself. The statute provides that when a candidate has been certified three times and has not been appointed, the civil service commission may drop such candidate from the eligible list. Under this provision a candidate has a right to be certified three times in a list of three candidates. When less than three are certified, the appointing officer or board is not required to appoint either of them, but when three are certified one of the three must be appointed.

In order to give a candidate an equal chance of appointment with the others he should be certified three times in a list from which the appointing officer or board is required to make a selection and not three times in a list from which no appointment is required.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

361.

COUNCIL—POWER TO FIX HOURS OF DUTY FOR FIREMEN.

Under Section 4393, General Code, council may fix the hours of labor of firemen with the one limitation that they shall not require continuous duty more than six days out of every seven.

COLUMBUS, OHIO, May 13, 1912.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—Your favor of May 6, 1912, is received in which you inquire of the following:

"Will you kindly render me an opinion in regard to the time required for the members of the fire department to be on duty? I have rendered an opinion holding that the firemen are not required to be on duty more than six days in every seven as provided in 101 Ohio Laws 380."

Section 4393, General Code, as amended in 101 Ohio Laws 380, provides:

"The council may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom and for such purpose may establish and maintain a fire department, provide for the establishment and organization of fire engine and hose companies, *establish the hours of labor of the members of its fire department, but after the first day of January, nineteen hundred and eleven, council shall not require any fireman to be on duty continuously more than six days in every seven,* and provide such by-laws and regulations for their government as is deemed necessary and proper."

By virtue of this section council is authorized to "establish the hours of labor" of the members of the fire department. The only restriction placed upon that power is that after January 1, 1911, no fireman shall be required "to be on duty continuously more than six days in every seven." The effect of this provision is that each fireman must have at least one day off duty out of each seven days.

So long as the time fixed for duty by council does not exceed six days of continuous duty out of any seven consecutive days it would not conflict with the statute. The statute fixes six days continuous duty as the maximum of consecutive days of service. It does not fix any minimum. The hours of service are left to the discretion of council with this one limitaiton that no fireman shall be required to be on duty continuously for more than six days in every seven days.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

363.

CHIEFS OF POLICE—FEES FOR SERVICES IN STATE CRIMINAL CASES IN POLICE COURT.

The city has no control over fees assessed in state cases, and Section 4213, *General Code, providing that all fees pertaining to any office shall be paid into the city treasury, has no application to fees assessed in police courts for state cases.*

Under Section 4581, *General Code, providing that other fees in police court shall be the same in state cases as are allowed in probate court or before justices of the peace in similar cases, the chief of police is entitled to legal fees charged to him for services in state criminal cases in a police court.*

Such fees being payable as in a justice court, the chief of police when he performs the services of a constable, shall be compensated under Section 3347, *General Code, and when he performs the services of a sheriff, shall be paid as provided in Section* 2845, *General Code.*

COLUMBUS, OHIO, May 13, 1912.

HON. HOWARD E. MCGREGOR, *City Solicitor, Springfield, Ohio.*

DEAR SIR:—Under date of May 1, 1912, you inquire of this department as follows:

> "The question has arisen in this city as to whether or not the chief of police should be paid fees for attendance at police court and for the service of process issued by the judge of said court, as in the same manner as are allowed fees in the probate court or before justices of the peace."

Your inquiry covers the services of the chief of police in all cases before the police court, whether arising from violation of city ordinances, or from violations of the statutes of Ohio.

Section 4581, General Code, provides:

> "Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, by ordinance, prescribes, not exceeding the fees for like services in state cases."

The fees in the cases for violation of ordinances are to be fixed by council. The fees in state cases are to be the same as are allowed in the probate court or before justices of the peace in like cases.

The disposition of the fees in city cases will be first considered.

Section 4213, General Code, provides:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

In the case of Portsmouth vs. Milstead, 18 Cir. Dec., 384, it is held:

> "The provisions of 96 O. L., Sec. 126 (Rev. Stat., 1536-633; Lan., 3228), requiring 'that all fees pertaining to any office shall be paid into the city treasury,' has reference to municipal fees solely, or such fees as may be fixed by municipal authority.
>
> "Said section does not authorize cities to interfere with the fees of mayors or chiefs of police in state criminal cases; whether such authority can be delegated to municipalities, quaere."

The fees in cases of violation of ordinances are prescribed by council, that is by municipal authority. Fees charged to the chief of police in such cases should be paid into the city treasury. The salary which the chief of police receives from the city is paid him for his services performed for the city, and he is not entitled to any fees in city cases.

In order to determine the disposition of fees in state cases, it will be necessary to ascertain what fees can be legally charged to a chief of police.

There is no specific provision of statute requiring the chief of police to serve process in the police court, nor is there any other statute, than Section 4581, Gen-

eral Code, supra., which might authorize the charging of fees to the chief of police in state criminal cases in a police court.

In the case of Delaware vs. Matthews, 13 Cir. Ct., N. S., 539, Taggart, J., says at page 540, of the opinion:

> "* * * The chief of police, in cities having a police court, were to receive like fees as constables and sheriffs in the probate court and before justices of the peace."

The provisions of Section 4581, General Code, were in their present form when the above opinion was rendered. At that time, as now, there was no specific provision of statute making it the duty of the chief of police to serve process in the police court. He is, however, the proper officer to serve such process.

Section 4581, General Code, authorizes the charging of fees to a chief of police for official service in a state criminal case before a judge of a police court.

The statute provides that the fees shall be the same "as are allowed in the probate court, or before justices of the peace, in like cases." This statute seems to provide two methods of charging fees.

Process in a probate court may be served by a sheriff or a constable.

Section 1596, General Code, provides:

> "When required by the probate judge, sheriffs, coroners and constables shall attend his court, serve and return process directed and delivered to them by such judge, * * * *"

"The fees in a probate court are prescribed by Section 11204, General Code, which provides:

> "The fees of witnesses, jurors, sheriffs, coroners and constables, for all services rendered in the probate court, or by order of the probate judge, shall be the same as is provided by law, for like services in the court of common pleas."

The fees of the chief of police, in accordance with the above provisions, are to be the same as are allowed in justices courts and in the court of common pleas in like cases. The same situation is thus presented as was presented in considering a similar provision in Section 4534, General Code. In construing this latter section, this department, in an opinion, a copy of which is enclosed, rendered to the bureau of inspection and supervision of public offices, dated August 30, 1911, it was held:

> "That in cases other than those arising out of violations or ordinances, the fees of a constable should be taxed in favor of the chief of police under Section 4534, General Code, as amended, unless Section 3347, which prescribes the fees of a constable fails to provide a fee for the specific service performed by the chief of police; in which case the chief is entitled to the fee provided for the sheriff by Section 2845 as amended."

The foregoing conclusion was based upon the ground that the duties of a chief of police in a mayor's court are similar to those of a constable before a justice of the peace, rather than those of a sheriff in a court of common pleas. The same applies to the present situation, and the rule as above stated should apply to Section 4581, General Code, now under consideration.

In the case of Portsmouth vs. Milstead, 18 Cir. Dec., 384, supra., it is seen that the city has no control of the fees charged for services of a chief of police in a state criminal case. These fees are subject to state control and Section 4213, General Code, requiring all fees to be paid into the city treasury, does not apply to the fees of a chief of police in state criminal cases.

The chief of police is entitled to the legal fees charged to him for services in state criminal cases in a police court.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

364.

CIVIL SERVICE—INITIATIVE AND REFERENDUM ACT—VILLAGE ADVANCING TO CITY—ORDINANCE PROVIDING FOR FIREMEN—POWERS OF APPOINTMENT OF FIREMEN BY DIRECTOR OF PUBLIC SAFETY.

On January 29, 1911, when Bellevue was a village, the mayor appointed for a term of one year, the necessary firemen under Section 4390, General Code.

On January 10, 1912, after Bellevue had become a city, the city council passed an ordinance organizing a city fire department, which ordinance, by virtue of the initiative and referendum act, could not become effective until after the expiration of sixty days and the village ordinance organizing the fire department would remain in effect until that time.

Pending such time, therefore, the director of public safety could act only under the village ordinance and therefor, at the expiration of the terms of the village firemen to wit: After January 29, 1912, the director could fill the vacancies by appointment.

The members appointed by the director would, however, be subject to civil service regulations, and therefore, such appointments could be only temporary, under Section 4488, General Code, until examinations could be held and the positions filled as required by the civil service law.

Under these rules, therefore, when the director made appointments on January 31, 1912, to fill positions under the new ordinance, aforesaid, which had not yet become effective, he could only appoint the number authorized by the village ordinance, and these could only be compensated as de facto officers.

COLUMBUS, OHIO, April 4, 1912.

HON. ALLAN G. AIGLER, *City Solicitor, Bellevue, Ohio.*

DEAR SIR:—Under date of March 9, 1912, you submit the following inquiries:

> "On the 29th day of January, 1911, the mayor of the village of Bellevue, with the advice and consent of the council, appointed for a term of one year the necessary firemen for the village of Bellevue in accordance with Section 4390, of the General Code of Ohio. The salary of the village firemen was fixed by ordinance. When did the terms of the village firemen expire?
>
> "The civil service commission of the city of Bellevue has so far failed to hold the necessary examinations for firemen to fill the positions created by ordinance for the organization of the city fire department.

On the 31st day of January, 1912, the director of public safety appointed firemen to fill the places created by the ordinance for the organization of the city fire department to serve until such time as the civil service commission should be able to certify names for appointment to the positions of firemen. Perhaps I should add that the ordinance for the organization of the city fire department and fixing the salaries of the members thereof was passed on the 10th day of January, 1912.

"As between the old village firemen and the appointees of the director of public safety, who, if any, are entitled to the salary as firemen of the city?"

The ordinance of January 10, 1912, to organize the city fire department and to fix the salaries of the members thereof, is an ordinance involving the expenditure of money. Such ordinance, as heretofore held by this department, is subject to the Crosser initiative and referendum act and does not become operative until sixty days after its passage. The ordinance would not be effective for any purpose until said sixty days had elapsed. Until such time the director of public safety could not act under it, and any appointments of firemen to fill positions created by this ordinance to take effect prior to the date when such ordinance became operative, would be null and void.

Bellevue is one of those municipalities which passed from a village to a city by the result of the last federal census.

Section 3499, General Code, provides:

"Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed."

The village form of government was continued by virtue of Section 3499, General Code, until the new form of government could be established and the city officers elected at the next general election of municipal officers.

The evident purpose of this statute, as shown by its provisions, was to provide a transition from the village form of government to the city form, without causing any break in the exercise of the governmental functions. The old form should continue until the new could be perfected. The officers of the village are continued in office until succeeded by the proper officers of the new corporation, and the ordinances of the village, not inconsistent with the laws relating to a city, are continued in force until repealed or changed by the new council.

The council elected for the city took office on the first day of January, 1912, and on January 10, 1912, the ordinance reorganizing the fire department was passed. The council acted diligently in providing for the new fire department, but for reasons over which they had no control, the ordinance could not become effective until sixty days after its passage.

A fire department is an important and necessary feature of a city government. It was not the intent of the legislature that the city should be without fire protection until the ordinance reorganizing the fire department should become operative, but on the contrary, the purpose and intent of the statute is that the old organization should continue until superseded by the new.

Under the village form of government, firemen, other than volunteers, are appointed for terms of one year as provided by Section 4390, General Code, which reads:

> "Council may provide for the employment of such firemen as it deems best and fix their compensation, or for the services of volunteer firemen. All firemen, other than volunteers, shall be appointed by the mayor for terms of one year, with the advice and consent of the council."

It appears that in Bellevue the firemen were appointed on January 29, 1911, for terms of one year. The terms of these firemen, unless superseded by the new firemen of the city, would not expire until January 29, 1912. They were not superseded by the new firemen at that time, and they were therefore, entitled to serve their full terms.

At the expiration of their terms, however, the ordinanc reorganizing the fire department had not become effective. This ordinance, although passed prior to January 29, 1912, did not repeal or change the village ordinance organizing the fire department, until it became operative.

Fire departments are established under both village and city forms of government. The general purpose of each is the same, the protection of life and property against loss by fire. The respective duties of the firemen would be substantially the same under either form of government.

The ordinance of the village organizing the fire department would not be inconsistent with the laws relating to the city form of government. The ordinance of the village of Bellevue, organizing the fire department, continued in force until superseded by the ordinance of the city, which would be the date when said ordinance became operative.

The fire department passed under the control of the director of public safety on January 1, 1912, or as soon thereafter as he took his office. The director of public safety could act under the village ordinance until such time as the city ordinance became effective. The terms of the village firemen expired on January 29, 1912. The director of public safety could either continue these men in their positions, or he could appoint others to fill the vacancies. These men were appointed for a definite term and at the expiration of that time, there would be a vacancy which could be filled in the manner provided by law.

Under the city form of government, the fire department is subject to civil service regulations. It is held by the courts that when the departments of the city were placed under civil service, the incumbents in the positions of the classified service, continued in their positions without examination, and were thereafter subject to civil service rules. This principle does not apply to a village passing to a city. The officers appointed under the village form of government would not be continued in office without examination.

Section 4488, General Code, authorizes temporary appointments as follows:

> "To prevent the stoppage of public business or to meet extraordinary exigencies, as provided in this title, the mayor may make temporary appointments."

It appears from your inquiry that no examinations have been held by the civil service commission to fill the positions of firemen. From a further communication it appears that examinations have later been held but that not enough have passed to fill all the positions. In such cases temporary appointments can be made by virtue of Section 4488, General Code, until all the positions can be filled as required by the civil service law.

The appointments to fill the vacancies upon the expiration of the terms of the village firemen would be only temporary.

From your letter it appears that the appointments of the director of public safety made on January 31, 1912, were made to fill positions created under the new ordinance. The only positions he could then fill were those authorized by the village ordinance.

While this proceeding may be irregular, and the firemen so appointed were only de facto officers or employes, yet there were no de jure firemen who could claim the compensation. The terms of the firemen appointed under the village form of government had expired, the city ordinance had not yet become effective, and the new appointees were actually filling the positions and performing the duties pertaining thereto.

In so far as the appointees of January 31, 1912, were filling positions authorized by the village ordinance they are entitled to the pay fixed by such ordinance. If the number so appointed was in excess of the number of positions authorized by the village ordinance, the excessive number could not be paid.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

366.

CIVIL SERVICE—SUMMARY DISCHARGE OF FIREMEN NOT APPOINTED FROM CLASSIFIED LIST.

When firemen were appointed after the department had been placed under the civil service, but before any classified list had been created, such firemen could be summarily discharged as soon as the positions were properly filled under civil service regulations.

COLUMBUS, OHIO, May 12, 1912.

HON. A. J. LAYNE, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—Your favor of January 11, 1912, is received in which you inquire as follows:

> "Three firemen of the fire department were summarily discharged by the mayor and director of public safety January 10, 1912. These three firemen were respectively appointed July 9, 1908, and September 20, 1909, and February 1, 1911. They were not appointed from any classified list, as there was no such list until very recently. Their positions were, on said 10th day of January, 1912, filled regularly from the classified list of those who had successfully taken the civil service examination. These firemen were discharged on the theory that they were temporary employes and not entitled to service when an eligible civil service list was available.
>
> "Had the mayor and the director of public safety the right to summarily remove said firemen?"

The police and fire departments of cities were placed under civil service by the provisions of Section 153, and others, of the Municipal Code, which was passed October 22, 1902, and became effective as to these provisions on the first Monday in May, 1903.

Following the decisions of the courts this department has held that when a department of a city passes from the unclassified to the classified service, the incumbents in the positions pass into the classified service without examination and are thereafter subject to civil service regulations.

It appears from your letter that the three firemen who were discharged were each of them appointed after the fire department had passed under civil service regulations; and that they were not appointed as required by civil service laws.

Section 4485, General Code, provides how members of the classified service shall be removed, as follows:

> "No officer or employe within the classified service shall be removed, reduced in rank, or discharged, except for some cause relating to his moral character or his suitableness to perform the duties of his position, though he may be suspended from duty for a period not to exceed thirty days, pending the investigation of charges against him. Such cause shall be determined by the removing authority and reported in writing, with a specific statement of reasons, to the commission, but shall not be made public without the consent of the person discharged. Before such removal, reduction, or discharge, the removing authority shall give such person a reasonable opportunity to know the charges against him and to be heard in his own behalf."

The above section protects those who have been legally appointed to positions in the classified service, or who passed to the classified service because they held the positions when such positions were placed in the classified service. The three firemen in question do not come within either of these classes. They were not incumbents in 1903 and they were not appointed from the classified list after examination. The positions which they occupied should have been filled from the classified service as soon as available. Their discharge in the manner stated by you was not illegal.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

367.

COUNTY AUDITOR—MANDATORY DUTY TO DRAW DRAFT WHEN REQUESTED UNDER SECTION 2692, GENERAL CODE.

Section 2692, General Code, makes it mandatory upon the county auditor to draw the draft therein provided for when properly requested by the proper local authority.

COLUMBUS, OHIO, May 1, 1912.

HON. A. J. LAYNE, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—I have your letter of January 1, 1912, in which you inquire:

> "(1.) Under Section 2692, General Code, has the county auditor discretion to draw or not draw such draft when properly requested by the proper local authority?"

My opinion is that the words "may draw" are not discretionary but authoritive, and that the auditor has no discretion when the request is properly made.

I am of the opinion that, assuming the request is within the two-thirds limit, there can be no reason why the auditor should refuse such request. As to some taxing districts the advance payments, perhaps, ought not to be favored, in view of the provisions of the Smith one per cent. law; that act has the effect, in my judgment, and as I have heretofore held, of devoting the proceeds of a levy made in a given year to the sole purpose of operating the taxing district during the next fiscal year. Therefore, the proceeds of a given levy cannot be used until the beginning of the next fiscal half year. As to school districts and municipal corporations, at least, however, the fiscal year for which the levy is made begins prior to the first distribution of the proceeds of the levy, so that it is practically necessary in the case of such taxing districts to rely upon the advance payments made under authority of Section 2692.

Investigation will develop when this provision was first enacted that it was made mandatory, and the only change in phraseology was when it became Section 11234, Revised Statutes. The rule laid down in such cases is found in Allen vs. Russell, 37 O. S., 337, as follows:

> "But where the general stautes of the state, or all on a particular subject are revised and consolidated, there is a strong presumption that the same construction which the statutes received before revision and consolidation should be applied to the enactment in its revised and consolidated form, although the language may have been changed."

I am, therefore, of the opinion that Section 2692, General Code, is mandatory as to the county auditor.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

373.

UNION CEMETERY TRUSTEES—POWER TO HIRE CLERK AND FIX SALARY—POWER AND DUTY OF JOINT BOARD OF CONTROL TO FIX SALARY OF TRUSTEES.

A member of the board of trustees of a union cemetery cannot be employed and receive pay as a clerk for the secretary or managing trustee of such board.

The trustees of a union cemetery are vested with the powers of the trustees of the cemetery of a municipal corporation, which powers are identical with those of the director of public service in a city. Such powers including the right to appoint a clerk to the secretary and managing trustee if said clerk is deemed necessary, and also the power to fix the salary of said clerk.

The salary of said clerk must be approved however, by the joint board of control of such union cemetery, composed of the governing boards of the subdivisions which jointly maintain the cemetery.

Said joint board may also fix a compensation for the board of trustees.

COLUMBUS, OHIO, April 22, 1912.

HON. A. J. LAYNE, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—Under date of January 3, 1912, you ask an opinion of this department upon the following:

"The trustees elect of a union cemetery have asked for answers to the three questions following:

"Can one of the trustees be employed and paid for services rendered by him as clerk for the secretary and managing trustee?

"Can the board of trustees employ a clerk for the secretary and managing trustee who is not one of the trustees and can they pay him for said services?

"In your opinion of May 31, 1911, in reply to letter of Will E. Heck, state examiner, as found at page 177 of the report of the examination for the city of Ironton (No. 7.) we find that you use the following language, to wit:

"'The duties of the board of trustees of union cemetery being defined by law as above set forth, no member of such board has the right to receive any compensation for any work or labor except such as is paid to every member of the board by virtue of the public office which he holds.'

"Is there any law or authority for the payment of the members of such board 'by virtue of the public office which they hold."

Your first inquiry is answered in the opinion rendered to the bureau of inspection and supervision of public offices on may 31, 1911, to which you refer, and in which it is stated:

"The trustees of union cemeteries are public officers of the municipality or township and are elected by the people and cannot employ one of their number for extra pay to do any necessary work."

It therefore follows, that a member of the board of trustees of a union cemetery cannot be employed and receive pay as a clerk for the secretary or managing trustee of such board.

In answering your second inquiry it will be necessary to refer to the statutes. Section 4189, General Code provides:

"The cemetery so owned in common, shall be under the control and management of the trustees, and their authority over it and their duties in relation thereto, shall be the same as where the cemetery is the exclusive property of a single corporation."

Section 4178, General Code, provides the duties of trustees of a cemetery of a village, as follows:

"The board of cemetery trustees shall have the powers and perform the duties prescribed in this chapter for the director of public service. Such trustees shall organize in accordance with the provisions in this chapter for the organization of trustees of union cemeteries."

Section 4162, General Code, provides for the management of cemeteries of a city, as follows:

"The director shall direct all the improvements and embellishments of the grounds and lots, protect and preserve them, and, subject to the approval of the council, appoint necessary superintendents, employes and agents, determine their term of office and the amount of their compensation."

The director herein referred to is the director of public service.

Section 4170, General Code, authorizes the director of public service to employ a clerk, as follows:

> "The director shall appoint a clerk, and keep accurate minutes of all his proceedings, and report quarterly to the council all the moneys received and disbursed by him in the management and control of the cemetery."

Section 4193, General Code, provides:

> "The trustees of such township or townships, or the council or councils of such municipal corporation or corporations may at any time call a joint meeting of the council or councils and the trustees of the township or townships, on a reasonable notice given by either, for the purpose of making joint rules and regulations for the government of the cemetery, or changing them, and making such orders as may be found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise."

The trustees of townships and councils of municipal corporations referred to in the latter section are the trustees and councils of the political divisions that have joint control of the union cemetery and for whom said cemetery is maintained.

By virtue of Section 4189, General Code, the trustees of a union cemetery have the same authority and perform the same duties over such cemetery, as is prescribed for cemeteries maintained by a single corporation. Section 4170, General Code, prescribes the powers and duties of trustees of a village cemetery and gives them the same power as is granted the director of public service.

By Section 4162, General Code, the director of public service is authorized to appoint the necessary superintendents, employes and agents and fix their compensation, all of which is subject to the approval of council. The trustees of a union cemetery have the same power. As the trustees of a union cemetery act for more than one political division, there is no council for the cemetery district. But the statutes, Section 4193, General Code, makes the trustees of the township and the council of the municipal corporations interested in the cemetery, a joint body for making rules and regulations and for making orders for the "application of moneys arising from the sale of lots, taxes, or otherwise."

It is my conclusion that the trustees of a union cemetery may appoint a clerk, if it deems such clerk necessary, to the secretary and managing trustee, and fix his compensation, but that such appointment and the fixing of his compensation is subject to the approval of the joint body composed of the trustees, or members of the councils of the political divisions that jointly maintain such union cemetery.

You next inquire as to the compensation of the trustees of a union cemetery.

The statute does not fix any compensation therefor, neither does the statute provide that they shall serve without compensation.

Under the authority vested in the joint body of trustees and council as provided in Section 4193, General Code, this joint body could fix a compensation for such trustees. Council in a municipal corporation have general powers to fix salaries, and in townships this power is usually vested in the trustees. This power is not taken away when they act jointly with a similar body.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

379.

SALARY, INCREASE AND DECREASE OF—POLICE OFFICERS IN CIVIL SERVICE—NO TERM OF OFFICE.

Police officers, under the civil service, do not hold their office for a specific term and therefore their salaries may be increased or decreased during tenure of office.

COLUMBUS, OHIO, May 18, 1912.

HON. BEN L. BENNETT, *City Solicitor, East Liverpool, Ohio.*

DEAR SIR:—Under date of April 25, 1912, you advised me that your city council is desirous of raising the salaries of the members of the police department, but that some time ago the supreme court affirmed a decision of the Lake county circuit court, without report, in which it was held in the lower court that as a police officer's term of office extended during good behavior his salary cannot be raised or lowered during incumbency. You further call attention to the fact that an exhaustive and well worded opinion in the court of common pleas of Cuyahoga county has held that an officer's salary could be raised during his term of office.

When the matter of raising or lowering policemen's salaries was first brought to the attention of this department an opinion was rendered on January 20, 1911, to the bureau of inspection and supervision of public offices, Columbus, Ohio, holding that policemen had no official term and, therefore, did not come within the purview of Section 4213, General Code. At the time of rendering such opinion there had been no expression of court upon the subject.

Subsequently the decision of the circuit court of Lake county in the case of State ex rel. Speller vs. Painesville was published February 13, 1911, in the Ohio Law Bulletin, Volume LXVI No. 7 which is the case to which you refer in your letter of inquiry. Under date of February 14, 1911, the Hon. James W. Galbraith, prosecuting attorney, Mansfield, Ohio, again submitted the question in reference to firemen as to the right to increase or diminish their salaries, and under date of March 7, 1911, I rendered an opinion based *solely* on said circuit court case that the salaries of policemen and firemen could not be increased or diminished. As such decision was the only one on the subject at that time I felt it to be my duty to waive my personal opinion and follow the ruling of the court as therein stated. I did not at that time have before me anything pertaining to such case but the decision as published as foregoing stated. This case was subsequently taken to the supreme court for review and the supreme court affirmed the judgment of the circuit court without report. In the entry there is no expression of the supreme court that it followed the reasoning of the circuit court in said circuit court's opinion. I have carefully examined the record and briefs as filed in the supreme court in said case and find that the supreme court would have had to affirm said judgment on either theory of the case, to wit: that the salaries of policemen and firemen could be increased or diminished after they had entered the service, or on the theory that such salaries would not be increased or diminished after they had entered the service. The record in said case discloses that on July 15, 1903, the council of Painesville passed an ordinance fixing the salary of patrolmen in the sum of seven hundred and twenty dollars per year; that on October 12, 1903, the relator was appointed a patrolman; that on December 18, 1907, council passed an ordinance *increasing* the salary of patrolmen to eight hundred and forty dollars per year, and that on January 12, 1910, said council reduced the salary of patrolmen to the original sum of seven hundred and twenty dollars per year. It would, therefore, appear that under either view of the case

the salary of the patrolmen was seven hundred and twenty dollars per year, and that, consequently, he was not entitled to the writ as prayed for. Since the affirmance of said case by the supreme court there have been two decisions of the common pleas court in relation to the matter, one by Judge Lawrence of the court of common pleas of Cuyahoga county, in the case of Stage vs. Coughlan et al. decided March 15, 1912, and found reported in 12 Nisi Prius n. s. 419, and one by judge Sprigg, of the court of common pleas of Montgomery county, in the case of State ex rel. vs. Bish decided March 9, 1912, reported in 12 Nisi Prius n. s. 369. In both of the above cases it was held that the salaries of policemen and firemen can be increased or diminished for the reason that said policemen and firemen do not hold their positions for a fixed or definite term.

After a very careful consideration of the two cases decided in the common pleas courts above mentioned, together with the opinion in the so-called Painesville case, and in view of the fact that the supreme court did not necessarily affirm the reasoning of the circuit court in affirming the judgment of said Painesville case, I am of the opinion that the reasoning of the common pleas courts is the better one, and believe that the same states the proper rule of law.

As before stated in the beginnig of this letter that was my original view in the matter.

I am, therefore, of the opinion that those holding under the civil service are not appointed for a "term" within the meaning of Section 4213, General Code, and that, consequently, council has power to increase or diminish their salaries after appointment.

I beg further to say that I am forwarding copy of this opinion to the bureau of inspection and supervision of public offices, advising them that this department would follow the decisions of the common pleas courts before referred to unless the same were expressly reversed by a superior court, and directing the bureau of inspection and supervision of public offices to be governed accordingly.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

383.

INTEREST OF PUBLIC OFFICIAL IN PUBLIC EXPENDITURES—COUNCILMAN MAY NOT SELL GROCERIES TO CITY HOSPITAL.

By virtue of Sections 3808 and 12910, General Code, a member of a city council cannot sell supplies to a city hospital, or be interested in the expenditure of money by the city other than the fixed compensation of his office.

COLUMBUS, OHIO, May 16, 1912.

HON. R. CLINT COLE, *City Solicitor, Findlay, Ohio.*

DEAR SIR:—Under date of May 7, 1912, you inquire as follows:

> "The question has come up here as to whether or not, and if so to what extent, councilmen can sell supplies to a city institution.
>
> "One of our councilmen is engaged in the grocery business. We have a hospital that is a city institution. Can the manager of the hospital buy groceries from this councilman?"

The situation which you present is covered by Sections 3808 and 12910 of the General Code.

Section 3808, General Code, provides:

> "No member of council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

Section 12910, General Code, provides:

> "Whoever holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Section 3808, General Code, prohibits a member of council from having any interest in the expenditure of money on the part of the corporation, other than his fixed compensation. A violation of this provision disqualifies the violator from holding any office of trust or profit in the corporation. Section 12910 makes such transaction a penal offense.

The person in your case is a member of council. The city of which he is a councilman maintains a hospital. The purchase of supplies for this hospital is made with city money. It is an expenditure of the city of which such person is a councilman. The statute prohibits such councilman from having any interest in any expenditure of the city other than his fixed compensation.

If those in control of the city hospital should purchase supplies from the grocery store owned by a councilman of the city, such councilman would have an interest in such expenditure of money, and such councilman would thereby violate the provisions of Section 3808, General Code.

A member of the council of a city cannot sell supplies to a city hospital, or be interested in the expenditure of money by the city other than the fixed compensation of his office.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

384.

INTOXICATING LIQUORS—ELECTIONS—CITY LOCATED IN TWO COUNTIES—RIGHT OF CITY VOTERS RESIDING IN DRY COUNTY TO VOTE ON BEAL LAW ELECTION IN SAID CITY.

When three wards of a city are located in one county and another ward of said city is located in another county, which latter county has been voted dry under the Rose law; held:

That the city is the unit and the residents of the ward located in the dry county may vote in a Beal election held in said city.

COLUMBUS, OHIO, May 23, 1912.

HON. ORA R. WADE, *City Solicitor, Fostoria, Ohio.*

DEAR SIR:—I am in receipt of your communication of May 6th, wherein you state:

> "A petition is being circulated in our city for the purpose of having a special election called to vote the town dry under the Beal law. Our city is located in two counties. The first, third and fourth wards are in Seneca county, and the second ward is in Hancock county, Ohio. Hancock county voted dry three years ago, and the second ward of this city voted in that election, and the territory is still dry.
>
> "Will you please advise me whether or not Hancock county would have the right to vote at a special election held in this city. Several parties held that they have no right to vote for something they already have. The council of our city has requested me to write you for an opinion."

Section 6108, General Code, provides as follows:

> "When thirty-five per cent. of the qualified electors of a county petition the commissioners, or a common pleas judge thereof, for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such county, such commissioners or common pleas judge shall order a special election to be held in not less than twenty days nor more than thirty days from the filing of such petition with or the presentation of such petition to such commissioners or common pleas judge. The petition shall be filed as a public document with the clerk of the common pleas court of such county and preserved for reference and inspection."

Section 6112, General Code, provides as follows:

> "If a majority of the votes cast at such election are in favor of prohibiting the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding such election it shall be unlawful for any person, personally or by agent, within the limits of such county to sell, furnish or give away intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished for beverage purposes."

The above sections are parts of the so-called Rose law, in reference to local option in counties.

Section 6116, which was part of Section 8 of the Rose law, provides:

> "The foregoing sections of this subdivision of this chapter shall not affect, amend, repeal or alter in any way any other law or ordinance which prohibits throughout a municipality, township or residence district the selling, furnishing or giving away of intoxicating liquor as a beverage, or the keeping of a place where intoxicating liquor is sold, furnished or given away as a beverage."

It was under the provisions of the above act that Hancock county, wherein is situated the second ward of Fostoria, voted dry.

Section 6127 provides:

> "When, in a municipal corporation divided into wards, qualified electors in a number equal to forty per cent. of the number of votes cast therein at the last preceding general elections for state and county officers, or when, in any other municipal corporation, qualified electors in a number equal to forty per cent. of the votes cast therein at the last preceding general election for municipal officers, petition the council thereof for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage, shall be prohibited within the limits of such municipal corporation, such council shall order a special election to be held at the usual place or places for holding elections therein in not less than twenty days nor more than thirty days from the filing of such petition with the mayor of such municipal corporation or from the presentation of such petition to the council thereof. Thereupon such petition shall be filed as a public document with the clerk of such municipal corporation and preserved for reference and inspection."

Section 6131, General Code, provides:

> "If a majority of the votes cast at such election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding such election, no person, personally or by agent, within the limits of such municipal corporation shall sell, furnish or give away any intoxicating liquors to be used as a beverage, or keep a place where such liquors are kept for sale, given away or furnished for beverage purposes."

Sections 6127 and 6131, supra, are parts of the act known as the Beal law, providing for local option in municipal corporations. In the case of the Rose county local option the entire county is the unit, and whichever way, "wet" or "dry," the county votes, the entire territory of the county becomes, and the fact that municipalities within said counties may vote "wet" or "dry," as the case may be, would be unavailing, as they would become either "wet" or "dry,' dependent upon the way the entire county voted. Again, if, under the law, the county voted "wet," still, under the municipal local option law, the municipalities would have a legal right to vote to determine whether they should remain "wet" or "dry;" and the fact that but a short time prior, the entire county had voted would not prevent the municipal election.

So, in the case cited by you; the mere fact that the second ward of your city, voting in the Hancock county local option election, was voted "dry" would

have no bearing at all upon the right of the residents of that portion of the city to take part in a municipal election to determine whether or not the municipality of Fostoria should be "wet" or "dry."

Under Sections 6140 et seq., residence districts may be determined in which the sale of intoxicating liquors shall be prohibited. In that case each residence district would be the unit and it would be possible that a great portion of a municipality might be, in this manner, rendered "dry," and this being a minor vote of the entire electorate of the municipality, in the event that a Beal law local option election was holden in such municipality, it certainly could not be held that the mere fact that the electors in these residence units had exercised their rights of prohibiting the sale of intoxicating liquor in their respective territories would prevent them from voting at the election when the entire municipality was the unit. Likewise in the case instanced by you, it is my opinion that in the proposed Beal law election the city of Fostoria is the unit; such election, under the statute, is to be conducted "as provided by law for the election of members of the council of such municipal corporation as far as such a law is applicable." (Section 6128, General Code.) Therefore, all of the qualified electors of the entire city would be eligible to vote at this municipal election and the mere fact that some of the territory has taken part in a vote of a larger unit would not prevent their exercise of the right to vote in the municipal election.

I am, therefore, of the opinion that the voters of the second ward of your city have a perfect right to vote in the proposed Beal law election.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

398.

COUNCILMAN OF CITY—MAY BE APPOINTED STREET COMMISSIONER AFTER RESIGNATION.

There is nothing in the statutes to prohibit a councilman of a city from resigning and immediately receiving an appointment as street commissioner, under the public service department.

COLUMBUS, OHIO, May 27, 1912.

HON. JAMES L. LEONARD, *City Solicitor, Mt. Vernon, Ohio.*

DEAR SIR:—Under date of May 11, 1912, you inquire as follows:

> "Can a duly elected and acting councilman resign and immediately thereafter be appointed to the office of street commissioner? Does Section 12912, General Code, apply to a case of this kind?"

I take it that the councilman and street commissioner to whom you refer are officers of a city and not of a village. The statute prescribes the duties of a street commissioner of a village, but does not prescribe his duties in a city. The director of public service in a city has the authority which is granted to the street commissioner in a village.

Section 4364, General Code, provides:

> "Under the direction of council, the street commissioner, or an engineer, when one is so provided by council, shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares,

wards, landings, market houses, bridges, viaducts, sidewalks, sewers, drains, ditches, culverts, ship canals, streams, and water courses. Such commissioner or engineer shall also supervise the lighting, sprinkling and cleaning of all public places, and shall perform such other duties consistent with the nature of his office as council may require."

Section 4325, General Code, provides:

"The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship canals, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title."

The director of public service is authorized to establish subdepartments by virtue of Section 4327, General Code, which provides:

"The director of public service may establish such subdepartment as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

I take it that the office of street commissioner is an office of the city, which is under the supervision of the director of public service, and that the compensation to be paid the holder of the office has been fixed by council.

It appears that member of council has resigned and was immediately thereafter appointed as street commissioner. You ask if Section 12912, General Code, will prevent such appointment.

Said section provides:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty nor more than six months, or both, and forfeit his office."

The purpose of this section is to prevent an officer of a municipality from having any interest in the profits of any contract or work done for the city. It specifically prohibits such officer from acting as commissioner, architect, superintendent or engineer in work undertaken by the municipality during the term for which he was elected or appointed and for one year thereafter. The statute seeks to prevent any officer from securing any interest in any contract with the municipality, so that he might not be tempted to use his official position to further the interests of a contractor or of himself.

It is not the purpose of the statute to prevent an officer from holding another office in the village or city, at the expiration of the term of his first office, even though the second office has duties which pertain to work undertaken by the municipality. Likewise this section does not prevent an officer resigning a position in the city government and accepting appointment to another office in the service of the city.

It is my conclusion that a councilman of a city may resign such position and immediately thereafter be appointed to the position of street commissioner of such city.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

404.

COUNCIL MAY NOT LICENSE PERSONS OR CORPORATIONS CONSTRUCTING OR REPAIRING SIDEWALKS—POWERS OF REGULATION AND CONTROL.

Under Section 3714 and Section 3853, General Code, council has control of and power to regulate the construction of sidewalks as therein provided.

A council is not authorized, however, to require a license of persons or corporations who are engaged in the business of constructing and repairing sidewalks.

COLUMBUS, OHIO, May 29, 1912.

HON. GEORGE BUNTING, *City Solicitor, Warren, Ohio.*

DEAR SIR:—Under date of May 22, 1912, you inquire as follows:

> "I wish to avail myself of your opinion as to the legality of the enclosed sidewalk ordinance."

Section 2 of the ordinance enclosed, provides:

> "No person, firm or corporation shall engage in or conduct the business of sidewalk construction or repair of sidewalks in the city of Warren, Ohio, without holding the proper license for such work from the board of control of the city of Warren, Ohio, excepting the persons operating under special contract with the city for such work, and as otherwise provided herein."

Section 5, of the ordinance, provides a license fee of five dollars. This ordinance provides for the licensing of persons, firms and corporations engaged in the business of constructing and repairing sidewalks. There are other features in this ordinance, but the right to license this business, is the only part that need be considered in this opinion.

There are several sections of the statutes which authorize a municipal corporation to license certain occupations and things. These sections need not be quoted, as none of them cover persons or corporations engaged in constructing or repairing sidewalks.

Section 3637, General Code, applies to house movers, plumbers, sewer tappers and vault cleaners. Section 3672, General Code, refers to exhibitors, hawkers,

peddlers, autioneers, hucksters and other occupations. Sections 3673, 3674, 3675 and 3676, General Code, authorize the licensing of various occupations and things. There is no authority given to municipal corporations to license persons or corporations engaged in repairing or constructing sidewalks.

In case of Frank vs. Cincinnati, 7 Low. Dec. 544, it is held:

> "Municipal corporations possess only such powers as are expressly granted by statute and such as are necessarily implied as essential to carry into effect those expressly granted. Sections 1692, 2669 and 2672, Rev. Stat., do not confer upon municipalities the right to license ticket brokers or scalpers, or to license any other business. Therefore, an ordinance to license and regulate the business of railroad and steamship ticket brokers or scalpers, in the city of Cincinnati, is illegal and void."

This principle is recognized in case of French vs. City of Toledo, 81 Ohio St., 160, when Summers, J., says at page 169, of the opinion:

> "The affidavit does not charge the defendant with the doing of any act for which the state authorized the city to exact a license."

In other words, if the state has not authorized the city to exact a license, a person cannot be punished for violation of an ordinance which attempts to require a license.

The state legislature has not authorized the city to require a license from persons or corporations engaged in constructing sidewalks, and the ordinance submitted is illegal and unauthorized.

The city, however, has the right to regulate the construction and repair of sidewalks.

Section 3714, General Code, provides:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

Section 3853, General Code, provides:

> "The council of municipal corporations may provide by ordinance for the construction and repair of necessary sidewalks, curbing, or gutters, or parts thereof, within the limits of the corporation, and may require by imposition of suitable penalties or otherwise, the owners and occupants of abutting lots and lands to keep the sidewalks, curbing and gutters in repair, free from snow or any nuisance."

The sections following 3853, General Code, prescribe the manner in which council may require the construction of sidewalks. These statutes do not authorize the city to require a license of persons or corporations who are engaged in the business of constructing and repairing sidewalks.

The ordinance submitted by you is clearly illegal.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

407.

DIRECTOR OF PUBLIC SERVICE—CONTROL OF INCOME FROM FUNDS FOR CEMETERY PURPOSES—CONTROL AND POWER OF INVESTMENT BY COUNCIL—DUTIES OF CITY TREASURER, CLERK OF COUNCIL AND CLERK OF CEMETERY.

Under Sections 4167, 4168 *and* 4169, *General Code, the director of public service is authorized to sell cemetery lots and to receive donations for cemetery purposes. All money so received must be turned over to the clerk of council and by him given into the custody of the city treasurer subject to the control and power of the investment of the same by the council.*

The income of such money shall be paid to the director of public service to be by him devoted to cemetery purposes.

A record of all expenditures, receipts and accounts of these moneys shall be kept by a clerk of the cemetery appointed under Section 4170, *General Code, by the director.*

COLUMBUS, OHIO, May 27, 1912.

HON. RODERICK JONES, *City Solicitor, Newark, Ohio.*

DEAR SIR:—Your favor of January 4, 1912, is received, in which you state as follows:—

> "As city solicitor of the city of Newark, I ask your advice and instructions concerning Sections 4168 and 4169, of the General Code, referring to the creation and management of the permanent fund for the care of lots in municipal cemeteries. I refer this matter to you because I have not been able to construe the statutes mentioned in any way which would be at the same time workable and afford any protection to the city or to the persons who provide this permanent fund against the dishonesty or carelessness of its custodians.
>
> "It seems to me to be fairly clear by 4168 how this money is to be raised and who shall receive it on behalf of the city. 4169, however, provides that the director is to turn over to the council property held by him as a permanent fund; that the council shall then do certain things, among which is the investment of these funds. No custodian seems to be provided other than the director was to turn the funds over to the council, which was to invest them, but who should have the custody of them pending investment is not clear.
>
> "It seems to me to be manifestly impossible for the council as a council to have the custody of any funds or to have the custody of the securities in which said funds are invested. It is not only impossible, but also improper, since the members of the council, or the council itself, are not required to give bond. Another thing which I do not understand is the manner of handling the income thereof, which may arise from such investments as the council may make. I am informed by the city auditor that there is no means known to him by which a record of the receipts of the income of this fund can be kept in his office or by which the payments directed to be made can be made upon a voucher issued from his office. Should the director of public service simply receive in his official capacity the income of such funds and disburse the same in his official capacity keeping his own accounts of the same without the intervention of the city auditor or of the city treasurer?"

Section 4167, General Code, provides:

"The director of public service shall have entire charge and control of receipts from the sale of lots, and of the laying off and embellishing the grounds. He may receive donations by bequest, devise, or deed of gift, or otherwise, or money, or other property, the principal or interest of which is to be used for the enlargement, improvement, embellishment or care of the cemetery grounds generally, or for any particular part, or parts, lot or lots therein, as the donor directs, or as the director may from time to time determine if no direction is given. He shall sell lots, receive payment therefor, direct the improvements, and make the expenditures, under such rules and orders as he prescribes, and invest, manage and control property received by donations and surplus funds in his hands from any source whatever."

Section 4168, General Code, provides:

"In the by-laws and regulations, the director shall declare the amount of money he will accept by agreement, gift, devise, bequest or otherwise and hold as a permanent fund of the cemetery. He shall pledge the faith and credit of the city for the perpetual care of the lot or lots designated, using only the interest or income of the money. On receipt of the sum of money they designate, the director shall issue therefor a written receipt and acknowledgment thereof, signed by him and bind the faith and credit of the corporation to forever hold such money as a permanent fund, and to provide perpetual care of the lot or lots therein named, for the use, income or interest of such money. He shall enter on the minutes of his proceedings full detail of the obligation, and shall enter the receipt and incomes of the money and the expenditure thereof in detail of his books of account, keeping each case separately."

Section 4169, General Code, provides:

"The director shall turn over to the council property on hand or held by him as a permanent fund, for such purposes under his control, or such money as may thereafter come to him for such purpose, rendering a full statement thereof, by whom, when, and for what purpose paid. The council shall acknowledge receipt thereof in writing to the director signed by its clerk. By resolution duly passed and entered on the minutes of its proceedings, the council shall pledge the faith and credit of the corporation to forever hold such money as a permanent fund, and pay in semi-annual payments, to the director as interest on the funds, sufficient to provide perpetual care of the lot and lots as agreed by the director. The council and its successors shall invest and keep invested such funds in interest bearing debts of the city, if any, and if no such debts are owing by the city, in safe interest bearing bonds, or stocks for the benefit of such cemetery funds, that will bear as great an income as possible, and all such money and the income thereof shall be exempt from taxation, the same as other cemetery property."

Section 4170, General Code, provides:

"The director shall appoint a clerk, and keep accurate minutes of all his proceedings, and report quarterly to the council all the moneys received and disbursed by him in the management and control of the cemetery."

The director of public service is authorized to receive funds, the interest and income on which is to be used in taking care of lots in the city cemetery. By Section 4169, General Code, he is required to "enter the receipt and income of the money and the expenditure thereof in detail of his books of account, keeping each separately." By virtue of Section 4170, General Code, the director of public service is authorized to appoint a clerk, and is directed to keep accurate minutes of his proceedings and to report quarterly to council all moneys received and disbursed by him. It is apparently the duty of the director of public service, through the clerk thus appointed, to keep all accounts and to make record of all his proceedings.

Section 4169, General Code, directs the director of public service to turn over to council property and money held by him as a permanent fund. The council shall acknowledge receipt thereof signed by its clerk. Council is composed of several members, and like all boards, it can only act as a body and through its chosen officers. The clerk of council receipts for the funds. In order to receipt for them he must first receive them. It is not contemplated that each individual member of council should actively participate in the handling of the money. The receipt of funds by the clerk of council, in his official capacity, would in law be the receipt of the funds by council.

Section 4210, General Code, provides:

> "Within ten days from the commencement of their term, the members of council shall elect a president pro tem., a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

The council elects its clerk, fixes his bond and prescribes his duties other than those prescribed by statute. Where the clerk receives funds or holds securities, the council can fix the bond of the clerk in such sum as will sufficiently protect the funds and securities.

Section 4300, General Code, provides:

> "The treasurer shall receive and disburse all funds of the corporation, including the school funds, and such other funds as arise in or belong to any department or part of the corporation government."

The treasurer of the corporation is made custodian of all funds of the corporation or that arise in any department or part of the government of the corporation. The funds received by council through the director of public service to secure the care of the cemetery or lots therein arise in a department of the city government. The credit of the city is pledged to carry out the object for which the funds are donated. The provisions of Section 4300, General Code, would include the funds under consideration.

Therefore, upon receipt of the funds, the clerk of council should pay the same into the city treasury.

The council is further directed to invest the funds. The city treasurer will hold the money until council has authorized its investment. The funds are invested by order of council and the investment is under its control. The securities should, therefore, be held by the clerk of council in his official capacity.

I find no statute which authorizes the auditor or treasurer of the city to receive or to pay out the income derived from the funds. The director of public service is required to take care of the lots and to expend the income of the funds

for that purpose. By virtue of the provisions of Section 4169, General Code, the income is paid to the director to carry out the purpose for which the principal was donated.

It is seen that a clerk of the cemetery is provided for, and in my opinion, one of his duties would be to keep account of all receipts and expenditures.

Section 4214, General Code, provides:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

By virtue of this section council can require the clerk of the cemetery to give bond for the faithful discharge of his duties.

In conclusion, the director of public service is authorized to receive donations, the income of which is to be used in caring for the city cemetery or part thereof, or for certain lots therein. These funds are turned over to council through its clerk. The clerk of council pays the same into the city treasury, where they are held until invested. The income of the investments is to be paid to the director of public service, and to be expended by him in the care of the lots or cemetery, as required by the terms of the donations. The clerk of the cemetery should keep an accurate account of all receipts and expenditures.

Respectfully,
TIMOTHY S. HOGAN.
Attorney General.

409.

ELECTIONS—DISQUALIFIED COUNCILMAN—PLURALITY OF VOTES —EQUAL RIGHT OF FORMER COUNCILMEN TO HOLD OVER— VACANCY.

When one of six councilmen who have received the requisite plurality at an election, is disqualified by reason of non-residence for a previous year, the candidate receiving the next highest vote has not received a plurality and cannot therefore, be held to be elected.

Each of the six former councilmen is equally entitled to hold over, and unless five voluntarily resign, all must relinquish their right to hold over. The vacancy thereby created could then be filled by the five newly elected members, under Section 4236, General Code.

COLUMBUS, OHIO, May 16, 1912.

HON. HOWARD C. SPICER, *Solicitor of Kenmore, Akron, Ohio.*

DEAR SIR:—Under date of May 8, 1912, you inquire of this department as follows:

> "One of the six councilmen elected in this village last November had not at the time of the election resided within the village one year as

required by law, this matter was just discovered some time ago, on my advice the councilman in question tendered his resignation, which was accepted, now the question arises whether a vacancy arises by reason of the resignation or whether the person receiving the next highest number of votes at the last election should be the councilman to succeed the one who has resigned."

The residential qualification of a councilman of a village is prescribed by Section 4218, General Code, which provides:

"Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office."

You state that one of the six persons elected as councilman had not resided within the village the prescribed length of time to be eligible. Although one of the six persons receiving the highest number of votes for councilman, he could not qualify for the position.

The rights of the candidate receiving the next highest number of votes will be considered first. The supreme court of Ohio has laid down the rule as to his rights.

In case of State vs. Speidel, 62 Ohio St., 156, the first syllabus reads:

"When the candidates for an office for whom a majority or plurality of votes was cast at an election, dies on the election day and before the polls are closed, the candidate for the same office receiving the next highest number of votes is not thereby elected; nor has he thereby acquired any right to be inducted into the said office."

On page 158, Davis, J., says:

"The claim of Cover that he has the right to be inducted into the office of sheriff of Clermont county, has no foundation. Whether Buvinger, the deceased candidate was elected or not, Cover was not elected. No process of valid reasoning can make 3,802 votes to be more than 4,369 votes. Not merely a plurality, but a majority, of all the votes cast for sheriff on that election day, were cast against Cover; and it does not avail him that the majority of votes was cast, in good faith, for a man who had died during the election. The majority was not for Cover, and that is all he can make of it. The election may fail altogether by reason of the death of the person receiving the largest number of votes cast, *or by reason of ineligibility of the successful candidate,* or by reason of irregularities, but that could not elect a man who in fact has received a smaller number of votes than his opponent."

It requires a plurality of votes to elect. When six persons are to be elected for the same positions, as in this case, the six receiving the highest votes are elected. The one receiving the seventh highest vote would have no claim to the position. The voters in good faith elected six men for councilman. The man who received the next or seventh highest vote was defeated. As seen in the opinion of Justice

Davis, supra, the fact that one of the six elected was ineligible to the office, would not alter the rule. The man who received the seventh highest number of votes did not receive a sufficient number of votes to entitle to the election, and he has no claim to the office.

The situation is presented: There were six positions to be filled at the November election for councilmen; five persons were elected who could and did qualify; the sixth could not qualify; there was no position to which no successor was elected or qualified. By virtue of Section 4215, General Code, councilmen serve until their successors are elected and qualified. Said section provides:

> "The legislative power of each village shall be vested in, and exercised by, a council, composed of six members, who shall be elected by the electors of the village at large, for terms of two years and shall serve until their successors are elected and qualified."

There is one position for which no person has qualified. The question arises which of the six old councilmen hold over? The fact that the person who was ineligible to the position took the office and served for a time, would not alter the rights of the old councilmen. He was a de facto officer, but not a de jure officer.

When a person is a candidate for councilman of a village he is not a candidate to succeed any particular person. Each councilman is elected by the village at large and the positions are identical.

Each of the old councilmen has a right to hold over. But there is but one position to fill and six persons have an equal right to fill that position. As against the five who were elected last November, neither of the six old councilmen have any right to the position, but as against each other, each have an equal right to hold over.

In the case of a tie vote for an election the statute provides a means of breaking the tie. But there is no provision of statute governing the present situation. If two or more of the old members insisted upon holding over the newly elected members could bring proceedings to oust them, and the court could not decide as to which of the old councilmen should hold over. The only alternative would be to oust all the old members.

If the old members of council are able to determine among themselves, which one shall hold over, such person could hold the position, provided the other five resigned. If they do not so determine, neither of the six can hold over, and all must relinquish their right to the office. In such case there would be a vacancy which could be filled by council in accordance with Section 4236, General Code, which provides:

> "When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term. If council fail within thirty days to fill such vacancy, the mayor shall fill it by appointment."

The right of one of the old councilmen to hold over, as above set forth, is based upon the conclusion that they have not forfeited their right thereto since January 1, 1912. The facts submitted do not permit a positive conclusion that there is a vacancy, but from the principles of law herein stated, you should have no difficulty in determining this question.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

411.

"GARBAGE COLLECTION" AND "DISPOSAL"—POWER OF COUNCIL TO CONTRACT WITH PRIVATE COMPANY FOR—LIMITATION OF PERIOD OF DURATION OF CONTRACT—APPROVAL BY BOARD OF HEALTH OF LIQUID WASTE WITHIN TWENTY MILES OF WATER INTAKE.

Section 4470, *General Code, providing that the council may contract for a period not exceeding five years for the "collection and removal" of garbage does not prevent a contract for a longer period for the "disposal" of garbage.*

Under Section 3809, *General Code, however, a contract for the disposal of garbage is limited to ten years. There is nothing to prevent the council from agreeing to collect and remove garbage for a company contracting to dispose of the same for the permitted period.*

Under Section 2140, *General Code, a municipal corporation may not establish a garbage disposal plant with a liquid waste which may enter any stream within twenty miles above the intake of a public water supply until the same is approved by the state board of health.*

COLUMBUS, OHIO, May 29, 1912.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—Your favor of May 22, 1912, is received, in which you inquire as follows:

> "I beg to direct your attention to Sections 3809 and 4470 of the General Code, with reference to the time for which the municipal authorities may take a contract relative to the disposal of garbage. You will note that the one section seems to provide for a contract for five years and the other for ten years.
>
> "Here in Akron we are confronted with this situation: A prospective company wishes to install a process for disposing of sewage and garbage, and their plans call for an initial investment of the sum of $300,000.00. Manifestly, the company wishes to protect its investment, and it has occurred to the gentlemen who are back of the process that five years or even ten years is a very short period within which to authorize a contract. What the city wishes to know is this: Is there any lawful means by which the city can give these gentlemen a longer time within which to operate, that is, for instance, twenty-five years.
>
> "It should be said in this connection that their plan contemplates that the city shall collect at its own expense all the garbage of the city and deliver it to this proposed company. The company's part in the transaction is to provide the plant, and to dispose of the garbage and the sewage in a manner satisfactory to the state board of health. You will see that we are anxious to know also whether the city can enter into an agreement with this gentleman for a longer period than five or ten years on the part of the city to collect and deliver this garbage to them. Our part of the contract would be to collect and deliver the garbage to them, and they want not only the right to dispose of the garbage for a period of say twenty-five years, but necessarily they wish the city to agree to deliver the garbage for the same length of time for which they have a contract."

Section 4470, General Code, provides:

Your inquiry is as to the time for which a city may contract with a private person or corporation for the disposal of garbage. You refer to two sections of the statutes.

> "The council may contract for a period of not to exceed five years for the collection and removal of such garbage, nightsoil, dead animals, and other solid waste substances at the expense of the municipality or at the expense of persons responsible for the existence of such waste substances."

This section does not refer to the disposal of garbage. It has reference to the collection and removal of garbage. The city may collect and remove the garbage by its employes through a department of the city or it may contract with a private person or corporation to collect and remove the garbage. After it is collected and removed, another step is necessary and that is the disposal of the garbage.

It appears that the city is endeavoring to enter into a contract for the disposal of the garbage by a private person or corporation, and that the city shall collect and remove the garbage to the plant to be established by such private person. Such a contract would not affect the right of the city to contract, under Section 4470, General Code, for the collection and removal of the garbage. The city may still collect the garbage itself, or it may contract for the collection and removal of the same.

The limitation of five years in Section 4470, General Code, for a contract for the collection and removal of garbage does not apply to a contract for the disposal of the garbage.

Section 3809, General Code, to which you also refer, provides:

> "The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company, for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, *or for the collection and disposal of garbage in such corporation,* or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or company therein situated, *for a period not exceeding ten years,* and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel."

This section covers the "collection and disposal" of garbage. It limits the time for which a contract may be entered into for the collection and disposal of garbage, "for a period of not exceeding ten years."

Section 3649, General Code, sets forth one of the enumerated powers of municipalities as follows:

> "To provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals and animal offal and to establish, maintain and regulate plants for the disposal thereof."

By virtue of this section the city is authorized to provide for the collection and disposal of garbage. It does not fix a time limit as to a contract for such purpose.

The only time limit that I find fixed by statute for the disposal of garbage is that found in Section 3809, supra, which is ten years. There can be no doubt as to the time which is fixed by this section. Such contract cannot run for a period exceeding ten years. A contract for a longer period would be unauthorized.

The city cannot enter into a contract for the disposal of its garbage for a period to exceed ten years.

You further inquire if the city can agree to collect and deliver the garbage to the plant for the same period for which a contract may be entered into for the disposal of the garbage.

The five-year limitation in Section 4470, General Code, does not apply to a contract for the disposal of the garbage. The city is authorized to contract for the disposal of the garbage, and it is essential first that the garbage be collected and removed from the different parts of the city to the disposal plant. One of the conditions of the contract is that the city shall deliver the garbage to the disposal plant. The disposal company then attends to its disposition.

The condition to collect and remove the garbage should run for the same length of time as the contract. And as Section 3809, General Code, authorizes the city to contract for the "collection and disposal" of garbage for a period not exceeding ten years, the city may agree to collect and remove the garbage to the disposal plant for such period of ten years. The city may still contract for the collection and removal of the garbage for a period of five years as provided in Section 4470, General Code.

Under date of May 27, 1912, you submit a supplemental inquiry in reference to Section 1240, General Code, and ask if this section will prevent a private corporation as well as a municipal corporation from establishing a garbage disposal plant with a liquid waste which may enter any stream within twenty miles above the intake of a public water supply, until the same is approved by the board of health.

Said Section 2140, General Code, provides:

> "No city, village, public institution, corporation or person shall provide or install for public use, a water supply or sewerage system, or purification works for a water supply or sewage, of a municipal corporation or public institution or make a change in the water supply, water water works intake, water purification works of a municipal corporation or public institution, until the plans therefor have been submitted to and approved by the state board of health. *No city, village, corporation or person* shall establish a garbage disposal or manufacturing plant having a liquid waste which may enter any stream within twenty miles above the intake of a public water supply until the location of such garbage or manufacturing plant, including plans for disposing of such liquid waste, is approved by the state board of health. Whoever violates any provision of this section shall be fined not less than one hundred nor more than five hundred dollars."

The words of the statute "no city, village, corporation or person," leave no doubt as to the application of the statute. These words will include private as well as public corporations. The provisions of this statute apply to municipal corporations and also to private corporations and persons.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

418.

TEACHER—CANNOT RECEIVE INSTITUTE FEE WHILE ATTENDING SUMMER SCHOOL.

Section 7870, General Code, providing for compensation to teachers for attendance at a teachers' institute, requires as a condition precedent to reimbursement, a certificate of actual daily attendance and as such certificate could not be given to a teacher who is in attendance at a summer school while the county institute is in session, he may not receive the institute attendance fee.

COLUMBUS, OHIO, May 31, 1912.

HON. R. C. COLE, *City Solicitor, Findlay, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 30, 1912, wherein you inquire as follows:

> "I have been asked by the superintendent of our schools, J. F. Smith, for an opinion as to whether or not a board of education can legally pay the institute attendance fee to one of its teachers who may be in attendance at a summer school while the county institute is in session."

In reply, Section 7870 of the General Code provides as follows:

> "The boards of education of all school districts are required to pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers or superintendents presenting certificates of full regular daily attendance, signed by the president and secretary of such institute. If the institute held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual daily attendance as certified by the president and secretary of such institute, for not less than four, nor more than six days of actual attendance to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed."

It would seem from the above language of the statute that a teacher must actually attend an institute in order to be legally entitled to pay from the board of education.

The above quoted section forbids payment to a teacher unless such teacher presents a "certificate of full regular daily attendance, signed by the president and secretary of such institute."

Said section further reiterates that "actual attendance" is required, in the following language:

> "Such teachers or superintendents shall be paid two dollars a day for *actual daily attendance,* as certified by the president and secretary of such institute for not less than four, nor more than six days of actual attendance."

Such president and secretary are without authority to issue such certificate of *"actual daily attendance"* to a teacher unless such teacher has actually attended the institute as required by said section.

I am of the opinion, therefore, that a board of education cannot legally pay the institute attendance fee to one of its teachers, who may be in attendance at a summer school while the county institute is in session.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

424.

BANKS AND BANKING—MUNICIPAL DEPOSITORY—"GOOD AND SUFFICIENT SURETY" MEANS PERSONAL SURETY; NOT MORTGAGE AND NOTE SECURITIES.

The words "or furnish good and sufficient surety" in Section 4295, General Code, providing for the deposit of municipal funds in banks which "give a good and sufficient bond issued by a surety company authorized to do business in this state, or furnish good and sufficient surety," refer to personal sureties only, and therefore, do not authorize counsel to accept note and mortgage securities.

COLUMBUS, OHIO, June 11, 1912.

HON. ALFRED CLUM, *Solicitor for the City of East Cleveland, Rockefeller Building, Cleveland, Ohio.*

DEAR SIR:—In your letter of May 23, 1912, you make the following request for my opinion:

> "I am solicitor for the city of East Cleveland, Ohio, and for guidance in the matter of procuring security for the city depository I solicit your construction of General Code Section 4295, as amended May 18, 1911. (102 O. L., 122.)
>
> "The attorneys for the depository claim that the clause, 'give a good and sufficient bond issued by a surety company authorized to do business in the state, *or furnish good and sufficient surety,* or secure said moneys by a deposit of bonds or other interest bearing obligations,' etc., authorizes the municipality to accept first mortgage deeds and notes from private individuals as security for the deposit of city moneys, the same as though the above quoted clause read, 'give a good and sufficient bond issued by a surety company authorized to do business in the state, *or furnish other good and sufficient security,* or secure said moneys by a deposit,' etc. * * *"

Section 4295 of the General Code is as follows:

> "The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by a deposit of bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; bonds of the state of Ohio

or of any other state of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States and as to which there has been no default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible, providing the issuing body politic has not defaulted at any time since the year 1900, in the payment of the principal and interest of any of its bonds, said security to be subject to the approval of the proper municipal officers, in a sum not less than ten per cent. in excess of the maximum amount at any time to be deposited, but there shall not be deposited in any one bank an amount in excess of the paid in capital stock and surplus and such banks, and not in any event to exceed one million dollars. And whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depositary laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits."

In my opinion the only *securities* that can be deposited by a bank to secure a deposit made with it under this section are the securities named in the section as quoted above, and as the catalog of such securities as there given does not include mortgage deeds and notes from private individuals, my opinion is that the same cannot be accepted as securities. These securities are evidences of indebtedness and could not be accepted under the provisions authorizing such deposits to be secured by "a good and sufficient bond issued by a surety company * * or furnish good and sufficient surety * * *" because the word "surety" as here used relates, I take it, to personal sureties as opposed to surety companies. This, I think, is evidenced by the statute itself in further specifying certain securities which may be accepted, thus making three classes of sureties which may be given by a bank: 1st, a bond issued by a surety company; 2nd, personal surety; 3rd, a deposit of securities.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

426.

DIRECTOR OF PUBLIC SERVICE—ILLEGAL AND VOID CONTRACTS—OMISSION OF AUDITOR'S CERTIFICATE — NO RECOVERY AGAINST CONTRACTOR FOR MONEYS PAID—LIABILITY OF PUBLIC OFFICIALS.

When a director of public service has entered into a contract without complying with Section 3806, General Code, requiring a certificate of the auditor to the effect that moneys are in the treasury and appropriated to the purpose of the contract, such contract is absolutely void.

When the contractor has received payment for work done on such contract, however, and there is no evidence of fraud or mistake, no recovery may be had from the contractor nor are the public officials involved liable for the amount so paid.

COLUMBUS, OHIO, May 28, 1912.

HON. JOHN T. BLAKE, *City Solicitor, Canton, Ohio.*

DEAR SIR:—Your favor of May 17, 1912, is received, in which you require as follows:

"1. A director of service enters into a contract for certain labor and material, the labor and material being furnished in pursuance to the contract, the director approves vouchers in favor of the contractor, which are honored by the auditor and paid by the treasurer of the city.

"The director in making this contract did not comply with the provisions of Sections 3806-8, of the code, and the amount being in excess of $500.00 the expenditure, or contract, was not authorized by council.

"2. A director of service enters into a contract under the terms of which the contractor is to paint certain bridges, and receive therefor the actual cost of labor and material, plus a certain daily allowance to himself for services, supervision, etc. Bills are rendered by the contractor weekly, or bi-weekly, and paid upon vouchers approved by the director; none of the bills exceeding $500.00, but in the aggregate the amount greatly exceeding $500.00, and the painting of no bridge costing $500.00.

"The director making the contract did not comply with Sections 3806-8, of the code, as to certificate of funds, etc., nor was the expenditure, or contract, authorized by council.

"In either of the above cases, is the director of service and his bondsmen liable for the amount of money so expended?"

It appears that the provisions of Sections 3806, General Code, have not been complied with in either of the cases you submit. If the contracts are illegal on that account, then it will not be necessary to consider whether the second contract is violative of Section 4328, General Code, in reference to contracts in excess of $500.00.

Section 3806, General Code, provides:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

Section 3807, General Code, provides:

"All contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of the preceding section shall be void, and no person whatever shall have any claim or demand against the corporation thereunder, nor shall the council, or board, officer, or commissioner of any municipal corporation, waive or qualify the limits fixed by such ordinance, resolution or order, or fasten upon the corporation any liability whatever for any excess of such limits, or release any party from an exact compliance with his contract under such ordinance, resolution or order."

Section 4328, General Code, provides:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than $500.00. When an expenditure within the department, other than the compensation of persons employed therein, exceeds $500.00, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

In the second case submitted by you, the contractor acted in the nature of a superintendent of the work, and he was paid for his services in addition to the cost of labor and material. Even though it is found that he was actually employed as superintendent and to be paid a stipulated compensation as other officers or employes of the city, this fact would not excuse a non-compliance with the provisions of Section 3806, General Code.

In case of Pittinger vs. City of Wellsville, 75 Ohio St., 508, it is held:

> "The policy of our statutes respecting municipal corporations is that no debt shall be incurred for the ordinary expenses of the corporation unless an appropriation to meet it has been made by the city council, and the city auditor or clerk has certified to the city council that the money is in the treasury; and in the absence of such certificate, as required by Section 45, of the Municipal Code, the board of public service is without authority to employ a janitor for the city building, and a person so employed cannot recover from the city for his services."

It is also held that where the provisions of Section 3806, General Code, have not been complied with, the contractor cannot recover from the city even though he has completed his part of the contract.

In Comstock vs. Incorporated Village of Nelsonville, 61 Ohio St., 288, the third syllabus reads:

> "Whether the certificate required by said Section 2702 has been filed and recorded or not, must be ascertained by each contractor for himself at his peril. In the absence of such certificate, when required, no liability arises against the municipality, even though the contractor has fully performed his contract."

In case of Lancaster vs. Miller, 58 Ohio St., 558, it is held:

> "A contract entered into by a municipal corporation by which, in its own behalf, it undertakes to pay for the construction of a sewer in one of its streets, the cost of which exceeds $500.00, imposes no valid obligation on the corporation, unless it has advertised for bids according to the requirements of Section 2303, Revised Statutes.
>
> "Nor will such contract impose on the corporation a valid obligation even if bids were advertised for pursuant to said Section 2303, unless the auditor, or clerk, of the corporation, as the case may be, 'shall

first certify that the money required for' that purpose 'is in the treasury to the credit of the fund from which it is to be drawn,' etc., as required by Section 2702, Revised Statutes.

"Where either of such requirements has been omitted, the municipality will not by the acts of its officers be estopped to set up such omission as a defense to an action brought against it on such contract."

In both of the contracts in question the provisions of Section 3806, General Code, were not complied with. The contracts were null and void, and the contractor or person employed thereunder could not have recovered any payment from the city by virtue of such contracts. The payments, however, have been made. They were made under an illegal contract and without authority of law.

The question arises as to the liability of the director of public service for the illegal payments. Before considering the liability of the officer it might be well to first consider the right of recovery from the contractor.

In case of State vs. Fronizer, 77 Ohio St., 7, it is held:

"Section 1277, Revised Statutes, which authorizes a prosecuting attorney to bring action to recover back money of the county which has been misapplied, or illegally drawn from the county treasury, does not authorize the recovery back of money paid on a county commissioners' bridge contract fully executed but rendered void by force of Section 2834b, because of the lack, through inadvertence, of a certificate by the county auditor that the money is in the treasury to the credit of the fund, or has been levied and is in process of collection, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of such contract for such work, nor any claim of effort to put the contractor in statu quo by a return of the bridge or otherwise, the same having been accepted by the board of commissioners and incorporated as part of the public highway.

On pages 17 and 18, Spear, J., says:

"The exact question arising upon this record has not before been presented to this court, although the statute itself was under review in Vindicator Printing Company vs. State, 68 Ohio St., 362. That case is authority for the proposition that there may be a recovery back by the prosecuting attorney where the money has been paid for the publishing of certain notices, the publication of which was not authorized by law. The publications were not only without authority of law, but they were of no value to either the county or the public. Therefore no property of the company had been obtained by the county. Clearly the case is not analogous to the case at bar."

A later decision, however, should also be considered in this connection. In case of Walker vs. Village of Dillonvale, 82 Ohio St., 137, it is held:

"In the absence of statutory regulation a taxpayer may maintain action, on behalf of himself and other taxpayers, to recover money illegally paid out of the public treasury; and in such action may unite as defendants all against whom any relief is asked and whose right will be affected by the determination of the subject of the action."

On page 145, Summers, J., says:

> "If a stockholder in such an association may sue in behalf of himself and other stockholders, and if a taxpayer may sue to enjoin the misapplication of the funds of a city, we see no good reason why he may not be permitted to sue on behalf of the city to recover the funds that have been misapplied. If those entrusted with the custody of public funds, or those who duty it is to protect the public interests are remiss in their duty, or refuse to act, the taxpayer should be permitted to do so, and the courts in the exercise of a sound discretion will prevent any abuse of the privilege."

This decision apparently changes the rule laid down in the case of Vindicator Printing Co., vs. State, 68 Ohio St., 362, in which it is held:

> "But where a claim for such excessive publications has been presented to the board and allowed, and payment made by the treasurer on the warrant of the auditor prior to April 25, 1898, the prosecuting attorney cannot maintain an action, in the absence of both fraud and mistake of fact, to recover back the money.
>
> "The act of April 25, 1898 (93 O. L., 408), clothes the prosecuting attorney with power to recover back money so illegally drawn from the treasury on and after the date of its passage."

It is to be observed that prior to April 25, 1898, there was no statutory authority for the prosecuting attorney to bring an action for the recovery of money of the county which had been misapplied.

The Dillonvale case in 82 Ohio St., lays down the rule that a taxpayer, may, without authority of statute, bring an action to recover funds which have been illegally paid out. Although the city solicitor is not authorized by statute to bring such an action, the ruling in the Dillonvale case that a taxpayer can bring such an action would also apply to the city solicitor, who is the proper authority of the city to bring suits in its behalf, and authorize him to sue in the first instance for the recovery of the money, without the intervention of a taxpayer.

While the Dillonvale case changes the rule as to the right of the city solicitor to bring the action, as formerly laid down in Vindicator Co. vs. State, supra, it does not change the rule of liability as set forth in 77 Ohio St., 7, supra. In Walker vs. Dillonvale, the question arose as to payment of salaries to councilmen, while in State vs. Fronizer, 77 Ohio St., 7, the question arose in reference to a contract, which had been fully completed. The contract price was paid and the county received property of the company.

The Dillonvale case is more nearly analogous to the situation in Vindicator Co. vs. State, which case is distinguished in the case of State vs. Fronizer, 77 Ohio St., 7. An officer is not entitled to pay for his services as such officer unless it is authorized by law. Although he gives his time to the city an excessive payment to him could be recovered, upon the same ground that a payment to a contractor, who had rendered no beneficial service, could be recovered, if such payment was illegal.

The situation in the present case, now under consideration is similar to that in 77 Ohio St., 7. The rule enunciated in that case applies, therefore, to the contractor in each case submitted by you.

As to the liability of the officer, the rule of recovery is stated in the fifth syllabus of case of McAlexander vs. Haviland Village School, 7, Nisi Prius, N. S., 590, as follows:

"Public funds paid out on a contract, completed in good faith and free from fraud and collusion, cannot be recovered back at the instance of a taxpayer, notwithstanding the contract was illegal and void."

This was an action, among other things, to recover from the members of the board of education and from the contractor, the amount of money paid out upon an illegal contract for the construction of a school house.

On page 600, Cameron, J., says:

"While the court finds that the contract for the building and construction of said school house was illegal and void, yet the court further finds that said contract has been fully executed, and the building built, completed and paid for, in good faith, free from fraud or collusion on the part of said board, the members thereof, or the contractor.

"It is, therefore, the further order and judgment of the court that the mandatory injunctions prayed for, should be and are refused, as is also the prayer for a finding of the amount of money claimed to be illegally paid out by said board of education on account of said proposed school building; and judgment therefor."

As to the right of recovery from the contractor, this decision follows the rule in 77 Ohio St., 7, and extends the rule to the right of recovery from the officer who authorized the illegal contract, or rather entered into the contract.

In your statement of the cases, there is nothing to show that there was collusion or fraud in the giving of the contracts. If the contracts were entered into in good faith, and there was no collusion or fraud, the officers who participated in the illegal contract, are not personally liable for the money so illegally paid out. Such contracts should be enjoined in the first instance when the noncompliance with the statutes is discovered. Furthermore, the auditor should refuse to make payment of the same. After payment has been made, and the contract completed in good faith, no recovery can be had.

The director of public service and his bondsmen are not liable for the money paid out on the contracts, if performed in good faith, and without fraud or collusion.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

434.

INITIATIVE AND REFERENDUM ACT—BOND ISSUE AUTHORIZED BY VOTE OF PEOPLE PRIOR TO ACT—SUBSEQUENT ACTION OF COUNCIL NOT WITHIN ACT—WHEN RESOLUTION OF NECESSITY PASSED BEFORE ACT WAS IN EFFECT, THE ORDINANCE DETERMINING TO PROCEED, PASSED AFTER THE ACT, IS SUBJECT TO THE ACT.

Since it is the object of the initiative and referendum to enable the electors to express their opinion upon a measure, when a two-thirds vote of the electors have, before the initiative and referendum went into effect, authorized an issue of waterworks bonds, any further acts of council, carrying out the purposes of the bond issue, after the initiative and referendum had gone into effect, are not required to be subjected to the vote of the people.

When upon street improvement proceedings upon the assessment plan, an issue of bonds has been authorized by council prior to the passage of the initiative and referendum act, and the ordinance determining to proceed is passed after that statute, since this ordinance is the one primarily involving the expenditure, it is subject to the statute and must be suspended sixty days.

COLUMBUS, OHIO, June 17, 1912.

HON. H. STANLEY MCCALL, *City Solicitor, Portsmouth, Ohio*

DEAR SIR:—In a letter dated May 13, 1912, you stated that before the initiative and referendum law (102 O. L., 521) was enacted, the people of Portsmouth voted at a special election in favor of issuing $300,000 worth of bonds for the purpose of enlarging your present waterworks plant, and that nothing was done in regard to selling these bonds until lately, when the city council voted to sell the same at once.

You state that the reason for the delay of council in selling the bonds was that the state board of health refused to approve the waterworks plans then decided upon, but that since that time new plans have been drawn up which are in accordance with the state board of health's ruling.

You inquire whether the initiative and referendum law would apply to any measures which may be passed by the council in appropriating the money for the purpose for which the fund was created, thereby making said enactments inoperative for sixty days.

In an opinion rendered to the Hon. Nicholas M. Greenberger, city solicitor, Akron, Ohio, under date of December 14, 1911, I gave it as my opinion that an ordinance providing for the issuance of bonds in pursuance of the authorization of electors was not within the provisions of the initiative and referendum act, stating my reason therefor that the object of the referendum is to provide a method whereby the electors of a municipality, should they so desire, may have submitted to them for their approval the various ordinances and resolutions passed and adopted by council; that since the electors had already had the question of the issuance of bonds submitted to them, and had voted in favor thereof a further submission would be in effect but a repetition of the former submission; that to hold otherwise would be to hold that although two-thirds of the voters of the municipality had voted in favor of the bonds, yet, upon a petition filed by fifteen per cent. of the electors the question would again have to be submitted to the electors at the next general election, thus postponing the carrying out of the will of the two-thrids majority voting at such election.

The electors of Portsmouth having heretofore, at an election held for that

purpose, authorized the issuance of the said bonds in the sum mentioned, and for the purpose mentioned, I am of the opinion that the acts of council necessary to carry into effect the purpose for which the bonds were so issued would not be within the purview of the initiative and referendum act. If the said acts were to be construed as within the provisions of the initiative and referendum act, a bare fifteen per cent. of the electors of the municipality could, by filing a referendum petition, postpone any action thereon until the next general election, at which time, if a majority of such electors should vote against the adoption of the said acts, would defeat such acts, and thus defeat the will of the two-thirds majority at the special election authorizing the issuance of the bonds for the purpose mentioned.

You next state, that prior to the enactment of the initiative and referendum act bonds had been authorized and sold and a fund created for the payment of the city's share of the street improvement under the assessment plan; that, however, no further steps were taken in reference to the street improvement until after the referendum act was in force. You, therefore, desire to know whether the ordinance determining to proceed with the improvement shall remain inoperative for sixty days, or whether the same would go into effect in accordance with the law in force, as it stood at the time the ordinance authorizing the sale of bonds was passed.

I have heretofore given it as my opinion in an opinion rendered to the Hon. M. R. Smith, city solicitor, Conneaut, Ohio, under date of October 25, 1911, that an ordinance determining to proceed, since such ordinance is the one that involves the expenditure of the money, is the only ordinance involved in the various steps necessary for the improvement under the assessment plan, that the electors of the municipality may cause to have referred to them for approval if they so desire.

I further held in such opinion that the resolution, of necessity, is merely preliminary, and the assessing and bond ordinances are ancillary thereto.

Although the ordinance authorizing the issuing of bonds for the city's share of the improvement was passed prior to the enactment of the initiative and referendum act, yet, since the ordinance determining to proceed, which is the ordinance which finally determines that the expenditures shall be made, had not been passed until after the passage of the initiative and referendum act, I am of the opinion that such ordinance is within the provisions of said act, and would, therefore, under paragraph 2 of Section 2, not become operative until sixty days after its passage.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

438.

AUTOMOBILES — POWERS OF MUNICIPALITIES TO REGULATE SPEED—FINES PAYABLE ONLY INTO COUNTY TREASURY.

Section 12604, *General Code, regulating the speed of automobiles, was passed in order to provide a uniform system of regulation by placing the matter within the exclusive jurisdiction of the state, and municipalities have no power thereunder, except that of defining the "business and closely built up portions."*

All violations of this statute are misdemeanors and the fines therefor must be paid into the county treasury, under Section 12378, *General Code.*

COLUMBUS, OHIO, June 14, 1912.

HON. HARRY F. WITTENBRINK, *City Solicitor, St. Marys, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter of inquiry under date of May 23, 1912, wherein you state:

> "I would be pleased to have an opinion from your office in regard to the construction of Sections 6307, 12604 and 12608, of the General Code of Ohio. The question arising is as follows:
>
> "Suppose the council of a municipality passes an ordinance defining the business and closely built-up portions thereof as provided in Section 12608, of the General Code, and suppose a party is charged with violating the speed limit as provided in Section 12604, and is fined under the provisions of that section, into what fund must such fine as collected by the mayor be placed—does it remain in the municipality, or does such fine belong to the county as provided in Section 12378, of the General Code?"

In reply thereto, I desire to say that Section 12604, of the General Code, provides for the violation of certain speed limits as follows:

> "Whoever operates a motorcycle or motor vehicle at a greater speed than eight miles an hour in the business and closely built up portions of a municipality, or more than fifteen miles an hour in other portions thereof, or more than twenty miles an hour outside of a municipality, shall be fined not more than twenty-five dollars, and, for a second offense shall be fined not less than twenty-five dollars nor more than fifty dollars."

Section 12608, of the General Code, provides that municipalities cannot diminish or change said speed limits by ordinance as follows:

> "The rates of speed mentioned in Section 12604 shall not be diminished or prohibited by an ordinance, rule or regulation of a municipality, board or other public authority, but municipalities, by ordinance, may define what are the business and closely built-up portions thereof."

Section 12607 places a further limitation upon local or municipal authorities, as follows:

> "For a third or subsequent offense, a person convicted of a violation of any provision of the next four preceding sections, shall be fined

not less than fifty dollars nor more than one hundred dollars or imprisoned not more than thirty days, but if such subsequent offense occurred within one year after any former offense, he shall be imprisoned not less than ten days nor more than thirty."

The reasons for establishing state-wide limitations of speed as applied to motor vehicles, and prohibiting local authorities from interfering therewith is well stated in the case of Frisbie vs. the City of Columbus, 80 O. S., 686, pages 686 and 687, of the opinion thereof, which is as follows:

"The automobile has but recently come into common use. Its use is not restricted to a particular locality or city, but extends from city to city all over the state, and to other states, and the number of horses likely to be frightened and the dangerous speed with which many cars were operated led to the enactment of ordinances regulating its use. These regulations were so various, and in some instances so unreasonable, and in view of the fact that outside of his own city it was impracticable for the operator to learn what the regulations were until after he had violated them, that the necessity for a law, making uniform regulations that might be known and understood by all, was apparent.

"Accordingly in 1906 a law was passed (98 O. L., 320), that provided for an annual license, the registration of the care and its identification by a number attached. It regulated the speed and manner of operating the car and prescribed brakes, lights and signals, and then provided: (Section 19.) Subject to the provisions of this act, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring of any owner or operator of a motor vehicle any license or permit to use the public highways, or excluding or prohibiting any motor vehicle whose owner has complied with Section 2 of this act from the free use of such highways, except such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages, or except as herein provided, in any way affecting the registration or numbering of motor vehicles or prescribing a slower rate of speed than herein specified at which said vehicles may be operated, or the use of the public highways, contrary to or inconsistent with the provisions of this act; and all such ordinances, rules or regulations now in force are hereby declared to be of no validity or effect.

"This act is, substantially, a copy of the New York motor vehicle law (L., 1904, Ch., 538), Laws of New York, 1904, which law it is held, in City of Buffalo vs. Lewis, 192 N. Y. 197, 'was clearly designed as a new, complete and general enactment to take the place of all the previous statutes, ordinances or rules relating to the use of motor vehicles upon the streets and highways of this state and must be held to have repealed all former statutes relating to such subject matter, even if such former acts are not in all respects repugnant to its provisions. The common council of the city of Buffalo had, therefore, no power, in 1907, to enact an ordinance in pursuance of the provision of chapter 31 of the laws of 1904, amended Section 17, of the city charter (L. 1891, Ch., 105), and authorizing it to enact an ordinance imposing tax upon the owners of motor vehicles or the privilege of operating them upon the streets of such city, since the provisions of the statute in question must be considered as repealed by the subsequent enactment of the motor vehicle law, and that statute expressly provides that with certain exceptions, not

applicable to the question under consideration, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring of any owner or operator of a motor vehicle any license, or permit, to use the public highways contrary to or inconsistent with its provisions.'

"The Ohio law of 1906, as appears from that part of Section 19, above quoted, expressly declares that all such ordinances and regulations shall be of no validity or effect."

In the above case the court construed the act regulating the speed of motor vehicles as passed April 2, 1906, and found in 98 O. L., 320. Said act was subsequently amended in 99 O. L., 538, and constitutes the present statutory law in Ohio upon the subject of regulating motor vehicles. It is apparent, by virtue of Sections 6307 and 12608, of the General Code, above quoted, that the speed limitation of motor vehicles is no longer subject to municipal control or regulation by ordinance, except in so far as municipalities may define what are the business or closely built-up portions thereof, as provided in Section 12608, of the General Code, above quoted. Any violation of such speed limitation is now made a misdemeanor by virtue of Section 12604, of the General Code, and it necessarily follows that any violation thereof must be prosecuted in the name of the state of Ohio. This being true, it logically follows that the principle of the law governs as laid down in the case of Cleveland vs. Jewett, 39 O. S., 271, the syllabus of that case being as follows:

"Fines and costs received by the directors of the workhouse at Cleveland, from persons convicted of misdemeanors, under the statutes, in prosecutions in the name of the state in the court of Cuyahoga county, and committed to such workhouse for non-payment of fines and costs, must, under Rev. Stat. Section 6802, be paid into the county treasury; and where such fines and costs have been paid into the city treasury, the city, on refusing to pay the same into the county treasury, is liable to an action therefor by the county commissioners."

In said case the court was construing Section 12378, of the General Code (Section 6802, Rev. Stat.). Said Section 12378, G. C., provides as follows:

"Unless otherwise required by law, an officer who collects a fine, shall pay it into the treasury of the county in which such fine was assessed, to the credit of the county general fund within twenty days after the receipt thereof, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."

Section 4270, of the General Code, specifically provides that the mayor shall pay certain fines, penalties and forfeitures into the county treasury, as follows, to wit:

"* * * All fines, penalties and forfeitures collected by him in state cases shall be by him paid over to the county treasurer monthly."

Therefore, in accordance with the foregoing, it is my conclusion that all fines collected by the mayor under Section 12604 of G. C., should be paid into the county treasury.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

439.

PRESIDENT OF COUNCIL OF CITIES—MAY NOT PERFORM JUDICIAL ACT WHEN ACTING AS MAYOR IN THE ABSENCE OF THE MAYOR.

In the decision of State vs. Hance, the court expressly states that the president of the council in cities, is deprived of the power to perform judicial acts in the absence of the mayor.

COLUMBUS, OHIO, June 12, 1912.

HON. S. C. CARNES, *City Solicitor, Cambridge, Ohio.*

DEAR SIR:—Your letter of April 19, 1912, received. You state:

> "As city solicitor of Cambridge, Ohio, I am called upon for an opinion in the following matter: Cambridge is a city without a police judge; the mayor for some time past has been, and probably for some time to come will be, unable to attend to his duties as mayor, and the question has arisen as to the powers of the president of council to perform judicial acts and act as mayor in connection with the mayor's court work; also whether or not the right under Section 4549 must be invoked in cities in case of the absence of the mayor.
>
> "26 G. C. 473 determines the question as regards the president of council in villages where he is not elected as president of council, but I do not feel able to determine whether or not the reasoning of Judge Cook in that decision applies to the same situation in cities and, therefore, am asking you for an opinion in the matter.
>
> "We have taken the safe course for the time being and had a justice of the peace designated but do not know from what source he will get his fees in prosecutions under ordinances, and as the matter is somewhat urgent, an early reply would be greatly appreciated."

You inquire as to the powers of president of council to perform judicial acts and act as mayor in connection with mayor's court work in the absence of the mayor.

Section 4272 of the General Code provides for the election of president of council for a term of two years.

Section 4273 of the General Code provides as follows:

> "When the mayor is absent from the city, or is unable for any cause to perform his duties, the president of the council shall be the acting mayor. While the president of the city council is acting as mayor, he shall not serve as president of council."

Section 4216 of the General Code provides as follows:

> "At the first meeting in January of each year, the council shall immediately proceed to elect a president pro tem. from their own number, who shall serve until the first meeting of the council in January next after his election. From time to time the council may provide such employes for the village as they may determine, and such employes may be removed at any regular meeting by a majority of the members elected to council. *When the mayor is absent from the village or is unable for*

any cause to perform his duties, the president pro tem. of council becomes acting mayor, and shall have the same powers and perform the same duties as the mayor."

Section 4549 of the General Code provides in part as follows:

"* * * In cities having no police judge, in the absence or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor."

You state in your communication, that Cambridge is a city without a police judge; that the mayor has been for some time, and is not now able to perform the duties of mayor; that you have designated, as provided by Section 4549, General Code, a justice of the peace to perform the duties of mayor in criminal matters.

You will note that the language in Sections 4216 and 4273 of the General Code, authorizing the president pro tem. of council of a village and president of council of a city to act as mayor in the absence or disability of the mayor, is substantially the same.

The circuit court of Belmont county, Ohio, in the case of State vs. Hance, 4 C. C. N. S. p. 541, held:

"The president pro tem. of a village council as acting mayor, under Section 1536-854 of the Revised Statutes, has no jurisdiction to hear and determine a misdemeanor."

Judge Cook, in his opinion in this case, on page 432 said:

"It is provided that 'in cities having no police judge, in the absence, or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor.' We are not prepared to say, as claimed by counsel, that this provision applies to villages. This provision however should have some effect in construing the section under consideration. The president pro tem. of council of cities has the same powers as in villages when the mayor is disqualified from acting. The provisions as to cities and villages are very similar (Section 1536-664). Why, then, should the mayor of a city be required to call in a justice of the peace, in a city having no police judge, to perform his duties in criminal cases? The president pro tem. of council could perform the duties as well in cities as in villages, but in cities he is deprived of that power. From these considerations we are persuaded that the president pro tem. of the council of a village has not jurisdiction to hear and determine a prosecution for a misdemeanor.

"This view is strengthened by the decision in case of Logan Branch Bank, ex parte, 1 O. S., 432. On page 434, Corwin, Judge, says:

" 'It is not within the competency of the legislature to clothe with judicial power any officer or person not elected as a judge.' "

You will note that Judge Cook expressly says "a president pro tem. of council could perform the duties as well in cities as in villages, but in cities, he is deprived of that power."

I am, therefore, of the opinion that the president of council in cities has not the power to perform judicial acts in connection with the mayor's court work.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

449.

CITY SOLICITOR, IN A CONTROVERSY BETWEEN CITY SCHOOL BOARD AND CITY, MAY REPRESENT EITHER—ORDER OF COUNCIL INEFFECTIVE.

In a controversy between a board of education of a city school district and the city, the solicitor is at liberty to choose which of the two parties he will represent regardless of a resolution of council ordering him to represent the city.

COLUMBUS, OHIO, June 21, 1912.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—Under date of June 3rd you state as follows:

"On May 2, 1912, the board of education of the school district of the city of Chillicothe, Ohio, instructed me to collect the rental claiming to be due said board from the city of Chillicothe for the use of the upper floor of the city building in said city. Section 4761 of the General Code provides, in part, as follows:

"In city school districts, the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education of the county.'

"On May 31, 1912, the council of the city of Chillicothe passed and the mayor approved June 3, 1912, a resolution in accordance with Section 4308 of the General Code as follows:

"'A resolution authorizing and directing the city solicitor to represent the corporation of the city of Chillicothe in the controversy with the board of education of the school district of Chillicothe, Ohio, in regard to the rental due said board from the city of Chillicothe for the use of the upper floor of the city building in which the said corporation, the said city of Chillicothe, is a party.'

"'Be it resolved by the council of the city of Chillicothe, state of Ohio, that the city solicitor be and he is hereby authorized and directed to represent the corporation of the city of Chillicothe in the controversy with the board of education of the school district of Chillicothe, Ohio, as to the collection of rental due said board of education from the city of Chillicothe for the use of the upper floor of the city building.'"

You then inquire:

"As solicitor, is it my duty to represent the city of Chillicothe or the board of education of the school district of Chillicothe, Ohio, or have I the discretion to choose whom I shall represent?"

Under the provisions of Section 4305 of the General Code the city solicitor is constituted the legal counsel and attorney of the city, and under the provisions of Section 4761 of the General Code, referred to in your inquiry, the city solicitor is also constituted the legal adviser and attorney of the board of education of the city school district.

There is no provision of statute making either of his said duties paramount to the other.

As he cannot serve in both capacities in the case put by you I am of the opinion that he is fully authorized to choose which of the two parties he will represent in the controversy.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

454.

COMPENSATION AND DUTIES OF CITY CHEMIST FIXED BY COUNCIL MAY NOT BE VARIED BY AUTHORITY OF WATER WORKS SUPERINTENDENT OR DIRECTOR OF PUBLIC SERVICE.

When council has, by ordinance, fixed the salary of the city chemist and provided that only certain duties shall be required of him, the water works superintendent or the director of public service may not impose other duties upon said chemist which are incidental to a city chemist's work and thereby, make compensation for the same, a charge upon the city.

COLUMBUS, OHIO, June 20, 1912.

HON. G. B. FINDLEY, *City Solicitor, Elyria, Ohio.*

DEAR SIR:—Under favor of June 13, 1912, you inquire as follows:

> "The director of public service of this city, under the authority granted by the council in ordinance No. 1715, a copy of which is enclosed herewith, orally employed a city chemist at $40.00 per month, with the oral understanding that his duties would be limited to three analyses of water each week.
>
> "Can the said city chemist analyze coal, cider, and other materials for the city at the request of the water works superintendent or the director of public service, and receive from the city additional compensation for each analysis so made?"

The ordinance fixing the salary of the chemist, as submitted by you, provides as follows:

> "To amend Ordinance No. 1681, passed by the council of the city of Elyria, January 12, 1910, to provide for the employment of a chemist at the water works plant.
>
> "Be it ordained by the council of the city of Elyria, state of Ohio that Ordinance No. 1681 of said city, adopted by the council thereof on the 12th day of January, 1910, be and same is hereby amended to add the following paragraph; under division water works department.

"One chemist, salary $480.00 per annum, payable semi-monthly from the water works fund of the city."

The ordinance of which the above is an additional paragraph fixes the salaries of various officers but contains no provision as to a chemist.

The authority of council to fix the salary is provided in Section 4214, General Code, which reads:

"Except as otherwise provided in this title council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employé in each department of the government if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

In case of Smith vs. Lothschuetz, 20 Ohio Dec. 390, it is held:

"A director of public service of a city has no power, either under Section 139, 140 or 141 of the act of 99 O. L. 563 (General Code 4324, 4325, 4326), the Payne law, giving him the management and supervision of his department to fix salaries or compensation of employes therein but the exclusive right to fix salaries and compensation thereof is reposed in the city council by Section 227 of such act (General Code 4214)."

In your city the council has fixed the salary of a chemist at $480.00 per annum. It appears that the director of public service has employed a chemist at that salary with the understanding that he should make three analyses each week. You inquire as to the authority of the director of public service or of the superintendent of the water works to require additional work of such chemist and of such chemist's right to receive extra compensation therefor. The extra work is of the same nature as that which he is to perform by his employment as city chemist.

In case of Lewis vs. Harrison, 11 Cir. Dec., 647, Jelke, J., says at page 648:

"The reason of such constitutional and legislative provisions sounds in contract, and is that one entering upon an office to which a salary or compensation has been affixed undertakes not only to perform such duties as are prescribed to such office, but has in contemplation the performance of all duties which may arise which are naturally incident to such office or are germane to it, and that when the legislature specifies an additional duty germane in its nature and naturally incident to the office it has added nothing but what the officer is deemed to have had in contemplation when he entered upon the office at a fixed salary."

The extra duties of the city chemist in question are germane to the duties of the office, they are of the same nature. The council has fixed the salary of the chemist. If extra compensation were to be paid such chemist, for work in excess of that for which he was employed, but which is of the same nature as the other work pertaining to his position, this would in effect give him a compensation in

excess of that fixed by ordinance. The amount of his compensation would not be fixed by council but by the director of public service who gives him the additional work.

As seen above the director of public service cannot fix the compensation. If the director of public service were permitted to make a contract of employment, as in this case, limiting the number of analyses, and could then require extra analyses of such employe for which the city must pay in addition to the salary fixed by council, such director would in effect be fixing the compensation as other than that prescribed.

Council has fixed the compensation of the city chemist and this compensation cannot be increased by the director of public service or the superintendent of the water works requiring extra work of such chemist, as a chemist. Such chemist could not receive extra compensation for such work. His salary is fixed by council. If the compensation so fixed for the city chemist is not in keeping with the duties of the position, the remedy lies with council to change the salary, and not in giving the chemist extra pay for work pertaining to the duties of his office, although such work may be in addition to what he is required to do by virtue of his employment.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

466.

CIVIL SERVICE—CHIEF OF POLICE IN UNCLASSIFIED SERVICE—APPOINTMENT AND REMOVAL BY MAYOR.

The chief of police is a member of the unclassified service and under Section 4250, *General Code, the mayor is given the power to appoint that official as the head of a subdepartment of the department of public safety, without the requirement of examination. Such appointment need not be made from the ranks of the police department.*

COLUMBUS, OHIO, June 24, 1912.

HON. MEEKER TERWILLIGER, *City Solicitor, Circleville, Ohio.*

DEAR SIR:—Your favor of June 14, 1912, is received, in which you inquire as follows:

> "In case of a vacancy occurring in the office of chief of police, by resignation, can the mayor appoint some person who has not taken an examination under the civil service commission? And who is not now in service as captain or other office in the police department.
>
> "In other words, can the mayor go outside the department and appoint some one as chief of police or will he have to make the appointment from the present police department, or will he have to make a requisition to the civil service commission to certify him three names from the list, from whom he must appoint a chief of police.
>
> "The mayor might prefer going outside of the department, to select his chief."

The employes of a city are divided into classified and unclassified service by virtue of Section 4479, General Code, which provides:

"The civil service shall be divided into classified and unclassified service. The unclassified service shall include the positions of officers elected by the people or appointed to fill vacancies in offices filled by popular election, or whose appointment is subject to confirmation by the council, or who are appointed by any state officer or by any court, employes of the council, persons who by law are to serve without remuneration, persons who are appointed to positions requiring professional or technical skill as may be determined by the civil service commission; persons appointed or employed to give instruction in any educational institution, persons appointed by any board or officers supervising elections; persons who as members of a board or otherwise, have charge of any principal department of the government of any city, the head or chief of any division or principal department relating to engineering, water works, street cleaning, or health, *the chief of the police department.* the chief of the fire department, the superintendent of any workhouse, house of refuge, infirmary, or hospital, the librarian of any public library, private secretaries, deputies in the office of the city auditor and city treasurer, unskilled laborers and such appointees as the civil service commission as they may by rule determine. The classified service shall comprise offices and places not included in the unclassified service."

By virtue of the foregoing section the chief of police is placed in the unclassified service.

Section 4250, General Code, gives the mayor the power to appoint the chief of police. Said section reads:

"The mayor shall be the chief conservator of the peace within the corporation. He shall appoint and have the power to remove the director of public service, the director of public safety and the heads of the subdepartments of the departments of public service and public safety, and shall have such other powers and perform such other duties as are conferred and required by law."

The chief of police is the head of the police department, which is a subdepartment of public safety. This section does not limit the mayor as to the manner of the appointment.

Section 1536-685 of the Revised Statutes, contains this provision:

"The chief of police shall be appointed from the classified list of such department."

This provision was not carried into the General Code. There is no provision in the General Code requiring that the chief of police shall be appointed from the classified service.

The provision of the civil service law that applicants for positions in the classified service shall take an examination, applies to positions in the classified service and not to those in the unclassified service.

Section 4480, General Code, provides:

"*Applicants for admission into the classified service shall be subjected to examination which* shall be competitive, public and open to residents of the city, with such limitation as to age, residence, health, habits and moral character as the commission prescribes. The commission shall prepare rules and regulations adapted to carry out these pur-

poses with reference to the classified service of the city, which rules and regulations shall provide for the grading of offices and positions similar in character in groups and divisions so as to permit the filling of offices and positions in the higher grades as far as practicable through promotions, and for public examinations to ascertain the fitness of applicants for appointment in the classified service. Such applicant shall take rank upon the register as candidates in the order of their relative standing without reference to priority of examination. The result of the examination shall be accessible to all persons."

The chief of police is not in the classified service and an appointee to such position is not required to take an examination.

In making his appointment for chief of police the mayor is not confined to the persons in the police department, but may go outside of it.

Respectfully,

TIMOTHY S. HOGAN.

Attorney General.

477.

OFFICES COMPATIBLE—CLERK AND MEMBER OF SCHOOL BOARD—OFFICES INCOMPATIBLE—TREASURER AND MEMBER OF SCHOOL BOARD—WHEN DEPOSITORY ESTABLISHED, MEMBER MAY PERFORM DUTIES OF CLERK AND TREASURER.

By specific provision of Section 4747, General Code, a member of a board of education may at the same time, act as its clerk and receive compensation for both services.

The position of members of the board of education and treasurer of the board are incompatible, however.

Under Section 4782, General Code, when a depository is established, the clerk performs the duties of the treasurer and a member of the school board may, in this case, perform such duties.

COLUMBUS, OHIO, June 24, 1912.

HON. D. F. DUNLAVY, *City Solicitor, Ashtabula, Ohio.*

DEAR SIR:—I herewith desire to acknowledge the receipt of your letter of May 29, 1912, wherein you inquire as follows:

"As city solicitor of the city of Ashtabula, I write you to ascertain your opinion on the following proposition; can a member of the board of education in a city where a depository has been established, act as treasurer and clerk of said board, or either?

"In our city a depository has been provided according to statute, but the conditions are such that it would make it very inconvenient for the tuition, which is very small in amount, to be handled directly through the depository and on that account it has been handled through clerk. At this time the question seems to arise on the proposition as to whether or not the clerk of said board can act as treasurer and also involving the question aforesaid mention, and we are now up against the proposition as to how to handle the same."

In reply to your inquiry I desire to say, that this department, in an opinion of the date of March 4, 1911, rendered to the Hon. T. E. McElhiney, prosecuting attorney, McConnellsville, Ohio, held, that a clerk of a township board of education can legally receive compensation, both as a member of such board of education and as clerk, a copy of which opinion I am enclosing herewith.

Section 4747 of the General Code provides as follows:

> "The board of education of each school district shall organize on the first Monday in January after the election of members of such board. One member of the board shall be elected president and a person, *who may or may not be a member of the board,* shall be elected clerk. The president shall serve for a term of one year and the clerk for a term not to exceed two years. The board shall fix the time of holding its regular meetings."

Inasmuch as Section 4747 of the General Code specifically says *that the clerk may or may not be a member of the board,* I am, therefore, of the opinion that, without question, a member of a board of education can legally act as clerk of the board of education.

In an opinion of the date of January 29, 1912, rendered to Hon. Hugh R. Gilmore, prosecuting attorney, Eaton, Ohio, this department held, that the office of member of the board of education and the office of treasurer of the board of education are incompatible, and cannot be held by the same person at the same time. I am enclosing you herewith a copy of said opinion also.

From the conclusions reached in the above opinions, it is apparent that while a member of a board of education could legally act as a clerk of such board, such member could not, however, act as treasurer, or both as treasurer and clerk. However, I desire to say, that when a depository is provided for by the board of education a different question arises by reason of Section 4782 of the General Code, which provides as follows:

> "When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, may dispense with a treasurer of the school moneys, belonging to such school district. In such case, the *clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school district.*"

Said section specifically says that when a depository is provided by the board of education, that then such board, by resolution adopted by a majority vote thereof, may dispense with a treasurer of school moneys, and *that thereupon the clerk of such board shall discharge all the duties of the treasurer.*

Therefore, in direct answer to your question, I am of the opinion that a member of the board of education, in a city where a depository has been established, can act as clerk and also perform and discharge the duties of treasurer of such board of education at the same time.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

490.

BASEBALL PLAYING ON SUNDAY—POWERS OF COUNCIL TO LICENSE, REGULATE OR PERMIT—CHEERING—"PUBLIC NUISANCE"—"LOUD NOISES"—RIOTOUS AND DISORDERLY CONDUCT.

By virtue of Section 13049, *General Code, baseball playing of any kind is prohibited on Sunday morning, and as regards that time, therefore, council may not regulate, license or permit ball playing of any kind.*

Section 3670, *General Code, delegates to council the power to regulate and license ball grounds conducted for a profit at any time other than Sunday forenoon, in any reasonable manner deemed advisable.*

The words "to prevent noise" and "to preserve the peace and good order," in Section 3658, *General Code, extend only to the prevention of riot and disorder.*

Section 3670, *General Code, refers to ball grounds conducted for a profit only and council therefore, cannot prevent cheering or regulate ball grounds not conducted for a profit, under either Section* 3670 *or Section* 3658, *General Code. Neither of said "conducts" can be classed as "public nuisances," to be abated under Section* 3650, *General Code.*

An ordinance prohibiting cheering would probably be annulled on the ground of unreasonableness. Council cannot prevent cheering at a ball game, and may prevent only such "loud noises" as amount to riotous or disorderly conduct.

COLUMBUS, OHIO, July 3, 1912.

HON. JOSEPH SMITH, *City Solicitor, Niles, Ohio.*

DEAR SIR:—Under date of April 9th, I received your favor in which you state in part:

> "A petition has been presented to the city council to permit Sunday baseball playing. The city ordinance prohibits Sunday ball playing, as it has not been changed since the legislature amended Section 13049, of the General Code.
>
> "I am informed that you have rendered an opinion that an ordinance in conflict with said section is null and void. If you have rendered an opinion to this effect, I would like to see it."

No such opinion has been rendered by this department. It is my opinion, however, that an ordinance of council which is actually in conflict with Section 13049, of the General Code, or with any other state statute would be null and void.

In your letter you further state:

> "I would like to know your opinion as to whether under Sections 3658 or 3670, the council can pass an ordinance to regulate the use of ball grounds on Sunday, or license the owners or lessees of ball grounds to permit Sunday ball playing, and whether or not council can pass an ordinance to prohibit cheering or any other loud noise at ball games played on Sunday?"

The code sections material are as follows:

> "Section 13049. Whoever, on Sunday, participates in or exhibits to the public with or without charge for admittance, in a building, room, ground, garden or other place, a theatrical or dramatic performance or an equestrian or circus performance of jugglers, acrobats, rope dancing

or sparring exhibition, variety show, negro minstrelsy, living statuary, ballooning, *baseball playing in the forenoon,* ten pins or other game of similar kind or participates in keeping a low or disorderly house of resort or sells, disposes of or gives away ale, beer, porter or spirituous liquor in a building appendant or adjacent thereto, where such show, performance, or exhibition is given, or houses or place is kept, on complaint within twenty days thereafter, shall be fined not more than one hundred dollars or imprisoned in jail not more than six months, or both.

"Section 3658. To prevent riot, gambling, *noise* and disturbance, indecent and disorderly conduct or assemblages, and to *preserve the peace and good order,* and to protect the property of the corporation and its inhabitants.

"Section 3670. To regulate and license manufacturers and dealers in explosives, pawnbrokers, chattel mortgages and salary loan brokers, peddlers, public ball rooms, scavengers, intelligence offices, billiard rooms, bowling alleys, livery, sale and boarding stables, dancing or riding academies or schools, race courses, *ball grounds,* street musicians, second-hand dealers, junk shops and all persons engaged in the trade, business or profession of manicuring, massaging or chiropody. In the granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient."

Section 13049, of the General Code, prohibits ball playing on Sunday forenoon. Your questions, therefore, are eliminated as regards Sunday morning, and are to be considered only as they pertain to the remainder of the day.

The rule of construction is briefly stated in Whitcomb vs. City of Springfield, 3 O. C. C., on page 246, which is as follows:

"Municipal corporations derive their powers from the statutes passed by the general assembly, in which all legislative power is vested by the constitution. That body may delegate to cities and villages the power to make by-laws and ordinances, which, when authorized, have the force, in favor of the municipality, and against those bound thereby, of laws passed by the legislature. An ordinance which does not fall within the grant of power, express or necessarily implied, is void.

"In determining the existence of such power all substantial doubts are to be solved against the corporation and in favor of the general public."

Section 3670, General Code, above quoted is clear and unambiguous in so far as it confers on council, the right to license and regulate ball grounds. In construing this act, however, the court, in Village of Silverton vs. Davis, 10 C. C., n. s. on page 60, restricts its application to ball playing for profit only.

On page 63, Judge Smith says:

"The section relates to one engaged in the 'business' or 'occupation,' or one who 'keeps' or is 'proprietor' of, or 'manager' of a certain 'thing or business.'"

I am, therefore, of the opinion that under Section 3670, General Code, council may license and regulate the conduct on Sunday afternoons, of ball grounds which are conducted for a profit.

If council is given power to regulate and license ball playing, under Section 3658, General Code, above quoted, that power is conferred by the words therein "to prevent noise" or "to preserve peace and good order."

These expressions are each construed in the case of Whitcomb vs. City of Springfield, 3 O. C. C., p. 244.

On page 249 the court says:

> "No construction has been given to these words by our supreme court. But testing the section as it formerly stood by the rules stated, we cannot escape the conviction that the word 'noise,' as used therein, is ejusdem generis with 'riot' and 'disorderly conduct.' And we do not think there is any reason to suppose that the legislature intended to enlarge the meaning of these words by the transposition of the word 'gambling.' The same construction is to be given to the phrase 'peace and good.' These words are correlatives or antitheses of 'noise' and 'disturbance.' The council may prevent the one by preserving the other. Peace and good order, as used in the statute, consist in the absence of riot, noise and disturbance, as therein intended."

In the light of this construction, inasmuch as neither the game itself nor the practice of cheering as such can be classed as inherently riotous or disorderly, or as a natural menace to peace and good order, neither of these conducts can be held to come within the terms of Section 3658, General Code. Council, therefore, has no power to regulate ball games not conducted for a profit, nor to prevent cheering, under this section.

In further support of this construction, I beg to refer to the cases of City of Wellsville vs. O'Connor, and City of Wellsville vs. Kirkbride, 1 O. C. C., n. s., p. 253, wherein it was held that the provisions of Section 3658, General Code, are to be construed within the limitations of what is now Section 3664, which statute can, in no sense be construed to include the practice of ball playing nor of cheering thereat.

The one other possible grant of power which might extend to the restraint of cheering is that conferred by Section 3650, General Code, to cause any nuisance to be abated. Cheering, in its primary meaning, however, and as it is generally demonstrated in the course of the national game, in no sense of the word can be construed to come within the term "public nuisance."

I can point to no authority in council, therefore, to prevent cheering as such, at a baseball game, unless it comes within council's powers to regulate games conducted for a profit on other than Sunday forenoons, which powers are conferred by Sections 3670 and 3657, General Code. The practicability of such a method of regulation, however, and its reasonableness present questions of very grave doubt. Although they are questions in which council's discretion has a controlling force, I am of the opinion that an ordinance separating cheering from the game would exceed the bounds of a legitimate discretion, and invoke annullment at the hands of the courts, on the grounds of unreasonableness.

Answering specifically, each of your questions in conclusion:

First—Council cannot regulate license nor permit ball playing of any kind on Sunday morning.

Second—Section 3670, General Code, clothes council with the power to regulate and license ball grounds conducted *for a profit* on Sunday afternoons in any reasonable manner which it deems advisable.

Third—Neither Section 3670, General Code, nor Section 3658, General Code, confers upon council, the power to regulate or license ball grounds which are *not conducted for a profit.*

Fourth—There has been no authority delegated to council to prevent cheering at a ball game.

Fifth—Council is empowered to prevent such "loud noises" at ball games as amount to riotous or disorderly conduct.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

517.

CIVIL SERVICE—APPOINTMENT OF POLICEMEN AND FIREMEN WHEN ONLY ONE APPLICANT CERTIFIED BY COMMISSION—TEMPORARY APPOINTMENT WITHOUT EXAMINATION.

Under the civil service law the appointing power may appoint the only applicant for a position as policeman or fireman which is certified to him by the commission. He is not obliged to appoint, however, unless three are certified to him.

Temporary appointments may be made under Section 4488, of the General Code, without examination.

A permanent appointment may not be made, however, without examinations,

COLUMBUS, OHIO, June 28, 1912.

HON. CLYDE C. PORTER, *City Solicitor, Tiffin. Ohio.*

DEAR SIR:—Your favor of June 19, 1912, is received in which you inqiure as follows:

> "At the request of the mayor of this city, we are writing for your opinion in the following matter. The city of Tiffin recently, through the proper channels, appointed a civil service commission. At the examination, called for by this commission, there was but one applicant for the appointment of fireman and one applicant for the appointment as policeman.
>
> "It appears that there have been substitutes doing duty in these two departments. The mayor wishes to know whether or not appointments to regular positions can be made from among these substitutes, in these two departments, without requiring them to take the civil service examination."

The manner of appointment to positions in the classified service of the city is provided for by Section 4480 and 4481, General Code.

Section 4480, General Code, provides:

> "Applicants for admission into the classified service shall be subjected to examination which shall be competitive, public and open to residents of the city, with such limitations as to age, residence, health, habits and moral character as the commission prescribes. The commission shall prepare rules and regulations adapted to carry out these purposes with reference to the classified service of the city, which rules and regulations shall provide for the grading of offices and positions similar in character in groups and divisions so as to permit the filling of offices and positions in the higher grades as far as practicable through promotions, and for public examinations to ascertain the fitness of applicants for appointment in the classified service. Such applicant shall take rank upon the register as candidates in the order of their relative standing without reference to priority of examination. The result of the examination shall be accessible to all persons."

Section 4481, General Code, provides:

> "Appointments shall be made in the following manner: The appointing board or officer shall notify the commission of any vacancy to

be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest in the respective lists as shown by the result of such examination. Such board or officer shall thereupon appoint one of the three so certified. Grades and standings so established shall remain the grades for a period of six months, or longer if the commission so determines, and in succeeding notifications of vacancies, candidates not selected may be dropped by the commission after having been certified a total of three times."

It appears that there have not been enough applicants before the civil service commission to fill the positions, or to permit the civil service commission to certify three names as required by Section 4481, General Code.

In an opinion given to Allen G. Aigler, city solicitor of Bellevue, Ohio, on April 29, 1912, is was held that where the civil service commission has less than three names qualified for a certain position, the appointing officer or board may appoint such persons, but are not required to make an appointment unless three names are certified to it by the commission.

In your case the civil service commission may certify the one name upon its list and the mayor or other appointing power may appoint such person, but he is not required to do so.

Section 4488, General Code, provides:

"To prevent the stoppage of business or to meet extraordinary exigencies, as provided in this title, the mayor may make temporary appointments."

A case such as you present would constitute an emergency and the mayor may make temporary appointments until such time as the civil service commission can certify sufficient names to fill the positions. Such emergency appointees are not, however, entitled to the positions permanently.

Appointments to regular positions in the classified service can only be made in the manner provided in Section 4480 and 4481, General Code. Applicants must take the examination and must be certified to the appointing board or officer by the civil service commission. Emergency appointees do not hold regular positions.

Section 4480, General Code, provides that appointments to the higher positions should be made by promotion as far as practicable. This would apply to substitute patrolmen who would be appointed as regular patrolmen. This does not dispense with the requirement that the applicants must take the examination. If the substitutes desire regular appointments they should qualify therefor by taking the examination.

The substitutes cannot be appointed to positions as regular patrolmen or policemen or firemen without taking the civil service examination for such position.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General

521.

MUNICIPAL PUBLIC UTILITIES—ELECTRIC LIGHT PLANT OWNED BY CITY CANNOT USE POLES OF PRIVATE COMPANY.

Public utilities which are owned or operated by a municipality are not included within the provisions of the public utilities act requiring one utility to use the poles or equipment of another utility. These provisions are therefore not available for municipal electric light plant owned by the city of Akron.

COLUMBUS, OHIO, July 13, 1912.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

I beg to acknowledge receipt of your communication of July 8th, in which you request my opinion as follows:

> "If the city of Akron should erect a municipal electric lighting plant, I wish to ask you whether we could avail ourselves of the public utility act under the provisions which allow one utility to use the poles of another utility."

In reply thereto I desire to say that Section 614-2*a* of the General Code provides as follows:

> "The term 'public utility' as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilitis not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, etc."

Section 614-29, General Code, provides that,

> "Every public utility having any equipment on, over or under any street, or highway, shall, subject to the provisions of Section 9103 of the General Code, for a reasonable compensation, permit the use of the same by any other public utility whenever the commission shall determine as provided in Section 32 (General Code Section 614-30) hereof that public convenience, welfare and necessity require such use, or joint use, and such use or joint use will not result in irreparable injury to the owner or other users of such equipment, nor in any substantial detriment to the service to be rendered by such owner or other users."

Section 614-30, General Code, provides that,

> "In case of failure to agree upon such use or joint use or the conditions or compensation for such use or joint use, any public utility may apply to the commission, and if after investigation the commission shall ascertain that the public convenience, welfare and necessity require such use or joint use and that it would not result in irreparable injury to the owner or other users of such property or equipment, nor in any substantial detriment to the service to be rendered by such owner or other users of such property or equipment, said commission shall by

order direct that such use or joint use be permitted and prescribe reasonable conditions and compensation for such joint use."

From a careful reading and consideration of the whole act creating the public service commission, and particularly the sections above quoted, I am of the opinion that public utilities, such *"as are or may hereafter be owned or operated by any municipality,"* cannot avail themselves of the provisions of Section 614-29, General Code, and compel other public utilities to consent to the use of their equipment on, over or under any street or highway, the legislature having exempted such municipal public utilities from the operation of said sections.

I arrive at the above conclusion, more thoroughly convinced of the correctness thereof, by virtue of the fact that there is no remedy procedure provided in said act wherein the commission would be given the right to entertain jurisdiction and enforce an order to that effect when the public utility seeking to use the other public utility's equipment is a public utility owned by a municipality and exempt from the provisions of said act.

I am, therefore, of the opinion that should the city of Akron erect a municipal electric light plant it could not avail itself of the public utility act under the provisions quoted, which permit one utility to use the poles or equipment of another utility, as therein provided.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

522.

GARBAGE COLLECTION AND REMOVAL—POWERS OF COUNCIL, BOARD OF HEALTH, AND DIRECTOR OF PUBLIC SERVICE TO CONTRACT FOR—ADVERTISEMENT AND BIDS.

Legislative acts granting powers to municipalities are not in the nature of contracts and they may be modified or withdrawn by the legislature at will. Section 4470 of the General Code granting to council the power to contract for garbage collection and removal is a valid exception to Section 4211 of the General Code, providing that the powers of council shall be legislative only.

Such contracts should be entered into through the president and clerk of the council.

There is no authority given to the board of health to execute a contract for the collection and disposal of garbage under either Section 3809 or 4470 of the General Code.

Under Section 3809 of the General Code the council of a village may make such contract but the council of a city is thereunder empowered only to authorize the proper authorities to enter into the same.

Under Sections 4216, 4324 and 4326 of the General Code the director of public service becomes the proper officer to enter into such contract upon the authorization of the council.

Under Section 3809 of the General Code the requirement of the auditor's certificate to the effect that there is money in the treasury is dispensed with and under Section 4328 of the General Code advertising and bids are required only when the expenditure amounts to more than $500.00.

Section 4463 of the General Code empowers council to authorize the board of health to contract for the removal of garbage.

COLUMBUS, OHIO, July 5, 1912.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—Under date of June 15, 1912, you ask an opinion of this department upon the following:

> "I wish to write you again regarding the proposed garbage contract into which we are about to enter, and the query in my mind is who is the proper officer to execute the contract referred to in Section 3809 of the General Code. You will note the section reads:
>
> "'The council of the city may authorize—a contract—for the collection and disposal of garbage in such corporation.'
>
> "Whom should the council authorize?
>
> "Again, the contract referred to in Section 3809, is it subject to competitive bidding, and must it be advertised as other contracts?
>
> "With reference to Section 4470, you will note it reads:
>
> "'The council may contract for a period of not to exceed five years.'
>
> "This seems to be a departure from our ordinary standard method of procedure, as in practically all other cases council makes no contracts but simply authorizes them. My questions are these with regard to this section:
>
> "1. If the council make such a contract, by whom is it executed?
>
> "2. If the council authorizes such a contract whom should it authorize to execute the same?

"With regard to both these sections, to what extent, if any, may the board of health contract for either of the purposes set out in these sections 3809 and 4470?"

The question in reference to Section 4470, General Code, as to the power of the city council to contract will be considered first. Said Section 4470, General Code, provides:

"The council may contract for a period of not to exceed five years for the collection and removal of such garbage, nightsoil, dead animals, and other solid waste substances at the expense of the municipality or at the expense of the persons responsible for the existence of such waste substances."

This section standing alone will authorize council to enter into a contract for the purpose therein provided.

Section 4211, General Code, limits the power of council as follows:

"The powers of council shall be legislative only, and it shall perform no administrative duties whatever and shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

There is no constitutional limitation upon the powers of council, or upon the power of the legislature to fix the manner in which contract shall be executed by municipal corporations. The limitation of the powers of a city council fixed by Section 4211, General Code, has been prescribed by the legislature and the same power has granted to council the authority to contract under Section 4470, General Code.

The Municipal Code of Ohio is the charter of its municipal corporations. All powers therein provided are granted by the legislature and may be taken away or modified at the will of the legislature.

In McQuillen of Municipal Corporations at Section 165 it is said:

The usual judicial view is that, neither is the charter of a municipal corporation nor any legislative act conferring power or regulating the use of property held by it for governmental (state) purposes a contract within the meaning of the constitutional prohibition of laws impairing the obligation of contracts. Therefore, the general legal doctrine, supported by an unbroken line of authorities, is that, political powers conferred upon public corporations for the local government of a place are not vested rights as against the state, and where there is no constitutional restriction, either express or implied, on the action of the legislature it has absolute power to create, change, modify or destroy them at pleasure."

Dillon in his work on Municipal Corporations, fifth edition says at Section 106:

"Legislative acts respecting the political and governmental powers

of municipal corporations not being in the nature of contracts the provisions thereof may be changed at pleasure where the constitutional rights of creditors and others are not invaded."

The limitation placed upon the powers of council by Section 4211, General Code, is a general rule. An exception to that rule has been made by the legislature in Section 4470, General Code. Sections 4211 and 4470, General Code, have been passed by the same authority and are of equal validity. In order to permit the provisions of each section to stand, Section 4470, General Code, must be considered as an exception to the rule as set forth in Section 4211.

The provision of Section 4211, General Code, that the power of council shall be legislative only does not invalidate the provision of Section 4470, which authorizes the council to contract.

A contract by council should be entered into through its officers. In the case of contracts by a village council, they are entered into on behalf of the village by the mayor and clerk of the village, as provided in Section 4221, General Code. The mayor of a village is the presiding officer of council and the clerk of of the village performs the duties of the clerk of council.

All boards or bodies act through their officers. Council as a body authorizes the execution of the contract and agrees upon its terms, by resolution or ordinance. The officers of council, the president and clerk, carry out the will of council by formally executing the contract on behalf of the city in their official capacities. In this manner council makes the contract.

Section 4470, General Code is placed, under the chapter relating to the board of health of municipalities. Section 4463, General Code, gives the board of health the power to contract for the removal of garbage as follows:

"The council may empower the board of health to employ such number of scavengers for the removal of swill, garbage and offal from the houses, buildings, yards and lots within the municipality, as it deems necessary. In such case the board may make contracts therefor, subject to the approval of council, to be signed by the proper officers of the council, and may regulate the work to be done. Upon the request of the board of health, it shall be the duty of council to lease or purchase suitable lands, the location of which shall be approved by the board of health, to be used as a dump ground for such and other noxious substances removed from the municipality."

Your inquiry as to the power of the board of health is as to Sections 3809 and 4470, General Code, and not as to Section 4463, General Code. I find no authority given to the board of health to execute a contract for the purposes mentioned in Sections 4470 and 3809, General Code.

Said Section 3809, General Code, provides:

"The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the water works plant, or both, of any person, firm or company therein situated, for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract, and such requirement shall not apply to street improvement contracts

extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel."

It will be observed that this section gives power to the council of a city to authorize a contract for the collection and disposal of the garbage. It does not authorize council to make the contract for such purpose.

This section does not provide who shall execute such a contract for the city. The statutes applying to the power to contract for a city must control.

By virtue of Section 4468, General Code, the board of health may recommend to council the necessity of providing means for the proper disposal of garbage, sewage and waste matters of the city.

Said Section 4468, General Code, provides:

"Upon the recommendation of the board of health of a municipality, or, if the powers of such board have been vested in any other officer or board, upon the recommendation of such officer or board, the council may cause plans and estimates to be prepared and acquire by condemnation or otherwise such land or lands within or without the corporate limits as are necessary to provide for the proper disposal in a sanitary manner of the sewage, garbage and waste matters, and either or any of them, of the municipality."

This section does not authorize the board of health to execute a contract for that purpose.

Section 4324, General Code, provides:

"The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts."

Section 4325, General Code, provides:

"The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship canals, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title."

Section 4326, General Code, provides:

"The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

The director of public service is given authority, by Section 4324, General Code, over all public works and undertakings of the city, except as otherwise provided for by law.

Section 4326, General Code, specifically gives the director of public service the management of the undertakings of the city pertaining to garbage and of sewage disposal plants.

These statutes place the management of the garbage and sewage works and undertakings of the city in the director of public service. Section 4211, General Code, provides that the officer or board having charge of the matters to which a contract relates shall execute such contract.

The execution of the contract for the collection and disposal of the garbage provided and authorized by Section 3809, General Code, is not specifically provided for. The director of public service, therefore, should execute the contracts entered into by virtue of said Section 3809, General Code, for the collection and disposal of the garbage. The council is to execute the contract authorized by Section 4470 for the collection and removal of the garbage. The board of health is not authorized to execute a contract under either of said Sections 3809 and 4470, General Code, but may contract in the manner provided in Section 4463, General Code.

These several sections all relate to garbage. There is distinction in the manner of collecting and removing the same. While contracts under the several sections are to be executed by different authorities, the possibility of conflict in authority is avoided for the reason that council must act in each case. Council makes the contract under Section 4470, General Code, and must authorize the contracts under Sections 3809 and 4463, General Code. No contract can be entered into under these sections without the authority of council.

Shall the contract for the collection and disposal of garbage under Section 3809, General Code, be let at competitive bidding, after advertising therefor?

Section 4328, General Code, provides for competitive bidding as following:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The requirement for competitive bidding is based upon the amount of the expenditure involved in the contract. If the contract calls for an expenditure in excess of five hundred dollars, or the improvement will cost more than five hundred dollars, the contract must be let at competitive bidding.

It will be observed that under Section 3809, General Code, a contract for the collection and disposal of garbage may be entered into without first securing a certificate from the auditor that the money therefor is in the treasury. No exception is made, however, as to competitive bidding, if the contract involves an expenditure in excess of five hundred dollars.

From the facts submitted in your former inquiry of May 22, 1912, I take it that the proposed contract involves no expenditure of money upon the part of the city. The city is not required to pay the proposed company anything for the disposal of the garbage. The company receives its compensation from the

products of the garbage. The city, however, is required to deliver the garbage to the proposed plant. The collection and removal of garbage is a part of the duty of the city, which duty it may perform at the expense of the city or at the expense of those who are responsible for the garbage. The fact that the city is required to deliver the garbage to the proposed plant, would not of itself necessarily require an extra expenditure of money. The city must remove the garbage and it may as well remove it to the proposed plant as to some other point.

A contract under Section 3809, General Code, for the disposal of garbage by a private person or company, by which the city is to deliver its garbage to the proposed plant, wherein the garbage is to be disposed of without additional expense to the city, does not involve an expenditure of money by the city, and does not require competitive bidding.

If such contract involves an expenditure of money in excess of five hundred dollars, or involves the sale of real estate by the municipality, then such contract, or such sale of real estate, must be advertised and let or sold at competitive bidding.

The features of the proposed contract submitted by you do not show either of the above conditions.

The purpose of advertising a contract is to secure bidders. As this contract may be let without competitive bids, advertising of such contract is not required.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

523.

PUBLICATIONS OF COUNCIL—NEWSPAPER IN WHICH MAYOR IS INTERESTED IS DISQUALIFIED.

By provision of Section 3808 of the General Code when a mayor is pecuniarily interested in a newspaper, publications of council may not be made in said paper. In such case said paper is disqualified and must be deemed to be non-existing within the contemplation of the statutes requiring publication.

COLUMBUS, OHIO, July 13, 1912.

HON. WILLIAM B. JAMES, *City Solicitor, Bowling Green, Ohio.*

DEAR SIR:—Your favor of June 24, 1912, is received in which you inquire:

> "Can the mayor of the city, in which there are but two newspapers of general circulation of opposite politics, and who is the owner of a one-half interest in one of said papers, receive compensation for the publication of ordinances and resolutions required to be published in two newspapers of opposite politics?
>
> "In explanation I might say that our city, Bowling Green, has but two papers published in the city, one Republican, and one Democratic paper. The mayor of Bowling Green owns a one-half interest in the Wood County Democrat.
>
> "What would you say as to the necessity of publication, validity if no charge for publication is made, and the right of the paper under the circumstances to be paid for the publication?"

Section 3808, General Code, provides:

> "No member of council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

Section 12910, General Code, provides:

> "Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

The mayor is an officer of the city. The foregoing sections make it a penal offense for an officer of the city to be interested in a contract with such city for the expenditure of money, other than his compensation. The mayor as such officer cannot be interested in a contract for the publication of ordinances and other legal notices.

The mayor is interested in one of the newspapers of your city. So long as he is mayor and has a financial interest in such newspaper, no contract can be entered into with such newspaper by the city. The statutes do not contemplate that notices shall be published in a newspaper without compensation for such publication. The newspaper in which the mayor has an interest is ineligible to publish any ordinances or other notices for the city.

Section 4227, General Code, provides:

> "Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

In construing this section in an opinion to the bureau of inspection and supervisions of public offices under date of August 13, 1911, it was held that in order to make this section clear, the following words contained in the original section of the Revised Statutes must be read into said Section 4227, General Code, to wit:

> "Ordinances of a general nature, or providing for improvements shall be published in some newspaper of general circulation in the corporation; if a daily, twice, if a weekly, once before going into operation."

Section 4229, General Code, provides:

"Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, *if there are such in the municipality,* and for the following times: The statement of receipts and disbursements required shall be published once; the ordinances and resolutions once a week for two consecutive weeks; proclamations of elections once a week for two consecutive weeks; notices of contracts and of sale of bonds once a week for four consecutive weeks; all other matters shall be published once."

This section provides for publication in two newspapers of opposite politics, if there are such in the municipality.

In your city there are two newspapers of opposite politics, but one of said newspapers is disqualified from publishing ordinances and resolutions for the city. The statute has reference to two newspapers that are qualified to publish such ordinances and notices.

Your city has, therefore, but one newspaper that is qualified under the statutes to publish the ordinances and other notices for the city. Publication in such newspaper will be sufficient to make the ordinances and notices valid. Publication in the other newspaper which is disqualified is not required.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

526.

COUNCIL—TAX MAY NOT BE LEVIED FOR BENEFIT OTHER THAN A FREE HOSPITAL.

Section 4021 *of the General Code authorizes the council to levy and collect a tax for the aid only of a private corporation or association which maintains a free public hospital for the benefit of inhabitants of the municipality.*

COLUMBUS, OHIO, July 12, 1912.

HON. J. D. T. BOLD, *City Solicitor, Canal Dover, Ohio.*

DEAR SIR:—I am in receipt of an inquiry from you of the date of June 19, 1912, as follows:

"There is a hospital situated outside the corporate limits of this city and said hospital is not a 'free public hospital for the benefit of the inhabitants of the municipality.' Can the council of this city make the levy and collect the tax and pay the same to said hospital as authorized by Section 4021 of the General Code. We would be much obliged for your opinion on the above as soon as possible."

Section 4021 of the General Code provides that the council of a municipality may levy a tax to compensate a free public hospital as follows:

"The council of each municipality, annually, may levy and collect a tax not to exceed one mill on each dollar of the taxable property

of the municipality and pay the amount to a private corporation or association which maintains and furnishes a free public hospital for the benefit of the inhabitants of the municipality, or not free except to such inhabitants of the municipality as in the opinion of a majority of the trustees of such hospital are unable to pay. Such payment shall be as and for compensation for the use and maintenance of such hospital. Without change or interference in the organization of such corporation or association, the council shall require the treasurer thereof, annually, to make a financial report setting forth all of the money and property which has come into its hands during the preceding year and the disposition thereof, together with any recommendations as to its future necessities."

I am of the opinion that said section should be strictly construed. Your inquiry states that said hospital is not a "free public hospital for the benefit of the inhabitants of the municipality." Said hospital does not, therefore, come within the provisions contained in Section 4021 of the General Code. In other words, the council can only aid an individual, corporation or association "which maintains and furnishes a free public hospital for the benefit of the inhabitants of the municipality," and the hospital about which you inquire is not such a hospital.

Therefore, in direct answer to your question, I am of the opinion that the council of your city cannot make the levy and collect the tax and pay the same to said hospital, as authorized by said Section 4021 of the General Code, above quoted.

I am,

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

572.

CHIEFS OF POLICE AND MAYORS—FEES IN STATE CRIMINAL CASES.

Under 4534 *of the General Code the mayor is entitled to the same fees for services in state criminal cases as are charged by justices of the peace in such cases.*

COLUMBUS, OHIO, August 3, 1912.

HON. GEORGE C. VON BESELER, *City Solicitor, Painesville, Ohio.*

DEAR SIR:—Your favor of July 16, 1912, is received in which you inquire:

"The question here has arisen in reference to fees of the mayor and the chief of police in state cases. May I respectfully request your opinion in each case?"

The fees of a chief of police for service in a mayor's court and the disposition thereof has been determined by this department in an opinion to the bureau of inspection and supervision of public offices under date of August 30, 1911, a copy of which is herewith enclosed.

Section 4534, General Code, as amended in 102 Ohio Laws 476, provides:

"In felonies and other criminal proceedings not herein provided

for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace. The chief of police shall execute and return all writs and process to him directed by the mayor, and shall by himself or deputy attend on the sittings of such court, to execute the orders and process thereof and to preserve order therein, and his jurisdiction and that of his deputies in the execution of such writs and process, and in criminal cases, and in cases of violation of ordinances of the corporation, shall be co-extensive with the county and in civil case shall be co-extensive with the jurisdiction of the mayor therein. *The fees of the mayor in all cases, excepting those arising out of violation of ordinances, shall be the same as those allowed justices of the peace for similar services* and the fees of the chief of police or his deputies in all cases, excepting those arising out of violations of ordinances shall be the same as those allowed sheriffs and constables in similar cases."

By virtue of this statute the fees of the mayor, except in cases of violations of ordinances, are to be the same as those allowed justices of the peace for similar services. This will include the fees in state criminal cases. Therefore, in state criminal cases the mayor shall receive the same fees as a justice of the peace for similar services.

Section 4213, General Code, provides:

"The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

In the case of Portsmouth vs. Milstead, 18 Cir. Dec., 384, it is held:

"The provision of 96 O. L. Section 126 (Rev. Stat. 1536-633; Lan. 3228) requiring 'that all fees pertaining to any office shall be paid into the city treasury' has reference to municipal fees solely, or such fees as may be fixed by municipal authority.

"Said section does not authorize cities to interfere with the fees of mayors or chiefs of police in state criminal cases; whether such authority can be delegated to municipalities, quaere."

The fees of the mayor in state criminal cases are not fixed by municipal authority and the provisions of Section 4213, General Code, do not apply to such fees. These fees are subject to state control.

For the same reason that the chief of police is entitled to the fees in state criminal cases, the mayor is also entitled to the fees charged to him for services in state criminal cases.

It is my conclusion that the mayor is entitled to the legal fees charged to him for services in state criminal cases in his court.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

573.

SMITH ONE PER CENT. LAW—TEN MILL AND AMOUNT LEVIED IN 1910 ARE LIMITATIONS ON AMOUNT LEVIED *IN* NOT *BY* A TAXING DISTRICT—BUDGET COMMISSION MAY NOT REDUCE BELOW LEGAL LIMITATIONS—MANDAMUS AND INJUNCTIONS AGAINST COMMISSION.

Under the Smith one per cent. law, both the ten mill limitation and the limitation with respect to the amount levied in the year 1910 *extend to levies made in a taxing district for all purposes and not to levies made by such taxing districts.*

The budget commission is not an independent levying authority. Its discretion must not be exercised beyond the province of preventing levies in excess of legal limitations, and when the amounts certified to it are within such limitations it is not empowered to make reductions therein.

The budget commission must be allowed a reasonable discretion, however, in making allowances for estimated increases in the duplicate between the time of making up the annual budget and the time when the duplicate is transmitted to the county treasurer by the county auditor through the agency of the county auditor and board of review.

REMEDIES:

(1.) *When the budget commission has clearly exceeded its authority, its work may not be deemed to have not been completed within the meaning of Section* 5649-3a, *of the General Code, and its certificate to the auditor may not be deemed to be final. It may, therefore, be compelled, in an action in mandamus, to complete its work.*

(2.) *When the certification has not been made to the auditor, the action may be in injunction to restrain any illegal action.*

COLUMBUS, OHIO, August 15, 1912.

HON. STUART R. BOLIN, *City Solicitor, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 1, requesting my opinion upon the following facts:

> "The city of Columbus this month submitted to the auditor of Franklin county a request for $1,642,314.85 to be raised from a levy of taxes for the year 1913, and the same was referred by the auditor to the budget commission, upon consideration of which the budget commission have deducted from the request for the service fund $35,665.85, thereby making the allowance to the city of Columbus for all purposes $1,606,-649.00, instead of $1,642,314.85 requested.
>
> "The tax duplicate for the city of Columbus for the year 1910 was $101,588,930.00, upon which the taxpayers of Columbus paid a rate of 3.12 on each $100.00 of valuation, which yielded a total revenue of $3,169,-574.61. The 6 per cent. additional allowance for the year 1913 on this amount, the allowance being $190,174.47, would make a total available revenue for the city of Columbus for the year 1913, $3,359,749.08.
>
> "The tax duplicate for the city of Columbus for the year 1912 as estimated by the county auditor is $240,000,000.00. Upon this amount the taxpayers of the city of Columbus will pay next year 1.34 per $100.00

of valuation, which will yield a revenue of $3,216,000.00. This amount is $143,749.08 less than the amount permitted to be raised by taxation for the year 1913, and is the total amount which will be paid in by taxation by the taxpayers of the city of Columbus for that year at the rate of 1.34. This figure of $143,749.08 might have been added to any of the taxing districts of the city of Columbus, and yet the same would not exceed the 6 per cent. limitation upon the total of taxes paid in this corporation, nor does the same exceed the amount permitted by the Smith law for any special subdivision or purpose.

"I would like your opinion as to whether or not the budget commission and the county auditor should return the $35,665.85 to the duplicate to the credit of the city of Columbus."

If I interpret your statement of facts correctly, it is to the effect that the budget commission has reduced the aggregate estimated levies within the taxing district of the city of Columbus below the amount represented by the total levy made in the year 1910, plus 6% thereof. While you do not so state, I assume that if the additional $143,749.08, of which you speak, were added to the total levy as fixed by the budget commission resulting in a total levy of $3,216,000, this result of the total would not require the levy of a *rate* in excess of that authorized by Section 5649-2, exclusive of interest and sinking fund levies and in excess of that prescribed by Section 5649-5b for all levies combined.

I also assume that the addition of the $35,665.85 to the levy made by the city of Columbus would not cause the aggregate levy for the city to require a rate in excess of the limitation of five mills prescribed by Section 5649-3a, of the Smith law, as interpreted in State ex rel. vs. Sanzenbacher, 84 O. S., ——, unreported—that is to say, exclusive of interest and sinking fund levies.

In order to consider the facts which you suggest with relation to the question which you ask, it is necessary for me to make these assumptions. The opinion which I shall give you is based upon them, and if they are erroneous then the conclusion which I shall state does not necessarily follow.

You speak of the "tax duplicate of the city of Columbus for the year 1910." By this I assume that you mean the duplicate made up in October, 1910. This is correct. Both Sections 5649-2 and 5649-3 provide a limitation measured by the "total amount of taxes that were levied * * * for all purposes *in* the year 1910;" so that the duplicate to which regard must be had for the purpose of ascertaining this limitation is not the duplicate made up in the year 1909 for the year 1910, but the duplicate made up in the year 1910 for the year 1911.

You also speak of the "6% additional allowance for the year 1913 on this amount." Here again you have correctly interpreted the law, although you have not used the words of the law.

Section 5649-3, General Code, provides that:

"The total amount of taxes which may be levied in the year 1911 * * * for all purposes shall not exceed in the aggregate the total amount of taxes levied in the year 1910, plus six per cent. thereof for the year 1912."

This really means—and I think it is perfectly apparent—"plus 6% thereof in the year 1912 for the year 1913." So that the amount which may be levied in the year 1912, other limitations of the law being left out of the question is 6% in excess of the amount that was levied in the year 1910.

You have also correctly interpreted the law in applying the limitation which I have been discussing not to the amount which may be levied *by* the taxing

authorities of any taxing district, but to the amount that may be levied or allowed to be levied within the limits of any taxing district for all purposes and by all taxing authorities. Section 5649-2, General Code provides that:

> "The aggregate amount of taxes that may be levied on the taxable property *in* any * * * taxing district for the year 1911 and any year thereafter, including * * * levies for state, county, township, municipal, school and all other purposes shall not in any one year exceed *in the aggregate* the total amount of the taxes that were levied *upon* the taxable property therein * * * for all purposes in the year 1910."

Similar language is incorporated in Section 5649-3, so that there cannot be the shadow of a doubt that this limitation, like that of ten mills, is not upon the amount which may be levied *by* a taxing district but *in* a taxing district.

The ultimate question which you ask turns on the powers and dtuies of the budget commission which are explicitly set forth in Section 5649-3c. I quote the first paragraph of that section in full:

> "The auditor shall lay before the budget commissioners the annual budget submitted to him by the boards and officers named in Section 5649-3a of this act, together with an estimate to be prepared by the auditor of the amount of money to be raised for state purposes in each taxing district in the county, and such other information as the budget commissioners may request, or the tax commission of Ohio may prescribe. The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised, *so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein.* In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district, *within the limits provided by law.*

It seems to me that the following points are true in connection with the meaning of this section:

1. The budget commission is not an independent levying authority. The sole purpose of its creation is to provide an agency for the enforcement of the limitations, provided by the remainder of the act. Some of these limitations, notably the one which we are discussing, are imposed from the standpoint of the taxpayer rather than from the standpoint of the taxing district; that is to say, they are applicable to the aggregate levies to be made within a given territory

and not to any single levy or to any levies made by a single authority as such. Hence the limitations of the law are not self-executing, but must be put into effect and applied by some duly constituted authority. This necessity is supplied in the shape of the budget commission.

2. The section which I have quoted, defining as it does the powers and duties of a tribunal exercising revisionary and plenary power over levies made by different and independent governmental agencies, must be strictly construed. This I think is elementary. It is not intended that the budget commission shall exercise any discretionary power, the exercise of which is not made absolutely necessary in order that the single purpose of the budget commission's existence may be accomplished.

3. The section itself in conferring the power to revise and adjust the annual estimates contained in the budgets always qualifies its grant of power by a statement of the purpose for which the power is granted. I quote this statement as it occurs in the section:

> "So that the total amount * * * shall not *exceed* in any taxing district the sum authorized to be levied therein; * * * 'as will bring the total for each * * * taxing district within the limits provided by law.'"

Having regard to these three points, which I think are self-evident, I am of the opinion that the budget commission is not authorized to reduce any estimate further than may be necessary to bring the aggregate of all estimates down to the limits provided in the law. If, for example, a municipal corporation has submitted an estimate which will require a levy in excess of the five mills prescribed by Section 5649-3a, it will be the duty of the budget commission, so far as that limitation is concerned, to reduce any or all of the items in that budget by such an amount in the aggregate as would bring the total within the limitation. This done, the full extent of the power of the budget commission in that particular would have been exerted. It would not then have authority, because it might deem some item of the budget extravagant or unnecessary, further to reduce any of the items therein so that ultimately the estimate as reduced by the budget commission would call for a levy of less than five mills. The same principle applies to the enforcement of the ten mill limitation and that of the limitation measured by the 1910 tax, plus 6% thereof for the year 1912. In reducing and revising the estimates in the various budgets submitted by them with a view to the enforcement of this limitation, the budget commission is without authority to carry its reductions to the point where an aggregate amount considerably less than that of the 1910 taxes, plus 6%, would result.

Each reduction made by the budget commission in the aggregate amount after the same has been reduced to the amount of the 1910 taxes, plus 6%, would be in excess of the jurisdiction of the commission and an abuse of its power.

I am, therefore, of the opinion that the budget commission for Franklin county has certainly exceeded its authority in reducing the aggregate of all budgets applicable within the territory of the city of Columbus $143,749.08 below the figure to which it was authorized by law to reduce that aggregate. In so holding, however, I wish to qualify my opinion by stating that strict mathematical accuracy is not required of the budget commission in the view I have taken of the law. An approximation of such aggregates is all that can be required, and I believe that the budget commission may lawfully take into account the possibility of increases being made in the duplicate between the time of making up the annual budget and the time when the duplicate is transmitted to the county treasurer by

the county auditor through the agency of the county auditor and the board of review.

As you, yourself state, the duplicate upon which the budget commission is working is at best an estimated duplicate, so that in all cases of this sort there would be the question of fact as to whether or not the budget commission has not properly exercised a sound discretion committed to it though it may have deviated slightly from the strict mathematical rule of the statute. The deviations in the specific instance described by you, however, does not appear to be slight, amounting to a little over half a million on the estimated duplicate. In order that the rate fixed by the budget commission (1.34) may produce in the city of Columbus in the year 1913 the amount of revenue levied upon the duplicate of 1910, plus 6%, it will be necessary, as I compute, for the county auditor and the board of review to add approximately $18,250,000.00 to the tax duplicate. This is possible, of course, but it hardly seems likely to me that it could be claimed on behalf of the budget commission that any such considerable increase over the auditor's estimate could have been anticipated in any degree of possibility.

It would seem, therefore, that while on the facts you submit it cannot be said that the budget commission has arbitrarily exceeded its powers, yet these facts are sufficient, in my judgment, to create a very strong presumption of such arbitrary action which would have to be refuted by very satisfactory proof to the effect that the budget commission had reasons, such as I have suggested, for refusing the aggregate below $3,359,749.08.

Coming now to the question which you submit, I cannot advise from the facts stated by you, that the budget commission and the county auditor must return the $35,665.85 stricken from the estimate of the city of Columbus to the credit of the city. In order to pass upon the right of the city to have its full estimate allowed, it would be necessary for me to know the facts respecting the estimate submitted by the county commissioners and that submitted by the board of education of the city of Columbus school district. If the estimates submitted by these two other sets of officers would not require a levy in the city of Columbus in excess of the difference between $143,749.08 and $36,665.85, then in my opinion the city, the school district and the county are each entitled to the full amount of their estimate so far as the territory of the city of Columbus is concerned, although both the county and the school district might have to be reduced on account of other levies made in territory outside of the corporate limits of Columbus.

I am clearly of the opinion, however, that the city has the right to question the proceedings of the budget commission. The theory of such a proceeding would be as follows: The budget commission appears to have acted in excess of its authority; therefore that which it has done is not a "completion of their work" within the meaning of the last paragraph of Section 5649-3c. Therefore, if the action of the budget commission has been certified to the county auditor, this certificate is not final and the budget commission could be compelled by a proceeding in mandamus to complete its work and to divide the $143,749.08 among the various taxing districts levying within the territory of the city of Columbus, having due regard to the proportions in which these districts are authorized to levy therein, and having also regard to the interests of the county which has to levy in every taxing district and those of the school district which overlaps into taxing districts other than that of the city of Columbus; and having regard also to the imperative needs of the city of Columbus. As already suggested, this would be on the theory that the work of the budget commission has not been completed according to law, and that the budget commission is threatening to leave its work in an incompleted state to the injury of the city for which the city has no adequate remedy at law.

If, however, the budget commissioners have not assumed to have completed their work and have not certified their final action to the county auditor, then if the members of the commission refuse to reconsider their tentative action, the proper proceeding would seem to be in injunction to restrain the budget commission from reducing the aggregate levies within the territory of the city of Columbus below those made within the same territory in the year 1910, plus 6%.

I have endeavored to cover the entire field of inquiries suggested by your letter. I regret that I am unable to return a categorical answer to the question which you expressly submit. I am very strongly of the opinion that the principles which I have laid down are correct, and trust that they may be applied by those concerned in an amicable settlement of the controversy.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

581.

MANAGEMENT OF PARKS BY DIRECTOR OF PUBLIC SERVICE—MAY PROHIBIT BASEBALL THEREIN, NOTWITHSTANDING ORDINANCE OF COUNCIL.

Since the powers of council are legislative only, by virtue of Section 4326, and since the management of the parks is an administrative function, which is vested in the director of public service by Section 4326, of the General Code, that official may prohibit the playing of baseball in the parks on Sunday afternoon in spite of an ordinance of council authorizing the playing of the game at such time.

COLUMBUS, OHIO, August 10, 1912.

HON. R. B. HYGATT, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 26, wherein you state:

> "At the last regular meeting of the city council, I was instructed by motion duly passed to draw an ordinance permitting the playing of baseball Sunday afternoons between the hours of two and six on the ball grounds in the park owned by the city of Conneaut.
>
> "The city owns only one public park, and this consists of about fourteen (14) acres of land, a large part of which is a sloping bank to the beach. The conditions are such that it was impossible to construct the ball grounds in such a way that the ball would not occasionally be batted over the bank onto the beach. This materially interferes with the enjoyment of the park for other purposes when a ball game is being played.
>
> "The director of public service (there being no park commissioners) has refused to allow baseball to be played in the park on Sundays on the ground that the said city owns only one park, and that the playing of such game materially interferes with the enjoyment of the park by all the people of the city.
>
> "A majority of the council take the position that the playing of baseball in the park on Sunday is desired by a majority of the people of the city, and have theretofore instructed the above ordinance to be drawn.

"Does the city council have power to legislate on this subject contrary to the orders of the director of public service?"

Section 4326, of the General Code, provides that:

"The director of public service shall manage * * * parks."

Section 4211 provides that:

"The powers of council shall be legislative only, and it shall perform no administrative duties whatever."

And further provides that:

"All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

The management of parks is an administrative and not a legislative function, and such management is, by Section 4326, vested exclusively in the director of public service. Council may make appropriations for the maintenance of parks, but the director of public service is given the power under Section 4326 to make contracts or purchase supplies or material, or provide labor for any work under the supervision of his department not involving more than $500.00. When an expenditure other than the compensation of employes in such department exceeds $500.00, the same shall first be authorized by council, and in such cases the council is required to authorize and direct the director of public service to enter into contracts therefor.

From the foregoing, it will be observed that the powers of council over the director of public service in the performance of his official duties, among which is the management of parks, are very limited.

The director of public service, as an incident of his statutory power to manage parks, has in my judgment, the exclusive right to determine the manner in which said parks shall be used by the public; and I am, therefore, of the opinion that council is without legal authority to pass such an ordinance as that described in your letter, as it would be an encroachment upon the power of the director of public service, unwarranted by statute.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

584.

OHIO STATE BUILDING CODE—PROVISION FOR DIMENSIONS OF THEATER BUILDING MAY NOT BE AVOIDED BY CONSENT OF BUILDING CODE COMMISSION.

Section 5 of the Ohio state building code, providing for the substitution of "another fixture, device or construction by consent of the commission upon submission of plans and specifications, etc.," is an amendment to the original act which was intended to take care of later improved devices, fixtures or constructions, and was not intended to apply to provisions for fixed dimensions.

Said Section 5 may not, therefore, be resorted to to enable Section 3, which specifies dimensions for theater buildings, to be departed from.

COLUMBUS, OHIO, August 15, 1912.

HON. W. A. O'GRADY, *City Solicitor, Wellsville, Ohio.*

DEAR SIR:—I have your letter of July 17th wherein you state:

> "I am requested to ask for the opinion of your department in reference to Section (5) governing administration under part one of the Ohio state building code, issued in small book form by department in charge of same, Section (5) contains the following phrase 'Where use of another fixture, device or construction, is desired at variance with what is described, in this statute" plans and specifications shall be submitted to proper authorities mentioned in Section (1).
>
> "Section (3) under part (2) of the said building code, reads as follows: Title exposure and courts, no theater shall be less than twenty-five feet wide measuring in the clear between the walls nor less than fifteen feet high. We desire to learn whether in your opinion Section (3) of the said code is mandatory and absolute, or whether the language of Section (5) permits the proper authorities to permit parties to construct picture theater less than the width enumerated in Section (3) of part (2) of the said code."

It is true that Section (5) of the state building code (12600-277, General Code) provides:

> "* * * Where the use of another fixture, device or *construction* is desired at variance with what is described in this statute, the plans, specifications and details shall be furnished to the proper state and municipal authorities mentioned in Section (1), (General Code 12600-281) for examination and approval and if required actual tests shall be made to the complete satisfaction of said state and municipal authorities that the fixture, device, or construction proposed answers to all intents and purposes the fixture, device or construction hereafter described in this statute, instead of actual tests satisfactory evidence of such tests may be presented for approval with full particulars of the results and containing the names of witnesses of said tests."

But this provision was an amendment to the act as originally drawn, presented therein to take care of a later and improved device, fixture and construction going into the physical construction of the buildings.

There was no intent, nor did the legislative mind contemplate that this pro-

vision should apply to provisions for fixed dimensions. In fact, in the construction of a building, Section (5) above quoted was intended to apply particularly to the "standard device" detailed in part (3) of the act (12600-72*a* et seq.).

Section (3), part (2) of the Ohio state building code (12600-4, General Code) provides:

> "No theater shall be less than twenty-five feet wide, measuring in the clear between the walls not less than fifteen feet high * * *."

The ruling of the department whose duty it is to enforce the provisions of the building code, has been that the language of Section (3), last above quoted, is mandatory and that the provisions of Section (5), supra, are in no way applicable to, or affect the provisions of Section (3), part (2).

I am constrained to hold with the ruling of the department and it is my opinion that the provisions for the dimensions of a theater as provided in Section 12600-4, General Code, are mandatory and that they cannot be modified by the provisions of Section 12600-277, General Code; nor would the provisions of said last mentioned section be applicable to the question involving the width and height of a theater, under Section (3), part (2) of the building code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

591.

LIBRARY—DEED DONATING LAND FOR, GOVERNS AS TO ITS TERMS PROVIDING FOR APPOINTMENT OF DIRECTORS.

When by the terms of a deed of property donated to the city of Mt. Vernon in 1884, *for library purposes, directors were required to be chosen in a specified manner, said terms should be allowed to control, and Section* 4004 *of the General Code, passed subsequent to said deed, providing for the appointment of directors of libraries established by a municipality, shall have no application.*

COLUMBUS, OHIO, August 23, 1912.

HON. JAMES L. LEONARD, *City Solicitor, Mt. Vernon, Ohio.*

DEAR SIR:—Under date of June 21st, you inquired of me as follows:

> "The city of Mt. Vernon has a deed made in 1884 for certain property to be used by said city for public library purposes; in said deed is the following limitation:
>
> "'The board of directors shall furnish to the mayor of said city a list of names of not less than six residents of said city, from which he shall select, subject to the approval of the council of said city, two persons to serve as directors for the term of three years from the first Monday in July next thereafter, and until successors are duly appointed and qualified.'
>
> "Should the mayor, in making the appointments, follow this limitation, or should he be governed by the statute now in force, Section 4004 of the General Code?"

Section 4004 of the General Code provides:

"The erection and equipment, and the custody, control and administration of free public libraries established by municipal corporations, shall be vested in six trustees, not more than three of whom belong to the same political party, and not more than three of whom shall be women. Such trustees shall be appointed by the mayor, to serve without compensation, for a term of four years and until their successors are appointed and qualified. In the first instance three of such trustees shall be appointed for a term of two years, and three for a term of four years. Vacancies shall be filled by like appointment for the unexpired term."

The deed from the trustees of the original donors to the city of Mt. Vernon was made prior to the enactment of Section 4404, General Code (97 O. L., 38). and provided a different method for the selection of trustees than that required by Section 4004. That section clearly refers to libraries *established* by municipal corporations. The Mt. Vernon library was established by certain private citizens and not by the municipality itself, and for this reason I hold that Section 4004 does not apply.

It is, therefore, my opinion that the mayor of Mt. Vernon should appoint trustees of said library in accordance with the term of the deed, rather than of the statute.

Very respectfully,

TIMOTHY S. HOGAN,

Attorney General.

592.

INITIATIVE AND REFERENDUM—ORDINANCE AUTHORIZING ISSUE OF BONDS AFTER ORDINANCE DETERMINING TO PROCEED NOT SUSPENDED SIXTY DAYS—SAME WITH RESPECT TO ORDINANCE FOR BORROWING MONEY WHICH IS TO BE ASSESSED AGAINST OWNERS FOR SEWER CONNECTIONS, AND NOT PAID FROM MUNICIPAL FUNDS—RENTAL BY CITY FOR GAS AND ELECTRIC METERS—BINDING INDEBTEDNESS FOR SALARIES OF OFFICERS.

1. *An ordinance authorizing the issuance of bonds for a street improvement, following an ordinance determining to proceed with said improvement does not involve an expenditure of money within the meaning of the initiative and referendum act, and is not required to lay over 60 days. Such ordinance goes into effect ten days after its first publication.*

2. *An ordinance providing for the borrowing of money by a city for the purpose of paying the cost of constructing sewer connections from houses upon failure of the owners to make such connections is not required to be suspended 60 days under the initiative and referendum act, for the reason that said cost is to be collected by assessment against the property holders and is not borne by the municipality itself, and, therefore, such an ordinance does not involve an expenditure of municipal funds as intended by the initiative and referendum.*

3. *If meters are supplied by a municipality which operates a municipal gas or electric power plant, said municipality may charge a reasonable rent for the same.*

4. *Under Sections 3916 and 3917 of the General Code, salaries due public officials are such valid existing and binding obligations as will enable its council to borrow money for payment of the same when it has not on hand sufficient sums for the purpose.*

Council may not act under the same statutes, however, for the purpose of replenishing exhausted funds.

COLUMBUS, OHIO, August 7, 1912.

HON. F. G. LONG, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR:—Under date of July 6, 1912, you submitted to me several questions requesting my opinion thereon. I shall take up said questions and answer the same seriatim.

First. The first question submitted by you is as follows:

> "Should an ordinance authorizing the issuance of bonds for a street improvement, following an ordinance determining to proceed with the street improvement be governed, as to the time of going into effect, by the initiative and referendum law which is applicable to certain other ordinances? Or may said bond ordinance, following the ordinance to proceed be in force after ten days from its first publication?"

In answer to such question I herewith submit for your consideration an opinion rendered to the Hon. M. R. Smith, city solicitor, Conneaut, Ohio, under date of October 25, 1911, which you will find on reading over to fully cover your inquiry.

In this case, however, I beg to state that I have been informed that the common pleas court of Portage county has rendered a decision wherein it is held that the bond ordinance following the ordinance determining to proceed is an ordinance involving the expenditure of money, and, consequently, that said ordinance would lie sixty days before becoming effective under paragraph two of Section 4227-2, General Code. As a bond ordinance is simply one providing in advance of the collection of assessments the moneys necessary to carry out the provisions of the ordinance determining to proceed, I am of the opinion, as stated in the opinion herewith enclosed, that it is not necessary that said ordinance shall lie sixty days before becoming effective, and, consequently, would be in force after ten days from its first publication.

Second. You next inquire as follows:

> "In this city the director of public service has, according to law, Section 3812-1, General Code, and in view of a contemplated street improvement, served notices on abutting property owners to construct sewer house connections. About half of them have done so and the time limit is up. May we borrow money for this purpose on the city's note, and would the ordinance providing for this note be governed by the provisions of the initiative and referendum as referred to in question one, since it is a special improvement and only concerns a few?"

Section 3812-1, General Code, provides in substance that whenever the director of public service in cities deems it necessary in view of a contemplated street paving or as a sanitary regulation that sewer or water connections or both be constructed he shall cause written notice thereof to be given to the owner of each lot or parcel of land to which such connections are to be made and shall appoint some competent person to serve said notice; that if any of the said lot owners be non-residents or cannot be found such notice may be given publication twice in one or more newspapers of general circulation in the municipality. It is further provided in said section "If said connections are not constructed within twenty days of such service of notice or day of first publication thereof, as the case may be, the same may be done by the city and the cost thereof, together with a penalty of five per cent. (5%) assessed against the lots and lands for which such connections are made and said assessments shall be certified and collected as other assessments for street improvements."

Section 3915, General Code, authorizes municipal corporations to borrow money and issue notes in anticipation of the collection of special assessments.

In view of the fact that said Section 3915, General Code, provides that a municipal corporation may borrow money and issue notes in anticipation of the collection of special assessments, and the fact that the cost of the sewer house connections may be assessed against the lots for which such connections are made, thus being treated as a special assessment, I am of the opinion that the city may borrow money for the purpose of paying for the work done by the city by note as provided in Section 3915, General Code. As the money with which to pay this note is to be collected by way of special assessments upon the property owners and no part thereof to be paid out of the public moneys of the city, I am of the opinion that the provisions of paragraph two of Section 4227-2, General Code, providing that no ordinance involving the expenditure of money shall become effective in less than sixty days does not apply as I construe said provision of said section to apply solely to ordinances involving the expenditure of public moneys of the corporation, and not to ordinances which do not and cannot involve the expenditure of public money but moneys which are not to be a burden on the general taxpayers.

Specifically answering your question, therefore, I am of the opinion that the municipal corporation can borrow money on the city's note for the payment of the work done by the city upon failure of the property owner to make the necessary sewer connection, and further, that the ordinance providing for this note is not one covered by the provisions of Section 4227-2 of the General Code.

Third. Your third inquiry is as follows:

> "May cities legally collect meter rent for gas or electric meters? If they cannot, may they establish a minimum charge?"

The power of municipal corporations to establish municipal gas and electric plants is found in Section 3618, General Code, being one of the enumerated powers therein, as follows:

> "To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat, to procure everything necessary therefor, and to acquire by purchase, lease or otherwise, the necessary lands for such purposes, within and without the municipality."

and Section 3990 of the General Code:

> "The council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas or electric works already erected therein, but in villages where gas works or electrical works have already been erected by any person, company of persons, or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not expired, the council shall with the consent of the owner or owners, purchase such gas works or electric works already erected therein."

Section 3982, General Code, provides that council of a municipality in which an electric light company or gas company has been established may regulate the price from time to time which such companies may charge for such electric light or gas for lighting and fuel purposes, and further provides such companies shall in no event charge more for such electric light or gas than the price specified by ordinance. It further provides that council may regulate and fix the price which such companies may charge for the rent of their meters, and that in the ordinance regulating the price which such companies may charge for electric light or gas that such price shall include the use of the meter to be furnished by the company and that in such case the meters so furnished shall be furnished and kept in repair by such companies and no separate charge made either directly or indirectly for the use or repair of them.

Section 9329, General Code, provides that no gas company shall charge rent for meter. It is to be noted that the legislature by Section 3982, General Code, has granted to council the power to regulate and fix the price not only of gas and electricity to be furnished by public service corporations but also to regulate the charge that can be made by said companies for the rent of their meters, further granting them the power to provide that the price to be charged for the electricity or gas so furnished shall include the use of the meters and further that it is a positive provision of law under Section 9329, General Code, that such companies shall make no charge for the use of gas meters. While the decisions in relation to the rent of meters to be charged by public service corporations

furnishing gas and electricity are not uniform, yet from a reading of said cases, the rule may be finally deduced that if meters be supplied by such corporations or by a municipality it has the right, in the absence of statutory provision to the contrary, to charge reasonable rent for the meter. In the case put by you there is no question of construction to be placed on an ordinance granting the right to a private corporation, nor is there any statutory inhibition placed against a municipality owning and operating a gas plant or electric light plant that no rent shall be charged for the meters used in measuring out such gas or electricity. The statutes are silent upon the subject, and, consequently as I view it, reasonable rules and regulations can be made which may provide that the meter for the measuring of either gas or electricity shall be furnished by the municipal corporation and a reasonable rental charged for the use of such meter. As you have stated your question to be whether cities may legally collect a meter rent for gas or electricity, and if they cannot, may they establish a minimum charge, and as I have given it as my opinion that such cities may legally collect a meter rent for gas and electric meters, I do not undertake to answer the question as to whether a minimum charge may be established.

Fourth. You next inquire as follows:

> "In about two months more our salaries will cease being paid for the want of funds with which to pay them, and a number of other funds will have been exhausted by that time. What can be done in order to obtain money with which to meet the same?"

You do not state in your inquiry the reason why there is a lack of funds with which to pay your salaries, or the reason why a number of the other funds will be exhausted; that is to say whether because the amount raised by taxation and placed to the credit of such fund has been exhausted, or whether council in making its semi-annual appropriation has failed to appropriate out of the specific fund an amount necessary to meet such salaries and other expenses. The salaries to be paid by municipal corporations are fixed by council, and usually are payable monthly. As soon as the services are performed the amount due becomes an existing, valid and binding obligation of the corporation as are all other fixed charges of such corporation.

Section 3916, General Code, provides as follows:

> "For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually."

Section 3917, General Code, provides as follows:

> "No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. Such resolution shall also state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and de-

nomination, the date of maturity, the rate of interest they shall bear, and the place of payment of principal and interest."

From the language of your inquiry I am unable to decide whether the condition that there will be no money with which to pay your salaries within about two months is caused by reason of limitation of taxation or not, but Section 3916, General Code, provides that when it appears to the council for the best interest of the corporation the council may borrow money so as to change but not increase the indebtedness. Section 3917, General Code, provides that no indebtedness shall be funded, until it be determined by council to be an existing, valid and binding obligation. I am aware of the fact that it has been held in the case of Herrman et al. vs. The City of Cincinnati 9 O. C. C. 357 that Section 2701 Revised Statutes as it stood at the time said case was decided was not intended to authorize the issue of bonds of a municipality to meet deficiencies in its various departments, but that it was intended by such section to authorize the issue of bonds after a prior funded indebtedness of the municipal corporation existed. The statute, Section 2701 R. S. as it at that time existed did not contain the provisions that are now embraced in Section 3917, General Code. It is to be noted that Section 3917, General Code, provides that no indebtedness of a municipal corporation shall be *funded* unless it shall first be determined to be an existing, valid and binding obligation. This addition to Section 2701, Revised Statutes, was first incorporated in said section in 1896 and as it grants to a municipal corporation the right to fund an existing, valid and binding obligation, I am of the opinion that it does now authorize the issue of bonds to take care of such obligations whether the same had been a previously funded indebtedness of the corporation or not. As the salaries of the municipal officers are valid and binding obligations upon the corporation, I am of the opinion that under Section 3916 and Section 3917 of the General Code council may borrow money in order to pay the same when due. In reference to the other funds which have been exhausted moneys in which were not to take care of the existing, valid and binding obligations of the corporation, I am of the opinion that money cannot be borrowed in order to replenish the same, for the reason that the same is not covered by Sections 3916 and 3917, General Code. The Smith law, Section 5649-3*d* requires that all expenditures within the six months following the appropriation shall be made from and within such appropriations and balances thereof, except as to existing, valid and binding obligations of the corporation, I am of the opinion that appropriations that have been exhausted prior to the end of the six months cannot be replenished by the issuance of either deficiency bonds or by the issuance of bonds under the sections above referred to, but that as to the fixed charges of a corporation, such as salaries, which are upon services being rendered an existing, valid and binding obligation of the corporation, money may be borrowed to pay the same as provided in Sections 3916 and 3917 of the General Code supra.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

595.

CEMETERIES—TOWNSHIP OR MUNICIPAL BOARDS OR TRUSTEES MAY NOT LEASE OR DEED LOTS TO MAUSOLEUM COMPANY.

The only power given by the statutes to trustees or boards controlling public cemeteries, either municipal or township, is to vest the title to lots directly in individuals who purchase the same.

They have no power, therefore, to lease or deed cemetery lands, either permanently or temporarily, to a mausoleum company under any agreement whatever.

COLUMBUS, OHIO, August 13, 1912.

HONORABLE R. CLINT COLE, *City Solicitor, Findlay, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your two letters, dated June 24th and August 2, 1912, respectively. I had written an opinion covering your first letter, but upon receipt of the latter one, I will reply to both. Your first letter contains the following:

STATEMENT.

"The Standard Mausoleum Company, of Findlay, Ohio, a company organized for the purpose of constructing mausoleums, desires to make arrangements with the proper city authority for the erection of a mausoleum within the cemetery owned by the city. These arrangements embrace the purchase of sufficient land within said cemetery whereon to construct said mausoleum.

"Said company proposes to sell crypts in said building to inhabitants of the city and adjoining townships, and to turn over to the proper authorities an endowment or maintenance fund sufficient to perpetually care for said mausoleum in return for which the proper municipal authorities shall assume the maintenance thereof."

ASSUMPTIONS.

"1. That the method of construction is agreed upon.
"2. That all sanitary features are acceptable.
"3. That the endowment fund is sufficient."

QUERIES.

"1. Is such an arrangement within the legal authority of any department of the city government?

"2. If so, what board, officer, or official body has authority to grant such permission?

"As it is the desire of our cemetery directors to negotiate on some basis with said mausoleum company, I would appreciate very much any suggestion whereby the same might be legally accomplished.

In your second letter you request an opinion on the following proposition:

"Have the proper municipal or township authorities, owning public cemeteries, legal authority to permit said mausoleum companies to erect a mausoleum where the proper municipal authorities or township trustees

do not part with either the title or control of the land upon which such building is located, and have the proper municipal authorities or township trustees the legal right to assume the perpetual maintenance and care of such building if the mausoleum company places in its hands a sufficient sum to fully endow and maintain the same?"

My reply to both of your letters is as follows: Neither your city, nor any department thereof, has power, under the law as it now stands, to enter into any such arrangement or contract as the one suggested and outlined in your first letter. The same conclusion applies to the matters in your second letter relative to municipal or township cemeteries. Despite the attempted *endowment,* and the other conditions set forth in your letter, it yet remains plainly to be seen that the county trustees do *invest the mausoleum company with at least temporary control and temporary title* to the lots upon which the proposed structure is about to be erected.

You say in your letter that the mausoleum company *"will contract to reconvey the same as soon as conveyance of individual crypts can be made to individual purchasers thereof."* This shows a *parting with title for an indefinite time,* and a control of the lots vested in the company. The only power given cemetery trustees, or boards controlling public cemeteries, either municipal or township, is to vest the title to lots *directly to individuals who purchase the same.*

It will require additional legislature to confer such power on any of the above cemetery authorities along the lines proposed in both of your letters. I have heretofore rendered an opinion to the Honorable F. R. Hogue, prosecuting attorney of Ashtabula county, dated April 30, 1912, released May 14, 1912, and a further opinion to the bureau of inspection and supervision of public offices, under date of June 24, 1912, on this general subject, copies of which are herewith enclosed. These opinions cover the questions submitted by you and are reaffirmed.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

598.

OILING STREETS—ASSESSMENT OF WHOLE COST INCLUDING STREET INTERSECTIONS UPON ABUTTING PROPERTY WHEN IMPROVEMENT PETITIONED FOR—CITY NOT ABUTTING OWNER OF INTERSECTING STREETS.

Sections 3753 et seq., of the General Code are special provisions with reference to assessments for oiling of streets, and any provisions therein, which are in conflict with Section 3820 of the General Code, which is a general provision providing that the corporation when assessments are made for street improvement shall pay at least 1/50 of the cost, as well as the cost of street intersections should be allowed to govern.

Applying this rule under Section 3753, when such oiling is petitioned for, the whole cost thereof, including street intersections, may be assessed against the abutting property.

The city cannot be regarded, for these purposes, as the abutting property holder of intersecting streets.

COLUMBUS, OHIO, August 8, 1912.

HON. MEEKER TERWILLINGER, *City Solicitor, Circleville, Ohio.*

DEAR SIR:—Your favor of July 15, 1912, is received, in which you inquire:

"Interpretation of words 'the whole cost thereof' in Section 3753 and 'the entire cost of any improvement' in Section 3836 of the General Code of Ohio.

"Some doubt has arisen in my mind as to the legal construction to be placed upon the words 'the whole cost thereof,' used in Section 3753 with reference to assessing for oiling streets under said section; under said section, can the 'whole cost' for oiling any street be assessed upon the property abutting said street by the abutting foot—proportionately—or does it recognize the limitation of Section 3820, General Code, and mean the whole cost of said oiling, excepting the cost of oiling street and alley intersections? We have a number of petitions which are signed by the owners of a majority of the abutting feet of property on a street or connecting streets, having a roadway of over 5,000 square yards, which petitions pray that the roadways within the district described in said petitions may be treated with oil, and for the assessment of the 'whole cost thereof' on the property abutting such street, etc. Is the entire cost of said street oiling to be ascertained (including the cost of oiling the intersections of said street which is petitioned to be oiled) and assessed upon the abutters, in proportion to their abutting feet? Even though the petitions read as above stated, would Section 3760, General Code, have any application where it reads 'the corporation's portion of the cost thereof, may be paid, etc., 'be considered, and the 'corporation's portion' be held to mean the costs of oiling the street and alley intersections?"

At the beginning of your letter you ask for an interpretation of the provisions of Section 3836, General Code. But in as much as the facts stated in your inquiry apply only to the provisions of Section 3753, General Code, only the provisions of the latter section will be construed in this opinion.

The act pertaining to the oiling of streets by a municipality was a special act which is first found in 98 Ohio Laws 50. The original act consisted of eight sections, which are now known as Sections 3751 to 3761, both inclusive, of the General Code.

Section 3753, General Code, provides:

"When a written petition signed by the owners of a majority of the abutting property on a street or alley, or part thereof, or of connecting or intersecting streets or alleys, or parts thereof, having a roadway area of not less than five thousand square yards, is presented to the director of public service in a city, or in the council in a village, praying that the roadways within the territory described be treated with oil, and for the assessment *of the whole cost thereof* on the property abutting such streets or alleys, the director or council shall forthwith declare, by resolution, such territory to be, and thereupon it shall be, a district within which the roadways will be treated with oil, for a period named in the petition, not to exceed the life of the contract, and the cost thereof assessed upon the property abutting the streets or alleys therein, by the abutting foot."

Section 3754, General Code, provides:

"When, in the opinion of the director of public service in a city, or of council in a village, the treatment with oil, for the purpose of laying the dust on and preserving the surface of, the roadways

of any public park or parks, or of any street or alley, or part thereof, or of connecting or intersecting streets or alleys, or parts thereof, having a roadway area of not less than five thousand square yards, will be of general benefit within the corporation, such director or council may declare by resolution such park or parks, or the territory including such street or alley, or part thereof, or intersecting or connecting streets or alleys, or parts thereof, to be, it thereupon shall be a district, within which the roadways shall be treated with oil, for a period named in the resolution, not to exceed the life of the contract. The whole cost, or such portion thereof as may by him or the council be deemed just, shall be paid by the corporation, and the remainder of the cost to be assessed by the abutting foot on the property abutting the streets or alleys in such district. *There shall be no assessment levied on any property in excess of fifty per cent. of the whole cost, except where petitioned for, as hereinbefore provided.*"

Section 3758, General Code, provides:

"Where the whole or a portion of the cost is to be assessed, such director or council shall, within thirty days after the first treatment with oil has been accomplished, and at his or its option may, at any time previous thereto, levy an assessment by the abutting foot on the property abutting the streets and alleys in the district, to pay the whole or such portion of the cost as was in the resolution determined. The assessment may be collected in one or more installments, in the manner provided for assessments for street improvements, with a penalty of five per cent. and interest for failure to pay at the time fixed in the assessing ordinance. No assessment shall be collected in more than one installment, unless the work petitioned for covers a period of time greater than one year, when the installments may equal in number the years for which the district was created."

Section 3759, General Code, provides:

"Bonds or certificates of indebtedness may be issued and sold in anticipation of the collection of such assessments, or installments of assessments, and there may be included in one bond issue or one certificate of indebtedness the amount of uncollected assessments, or installments of assessments, levied on the property, in any number of districts and payable within any one calendar year. *In the cost shall be included the cost of work done on intersections* and roadways within the district, advertising, inspection and superintendence. The right of the municipality to levy such assessments shall not be affected by the amount of assessments theretofore levied upon such property."

Section 3760, General Code, provides:

"Such treatment with oil shall be regarded as a cleaning and repairing of streets and alleys, and the corporation's portion of the cost thereof may be paid from any fund available for the cleaning or repairing of streets or alleys. When the roads of a public park or parks are ordered to be so treated, the cost thereof may be paid from any fund available for the care or maintenance of such parks."

The foregoing sections are provisions of the special act pertaining to the oil ing of streets, alleys and parks.

You ask if the provisions of Section 3820, General Code, apply to the assessments to be levied by virtue of Section 3753, General Code.

Said Section 3820, General Code, provides:

> "The corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections."

The provisions of this section are not found in the special act pertaining to the treatment with oil of streets, alleys and parks.

Section 3820, General Code, provides that the city shall pay the cost of intersections and also not less than one-fiftieth of the cost of such improvement. In Section 3754, General Code, when council or the director of public service acts upon its or his own volition, it is provided that no assessment shall be levied against the abutting property in excess of fifty per cent of the whole cost. If Section 3820, General Code, applied to the oiling of streets, we would have two rules of apportionment of the cost thereof.

The provisions of Section 3758 and 3759, General Code, were found in Section six of the original act. Section 3758, General Code authorizes thhe levying of "an assessment by the abutting foot—to pay the whole or such portion of the cost as was in the resolution determined." And in Section 3759, General Code, it is provided, "in the cost shall be included the cost of work done on intersections and roadways within the district."

It is evident, therefore, that the whole cost is to include the cost of intersections.

These provisions of Sections 3758 and 3759, General Code, and the provision of Section 3754, General Code, as to the proportion of the cost that may be levied against the abutting property when no petition is filed, show conclusively that the provisions of Section 3820, General Code, do not apply to the act pertaining to the oiling of streets.

When petitioned for as provided in Section 3753, General Code, the "whole cost" of such treatment is to be levied against the abutting property. It might be urged that the city should pay for the oiling of the intersections because the city is the owner of the intersecting streets, and such streets should be considered as abutting property. This contention has not been upheld by the supreme court of Ohio.

In the case of Creighton vs. Scott, 14 Ohio St., 438, it is held:

> "When in making such improvement, squares formed by the intersection of other streets, are crossed and improved, the city council may, if the object of improving the squares is the improvement of such street, assess the whole expense upon the same property on which the other expenses of such improvement are assessed."

On page 443, White, J., says:

> "As to the second proposition, the squares at the intersections form, in common, parts of both streets, and are to be improved as the other portions. It is the duty of the city council to determine to which of the streets, thus occupying ground in common, the expense of improvement, in any given case, is to be appropriated; or whether to both. If

the necessity and object are for the improvement of only one of the streets, and in making the improvement across the square the other is incidentally affected, we think the whole expense may be assessed upon the same property on which the other expenses of the improvement are assessed."

In the case of State vs. Mitchell, 31 Ohio St. 592, it is held:

"Under the provisions of the act, the intersecting streets and alleys are not subject to be assessed to pay for the improvement."

In this latter case, the commissioners who were to make the assessment excluded the cost of improving the intersections upon the theory that the intersecting streets should be considered as abutting property. The court overruled this contention.

You have called attention to the provisions of Section 3760, supra, General Code, which provides the manner in which the city's portion of the cost may be paid. This provision applies when the city is required to pay part of the cost. It does not mean that the city shall pay part of the cost when the oiling is petitioned for.

It is seen that the intersecting streets cannot be considered as abutting property and is not subject to assessment upon that theory. The treament of the intersections with oil is for the benefit, usually, of the street as a whole and following the rule stated by White, J., in Creighton vs. Scott, supra, the whole cost of oiling may be apportioned to the street that is oiled.

It is my conclusion that the provisions of Section 3753, General Code, as to levying the "whole cost" of treating a street with oil when petitioned for, will authorize the levying of an assessment against the abutting property for the cost of oiling the intersections of streets and alleys, that is, the term "whole cost" as therein used will include the cost of oiling the intersections.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

599.

FIREMAN AN EMPLOYEE—NOT ENTITLED TO PAY WHILE INCAPACITATED—RELIEF BY COUNCIL FROM PENSION FUNDS AND FROM FIRE FUND.

An officer entitled to a salary receives the same whether performing his duties or not. A mere employe is paid for the services which he performs, and his compensation may be suspended during incapacity for duty. A city fireman is an employe, within this rule, and he is not entitled to pay while incapacitated for work.

Under Section 4379, which supplies the reasons for which a fireman may be suspended from the service, sickness is not included.

Under Section 4600, of the General Code, a pension fund may be provided by the city for the benefit of disabled firemen, and under Section 4383, of the General Code, council may provide for assistance to regular members of the department out of the police and fire funds, by general ordinance. After a fireman has resigned the council cannot act under this section to afford relief for a former period of disability.

COLUMBUS, OHIO, August 6, 1912.

HON. MEEKER TERWILLIGER, *City Solicitor, Circleville, Ohio.*

DEAR SIR:—Under date of June 25, 1912, you make inquiry of this department as follows:

> "One of our regular firemen, in the city fire department, took sick last January, and has been unable to perform any duties since. Our director of public safety, called upon him, and as this fireman has been in the fire department here for about twenty years, the director did not like to have him suspended, but he was continued in service, with the understanding that the fireman was to continue in the service nominally, but that a substitute was to be employed, who should perform the regular duties of said sick fireman until such time as he would recover his health, said substitute to draw the salary of the regular fireman. Said substitute worked during January, February and half of the month of March; but during the latter half of March and the whole of April this sick fireman's place was not filled by substitute or otherwise. Said sick fireman was not suspended, it being understood that he was to pay for his substitute, and his substitute was paid the salary of the sick fireman for part of January, all of February and one-half of March. Now it seems that this sick fireman is no better, and has tendered his resignation, under the date of May 1, 1912, which has been accepted and his place filled as provided by law.
>
> "We have no firemen's pension fund and no fund for the relief of disabled firemen.
>
> "Now this sick fireman presents his claim to the city for full pay from the time his substitute began work up to the date of his resignation May 1st, on the ground that he was not suspended and that he was still in the service, although disabled by sickness from January 15th last to May 1st, the date he resigned.
>
> "The sick fireman did not report for and performed no duty.
>
> "1. Can a fireman be suspended on account of ill-health or sickness?

"2. While this sick fireman was continued in service, and no substitute furnished or paid, yet said sick fireman performed no duty, can he draw salary?

"3. Can said sick fireman draw full pay from the time he took sick in January last until May 1st, the date he resigned, notwithstanding the fact that he performed no service, and that a substitute was employed from January 15 to March 15, at the regular salary of said fireman?"

It is a well established principle of law that an officer is entitled to the salary, which is an incident to the office, whether he performs the duties of the office or not. This principle does not apply to an employe who is paid for the services which he performs.

In State vs. Jennings, 57 Ohio St., 415, it is held that a fireman is an employe. The second and third syllabi read:

"To constitute a public office, against the incumbent of which quo warranto will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointement to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else.

"Where, in pursuance of an ordinance, a fireman is employed by the council to perform the usual duties of a fireman; who has no control of the fire department, or its property other than in the use of it; performs his duties subject to the chief of the department and the city council; and is paid by the month for his services, he is not a public officer; and cannot be ousted from his employment by a proceeding in quo warranto, on the ground that he should have been appointed by the mayor with the advice and consent of the council."

The salary which is fixed for a fireman is based upon services rendered or to be rendered. If he performs no services he is not entitled to the salary of the position.

The firemen in question who was unable to perform the duties of that position because of sickness is not entitled to the salary during the period of his sickness.

You ask if a fireman may be suspended for ill-health or sickness.

Section 4379, General Code, provides:

"The chief of the police and the chief of the fire department shall have exclusive right to suspend any of the deputies, officers or employes in his respective department and under his management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause."

The cause for suspension under this section should be something for which the employe is at fault. Sickness or ill-health is not such a fault. An employe who is sick should be continued in the service until he is again able to perform his duties. This will apply especially to those under civil service.

If the illness is of such a nature that he will be permanently incapacitated for further duty, he should be retired or removed.

You further ask as what relief council can grant to this fireman.

The statutes, Sections 4600, et seq., General Code, provide a means by virtue of a firemen's pension fund by which firemen may receive aid from the city when they are disabled. Your city has not it appears, acted under these provisions.

Section 4383, General Code, provides:

> "Council may provide by general ordinance for the relief out of the police or fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty. Nothing herein shall impair, restrict or repeal any provision of law authorizing the levy of taxes in municipalities to provide for firemen's police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds."

This section authorizes council to relieve the members of the police or fire department when such members are disabled in the discharge of their duties. However, in order that council may relieve such firemen or policemen, they must be members of the department. In your case the fireman has resigned. He is no longer a member of either department.

In order to grant such relief to the members of the fire or police departments, council is required to act by "general ordinance." It appears that council has not acted under this provision of the statutes. It cannot now pass a general ordinance so as to grant relief to the person in question. The fireman has resigned from the department, and has thereby severed his connection with the service of the city.

I am of the opinion that the city council cannot now grant relief to the fireman in question.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

600.

DIRECTOR OF PUBLIC SERVICE—APPOINTEES IN DEPARTMENT—SALARY FIXED BY COUNCIL FOR ENGINEER IN EXCESS OF $500.00—ADVERTISEMENT AND BIDS NOT REQUIRED.

Under Section 4327, of the General Code, the director of public service is required to create the position and name the appointee therefor in his department, while under Section 4214, of the General Code, council must fix the compensation by ordinance or resolution.

In paying compensation of an engineer so fixed at an amount in excess of $500.00, advertisement and bids are not required under Section 4328, of the General Code.

COLUMBUS, OHIO, August 16, 1912.

HON. D. F. MILLS, *City Solicitor, Sidney, Ohio*

DEAR SIR:—Your favor of July 19, 1912 is received, in which you inquire:

> "The council of the city of Sidney, Ohio, are contemplating improving certain streets and alleys in the city by paving, etc., and they desire the services of an experienced engineer to supervise the entire work, mak-

ing the original plans, surveys, etc. I would like to have your opinion as to whether or not it is absolutely necessary to advertise for bids as provided in Section 4328, General Code. The amount to be paid the engineer employed will exceed $500.00."

Section 4328, General Code, to which you refer, provides:

"The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than $500.00. When an expenditure within the department, *other than the compensation of persons employed therein,* exceeds $500.00, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The requirement in the foregoing section for competitive bidding covers expenditures "other than the compensation of persons employed therein."

The engineer the city desires to employ would be employed in the department of public service. The amount to be paid him would be his compensation for his services. In order, however, for a person to be employed in the department of public service of a city, a position must be created by the director of public service, and the compensation for the same must be fixed by council.

Section 4327, General Code, provides:

"The director of public service may establish such subdepartment as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

Section 4214, General Code, provides:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

The director of public service should create the position of engineer in question in his department, and the council should then fix the salary for such position.

In employing or appointing a person to fill a position as engineer so created, ability, experience and other qualifications are taken into consideration. Competitive bidding in such a case would be worthless.

It is not necessary to ask for bids in order to employ an experienced engineer to fill a position in the department of public service of a city.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

607.

SEWER ASSESSMENTS—GENERAL SEWERAGE PLAN—NOTICE OF RESOLUTION OF NECESSITY NEED NOT BE SERVED ON ABUTTING OWNERS IN CONSTRUCTION OF MAIN OR DISTRICT SEWERS.

By virtue of Section 3834 of the General Code, notices of the passage of the resolution of necessity to construct sewers as a part of a general plan must be served upon abutting owners in all cases except abutting owners upon main or district sewers, which, under Section 3872 of the General Code, are defined to be such as have their outlet in a river or other proper place.

COLUMBUS, OHIO, August 1, 1912.

HON. ELMER E. BODEN, *City Solicitor, Barberton, Ohio.*

DEAR SIR:—Under date of July 6th, you state that at the request of your city council you wish our opinion as to the service of notice upon property owners upon a storm sewer improvement when such improvement is made under a plan for a system of sewerage.

In your letter you state in part as follows:

> "*Assessments in general* are provided for by Sections 3812 to 3837 of the General Code of Ohio.
>
> "Section 3814 provides for the *resolution of necessity* and the manner in which same shall be published."
>
> "Section 3818 provides for the *service of notice* of the passage of such resolution of necessity, and Section 3823 provides for the *filing of claims for damages.*
>
> "But where the improvement is made under a plan for a system of sewerage for the whole or any part of the municipality, it seems that special provisions are made therefor, and that a different rule applies.
>
> "The subject of *'sewers'* is especially provided for in Sections 3871 to 3891 of the General Code. Section 3871 provides in part: 'In addition to the power herein conferred to construct sewers and levy assessments therefor, council of a municipal corporation may provide a system of sewerage for such municipal corporation or any part thereof * * *.'
>
> "Section 3872 provides for *sewer districts;* Section 3873, as to *how plan to be prepared;* Section 3874, for *notice of completion of plan* to be advertised; Section 3877 for the *designation of portions for immediate construction;* Section 3875 for *objections to plan;* Section 3876 for *amendment of plan.*
>
> "Section 3878 provides for the Resolution of Necessity, and concludes by saying: '* * * and shall cause the resolution to be published once a week for not less than two nor more than four consecutive weeks in one newspaper of general circulation in the corporation.'
>
> "Section 3879 provides for the Ordinance Determining to Proceed, and reads in part as follows: 'After the publication of such notice, the council shall determine whether it shall proceed with the proposed improvement or not, and if it decides to proceed therewith, an ordinance for the purpose shall be passed. * * *'"

You further call our attention to Section 3834 of the General Code. You then advise us as follows:

"All the necessary steps under these special provisions have been complied with, and as laid down in Ellis' Ohio Municipal Code (5th Edition) pp. 331 and 332, up to and including the Resolution of Necessity. A general plan was adopted, reported to council, notice thereof published for ten days, plan approved by council by ordinance, resolution designating portion required for immedate use, and resolution of necessity. Am including herewith Resolution No. 36 and Resolution No. 42 which please return to me."

Resolution No. 36, enclosed in your letter, was passed in pursuance of the provisions of Section 3877 of the General Code which provides as follows:

"After such plan has been adopted and approved, the council shall designate such portions of the work as may be required for immediate use, and the designation shall be by districts, and shall show what districts or part thereof is to be improved, and may order the engineer to make an estimate of the cost and expense of constructing the work, or such portions thereof as may have been designated in accordance with the last section, according to such plan, and report them to council."

Upon an examination of said resolution it is to be noted that Section 2 thereof provides that the territory designated by said resolution shall be known and designated "Barberton storm sewer district number three," and that Section 3 thereof provides:

"That said district shall consist of two main sewers, to be known as main sewer No. 1 and main sewer No. 2, *with the necessary branch or connecting sewers.*"

Section 4 thereof provides:

"That said main sewers, *with the necessary branch* or connecting sewers, shall be constructed upon and drain the separate portions of of said district as follows, to wit:

"Main Sewer No. 1 (describing it); Main Sewer No. 2 (describing it)."

Resolution No. 42 was passed in pursuance of the provisions of Section 3878, General Code, and is designated "a resolution declaring it necessary to construct main and *local* storm sewers in storm sewer district number three in the city of Barberton, Ohio."

Section No. 1, provides that:

"That it is necessary to construct all of the main and *local* storm sewers provided for in a general plan for a system of storm sewerage for the following described territory to the city of Barberton, Ohio, to wit: (describing said territory)."

Section 2 provides:

"That said main and *local* storm sewers shall be constructed in accordance with the plans and specifications on file in the office of the auditor of said city, and shall be as follows, to wit: Main Sewer No. 1, (describing it); Main sewer No. 2, (describing it); Mulberry Street

describing it); Center Street (describing it); and thereafter describing various other streets and avenues."

Sections 3871 et seq., General Code, provide for the establishment of a system according to a previously adopted plan and it is stated in Section 3871 that such power is "in addition to the power herein conferred to construct sewers and levy assessments therefor."

Section 3872, General Code, provides as follows:

> "The plan so devised shall be formed with a view of the division of the corporation into as many sewer districts as may be deemed necessary for securing efficient sewerage. Each of the districts shall be designated by a name and number, and shall consist of one or more main sewers, with the necessary branch or connecting sewers, the main sewers having their outlet in a river, or other proper place. The districts shall be so arranged as to be independent of each other, so far as practicable."

It is to be noted that "main sewers" are defined as such sewers as have their outlet in a river or other proper place.

Section 3878, General Code, provides as follows:

> "When it is deemed necessary by a municipal corporation to construct all or a part of the sewers provided for in such plan, the council shall declare by resolution the necessity thereof. Such resolution shall contain a declaration of the necessity of such improvement, a statement of the district or districts or parts thereof proposed to be constructed, the character of the materials to be used, a reference to the plans and specifications, where they are on file, and the mode of payment therefor, and shall cause the resolution to be published one a week for not less than two nor more than four consecutive weeks in one newspaper of general circulation in the corporation."

Section 3879, General Code, provides in part as follows:

> "After the publication of such notice, the council shall determine whether it shall proceed with the proposed improvement or not, and if it decided to proceed therewith, an ordinance for the purpose shall be passed."

Section 3818, General Code, provides as follows:

> "A notice of the passage of such resolution shall be served by the clerk of council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions. If any such owners or persons are not residents of the county, or if it appears by the return in any case of the notice, that such owner cannot be found, the notice shall be published at least twice in a newspaper of general circulation within the corporation. Whether by service or publication, such notice shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer or person serving the notice, or a certified copy of the return shall be prima facie evidence of the service of the notice as herein required."

Section 3834 of the General Code, the latter part thereof, provides:

> "In the construction of sewers, excepting main or district sewers, notice of the passage of the resolution therefor shall be made in the manner hereinbefore provided."

If I read Resolutions Nos. 36 and 42 respectively correctly the said Barberton storm sewer district No. 3 is to consist of two main sewers and branch sewers connecting therewith in the various streets, to wit: Mulberry, Center and others designated therein.

The question you desire answered is whether or not notice of the passage of the resolution of necessity must be served upon the owner of each piece of property to be assessed as provided in Section 3834, General Code, also foregoing set forth.

Section 3834, General Code, was first introduced into the law, 97 O. L. 123, and so much as is pertinent to this inquiry read as follows:

> "In the case of the construction of sewers hereafter excepting main or district sewers, notice of the passage of the resolution therefor, as provided in Section 84 of the act of which this is amendatory (now Section 3878 General Code) shall be made in the manner provided in Section 52 of said act as amended herein. (Now Section 3818, General Code.)"

While it is true that it is provided in Section 3824 of the General Code that at the expiration of the time limited for so filing claims for damages, council shall determine whether it will proceed with the improvement or not, and whether the claims for damages so filed shall be judicially inquired into, as hereinafter provided, before commencing, or after the completion of the proposed improvement, and under Section 3879, General Code, it is provided that after the publication of such notice (as required in Section 3878, General Code) the council shall determine whether it shall proceed with the proposed improvement or not, yet in view of the provisions of Section 3834, General Code, that in the construction of sewers, excepting main or district sewers, notice of the passage of the resolution therefor shall be made in the manner hereinbefore provided, I am of the opinion that it is necessary to serve such notice on the owners of the property to be assessed on all connecting sewers, but that it is not necessary to serve such owners with such notice as to the main sewers which have been designated in Resolution No. 42 as main sewer No. 1 and main sewer No. 2. This is more clearly seen by reference to the statute as originally passed in that said statute specifically provided that the notice of the passage of the resolution passed in accordance with the provisions of Section 3878, General Code shall be made in the manner provided in Section 3818. In other words, the only exception that is made in reference to serving notice of the passage of the resolution provided for in Section 3878 in the construction of sewers is in relation to main or district sewers, which, as before stated, under the provisions of Section 3872, General Code, are defined as such sewers as have their outlet in a river or other proper place.

I am, therefore, of the opinion that it is necessary to serve notice upon the property owners in a storm sewer improvement when such improvement is made under a plan for a system of sewerage in regard to such sewers as are not main or district sewers.

I herewith return you the copies of the two resolutions which you enclosed in your inquiry.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

616.

REFUNDING INDEBTEDNESS—POWERS OF COUNCIL AND SINKING FUND TRUSTEES.

By provision of Section 3916 *and* 3917, *General Code, when the sinking fund trustees of a city have not sufficient funds to meet the installments of the bonded indebtedness during the current year, council may refund the bonded indebtedness and sell bonds for the purpose of meeting the bonds to become due.*

Under Section 3925, *General Code, a new relief is accorded by which semi-annual interest bearing bonds may be exchanged for outstanding bonds, with the consent of the holders, to such reduction of interest.*

COLUMBUS, OHIO, September 12, 1912.

HON. B. F. LONG, *City Solicitor, Shelby, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 22nd requesting my opinion upon the following question:

> "The sinking fund trustees of a city have not sufficient funds under their control to meet the installments of the bonded indebtedness of the city during the current year.
>
> "May the council of the city refund the bonded indebtedness and issue and sell bonds for the purposes of meeting the bonds to become due?"

Section 3916 of the General Code provides as follows:

> "For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually."

Section 3917, General Code, must be read in connection with the foregoing section and is as follows:

> "No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. Such resolution shall also state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of maturity, the rate of interest they shall bear, and the place of payment of principal and interest."

I am clearly of the opinion that council has authority under these sections to issue bonds for the purpose of refunding the indebtedness which the city cannot meet. In the case you submit the existing indebtedness is bonded, and as to the bonds coming due, is matured, and cannot be met because of the limits of taxation of the corporation—for you advise me that the lack of funds in the hands of the

sinking fund trustees is due to the enforcement of the limitations of the Smith law. However, Section 3916 authorizes the refunding of bonded indebtedness "when it appears to the council for the best interests of the corporation." So that the authority of council to refund the bonded indebtedness by the issuance and sale of new bonds is very broad and is not even limited to cases in which the bonded indebtedness is due and cannot be paid at maturity because of the limits of taxation.

In this connection I beg leave to call attention to Section 3925, General Code, which provides as follows:

> "When it appears to the council of a municipal corporation, to be for the best interests thereof to renew or refund any bonded indebtedness of such corporation which has not matured, and thereby reduce the rate of interest thereon, such council may issue for that purpose new bonds, with semi-annual interest coupons attached, and exchange them with the holder or holders of such outstanding bonds, if they consent to make such exchange and to such reduction of interest. When new bonds are issued they shall not in any case exceed in amount the outstanding bonded indebtedness to be renewed or refunded."

I do not know that this section will be of use to you but it seems to afford still another method of relief in a case like that which you describe.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

618.

HUMANE AGENT—APPROVAL OF APPOINTMENT BY MAYOR MAY NOT BE REVOKED—MANDATORY DUTY OF COUNCIL TO PAY SALARY.

Under Section 10071, *General Code, appointment of humane agent by humane societies must be approved by the mayor of the city or village for which they are made. After such approval has been made, inasmuch as the power of removal of such agent is not vested in the will of the mayor, he may not revoke his approval.*

The council has no power to direct the mayor to revoke such approval and may be compelled by action in mandamus to fix the salary of said agent under 10072, *General Code, at not less than twenty dollars per month, and to make an appropriation for the same.*

COLUMBUS, OHIO, August 20, 1912.

HON. HARRY F. WITTENBRINK, *City Solicitor, St. Marys, Ohio.*

DEAR SIR:—Your letter of July 31st received. You state:

> "On the first day of June, 1912, one Mr. S. was duly appointed humane officer of the Auglaize county humane society, and such appointment was approved by the mayor of the city of St. Marys, Ohio, according to law, on the 4th day of June, 1912. After such approval and confirmation as required by law, the city council was asked to fix a salary. This was refused and thereupon the council passed a motion instructing the mayor to withdraw his said approval.

"1. Was the action of council in thus instructing the mayor legal and according to law?

"2. Has the mayor power or authority to revoke such approval or confirmation after once given?

"3. If so, by what process? And for what causes?

"The fact of the matter is that at a previous meeting of the said council, that body instructed the mayor not to consider any appointments in respect to the humane society. But the mayor, either through negligence on his part or because of unavoidable mistake, approved the appointment of Mr. S. as humane officer. When Mr. S. made inquiries in regard to salary he discovered council had made no appropriation and had not determined upon any salary. Furthermore, council refused to determine such salary or make appropriations for same but instead that body ordered the mayor to withdraw his approval."

Section 10067 of the General Code provides that humane societies may be organized in any county by the association of not less than seven persons. Section 10070 authorizes said societies to "appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals," etc. Section 10071 provides:

"All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, appointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments."

It appears that the appointment of said humane officer was regularly made by the humane society, and that the mayor approved such appointment. Council was thereupon asked to fix a salary for such officer and refused to do so, but instead passed a motion instructing the mayor to withdraw his approval of said officer.

This action of council was, in my opinion, clearly illegal. The approval of the agent appointed by a duly organized humane society is an executive function and rests exclusively in the discretion of the mayor and the appointee is not subject to confirmation by council. Council has legislative powers only and its attempt to dictate to the mayor was beyond the scope of its powers and an unwarranted interference with the functions of the executive.

I am also of the opinion that the mayor is without authority to revoke such approval after it is once given, and in support of this view I call your attention to the following authorities: In 29 Cyc., at page 1372, it is said:

"After the act of appointment is complete the power of the appointing authority is exhausted. The appointing authority may not revoke its former appointment and make another. The only exception to this statement is to be found in the case of appointments by legislative bodies whose actions in the case of appointments are generally treated like their legislative business and governed by their ordinary rules."

The supreme court of the United States, in the case of Marbury vs. Madison, 1 Cranch, 137, at page 161 of the opinion, says:

"Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revokable; and the commission may be arrested, if still in the office, but when the officer is not removable at the will of the executive the appointment is not revokable and cannot be annulled. It has conferred legal rights which cannot be assumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him."

It is held in the case of Haight vs. Love, 39 N. J., 14, that:

"When a board has completely exercised its power of appointing a person to an office, and that person is not removable at the will of the board, a recision of the appointment will not affect the right to the office."

The first syllabus in the case of Speed vs. Common Council of Detroit, 97 Mich., 198, is:

"Act No. 419, Local Acts of 1893, vests in the mayor of the city of Detroit the exclusive power to appoint a city counselor, and when such appointment has been duly made and filed it is absolute, and beyond the power of the mayor to recall."

Another question is suggested by your letter that I deem worthy of consideration, namely: Whether council may legally refuse to fix a salary for the humane officer? In this connection I quote Section 10072 of the General Code, as follows:

"Upon the approval of the appointment of such an agent by the mayor of the city or village, the council thereof shall pay monthly to such agent or agents from the general revenue fund of the city or village, such salary as council deems just and reasonable. Upon the approval of the appointment of such an agent by the probate judge of the county, the county commissioners shall pay monthly to such agent or agents, from the general revenue fund of the county, such salary as they deem just and reasonable. The commissioners and the council of such city or village may agree upon the amount each is to pay such agent or agents monthly. The amount of salary to be paid monthly by the council of the village to such agent shall not be less than five dollars, by the council of the city not less than twenty dollars, and by the commissioners of the county not less than twenty-five dollars. But not more than one agent in each county shall receive remuneration from the county commissioners under this section."

Section 4214 of the Code requires council, except as otherwise provided in the title of which that section is a part, to determine the number of officers, clerks and employes in each department of the city government, and fix their respective salaries or compensation. It may be contended that because council did not first determine the position of humane officer it cannot now be compelled to fix the salary of such officer and make an appropriation therefor. It is true the humane officer has certain police powers and draws his compensation from the city treasury,

but he is not a city officer. He derives his authority from his appointment by the humane society and approval of the mayor or probate judge, as the case may be, pursuant to Sections 10070 and 10071, independent of any action that council may take. Section 4214 refers only to the establishment of city officers or positions not otherwise provided for by statute and inasmuch as the appointment of a humane officer is provided for by another statute, I am of the opinion that Section 4214 does not govern in that case.

Section 10072, supra, places upon council the duty of paying to such agent, monthly, out of the city treasury, such salary as the council deems just and reasonable, but not less than twenty dollars.

I am of the opinion that council, under said section, may be compelled by mandamus to fix the salary of such humane officer and make an appropriation to pay the same.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

619.

PLATTING OF LANDS WITHIN THREE MILES OF CITY LIMITS—APPROVAL OF PLATTING COMMISSIONERS NOT ESSENTIAL TO RECORDING OF LAND IN ANOTHER COUNTY OR OTHER CORPORATION.

Under Section 4346, *General Code, before lands, which are to be platted within three miles of the corporate limits of this city, may be recorded in the county in which said city is located, the approval of the director of service, as platting commissioner, must be endorsed upon the plat thereof; provided said city is the nearest to said lands.*

Said section, in view of its plain language, would have no application as regard the right to record, where said lands are located in a county other than the one in which said city is located.

Under 3580, *General Code, a plat of land within a municipal corporation, must be approved by the council before it may be recorded. In view of this section, the requirements of approval by the platting commissioner of a city cannot be applicable to land within three miles of said city which is located within another municipal corporation.*

COLUMBUS, OHIO, August 30, 1912.

HON. DAVID G. JENKINS, *City Solicitor, Youngstown, Ohio.*

DEAR SIR:—Your favor of August 9, 1912, is received, in which you state and inquire as follows:

> "The platting commissioner of the city of Youngstown, authorized by council under Section 4346, General Code, has adopted rules and has drawn a comprehensive plan for the platting of all territory within three (3) miles of the corporate limits of the city. The city limits on the north, for a distance of about four (4) miles, are practically identical with the line between Trumbull and Mahoning counties, the city itself being wholly in the latter county.

"First. Has the platting commissioner jurisdiction over lands in Trumbull county within three miles of the corporate limits of Youngstown for the purpose of requiring plats to be first submitted to him and to receive his approval as in accordance with his rules and plan before same shall be entitled to record in Trumbull county?

"Second. Has the platting commissioner jurisdiction over plats in incorporated villages in Mahoning county located within three miles of the city limits?"

Section 4346, General Code, to which you refer, provides:

"The director of public service shall also be the platting commissioner of the city, who shall provide regulations governing the platting of all lands to require all streets and alleys to be in proper width and to be coterminous with adjoining streets and alleys. Whenever council shall deem it expedient to plat any portion of the territory within the corporate limits in which the necessary or convenient streets, or alleys have not already been accepted by the corporation so as to become public streets, or *when any person plats any lands within three miles of the corporate limits of a city, the platting commissioner shall, if they are in accordance with the rules as prescribed by him, endorse his written approval thereon and no plat of such land shall be entitled to record in the recorder's office in the county in which such city is located without such written approval so endorsed thereon;* provided, that the approval of the platting commission of a city shall not be required, unless such city is the nearest to the lands sought to be alotted."

The provisions of this section in reference to platting land within three miles of the corporate limits of a city were first inserted in the statutes by act in 101 Ohio Laws, 205, which was approved May 13, 1910. Prior to the passage of this amendment to Section 4346, General Code, municipal corporations had no jurisdiction of the platting of lands beyond their corporate limits:

This section now provides that "when any person plats any lands within three miles of the corporate limits of a city the platting commissioner shall, if they are in accordance with the rules, as prescribed by him, endorse his written approval thereon." This provision of the section, standing alone, would authorize a land owner, who plats land within three miles of the corporate limits of a city to submit such plat to the platting commissioner of the city for his approval. If such plat is made in accordance with the rules prescribed by him, the platting commissioner would be authorized to endorse his written approval upon such plat. Under this provision county lines would not be a bar to the right of the land owner or to the authority of the platting commissioner.

The provision following that last above quoted prescribes the manner in which the land owner may be required to submit his plat to the platting commissioner for approval. This provision reads, "and no plat of such land shall be entitled to record in the recorder's office in the county in which such city is located without such written approval so endorsed thereon."

A plat of land is of no substantial benefit unless the same can be recorded. In accordance with the above provision a plat of land within three miles of a city cannot be recorded in the county "in which such city is located" without the written approval of such plat by the platting commissioner of such city.

A plat of land within three miles of the boundaries of a city, but which is in a county other than that in which the city is located, is not required to be recorded in the county in which such city is located. A plat of land is to be recorded in the county in which the land is situated.

The words used in this last cited provision are not ambiguous, although they may not express the full intent of the legislature. The intent of the legislature must be determined from the language of the statute. If such language is clear, statutory rules of construction do not apply. It is only when the language used is uncertain or ambiguous that resort is had to extrinsic aids in the construction of a statute.

This provision provides that such plat shall not be recorded in the county in which such city is located, without the approval of the platting commissioner. In order to make this provision apply to land located in another county it should read that such plat should not be recorded "in the county in which such *land* is located," without the written approval of the plat by the platting commissioner.

In order to give the platting commissioner jurisdiction over land in a county other than the one in which such city is located, it would be necessary to read the word "city" in the last above quoted clause as meaning "land." It is within the province of the legislature to change the words of a statute. We can only construe the law as enacted. It is not within the province of an executive or judicial officer to change the plain meaning of the words of a statute.

It is my conclusion that under the provisions of Section 4346, General Code, a city cannot require an owner of land in a county other than in which such city is located to submit a plat of his land to the director of public service, who is the platting commissioner of such city, for approval, even though the land so platted is within three miles of the corporate limits of such city.

Therefore the platting commission of Youngstown would not have jurisdiction over the platting of land in Trumbull county.

Your second inquiry is as to the authority of the platting commissioner over the platting of lands in an incorporated village, when the land so platted is within three miles of the limits of the city.

The plain import of the language used in Section 4346, General Code, would give such platting commissioner jurisdiction over lands of villages if such land is within three miles of the boundaries of the city.

However, there are other statutes to be taken into consideration.

Section 4354, General Code, provides:

> "When municipal corporations adjoin each other, the councils thereof may agree, in any manner they determine, upon the appointment of a joint commission for the purposes of this chapter. Such commission, when appointed, shall have all the power over the territory of the municipal corporations described in the resolutions of the councils, that is hereby given to a commissioner appointed by a single council."

This section applies to all municipal corporations, cities and villages. It does not appear, however, that the municipal corporations in your case, adjoin each other.

Section 4356, General Code, provides:

> "The council shall provide by resolution or ordinance for the care, supervision, and management of all public parks, baths, libraries, market houses, crematories, sewage disposal plants, houses of refuge and correction, workhouses, infirmaries, hospitals, pest houses, or any of such institutions owned, maintained or established by the village. When the council determines to plat any of the streets as authorized by law, it shall provide for the platting thereof."

Section 3586, General Code, provides:

"When there are no record plats adopted by a platting commission or board of public works, no such map or plat of any addition within the limits of a municipal corporation shall be recorded until the engineer thereof certifies that the streets, as laid down on the plats of such addition, correspond with those laid down on the recorded plats of the platting commission or board of public works. When there are streets laid down in addition to those adopted by a platting commissin or board of public works, or in any municipal corporation where no platting commission is or has been in existence, no such plat shall be recorded until it has been approved by the council of the municipal corporation."

By virtue of this latter section a plat of land within a municipal corporation must be approved by the council of such municipal corporation before such plat can be recorded. The council of a village, therefore, has the power to approve plats of land in said village.

If such land in a village is located within three miles of the boundaries of a city, there would be, by a literal construction of the statutes, two powers to approve such plat, to wit: the village council, and the platting commissioner of the city. There is no provision in either statute to show that such a condition was contemplated, nor is there anything in the statute to show that the platting commissioner of a city is to have jurisdiction of the platting of land in a village, exclusive of the right of the village council.

The platting of territory in a village is under the jurisdiction of the council of the village. That territory has been taken by the village and so long as it remains a part of such village, it is subject to the jurisdiction thereof.

A director of public service of a city could not take jurisdiction over the territory of an incorporated village unless such jurisdiction is specifically granted him by statute. There is no specific authority granted him by statute to approve plats of land situated within a village.

The proper construction to be placed upon the provisions of Section 4346, General Code, is that a plat of land within three miles of the corporate limits of a city must be approved by the director of public service, as the platting commissioner of such city, unless such land is situated in an incorporated village or city, or unless such land is located in a county other than that in which such city is located. There is a further provision that such city in order to have jurisdiction of the platting of such land must be the nearest to the lands sought to be platted.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

625.

PAVING BETWEEN RAILS OF STREET RAILWAY COMPANY—NOT AN ASSESSMENT AGAINST LOTS AND LANDS—POWER TO ASSESS BASED ON CONTRACT—CERTIFICATION TO COUNTY AUDITOR VOID—COLLECTION FROM COMPANY.

The provisions of Section 3812, *General Code, providing that council shall have power to levy and collect special assessments, and of* 3818, *General Code, granting to council the power to designate the mode of payment of such assessments, apply solely to assessments against "lots and lands" and since the paving between the rails of a street railway company cannot be said to specially benefit "lots or lands" of said company, said provisions can have no application to an assessment against such company for paving between its tracks.*

The power, therefore, to assess a railway company for such paving under 3776, *General Code, and the assessment therefor, must be based upon the contract with the company as set out in its franchise.*

Section 3892 *providing for the certification of assessments to the county auditor applies only to assessments against "lots and lands" and has no application.*

The collection must be made directly from the company by the council, therefore, in accordance with the terms of the franchise.

COLUMBUS, OHIO, September 10, 1912.

HON. JAMES L. LEONARD, *City Solicitor, Mount Vernon, Ohio.*

DEAR SIR:—Your favor of August 22, 1912, is received in which you inquire:

> "The franchise of a street railway company, says that it must pave between the rails of its tracks when the city paves the street. How should the assessment for the cost of the same be collected from the street railway? Should their total assessment be collected at the time of the completion of the improvement or should it be certified to the county auditor in installments the same as against other abutting property owners?
>
> "The thing I am trying to find out is whether or not such an assessment can be collected if it has been certified in installments."

The provisions for the levying of special assessments for the improvement of streets and other improvements are found in Section 3812, et seq., General Code.

Section 3812, General Code, determines the property upon which the assessment may be levied as follows:

> "Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of an expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, watercourses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving

any stream or watercourse, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkheads, culverts, approaches, flood gates, or water ways or drains incidental thereto, which the council may declare conducive to the public health, convenience or welfare, by any of the following methods:

"First. By a percentage of the tax value of the property assessed.

"Second. In proportion to the benefits which may result from the improvement, or

"Third. By the foot front of the property bounding and abutting upon the improvement."

The assessment is to be made upon the "abutting, adjacent and contiguous or other specially benefited lots or lands" in the corporation.

Does this provision include the franchise and trackage of a street railway company and will it authorize a special assessment upon such franchise and trackage for the improvement of a street in which such tracks are located?

I take it that you are inquiring of the part of a street improvement to be paid by a street railway company, because it has tracks in a street improved or to be improved, and not to the part it is required to pay because it owns real estate abutting on such improvement. This opinion will deal solely with the obligation of the street railway company because of its trackage and franchise in the street.

The general rule is stated in Dillon on Municipal Corporations, fifth edition, at Section 1452, as follows:

"It is almost uniformly held that the rails, ties, and other appliances of street railways and other railroads, which are constructed in and along the streets of a municipality, constitute property of such a nature that it may be, and usually is, benefited by the paving of a street, or by otherwise improving it; and that the legislature may impose, or authorize a municipality to impose, a special assessment upon such railways for the cost of the improvement. But in keeping with the principle which requires the power of taxation to be expressly delegated, a special assessment against the tracks and other appliances of a street railway must be authorized by language appropriate to include property of that nature; and authority conferred by statute to levy a special assessment for the improvement of the street upon the lots and property abutting on the street, has been held not sufficient to support an assessment against a street railway."

It appears that it is generally held that the tracks of a street railway and its other appliances are benefited by the improvement of a street. The statute provides that the assessment may be made upon the "lots or lands" generally benefited or abutting, adjacent or contiguous thereto. In other words the property assessed must be lots or lands.

In Dean vs. Mayor and Alderman of the city of Paterson, 67 N. J. Law, 199, it is held:

"A street railway exercising its franchise within a city street, although having a property in its ties, rails and other necessary equipment, is not liable to be assessed for benefits of a street improvement made by the city, under the act of June 13, 1898 (Pamph. L. p. 466) which directs the assessment to be made in proportion to the benefits acquired by lands and real estate bordering on such street."

In the case of Seattle vs. Seattle Electric Company, 48 Wash. 599, the syllabus reads:

> "Under Bal. Code, Section 796, authorizing the assessment of lots, blocks or parcels of land that may be benefited by a municipal improvement, a street railway company's right of way and trackage upon a street, cannot be assessed where it did not own the fee in the street, but only held a franchise for its use for a limited time."

In State vs. District Court of Ramsey County, 31 Minn. 354, it is held:

> "A portion of the track of the St. Paul City Railway Company in a public street is not real estate within the meaning of sub. 6, title 1, Section 3 of the city charter, (Sp. Laws 1874, c. 1,) and therefore not assessable for the expense of paving."

The statute in the above case provided that the assessments were to be levied upon the real estate to be benefited thereby or fronting thereon. In the various statutes providing for the enforcement of the assessment the property to be sold and levied against is referred to as lots and lands. After quoting from these several statutes, Berry, J., says on page 357 of the report:

> "From these quotations and references, it is apparent that the real estate upon which assessments are authorized to be made, and against which assessment proceedings, culminating in judgments and sales, are authorized to be carried on, consists of "lots and parcels of land," using that expression in its ordinary sense. That a mere easement, such as is the right of the petitioner in the streets in which its track is laid, or the rails, spikes, and timbers which compose its track, are not lots or parcels of land, admits of no argument. Neither is its franchise to lay, maintain and operate its road over the streets nor such franchise and its track taken together, a lot or parcel of land. Hence, it appears to follow that a portion of its track in a public street cannot be assessable as real estate to defray the expenses of paving."

The franchise and trackage of a street railway company in a street in which it has only an easement, cannot be held to be a lot or lots, or land. The street railway company does not own the fee to the street or any part thereof. It only has a right to use the street for the purpose of maintaining and operating a street railway system.

Therefore, the franchise and trackage of a street railway company cannot be specially assessed for the paving of a street under the provisions of Section 3812, General Code. While it no doubt is benefited by the improvement, its franchise and track are not lots or lands.

Section 3815, General Code, authorizes council to provide for the payment of the special assessment in annual installments as follows:

> "Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or not bonds shall

be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to ten installments at such time as council prescribes."

The assessment herein referred to is that which is authorized to be levied by Section 3812, General Code. There is no other specific provision of statute authorizing council to make assessments payable in annual installments. As the franchise and trackage of a street railway company are not subject to special assessment under the provisions of Section 3812, General Code, so also Section 3815, General Code, will not apply to the part to be paid by the street railway company under the provisions of its franchise.

The franchise under which the street railway is operating requires it to pave that part of the street between the rails of its track when the city paves the street. The liability of the street railway is to be determined by the terms of its franchise, which is in the nature of a contract with the city.

The authority of council to make such requirement as to paving is found in Section 3776, General Code, which reads:

"The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders, or wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits, paving between the rails with stone, boulders, wooden or asphaltic pavement shall not be required."

At Section 1124 of Page and Jones on Assessments, it is said:

"Grants of franchises may contain provisions with reference to the collection of assessments, and such provisions, if otherwise valid, control. If a street railway company accepts a franchise granted by statutory authority, and such franchise ordinance contains the provision that assessment against a street railway shall be collected in the same manner as other street assessments, assessments against the railway may be collected in the manner prescribed by law at the time of the improvement for collecting street assessments."

Also at Section 605 of said work the rule is stated to be:

"If the liability of the street railway rests on its charter or on other statutory provisions such liability must be enforced in accordance with such statute. A contract liability must be enforced as such. The liability of a street railway company to a city under a contract by which the street railway company agrees to pave a certain part of the street cannot be enforced in a proceeding to apportion an assessment on the theory of benefits."

The terms of the franchise determine the liability of the street railway company. The collection of the share of the railway company should be made in accordance with the terms of the franchise.

It appears that the company is required to pave its share of the street at the same time that the city paves the street. Under such a provision the company could itself pave its share of the street. In such case the city would have nothing to do with the collection of the cost thereof. The company would, no doubt, in such case, be required to pay the cost upon the completion of the work.

A franchise usually provides how the improvement shall be made when the company refuses or neglects to pave its part.

Such a provision was construed in the case of City of Columbus vs. Street Railroad Company, 45 Ohio St. 98, wherein it is held:

> "The city of Columbus, by ordinance, granted the privilege to a company to construct and operate a street railroad on one of its streets for a specified period. The ordinance provided that the company should make, construct, and keep in order and repair, all that part of the street included between the rails of its tracks and switches, in the same manner, and with like material, as the street is constructed and repaired, so long as it shall use the same for its railroad; and any failure to comply with the provisions of the ordinance, or with any general ordinance of the city, regulating the use of its streets, or the police regulations thereof, should render such railroad company liable to the city, in an action of damages for such failure; and the council after giving the company twenty days notice, should have the right to order any work to be done on the railroad, necessary to keep it in repair, and charge the cost and expense thereof upon the railroad company. Held:
>
> "1. That the ordinance did not divest the city of its control of the street, or abridge its right to improve the same; and it might, during the period named, cause to be made new improvements thereof, including the part occupied by the street railway, and determine the kind of improvements to be so made.
>
> "2. By constructing and operating its railway the company accepted the burdens, with the privileges of the ordinance, and thereby incurred the continuing obligation, to make, construct and keep in order and repair, as long as it enjoyed those privileges, the portion of the street between the rails of its track, including such new improvement thereof as the city might determine and direct.
>
> "3. When, after notice, the company fails to do the work so required of it, and the city then causes it to be done, its reasonable cost may be recovered by action against the company; and it is not essential to the liability of the company therefor, that the notice to make such improvement precede the letting of the contract by the city for the same. It is sufficient if such notice be given before the work is done, and while the company may still perform the same.
>
> "4. Where the company, after receiving such notice, without attempt to perform any part of the work required of it, permitted the city, without objection or complaint, to commence and complete it, adjusted the track of its railway to conform thereto, as it progressed, and with knowledge that the city expected it to pay for the same, and of all the circumstances, received all the benefits thereof as fully as if it had been performed by the company, the city may recover the reasonable cost of the work so done, although the notice does not strictly conform to the requirements of the ordinance."

In this case the city was granted the right to recover the reasonable cost of the work. The right of this recovery is based upon the franchise and not upon the right to levy a special assessment. The terms of the franchise should determine the manner of collection. If the franchise does not otherwise provide the cost of the street railway's share should be collected as an entirety at the completion of the work.

You ask further if an assessment against a street railway company can be collected if the same has been certified in installments. It does not appear how the share of the street railway was ascertained. If it was made under the provisions of Section 3812, General Code, it is illegal. I assume that the amount to be paid by the street railway company was fixed in accordance with the terms of its franchise.

Section 3892, General Code, provides:

> "When any special assessment, is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessments to the county auditor, stating the amounts and time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

The special assessments herein referred to are those made by virtue of Section 3812, General Code. This section does not apply to the amount to be paid by a street railway company under its franchise. The statutes do not authorize the share of the street railway company to be certified to the county auditor.

The city under the franchise would be authorized to collect directly from the street railway company. If the share of the street railway company has been certified to the county auditor it should be held a nullity and collection be made in accordance with the terms of the franchise. That determines the contractual rights of the city and of the street railway company.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

631.

POLICE INSPECTOR—OFFICE MAY BE ABOLISHED BY COUNCIL—INCUMBENT HAS NO RELIEF—CIVIL SERVICE.

By virtue of Section 4374, General Code, the police department of a city may be reorganized by council and by virtue of this power, a police inspector who has been promoted from policeman to the office established by council may lose his position through the abolition by council of his office.

The civil service laws have made no provision for such a contingency and a person losing his position in this manner has therefore no relief.

COLUMBUS, OHIO, August 26, 1912.

HON. HOWARD MCGREGOR, *City Solicitor, Springfield, Ohio.*

DEAR SIR:—Your favor of July 31, 1912, is received in which you inquire:

"The council of the city of Springfield has, by ordinance, created the position of inspector of police under authority of law, and the present incumbent of the office of inspector of police is occupying same under the civil service.

"My office has been requested by a committee of council for an opinion on whether or not the office of inspector of police can be abolished.

"I will appreciate it very much if your department will furnish me an opinion as to whether or not the office can be abolished and if so, whether or not the present incumbent ceases longer to be a member of the police department or whether or not he is simply reduced in rank."

The authority of council to organize the police department of a city is found in Section 4374, General Code, which provides:

"The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen and other police court officers, station house keepers, drivers, and substitutes, as are provided by ordinance or resolution of council."

A police department may be reorganized by council by reducing or increasing the number of members thereof, or by creating or abolishing certain positions therein.

This is sustained by the case of State vs. Searcy, 11 Cir. Ct. N. S., 521, wherein the second syllabus reads:

"Section 227 of the Municipal Code of 1902 (Revised Statutes, 1536-1005), authorizing municipal councils to fix the number of employes in the department of public safety, gives councils authority to reduce the number of its patrolmen."

The rule is stated in 28 Cyc. at page 512:

"The office of a member of the police force may be abolished by the municipality, or the membership of the police department reduced for economic reasons, and in such case an officer may be dismissed from the service without a hearing and opportunity to show cause against the order of dismissal, a resolution abolishing the office and causing the chief of police to notify the incumbent that he was discharged being effectual as a dismissal. A dismissal by reasons of reduction of the force or abolition of the office does not violate a rule than no member shall be removed except for cause, or a rule requiring presentation of charges and a hearing, nor do the veteran acts apply where an office is abolished in good faith. It has been held, however, that the power to reduce the force cannot be exercised for the purpose of creating a vacancy and the appointment of some other person, but should be made in good faith. On abolition of the office the right to salary ceases."

When a position is abolished the incumbent has no further right to that position, nor to the salary provided therefor.

The position of inspector of police has been created by ordinance of council. Council can abolish such position by amending or repealing this provision of the

ordinance. When the position is abolished the right of the incumbent thereto ceases.

The position is in the classified service of the city. The inspector of police is of a higher rank than that of patrolman. The position has probably been filled by promotion in accordance with the provisions of Section 4480, General Code, which reads:

> "Applicants for admission into the classified service shall be subjected to examination which shall be competitive, public and open to residents of the city, with such limitations as to age, residence, health, habits and moral character as the commission prescribes. The commission shall prepare rules and regulations adapted to carry out these purposes with reference to the classified service of the city, *which rules and regulations shall provide for the granting of offices and positions similar in character in groups and divisions so as to permit the filling of offices and positions in the higher grades as far as practicable through promotions,* and for public examinations to ascertain the fitness of applicants for appointment in the classified service. Such applicants shall take rank upon the register as candidates in the order of their relative standing without reference to priority of examination. The result of the examination shall be accessible to all persons."

The statutes do not cover the situation when an office of higher rank is abolished. There is no provision of statute determining the status of the incumbent.

The provisions of the civil service law recognize the right to reduce an employe or officer to a lower rank. These provisions apply when an incumbent is reduced in rank for cause.

Section 4485, General Code, provides:

> "No officer or employe within the classified service shall be removed, *reduced in rank,* or discharged, except for some cause relating to his moral character or his suitableness to perform the duties of his position, though he may be suspended from duty for a period not to exceed thirty days, pending the investigation of charges against him. Such cause shall be determined by the removing authority and reported in writing, with a specific statement of reasons, to the commission, but shall not be made public without the consent of the person discharged. Before such removal, reduction, or discharge, the removing authority shall give such person a reasonable opportunity to know the charges against him and to be heard in his own behalf."

Section 4487, General Code, provides:

> "The director of public safety may suspend any of the employes of the police or fire department who are by law under his exclusive management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause, and shall forthwith notify such employe of the charges against him, and, within five days thereafter, shall proceed to inquire into such charges and render his judgment thereon, which judgment, if the charge be sustained, may be

> either suspension, reduction in rank or dismissal from the department, and such judgment in the matter shall be final, except as otherwise provided in this subdivision."

In each of the foreging sections the reduction in rank is for some cause, some fault of the individual who is reduced in rank. The statutes do not provide for the status of a holder of a position when the position is abolished.

In case of State vs. Searcy, 11 Cir. Ct. N. S. 521, supra, Jones, J., says at pages 522 and 523:

> "In the drafting of the municipal code while the legislature had in view the application of the merit system to possible increases of the force and to individual removals therefrom for specific causes, it did not make any provision whatever for a material reduction of the force of employes by the action of the city council."

Also on pages 524 and 525, he further says:

> "The merit system devised, was to meet the contingency of increases in the force and of individual removals for cause. Farther it does not apply. To meet the contingency that has arisen in this case, where a material reduction has been made in the police force, as is now suggested by counsel for relators by the application of the element of seniority of service, fould be to enlarge judicially the scope of the act where the legislature had failed."

The civil service law does not provide for the reduction in rank of an employe in the classified service of a city, when a position to which he has been promoted has been abolished. The council may legally abolish the position of inspector of police and the incumbent thereupon loses all right to such position. The incumbent thereof has no legal right to any other position. He occupies but one position and that has been abolished. His service with the city thereupon terminates.

This places the incumbent in an unfortunate position. He has probably been promoted because of good service or of special merit. However, this department can only construe the law as it has been enacted by the legislature. It is within the province of the legislature to make the law.

Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

642.

CITY SOLICITOR—LEGAL ADVISER OF CITY SCHOOL DISTRICT BOARDS OF EDUCATION AS TO TITLE TO REAL ESTATE—NOT OBLIGATED TO FURNISH ABSTRACT OF TITLE.

The duties of the city solicitor with respect to city school district boards of education, are set out in full in Section 4761, General Code, and as he is made the "legal adviser" of such boards, it is his duty as such to give his opinion upon the legal title to real estate in which the board is interested.

He may formulate his opinion in any reliable legal manner he desires however, and is not compelled to make his advice take the form of an abstract of title.

COLUMBUS, OHIO, October 1, 1912.

HON. D. S. LINDSEY, *City Solicitor, Piqua, Ohio.*

DEAR SIR:—Under favor of September 3, 1912, you request my opinion upon the question, whether it is one of the duties of the city solicitor to make and prepare abstracts of title for the board of education of the city.

The duties of the city solicitor with respect to boards of education of the city are set out in full in Section 4761 of the General Code, as follows:

> "Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, *the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of the prosecuting attorney for the other boards of education of the county.*"

Whilst the city solicitor is unquestionably obligated, as legal adviser of the city board of education, to give his opinion upon the nature and the validity of the title to any real estate in which the board possesses an interest, or which it is contemplating the purchase of, I am of the opinion that there is nothing within the provision of the above quoted statute which empowers the board to dictate or in any way fixes the *manner or form* in which such opinion must be rendered.

The city solicitor is free to found his advice upon any reliable legal grounds he may see fit to resort to and may formulate his expression of such opinion with the same freedom. The city solicitor may, therefore, if he so desires, render such advice in the form of an abstract of title, prepared by himself, but he is not obligated so to do.

In brief, neither the duties of the city solicitor as "legal adviser" nor as "attorney," as these terms are employed in this statute, extend to services of such nature as the preparation of abstracts of title, and as such duty is clearly not included in any of the requirements of this section, I am, therefore, of the opinion that the city solicitor is not obligated to make his advice upon the title of real estate, take the form of an abstract of title.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

645.

BOARD OF EDUCATION—POWER TO BUILD FOOT BRIDGE ON RIGHT OF WAY DEEDED TO IT WITH RESERVATION OF RIGHT OF USE IN COMMON BY GRANTOR.

Under authority of Sections 4749 and 7620, General Code, boards of education may legally construct a foot bridge upon a strip of land in which a right of way for a walk has been deeded it and a condition in the deed for such right of way providing for its use by the board in common with the grantor would not invalidate the same.

COLUMBUS, OHIO, October 2, 1912.

HON. G. B. FINDLEY, *City Solicitor, Elyria, Ohio.*

DEAR SIR:— am in receipt of your letter of June 13th, in which you inquire as follows:

> "Can a board of education legally construct a foot bridge upon a strip of land in which a right of way for a walk has been deeded to it; said right of way to be used by the board of education in common with the grantor?"

In reply thereto I would say that Sections 4749 and 7620 of the General Code provide as follows:

> "Section 4749. The board of education of each school district, organized under the provisions of this title, shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant or device of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred by this title and the laws relating to the public schools of this state.
>
> "Section 7620. The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as play grounds for children, or rent suitable school rooms, provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also, shall provide fuel for schools, build and keep in good repair fences inclosing such school houses, when deemed desirable plant shade and ornamental trees on the school grounds, make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

From your inquiry I gather that there is a ravine between the school building and the street; that you have a deed for the right of way from The Elyria Memorial Hospital Company, and by constructing a foot bridge over the ravine a suitable walk can be had from the school house to the street. I also take it that it was part of the consideration expressed in the deed that the school board should erect a foot bridge to complete the walk, and after its completion to be used jointly by the school board and the hospital.

Under authority of the above quoted sections the school board has the right to

purchase real estate and rights of way; and it follows after the right of way is obtained that it has the right to grade and build a foot bridge and to do the several other things that may be necessary to make the right of way to the school house a safe and convenient one.

Having decided that your board of education has the right to construct a foot bridge upon the strip of land acquired from the hospital company, I do not think that a condition in the deed that the right of way is to be used by the board of education in common with the grantor, as part of the consideration or otherwise, is illegal. I concur with your opinion in that respect. In any event, even if it were technically illegal to have this right of way used jointly, under the circumstances related in your letter, where the school board is in need of a suitable passage to the street, and can obtain the same by permitting the joint use of the right of way by some other party, they shoud take advantage of the opportunity to secure the right of way and erect a suitable foot bridge thereon and allow it to be used by the grantor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

646.

PRESIDENT PRO TEM. OF COUNCIL NOT ALLOWED COMPENSATION FOR SERVICES DURING TEMPORARY ABSENCE OF PRESIDENT WHEN ORDINANCE DOES NOT SO PROVIDE.

When a service for the benefit of the public is required by law and no provision for its payment is made, it must be regarded as gratuitous and there can be no claim for compensation where ordinance does not so provide, therefore, the president pro tem. of council cannot be allowed for his services during the temporary absence of the president of council.

COLUMBUS, OHIO, September 30, 1912.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—Your letter of August 15th received. You inquire, can the president pro tem. of the city council draw the salary of the president of council during the latter's absence on leave from the city council? You state that the ordinance of the city does not provide for any salary for the president pro tem. of council while acting as president of council, and that you are of opinion, for that reason, that the services of the president pro tem. of council must be regarded as gratuitous, and that no claim for compensation can be enforced.

I agree with you in your conclusion, as it has been expressly held in our supreme court in the case of Anderson vs. Commissioners, 25 O. S. 13, that when a service for the benefit of the public is required by law, and no provision for its payment is made it must be regarded as gratuitous and no claim for compensation can be enforced.

In the case you present I infer that the president of council was granted a leave of absence for only a short period and during that time the president pro tem. of council acted as president of council, and during the absence of the president of council the president drew the salary provided by law. In that

event there would be no authority to allow the president pro tem. of council for the services performed by him during the absence of the president of council.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

655.

BOARD OF EDUCATION—FUNDING INDEBTEDNESS—MAY ISSUE NOTES TO PAY TEACHERS FOR SERVICES PERFORMED WHEN TAXATION LIMITATION PREVENTS PAYMENT.

Under Section 5656, *General Code, the board of education is disjunctively authorized to issue bonds or "borrow money" for the purpose of funding valid existing and binding indebtedness under the limitations prescribed in Sections* 5656 *to* 5658, *General Code.*

When teachers' services have been performed therefore, the board may issue notes to pay the same when it is unable to meet the same by reason of limits of taxation.

COLUMBUS, OHIO, October 2, 1912.

HON. H. STANLEY MCCALL, *City Solicitor, Portsmouth, Ohio.*

DEAR SIR:—Under date of September 12th you state that the working out of the Smith one per cent. law has played havoc with your school funds and you are asking a little information as to the authority of the board of education to borrow money. You further state:

> "The board of education finds out that the money that it received for its tuition fund in the August settlement of taxes will not be sufficient to pay the current expenses therefrom until it receives its next advance draw and settlement of the December taxes. The question then presents itself, as to how the board will be able to pay the salaries of the teachers during this period."

Section 5656, General Code, provides in part as follows:

> "* * * the board of education of a school district * * * for the purpose of extending the time of payment of any indebtedness which from its limits of taxation such * * * district * * * is unable to pay at maturity, may borrow money or issue the bond thereof * * * so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said * * * board * * * deem proper, not to exceed the rate of six per cent per annum, payable annually or semi-annually."

Section 5657, General Code, provides in part:

> "When it appears to the * * * board of education of a school district * * * to be for the best interest of such * * * school district * * * to renew, refund or extend the time of payment

of any bonded indebtedness which has not matured and thereby reduce the rate of interest thereon, they may issue, for that purpose, new bonds, and exchange the bonds with the holder or holders of such outstanding bonds if such holder or holders consent to make such exchange and to such reduction of interest."

Section 5658, General Code, provides in part:

"No indebtedness of a * * * school district * * * shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such * * * school district * * * by a formal resolution of * * * * * * the board of education * * thereof. * * *. Such resolution shall state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of their maturity, the rate of interest they shall bear and the place of payment of principal and interest."

Section 5656, General Code, supra, authorizes the board of education, for the purposes therein mentioned, to borrow money or issue the bonds thereof using the term in the disjunctive—"borrow money *or* issue the bonds thereof."

I am of the opinion that a board of education under such provision and such other limitations of such act has the authority to borrow money on notes as well as to issue bonds of school districts and thus fund the indebtedness in that way.

It must first, however, be determined under Section 5658, General Code, by a resolution of the board of education that the indebtedness is an existing, valid and binding obligation on the school district. In order that the teachers' salaries shall become an existing, valid and binding obligation on the board of education it is necessary that the services be first performed. Having been so performed, I am of the opinion that in order to pay the teacher for such service so performed the board of education is authorized under the provisions of Sections 5656, General Code, et seq., to borrow money in order to pay said salary.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

668.

WHARFAGE—MUNICIPAL CORPORATIONS—ORDINANCE MAY NOT BE AMENDED BY MOTION—RENT CHARGE—PROPRIETARY CAPACITY OF CITY AS OPPOSED TO GOVERNMENTAL CAPACITY—CHARGE FOR STEAMBOATS AND VESSELS LANDING AT PRIVATE WHARFBOAT ATTACHED TO WHARF—CLASSIFICATION OF CHARGES—QUESTION OF REASONABLENESS AS DEFENSE AND BY INJUNCTION—STATUTE OF LIMITATION—SET OFF FOR DESK RENT OF WHARF MASTER NOT ALLOWED WHEN NOT AUTHORIZED—WHARF MASTER MAY NOT RECEIVE AS COMPENSATION A PER CENT. OF CHARGES RECOVERED BY CITY.

Under Section 4226, General Code, an ordinance cannot be amended unless the new ordinance contains the entire ordinance amended. An attempt by mere motion, therefore, to reduce a wharfage fee which has been fixed by ordinance is of no effect, and the city is entitled to the same wharfage fee after the motion as was fixed by the ordinance. If only the reduced fee has been paid, the city may recover the difference.

A city builds and charges for wharfage in its proprietary, not its governmental capacity. The charge is therefore a rent charge and not an exercise of police power.

A vessel which lands at a wharfboat which is owned by a company and remains attached to the wharf is such a user of the wharf as to be chargeable for wharfage.

Different rates may be charged different classes of boats, providing the classification is reasonable and such classification may be based upon the number of times the vessel uses the wharf.

The question of reasonableness of the charges may be raised by the persons charged, by injunction to restrain the denial of the use of the wharf when the excessive charge is unpaid. Such unreasonableness may also be employed as a defense when suit is brought to collect the charge. The unreasonableness must be clear, however, before the court will interfere with the discretion of council.

The six-year limitation provided in Section 11222, General Code, applies to a claim for wharfage. When payments have been made within that time, however, upon the general amount, the entire account is revived from the date of last payment as provided by Section 11223, General Code, and if the accounts are against one owner in behalf of several vessels, payments on general account, without specifying any particular vessel, will revive the general account for all.

When a wharf master's compensation is fixed at 25 per cent. of the amounts collected, he cannot receive pay for amounts recovered by suit on the part of the city, which he has neglected to collect.

When, without any authorization on behalf of the city such wharf master maintains his desk on a wharfboat owned by a private company, he is deemed to be so placed by private management and such company cannot claim a set off for desk rental against a claim for wharfage charges by the city.

COLUMBUS, OHIO, October 15, 1912.

HON. A. J. LAYNE, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—Under date of June 27, 1912, you submit to this department for answer, several questions pertaining to the findings of the bureau of inspection

and supervision of public offices against the owners of a certain wharfboat and a certain steamboat for failure to pay wharfage as provided by ordinance of the city of Ironton for the use of a wharf established by said city. These findings are found at pages 62 to 84 of the report of said bureau of the examination of the offices of said city of Ironton for the period from May, 1909, to January, 1911. The facts are given in said report and you submit the following questions:

> First. Is the fee fixed by the ordinance passed in 1869 or the motion passed in 1879 to control?
>
> "It is to be noted that the motion passed in 1879 refers to a particular wharfboat which wharfboat is now in possession of The Ironton Wharfboat Company, against whom the claim for arrearages is made, and such boat was the only wharfboat attached to such public landing or wharf.
>
> "Second. Is the fee fixed by the ordinance for wharfage a license or a rent charge? Does the same come under the police power of the municipality or is it in the exercise of a proprietary right of the municipality?
>
> "Third. Can a charge be properly made under the ordinance fixing the fee therefor for the landing of steamboats and other craft at the wharfboat so owned by The Ironton Wharfboat Company?"
>
> "Fourth. It is to be noted at page 69 of said report that there are different charges made for different craft landing at such wharf, such difference in charge being based principally upon the points between which the boats ply. Does this difference or discrimination in such charges render the ordinance invalid?
>
> "Fifth. Can the question of the reasonableness of the charge be raised by the party against whom the charge is made?
>
> "Sixth. What is the statute of limitations governing the arrearages?
>
> "Seventh. The wharf master has a desk on the dock of the wharfboat company by special arrangement and makes his collections from such place. Can the wharfboat company claim a set off against the city for such use of its wharfboat by the wharf master?
>
> "Eighth. By the ordinance the wharf master gets 25 per cent. of the collections of wharfage as his compensation. If the city brings suit for recovery of the arrearages and secures payment thereof will he be entitled to his percentage of the amount so collected?"

It appears from the report that an ordinance was passed in 1869, fixing the charge for a wharfboat using the wharf of the city at $1.00 per day. At a meeting of council held in February, 1879, a motion was made in council and carried reducing the charge in words as follows:

> "Mr. Goldcamp made the following motion, which was carried: I move that G. W. Bradford's wharfboat be reduced from one dollar to seventy-five cents per day."

The wharfboat herein referred to is the only wharfboat that has used said wharf and is the same wharfboat against which the findings have been made for arrearages.

Section 4226, General Code, provides the manner in which an ordinance made be amended. Said section reads:

> "No ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title. No by-law or ordinance, or section thereof, shall be revived or amended, unless the new by-law or ordinance contains the entire by-law or ordinance, or section revived or amended, and the by-law or ordinance, section or sections so amended shall be repealed. Each such by-law, resolution and ordinance shall be adopted or passed by a separate vote of the council and the yeas and nays shall be entered upon the journal."

The rule for an amendment of an ordinance is stated in 28th Cyc. at pages 380 and 381:

> "In general power to amend a by-law or ordinance is to be exercised in the same mode as power to enact. * * * However, an ordinance cannot be amended by mere resolution or motion, but only by another ordinance enacted with like formality as the original ordinance, especially where it does not contain "the entire ordinance or section revised or amended."

The rate to be charged against a wharfboat was established by ordinance of council. The action of council purporting to reduce the charge does not attempt to amend the ordinance, but is an effort to reduce the charge by motion. This motion has not the dignity of a resolution much less that of an ordinance.

The motion does not amend the ordinance and cannot be urged as a reduction of the charge for wharfage.

It is apparent from the report that the charge for a wharfboat has been reduced to seventy-five cents. In the ordinance passed June 27, 1905, as shown on page 69 of the report it is provided:

> "Provided further, that any individual, corporation or company owning or operating a wharfboat at said landing shall pay the sum of seventy-five cents per day for each and every day, payable monthly in advance."

The fee is here fixed at seventy-five cents per day. This appears to be the first time the charge was regularly reduced to seventy-five cents per day for a wharfboat. The findings against the wharfboat cover the period from June 1, 1899, to January 31, 1911.

The ordinance of 1869 fixing the charge at one dollar per day governs until it was regularly amended by ordinance of council. This was done by ordinance in June, 1905. The rate of $1.00 per day should be recovered until the ordinance of 1905 became effective, then the rate to be recovered is seventy-five cents per day.

Your second inquiry is as to the nature of the change for wharfage.

Wharfage is defined at page 894 of 40th volume of Cyc. as follows:

> "In its most general legal sense, wharfage is the use of a wharf furnished in the ordinary course of navigation. In this sense the term is usually applied to the use of a wharf by a vessel for the loading and unloading of goods or passengers. But it also may clearly include the use of a wharf while lying alongside for protection. In

its limited sense wharfage is a charge or rent for the use of a wharf; the compensation paid for loading goods on a wharf or shipping them off."

Farnham on Water Rights says at page 579:

"But the right to construct wharves is not held by the municipal corporation in its public or governmental capacity. The erection and maintenance of such structures are merely a business enterprise in regard to which the municipality acts in its private capacity; and there is no good reason why the city should not make contracts with regard to them, the same as it does with regard to other property held in the same capacity."

The charge made by the owner of a wharf is for the use of the wharf by the vessel. The fee charged for such use is not a license; it is in the nature of a rent charge. A municipality in building and maintaining a wharf acts in its proprietary capacity and not in its governmental capacity. The right to charge wharfage by a city which owns the wharf does not come within the police power of such city.

Your third inquiry involves the right of the city to charge a vessel for the use of the wharf, when such vessel is in fact moored to a wharfboat, which wharfboat is attached to the wharf and is charged wharfage by the city.

The wharfboat remains at the wharf continuously. In order to use the wharf for the loading and unloading of passengers and freight it is also necessary to use the wharfboat. The wharfboat cannot be used without the wharf. The wharf is maintained and owned by the city and the wharfboat by a private company. They are both essential for the proper use of the wharfage facilities. One is not complete without the other.

The ordinance which fixes the charge for wharfage for the landing of vessels at the wharf, also fixes the charge to be made against the wharfboat. The ordinance does not purport to give the exclusive use of the wharf to the wharfboat, nor does it grant the owner of the wharfboat the exclusive right to charge wharfage. There is no attempt to farm out or lease the wharf to the owner of the wharfboat. On the contrary the charge against the wharfboat is made for its use of the wharf, and the city in effect, if not specifically, reserves the right to charge other vessels for their use of the wharf.

At pages 580 and 581 of Farnham on Water Rights, it is said:

"The mere fact that a vessel which actually receives support from a pier is fastened to the further side of vessels which are themselves attached to the pier does not deprive the pier owner of his wharfage. But the owner of a wharf or pier is not entitled to collect wharfage from a vessel which is within the slip unless it makes use of his wharf. So, the owner of a wharf, within whose dock the vessel floats in discharging her cargo is entitled to the wharfage, although she may be moored to another wharf."

On page 575 of his work, Farnham further says:

"In the absence of statutory or other rules governing the matter of wharfage, the liability for it attaches whenever a vessel makes use of a wharf to aid in discharging her cargo or in getting into her berth at another wharf, whether she intends to discharge her cargo

at the wharf the aid of which she has received or not. If a vessel in discharging her cargo makes use of two adjoining wharves, or of a pier and the adjoining bulkhead, she must pay the regular rates of wharfage to each."

Also on page 576, he says:

"If in bringing goods discharged upon the wharf to land it is necessary to transport them over a wharf the owner of the latter is entitled to wharfage for the use made of his property."

A vessel which uses the wharfboat must also use the wharf in getting its cargo to the shore. In order to load and unload its passengers and freight the boat must use both the wharf and the wharfboat and it is liable to the owners of each for the use thereof.

It appears that the vessel which is in arrearage for wharfage is owned by the same persons as own the wharfboat. This fact will not prevent the city from charging said vessel for wharfage.

On page 574 of Farnham on Water Rights, it is said:

"The fact that the dock is owned by the charterer of the vessel does not absolve the vessel from liability."

In Mueller vs. Spreckles, 48 Fed. 574, the syllabus reads:

"Where a vessel to make the delivery required by the terms of the charter, is compelled to enter, and for this purpose enters the dock of the charterer, she is liable to him for the ordinary charges for such accommodation."

The city may, therefore, charge a vessel for wharfage even though such vessel must also pay for the use of the wharfboat. The fact that a vessel and the wharfboat are owned by the same person or company does not change the liability.

Your fourth inquiry is as to the manner of making the differences in the rates charged.

The provision of the codified ordinances of the city of Ironton fixing the fees to be charged for wharfage is set forth at page 62 of the report and provides:

"Each steamboat $2.00 per day and $1.00 for each subsequent day remaining at the landing; regular packets plying between Cincinnati and Pomeroy, Cincinnati and Pittsburgh, Cincinnati and Charleston and those running from Ironton up the Big Sandy, $1.00 each per landing; regular packets making daily round trip between Portsmouth and Proctorville, each the sum of $15.00 per month paid semi-annually in advance. Ferry operating between the city of Ironton and Russell, Kentucky, $360.00 per annum, payable monthly, in advance. Any individual, corporation or company operating a wharfboat at said landing the sum of 75c per day for each and every day; each propeller, barge, keel-boat, canal-boat, scow, raft, store-boat, house-boat or shanty-boat, 50c per day and 25c for every subsequent day such craft may remain at the landing."

This ordinance fixes a rate for each steamboat landing at the wharf. It then provides a less charge for regular packets plying between certain points. The steamboats do not evidently make regular landings. They use the wharf but a few times in a month or year. All steamboats coming within this class must pay the same charge. The charge is $1.00 for each landing of regular packets plying between certain points. A charge of $15.00 per month is made for packets making a daily round trip between certain points. A different charge is made for ferry boats.

While the ordinance designates the routes of the boats as the basis of its classification of charges, such classification is in fact based upon the frequency of the use of the wharf by the vessel. Steamboats make no regular stops; certain boats making daily round trips; other boats, evidently do not make daily round trips; ferry boats make landings several times a day. The basis of the classification is in fact the number of times the wharf is used by the vessel.

All vessels coming within a certain class are charged the same rate of wharfage. A grading of charges in accordance with the number of times the wharf is used in a given period is a reasonable and proper method of fixing the charges. This is in effect what council has done. It has divided the vessels in classes based upon the points between which the boats ply. This classification may be based upon the frequency of the use of the wharf and also upon the size of the different boats.

This is a reasonable classification and there is no discrimination apparent from the provisions of the ordinance.

Your next inquiry is as to the right to raise the question of the reasonableness of the charge.

At page 582 of Farnham on Water Rights, the rule is stated:

> "Wharfage must always be reasonable, and is subject to public regulation, which should be done by the legislature or officers to whom the authority is delegated. The court will not undertake to fix a limit to the amount which a municipal corporation may charge for wharves maintained by it; although it may declare whether or not rates which have been fixed are reasonable when the question is properly brought before it. Where the schedule rate is higher than the customary rate, the court will not enforce it where it appears to be excessive."

In some of the cases cited the question of the reasonableness of the charge was raised as a defense. In others the action was for an injunction seeking to restrain the collection of the excessive charges.

In De Bary Baya Merchants' Line vs. Jacksonville T. & W. Ry. Co., 40 Fed. 392, it is held:

> "A bill seeking injunction against extortionate charges must allege that complainant has no other means of carrying on his business than those wherein he is so overcharged.
>
> "A bill alleging discrimination in charges must aver that there are some parties who are charged less than complainant.
>
> "A reasonable compensation can be charged by the owner of a public or private wharf for its use by other parties."

In the case of The First Municipality vs. Pease, 2 La. Ann. 538, it is held:

"Where a municipal corporation is authorized to impose a wharfage charge, as a compensation for keeping the wharves in a proper condition for the safe and expeditious shipping and landing of merchandise, a court will not undertake to fix any limit to the amount which the municipal authorities may exact for that purpose. The question of the extent to which this right may be exercised, is purely administrative."

In Leathers vs. Aiken, 9 Fed. 679, it is held:

"A municipal corporation, owning improved wharves and other artificial means, which it maintains at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, may charge and collect, from parties using its wharves, such reasonable fee as will fairly remunerate it for the use of its property."

On page 909 of the 40th volume of Cyc. the rule is stated to be:

"Where wharfage charges are excessive, the proper remedy seems to be to commence an action at law to determine the excess, and, the excess being thus established, to seek an injunction from a court of equity to restrain the collection of such excess. So in a case where no wharfage can be legally demanded, an injunction will issue to prevent the collection thereof."

The proper remedy to determine the reasonableness of a charge for wharfage is by injunction to restrain the collection of the excessive charge. This is not, however, the only remedy. Wharfage is usually collected in advance and if not paid the boat is denied the use of the wharf. In such case injunction is the proper remedy.

In the present case the wharfage was not collected in advance, in fact, has not been collected at all. The city will doubtless be required to enter suit for the wharfage. As the charge for wharfage must be reasonable, the city can only collect a reasonable amount. A reasonable amount would be a sum sufficient to fairly remunerate it for constructing and maintaining the wharf. It would be a proper defense to such action that the charge was excessive. This defense would apply to only so much of the amount claimed as was proven excessive.

Where the city has fixed the charge by ordinance, the courts will not alter such charges unless they are clearly excessive. The fixing of the charge is a matter for the council in the first instance to determine, and unless such charges are clearly excessive they will be sustained.

Your next inquiry is as to the statutes of limitations.

The charge for wharfage, as has been seen, is not a license or penalty, but is a rent charge for the use of the wharf.

The six-year limitation as provided in Section 11222, General Code, applies to a claim for wharfage. Said Section 11222, General Code, reads:

"An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

Section 11223, General Code, should also be taken into consideration in this case. Said section provides:

> "If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment, acknowledgment or promise."

No payments appear to have been made on account of the wharfboat within the six-year period. Payments have been made within that time on account of wharfage for the steamer "Greyhound." It does not appear that these several payments were made for particular months or half months. In most cases the amount paid was for a half month. This is not the case, however, with all the payments. These payments, unless all the vouchers show otherwise, should be credited generally on the account for wharfage. This will bring the entire finding against the steamship "Greyhound" within the statute of limitations.

It is alleged that the wharfboat and the steamship "Greyhound" are owned by the same person or company, although the report shows one to be owned by The Ironton Wharfboat Company and the other by William Bay.

If they are in fact owned by the same person or company the two accounts should be merged, so as to bring the entire amount within the period of the statute of limitations. This cannot be done, however, if the payments made within the six-year period were made on behalf of the wharfage of the steamship "Greyhound."

We next come to the compensation of the wharfmaster.

Section 2 of the ordinance as shown on page 66 of the report, prescribes his duties as follows:

> "The wharfmaster shall have charge of the public landings, the mooring of boats thereto and the collection of wharfage, and for his services shall receive such compensation as the council may determine by resolution.
>
> "It shall be his duty to cause boats, rafts and crafts to land and moor in such manner as he may deem will best promote the general convenience; he may require any boat, raft or craft to change its position, he may require any skiff, canoe, or incumbrance of any kind to be removed to make room for craft subject to wharfage; he shall take care of and keep all racks, gangways and appurtenances in a situation to accommodate boats and the public; and to preserve good order at the public landings, he may upon view and without warrant arrest and bring before the mayor any persons guilty of disorderly conduct or offending against any provision of this ordinance."

The resolution fixing the compensation of the wharfmaster is not given. He is, however, allowed twenty-five per cent. of the amount of wharfage collected. He has other duties to perform besides the collection of the wharfage. His compensation so paid is to cover all his services as wharfmaster. He has failed to perform his duties in respect to the collections from the wharfboat and from the "Greyhound." By reason of his negligence the city will likely lose a large part of the arrearages. The city is further required to go to additional expense in collecting the same. The wharfmaster has failed to perform his duties as wharfmaster and by reason thereof the city has suffered

financial loss. He cannot recover for services which he has not performed. He is an employe of the city, and his compensation is based upon the performance of services.

If the city should recover by suit, or otherwise, the money which is in arrearage through the neglect of the wharfmaster, such wharfmaster could not collect from the city a percentage of the amount so collected.

It appears that the wharfmaster has his desk upon the wharfboat, from which he made his collections. It does not appear how or with whom this arrangement was made. The wharfage is due to the city of Ironton, and in order for the wharfboat company to secure a set-off or counter claim on account of the use of the wharfboat by the wharfmaster, it must appear that such arrangement was made by and on behalf of the city. The city would not be liable for such arrangement made by the wharfmaster, unless he was fully authorized to bind the city therefor. Unless the city has authorized this special arrangement, it must be considered a private arrangement between the wharfmaster and the owner of the wharfboat, and the city would not be liable for such use of the wharfboat.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

670.

CIVIL SERVICE COMMISSION—EMPLOYES IN MUNICIPAL DEPARTMENTS SUSPENDED AND REMOVED BY EXECUTIVE HEADS—COMMISSION MAY NOT ADOPT RULE GOVERNING LAY OFF AND REINSTATING OF EMPLOYES.

The power of removal and suspension of employes in municipal departments is still vested in the executive heads thereof, subject to the right of appeal by the employe to the civil service commission.

The right to lay off employes in dull season, and to reappoint them, is therefore vested in the said executive heads and the civil service commission is without authority to adopt a rule governing the method of suspending and reinstating in such cases.

COLUMBUS, OHIO, September 26, 1912.

HON. E. K. WILCOX, *City Solicitor, Cleveland, Ohio.*

DEAR SIR:—In your favor of September 12, 1912, through your assistant, J. P. Mooney, you inquire as follows:

> "I am enclosing herewith a copy of an opinion upon which I would like to have you pass.
>
> "The question is, has the Paine law given, either by express grant or by implication, to the civil service commission, the power to state how employes whose duties are intermittent, and who are subject to layoff during the winter months, shall be reinstated. Section 2 of Rule 12, over which the controversy has arisen, reads as follows:
>
> "'In refilling the vacancies caused by layoffs, as provided in the preceding paragraph (which has reference to layoffs during the

winter months) the employes so laid off shall be reinstated in the inverse order in which they were laid off the employe last laid off to be the first reinstated to the position formerly held by him.'"

There are two provisions in the civil service law which authorize the civil service commission to make rules and regulations.

Section 4480, General Code, provides:

> "Applicants for admission into the classified service shall be subjected to examination which shall be competitive, public and open to residents of the city, with such limitations as to age, residence, health, habits and moral character as the commission prescribes. *The commission shall prepare rules and regulations adapted to carry out these purposes with reference to the classified service of the city, which rules and regulations shall provide for the grading of offices and positions similar in character in groups and divisions so as to permit the filling of offices and positions in the higher grades as far as practicable through promotions, and for public examinations to ascertain the fitness of applicants for appointment in the classified service.* Such applicants shall take rank upon the register as candidates in the order of their relative standing without reference to priority of examination. The result of the examination shall be accessible to all persons."

By virtue of this section the civil service commission is authorized to make rules and regulations in reference to the examinations of applicants, and to provide for the grading of offices so that they may be filled by promotion as far as practicable. This provision of the statute will not authorize the civil service commission to adopt a rule, such as you submit, for the reinstatement, or rather the re-employment, of a member of the classified service.

Section 4486, General Code, provides:

> "The commission shall make such other rules and regulations as are not inconsistent with this chapter for the promotion and betterment of the service. The council shall provide for the salaries, if any, of the commission, for such clerical force, examiners, necessary expenses and accommodations as may be necessary for the work of the commission."

This section gives the civil service commission general power to make rules and regulations for the promotion and betterment of the service.

Before construing this provision it will be necessary to examine and ascertain the powers and duties of the executive officers of the city. These officers are given the power of appointment and removal of officers and employes under their charge, subject to the limitations provided by statute.

Section 4246, General Code, provides:

> "The executive power and authority of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by this title."

Section 4247, General Code, provides:

> "Subject to the limitations prescribed in this subdivision such executive officers shall have exclusive right to appoint all officers, clerks and employes in their respective departments or offices, and likewise, subject to the limitations herein prescribed, shall have sole power to remove or suspend any of such officers, clerks or employes."

The civil service act prescribes certain limitations upon the power to appoint and to remove. Section 4480, General Code, supra, provides how examinations shall be made. Appointments shall be made in accordance with the provisions of Section 4481, General Code. The officers now in question have been appointed.

Section 4484, General Code, provides:

> "Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments and of the sanitary police shall be dismissed only as provided by law and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt."

This section authorizes the civil service commission to make rules governing appeals by employes concerning their discharge or removal.

Section 4485, General Code, provides:

> "No officer or employe within the classified service shall be removed, reduced in rank, or discharged, except for some cause relating to his moral character or his suitableness to perform the duties of his position, though he may be suspended from duty for a period not to exceed thirty days, pending the investigation of charges against him. Such cause shall be determined by the removing authority and reported in writing, with a specific statement of reasons, to the commission, but shall not be made public without the consent of the person discharged. Before such removal, reduction, or discharge, the removing authority shall give such person a reasonable opportunity to know the charges against him and to be heard in his own behalf."

Section 4487, General Code, provides:

> "The director of public safety may suspend any of the employes of the police or fire department who are by law under his exclusive management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause, and shall forthwith notify such employe of the charges against him, and, within five days thereafter, shall proceed to inquire into such charges and render his judgment thereon, which judgment, if the charge be sustained, may be either suspension, reduction in rank or dismissal from the department, and such judgment in the matter shall be final, except as otherwise provided in this subdivision."

From the foregoing sections it is seen that the power of removal and suspension is still vested in the executive officer, subject to the right of the employe to appeal to the civil service commission.

The director of public service has authority to determine the number of employes in his department by virtue of Section 4327, General Code, which provides:

> "The director of public service may establish such subdepartment as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

Section 4324, General Code, provides:

> "The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts."

Section 4368, General Code, provides:

> "Under the direction of the mayor, the director of public safety shall be the executive head of the police and fire departments. He shall be the chief administrative authority of the charity, correction and building departments. He shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments except as otherwise provided by law. He shall keep a record of his proceedings, a copy of which certified by him shall be competent evidence in all courts."

The civil service commission is not given any power to appoint or to remove an officer or employe in the service of the city. It has the power to hold examinations of applicants and to certify names for appointment in the classified service to the appointive officer or board. It has the right to hear appeals from the order of the appointive board or officer suspending or removing an employe or officer in the classified service.

The management and control of the departments, including the officers and employes therein, are given to the respective heads of the departments. The director of public service has control of the employes in his department and the same is true of the director of public safety as to his department.

By the rule which you submit the civil service commission has endeavored to determine, in effect, what employes shall be employed by the executive heads. To this extent, at least, it has sought to limit the management of the departments by their respective heads. This authority has not been granted to the civil service commission.

When the work is not sufficient to keep all the officers and appointees of a department employed, the head of such department can determine who shall be laid off. When the work increases, he likewise can determine who shall be put to work. This is a part of the management of the department and is under his control.

In conclusion, the civil service commission is not authorized to adopt the rule which you submit. Such rule should be held null and void.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

672.

BIDS—STATEMENT OF NAME OF PARTY INTERESTED, UNDER CORPORATE CAPACITY, VALID.

A statement of the corporate name under which an individual is accustomed to do business is a compliance with Section 7623, General Code, requiring each bid to contain the name of every person interested therein.

COLUMBUS, OHIO, October 17, 1912.

HON. BEN L. BENNETT, *City Solicitor, East Liverpool, Ohio.*

DEAR SIR:—Under favor of October 8th, you present the following question:

> "Under Section 7623 of the Code, paragraph 4, it says: 'Each bid must contain the name of every person interested therein, * *'
>
> "In opening the contracts for construction of a school house here yesterday, the lowest bidder, Winland Brothers, state that the Claude Nease Lumber Company were the only persons interested in the contract. The Claude Nease Lumber Company is composed of no one but Mr. Nease. Do you understand the law to mean that the bid must recite who employs the Winland Bros., or do you think that the Claude Nease Lumber Company is sufficient to comply with this section?"

> "A copy of the portion of the bid in question is as follows:
>
> "As called for in the advertisement the following is a list of and the names of every person interested in the erection and completion of this work.
>
> (Signed) "CLAUDE NEASE LUMBER COMPANY."

The right of an individual to do business under a corporate name, in the absence of contrary provisions of statute, is well established.

In the case presented, the name of Claude Nease appears as he is accustomed to present it when acting in a business capacity. The object of the statute is to have a disclosure of all proper persons interested in the bid. Inasmuch as the name of the person appearing in a business capacity, does not operate in any way to lessen the responsibility of the individual, and as there is in fact a disclosure of this case of all persons interested, I am of the opinion, that the bid is not defective and that the board of education may award the contract to Winland Brothers, providing all other provisions of the statute have been complied with.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

679.

PRESIDENT OF COUNCIL MAY CAST DECIDING VOTE IN CASE OF A TIE IN ELECTION TO FILL VACANCY IN COUNCIL.

Under Section 4272, General Code, the president of council of a city is given the right to cast a vote in case of a tie and as this right is in nowise limited with respect to a vote to fill a vacancy in council, he may cast the deciding vote in case of a tie in such instance.

COLUMBUS, OHIO, October 21, 1912.

HON. A. W. OVERMEYER, *City Solicitor, Fremont, Ohio.*

DEAR SIR:—We have your favor of October 18, 1912, wherein you state:

> "Council of the city of Fremont consists of seven members; one of said members has resigned and the other six in attempting to fill the vacancy are deadlocked, one hundred ballots having been cast thereon. Can the president of council cast the deciding vote in the matter?"

Section 4236 of the General Code, provides as follows:

> "When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term. If council fail within thirty days to fill such vacancy, the mayor shall fill it by appointment."

Section 4272 of the General Code provides:

> "The president of council shall be elected for a term of two years. * * * He shall be an elector of the corporation, and shall preside at all regular and special meetings of council, but shall have no vote therein except in case of a tie."

The functions of the president of council, under Section 4272, of the General Code, are of an executive or administrative character, and whatever power he exercises in a legislative capacity of the municipal government is not to be implied, but must find its authority in some positive statute.

His powers are expressly stated to be "to preside at all regular and special meetings of council and to give a casting vote in case of a tie." He is only a member *sub modo* and to the extent of the powers especially committed to him. I find no restriction in the law applicable to the filling of vacancies in council, and if in voting, a tie arises, the president of council may give the casting vote, for an instance is then presented where he may exercise his power to do so, and thus determine the question before council.

Upon some matters the law has required a vote of two-thirds of the whole membership elected to council, for instance, in order to pass an ordinance over the mayor's veto, Section 4234 provides that two-thirds of the whole number elected to council must concur. And for the passage of an ordinance, Section 4224 of the General Code requires a majority of those elected to council.

If the legislature had not intended him to have the right to vote where a tie arises in an election to fill a vacancy in council, the purpose of the leg-

islature would have been easily expressed by similar language, requiring for an election to fill a vacancy a majority of the whole number of councilmen elected.

There are no decisions in Ohio on this question, but in the case of Frost vs. Pacific Savings Company, 42 Oreg. 41, under a law similar to ours giving the mayor a right to vote in case of a tie (there being a vacancy in the office of the city recorder and the vote on filling the vacancy stood four to four, and the mayor cast the deciding vote), it was held that the mayor had a right to vote on the nomination of such officers where the vote of council was evenly divided, and the court said:

> "Under city charters giving the mayor the right to vote in the case of a tie, and providing he shall appoint to office by and with the consent of council, it is uniformly held, as far as we are advised, he is authorized to give the casting vote upon the confirmation of the nominee when the council is evenly divided, and the same reasoning and principles apply in the case at bar. If the legislature had intended to deny the mayor a right to vote upon the appointment to an office in the case of a tie, it could easily have required such appointment could be made by a majority vote of council, but there being nothing in the act indicative of such intention, his right to vote remains the same in this as in other matters coming before the council for consideration."

Therefore, I am of the opinion that the president of your council can cast the deciding vote in the election to fill the vacancy in your city council.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

695.

INITIATIVE AND REFERENDUM—ORDINANCE INCREASING PAY OF CHIEF OF POLICE CANNOT TAKE EFFECT UNTIL SIXTY DAYS AFTER PASSAGE.

Under Section 4227-2, *General Code, an ordinance passed on August* 19, 1912, *providing for an increase of five dollars per month in the salary of the chief of police to take effect from the first day of August* 1912, *will be suspended sixty days; and such increase of pay will not take effect until October* 19.

COLUMBUS, OHIO, October 24, 1912.

HON. JOSEPH O. FRITZ, *City Solicitor, Wooster, Ohio.*

DEAR SIR:—I am in receipt of your letter of October 22d, wherein you state as follows:

> "The council of the city of Wooster, passed an ordinance August 19, 1912, to amend the then existing ordinance fixing the salary of the chief of police. The ordinance passed increases the salary of that office five dollars per month, and contains a provision that the increase shall date from and payment thereof be made from the first day of August, 1912."

You then inquire as follows:

"(1) Does this ordinance take effect before the 19th day of October, 1912?

"(2) Can the officer whose salary is increased draw the increased salary for the months of August and September?"

Paragraph two of Section 4227-2 of the General Code, provides that no ordinance involving the expenditure of money shall become effective in less than sixty days after its passage. An ordinance increasing or decreasing the salary of an officer of a municipality, since such an ordinance is one providing for the salary of such officer to be expended as the duties of the officer are performed, would necessarily involve the expenditure of money. Such being the case, I am of the opinion that such an ordinance is clearly within the provisions of paragraph two of Section 4227-2 of the General Code, and, consequently, will not become effective in less than sixty days after its passage.

In answer, therefore, to your first question I am of the opinion that the ordinance in question does not take effect before the 19th day of October, 1912.

In answer to your second question, since the statute provides that an ordinance shall not become effective until sixty days after its passage, I am of the opinion that the officer whose salary is increased cannot draw the increased salary for the months of August and September, for the reason that the ordinance under which he would draw such increased salary will not be in force until sixty days after its passage.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

696.

CHIEF OF POLICE HAS EXCLUSIVE POWER TO SUSPEND PATROLMAN—POWERS OF CHIEF OF POLICE AND DIRECTOR OF PUBLIC SAFETY TO MAKE SUSPENSIONS.

Section 4379, General Code, gives the chief of police power to suspend officers and employes of the department who are "under his control and management," while Section 4487, General Code, gives the director of public safety, power to suspend employes of the police department who are under his exclusive control and management.

By virtue of Sections 4372 and 4374, General Code, the chief of police is given the control and management of the officers enumerated in said Section 4374 and by virtue of Section 4375, General Code, the director of public safety is given exclusive control and management of "all other" officers, surgeons, secretaries, clerks and employes.

By Section 3479, General Code, therefore, the chief of police is empowered to suspend only the officers enumerated in Section 4374, General Code, and by Section 4487, General Code, the director of public safety is given power to suspend only the officers enumerated in Section 4375, General Code.

Under the above rule, therefore, the power to suspend a patrolman rests with the chief of police.

As held by the courts in construing similar provisions under the old system this power in the chief of police is exclusive.

COLUMBUS, OHIO, October, 26, 1912.

HON. W. S. JACKSON, *City Solicitor, Lima, Ohio.*

DEAR SIR:—Your favor of October 12, 1912, is received in which you inquire:

> "Section 4379 of the General Code gives to the chief of police the exclusive right to suspend any of the deputies, officers or employes in his respective department.
>
> "Section 4487 of the General Code gives the director of public safety the power to suspend any of the employes of the police and fire department who are by law under his exclusive management or control.
>
> "Query: May the director of public safety suspend a patrolman irrespective of any action by the chief of police?"

Section 4379, General Code, provides:

> "The chief of the police and the chief of the fire department shall have exclusive right to suspend any of the deputies, officers or employes in his respective department and under his management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause."

This section gives to the chief of police the exclusive right to suspend any of the deputies, officers or employes of the police department, who are "under his management and control."

Section 4487, General Code, provides:

> "The director of public safety may suspend any of the employes of the police or fire department who are by law under his exclusive management and control, for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given by the proper authority, or for any other reasonable and just cause, and shall forthwith notify such employe of the charges against him, and, within five days thereafter, shall proceed to inquire into such charges and render his judgment thereon, which judgment, if the charge be sustained, may be either suspension, reduction in rank or dismissal from the department, and such judgment in the matter shall be final, except as otherwise provided in this subdivision."

This section gives to the director of public safety the right to suspend the employes of the police department "who are by law under his exclusive control and management." This section was placed in its present form in 101 Ohio Laws 297. Said Section 4487 when originally placed in the General Code, read:

> "No officer, secretary, clerk, sergeant, patrolman, fireman or other employe serving in the police or fire departments of any city shall be removed or reduced in rank or pay except as provided in this chapter for removals by the chiefs of the police and fire departments."

This form of the section did not give any power to the director of public safety to suspend any of the employes of the police department. The amendatory act gives him that power. It is evident that the power was purposely given to the director of public safety.

There is a difference in the two sections to be construed which will avoid a conflict in authority. Section 4379, General Code, gives the chief of police the power to suspend the officers and employes of the department, who are under his control and management, while Section 4487, General Code, gives the director of public safety the power to suspend employes of the police department who are under his exclusive control and management. The power to suspend held by each officer is limited to those officers or employes who are under his control and management.

Are there, or may there be, two classes of employes in the police department; one under the control and management of the chief of police, and the other under the exclusive control and management of the director of public safety?

Section 4368, General Code, provides:

> "Under the direction of the mayor, the director of public safety shall be the executive head of the police and fire departments. He shall be the chief administrative authority of the charity, correction and building departments. He shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments except as otherwise provided by law. He shall keep a record of his proceedings, a copy of which certified by him shall be competent evidence in all courts."

Section 4372, General Code, provides:

> "The chief of police shall have exclusive control of the station-

ing and transfer of all patrolmen and other officers and employes in the department, under such general rules and regulations as the director of public safety prescribes."

Section 4374, General Code, provides:

"The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen and other police court officers, station house keepers, drivers and substitutes, as are provided by ordinance or resolution of council."

Section 4375, General Code, provides:

"The director of public safety shall have the exclusive management and control of all other officers, surgeons, secretaries, clerks and employes as are provided by ordinance or resolution of council. He may commission private policemen, who may not be in the classified list of the department, under such rules and regulations as council prescribes."

The provisions of Sections 4374 and 4375, General Code, were originally contained in one section, to wit, Section 149 of the Municipal Code, 96 Ohio Laws, page 70.

By virtue of Sections 4372 and 4374, General Code, the chief of police is given the control and management of the officers enumerated in said Section 4374. By virtue of Section 4375, General Code, the director of public safety is given exclusive control and management of all other officers, surgeons, secretaries, clerks and employes.

The power of the chief of police to suspend given by Section 4379, General Code, applies to the officers and employes enumerated in Section 4374, General Code. And the power of the director of public safety to suspend as given by Section 4487, General Code, applies to the officers enumerated in Section 4375, General Code.

The officer now in question is a patrolman. Patrolmen are specifically mentioned in Section 4374, General Code, and also in Section 4372, General Code, wherein the chief of police is given the exclusive power to station and transfer all patrolmen. Therefore, the power to suspend a patrolman rests with the chief of police.

A further question arises: Is this power to suspend a patrolman exclusively in the chief of police?

In case of State vs. Baldwin, 77 Ohio St., 532, the second syllabus reads:

"Under the new Municipal Code the mayor has authority to remove an officer or appointee in the police department, upon inquiry into the cause of suspension, by the chief of police, of such officer or appointee; but he is without original jurisdiction to inquire into charges against such an officer (other than the chief of police) or appointee, and upon such an inquiry he is without authority to remove an officer or appointee."

The court in this case had under consideration Sections 147, 148 and 152 of the Municipal Code, 96 Ohio Laws 70-71, and which are now known as Sec-

tions 4368, 4372, 4373 and 4379 of the General Code. In carrying these sections into the General Code, the provisions under consideration have not been materially changed, except that the director of public safety has been substituted for the mayor in Section 4368, General Code. Also, in other sections, the board of public safety has been succeeded by the civil service commission.

On pages 551 and 552 of the opinion in State vs. Baldwin, supra, Summers, J., says:

> "The evident purpose of the legislature respecting the police and fire departments, as indicated by the provisions relating to them in the new Municipal Code, was to adopt a civil service or merit system. The chief of police is made the executive head of the department under the direction of the mayor. He is given the *exclusive* right to suspend any of the deputies, officers or employes under his management or control, and in case of suspension, he is required to certify such fact, together with the cause of such suspension, to the mayor, who then finally determines the matter, excepting that an appeal may be taken to the board of public safety in case the judgment of the mayor is one of removal. The mayor is given the exclusive right to suspend the chief of the police department, and in the event he suspends the chief it is his duty to certify such fact, together with the cause of suspension, to the board of public safety and it is given final jurisdiction. And it is made the duty of the mayor to prefer charges with council against any director of public safety for incompetency, neglect of duty, malfeasance in office, habitual drunkenness, or gross immorality, and it is made the duty of council to inquire into the charges, in the manner provided for the removal of other officers of the municipality. Evidently it was thought that it would be conducive to the discipline or efficiency of the department, respecting the members of the police force, if the exclusive power of suspension should be vested in the chief of police, and if the mayor should not have original jurisdiction to remove members of the force, but only in the event of charges being certified to him by the chief. If the chief fails in his duty the exclusive power of suspending him is vested in the mayor, and he may suspend him and certify the fact to the board, so that the board of public safety does not deal directly with the members of the force or with the chief of the police, but exercises its control through the mayor, and the mayor does not deal directly or immediately with the members of the force but with the chief of police, and the chief is given immediate control of the men."

So under the present law, the director of public safety does not deal directly with the patrolmen, but deals with them through the chief of police. The power of the chief of police to suspend a patrolman is granted in the same terms as was his power under consideration in the above case. The provisions of Section 4487, General Code, as amended in 101 Ohio Laws 297, do not in any way limit that power. The chief of police is given the exclusive right to suspend a patrolman.

Therefore, the director of public safety cannot suspend a patrolman irrespective of any action by the chief of police.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

728.

TAXES AND TAXATION—TAXES ILLEGALLY LEVIED PRIOR TO JANUARY 1, 1910, AND COLLECTED WITHOUT DISTRESS ON PROPERTY CANNOT BE RECOVERED—AUTHORITIES MAY VOLUNTARILY REFUND.

By Section 12078-1, *General Code, provision is made for the recovery of illegal taxes, levied after January* 1, 1910. *Illegal taxes levied prior to that date, however, and paid under protest, cannot be recovered unless payment was made when a distress was about to be levied for their payment.*

While this rule applies to the legal right of the tax payer to recover, a public official who has collected a tax levy which was plainly illegal may be advised to refund the same.

COLUMBUS, OHIO, November 22, 1912.

HON. WILLIAM M. ROACH, *Solicitor, Alliance, Ohio.*

DEAR SIR:—Your favor of September 20, 1912, is received in which you inquire:

> "Where a special assessment has been levied by a municipal corporation upon property for public improvement before January 1, 1910 (Sec. 12078-1), and a property owner soon after the assessment had been levied, in order to save the interest on such assessment, desires to and does pay the entire assessment, but at the time of payment states to the auditor of such municipal corporation that he is paying the same under protest and asks to have and has marked by such officer upon his receipt 'Paid under protest,' although at the time of such payment no effort had been made or attempted to be made to collect such assessment or to enforce payment by any process authorized for that purpose, and there having been no attempt to levy a distress upon the property of the party paying such assessment, and the court afterwards determining such assessment to be illegal, can such person recover back to amount of the assessment so paid by him in excess of the legal assessment levied against such property?"

You further state the facts upon which the question arises. It was an assessment for the improvement of a street, wherein the entire cost was levied against the abutting property when only fifty per cent. could be levied.

Section 12078-1, General Code, to which you refer, provides:

> "That if, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error it has been or shall be adjudged and determined that any taxes or assessment or part thereof levied after January 1, 1910, was illegal and such judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax or assessment, then such tax or assessment or such part thereof as shall at the time of such judgment or order be then unexpended and in the possession of the officer collecting the same, shall be repaid and refunded to the person paying such tax or assessment by the officer having the same in his possession."

This section specifically applies to taxes or assessments that are levied after January 1, 1910. In your case the special assessment was levied before January 1, 1910. This section cannot, therefore, apply to your case.

In Whitbeck vs. Minch, 84 Ohio St., 210, it is held in a per curiam opinion, as follows:

> "A party who pays an illegal assessment upon his property, cannot recover it back in a suit against the treasurer, unless the payment was an involuntary one. To constitute the payment an involuntary one, it must appear that the treasurer was about to levy a distress upon the property of the party charged with the assessment: A simple protest against the validity of the assessment, with notice to the treasurer that the party intends to bring suit to recover it back, is not sufficient. In such case the general rule applies, if litigation is intended, it must precede payment, where, as in such cases, the party has a plain remedy provided by statute, Section 5848, Revised Statutes, and may resort to the same, and thereby avoid a distress of his property."

No syllabus is given to this case, and there is no statement of the facts. This case is considered by Sayler, judge of the superior court of Hamilton county, Ohio, in case of Van Ness vs. Brooks, 25 Bull. 307. The several causes of action in Whitbeck vs. Minch, supra, are set forth at page 307 of 25 Bulletin.

The first cause of action is there given as follows:

> "Minch filed his petition in the common pleas of Cuyahoga county, in which he sets forth that on September 11, 1882, the city council of Cleveland passed an ordinance by which they levied a district sewer tax on all real and personal property in sewer district No. 7 of 4.5 mills on the dollar; that said tax was certified to the county auditor and placed on the tax duplicate for collection and was collected by the treasurer. This sewer district tax plaintiff says is illegal and void. On December 16, 1882, said sewer district tax being as aforesaid on said tax duplicate for collection, and said defendant refusing to receive the other taxes levied on the said property of plaintiff unless said district sewer tax was paid, and threatened unless it was paid to add a penalty thereto, and afterwards, if still unpaid, to collect all said taxes and penalty by summary proceedings, this plaintiff was compelled to, and did under protest pay to said defendant the first half of said district sewer tax on his said personal property, said first half amounting to $187.85, no part of which has been repaid, and plaintiff asks judgment for this amount with interest."

Seven other similar causes of action are shown. The facts in the first cause of action above set forth are similar to yours, except that in your case the special assessment had not been certified to the county treasurer for collection, and there was no refusal by the county treasurer to receive the other taxes upon the property.

I assume also, from your letter, that these payments were made under protest before any action had been brought to enjoin the collection of such special assessment so paid.

The case of Whitbeck vs. Minch, supra, is cited with approval in case of

Ratterman vs. Express Co., 49 Ohio State 608, wherein Dickman, J., says at page 619:

> "In Whitbeck vs. Minch, 48 Ohio St., 210, it is said that, a party who pays an illegal assessment upon his property, cannot recover it back in a suit against the treasurer, unless the payment was an involuntary one.
>
> "It is difficult to lay down a rule by which to determine in the numerous cases that may arise, whether a payment has been made voluntarily or under compulsion. It has been repeatedly held, however, that a mere protest against the validity of a tax or assessment, with notice to the treasurer that the party intends to bring suit to recover it back, is not alone sufficient to relieve the payment of its presumed voluntary character."

In cases seeking the return of taxes or assessments paid under protest, it is necessary to show that such payments are involuntary and not voluntary. It is a question of fact to be determined from the circumstances of each particular case. Section 12078-1, General Code, supra, modifies this rule, but as seen herein this section does not apply to your case.

The facts submitted by you show that there was no compulsion or demand made for the payment of the special assessment. In the first cause of action in case of Whitbeck vs. Minch, there was a further element, the county treasurer refused to receive the other taxes unless the special assessment was paid. The court, nevertheless, held the payment to have been voluntary and denied the right to recover.

I am, therefore, of the opinion that the payment in the case you submit was made voluntarily and without compulsion, and that the payment made under such circumstances cannot be recovered.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM.

However, the case you present seems to be one wherein a distinction might be drawn between the right of the property owner to recover and the obligation of the public to refund. Where the facts are as plain as they seem to be in your case it does seem to me that the authorities would be warranted, if they are so inclined, in refunding this money. Nothing tends so strongly to create a feeling of revulsion in the citizen against law as a manifest injustice. This money was not collected even under the color of law. Its collection was in contravention of law plainly. I would suggest that you treat the claim just as if it were a judgment and honor it accordingly.

729.

AUDITOR'S CERTIFICATE OF SUFFICIENT FUNDS—MUNICIPAL CORPORATIONS—PARTS OF EXPENDITURES MAY NOT BE MADE FROM DIFFERENT FUNDS—CERTIFICATE NOT REQUIRED WHEN PROCEEDS OF ENTIRE BOND ISSUE EXPENDED.

The object of Section 3506, General Code, requiring a certificate of the auditor that there are sufficient funds in the treasury before municipal bonds may be expended is to set aside certain funds for the purpose of the expenditure and as this purpose is already accomplished, where a bond issue is provided for the payment of the entire expenditure on a contract, the certificate of the auditor is not required in such instance.

Where there is more than one contract to be paid out of a special fund, a certificate is required for each contract.

When, therefore, bonds are issued for the manifold purpose of purchasing ground, erecting a fire house and equipping the same, and the auditor has certified that there are sufficient funds in the treasury for the expenditure of a certain sum for a fire engine, an excess over that sum may not be spent for said engine by taking part of the expenditure from the bond issue fund and the balance from the fire fund.

COLUMBUS, OHIO, October 24, 1912.

HON. T. F. THOMPSON, *City Solicitor, Zanesville, Ohio.*

DEAR SIR:—Under date of October 9, 1912, you inquire as follows:

"Some few months ago council passed an ordinance providing for a bond issue for six thousand dollars for the purpose of purchasing a lot in the city of Zanesville, Ohio, on which to erect a fire station and also for the purpose of erecting a fire station on said lot, and for the purpose of equipping the same. Later council passed an ordinance authorizing the director of public safety to advertise for bids and enter into a contract for the purchase of a fire engine with which to equip said new station. On the later ordinance the auditor certified that there was money in funds for the purchase of said engine, to the amount of thirty-seven hundred and fifty dollars; after which the safety director advertised for bids for an automobile fire engine and entered into the contract for the purchase of an engine in the sum of fifty-five hundred and fifty dollars. This, of course, exceeded the amount in the auditor's certificate, but there was at the time the certificate was put on said ordinance, and now is sufficient funds in fire apparatus to pay for the fire engine in the amount over and above what the certificate called for, to wit, about fifteen hundred dollars.

"The question now arises has the city auditor authority to pay for said fire engine its full price in face of the fact that the certificate on the ordinance provided for only thirty-seven hundred and fifty dollars, and no certificate of funds was placed on the contract?

"In our case we might be able to pay part out of the bond issue and part out of the fire apparatus; and the auditor's certificate as certified, might be treated as applying to that portion that is paid out of the fire apparatus, and a portion paid out of the bond issue, for which a certificate would not be necessary.

"We are convinced that the transaction has been regular and in good faith, but we do not want the auditor to become liable for paying out funds which he has no right to pay out."

Section 3806, General Code, requires the certificate of the auditor as follows:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

Section 3809, General Code, provides several exceptions thereto, and reads:

"The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or company therein situated, for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel."

The contract in question does not come within any of the exceptions provided for in Section 3809, General Code.

In the case of City of Akron vs. Dobson, 81 Ohio St., 66, to which you call attention, the first and third syllabi read:

"A municipal corporation may, under Section 2835, Revised Statutes, issue its bonds for the purpose of equipping buildings used by its fire department with apparatus other than, or in addition to fire engines. The special provisions of paragraph 27 do not govern the general provisions of paragraph 2 of that section.

"Section 1536-205, Revised Statutes, providing that no contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or other order for the expenditure of money, be passed by the council or by any board or officer of the municipal corporation, unless the auditor of the corporation shall first certify to council that the money required for the contract, agreement or other obligation, or to pay the

appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, does not apply to an ordinance appropriating the money obtained by council, from a sale of bonds made by it, to the purpose for which the bonds were sold."

The court's opinion upon the question of the requirement of a certificate is very short. Summers, J., says at pages 77 and 78:

"It is also contended that the contract is void because the auditor did not certify to the council that the money required for the contract was in the city treasury as prescribed by Section 1536-205, Revised Statutes. The supplemental petition avers that the auditor did not so certify. This is denied by the answer in the circuit court, and that court does not make any finding upon that issue. This contract cannot create an obligation against the city in the nature of a debt, to meet which no funds have been provided. The council issued and sold the bonds and appropriated the proceeds to meet the expenditures it authorized, and any obligations incurred by the ordinance under the authority conferred are payable only out of the appropriation, so that the section can have no application to such a case."

The opinion is based upon two propositions, first that the obligation creates no debt of the city for which no funds have been created, and second the obligations to be incurred are payable only from the appropriation which was the proceeds of the bonds.

In your case it is sought to pay a part of the contract price from a fund other than that secured by the sale of bonds, and the part to be paid from an additional fund would constitute a debt of the city for the payment of which no fund has been specially provided. The contract price to be paid for the fire engine, is to be paid partly from the fund realized by the sale of bonds and partly from the general revenues of the city. In the case above quoted from the entire contract price was to be paid from the amount realized from the sale of the bonds.

The second syllabus in Emmert vs. City of Elyria, 74 Ohio St., 185, reads:

"Sections 45 and 45*a* of the Municipal Code (1536-205 and 1536-205*a*, Revised Statutes, Bates 5th ed.), providing in substance that no contract involving the expenditure of money shall be entered into unless the auditor of the corporation shall first certify to council that the money required for the contract is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose and that a contract entered into contrary to such provision shall be void and that the money to be derived from lawfully authorized bonds or notes sold and in process of delivery shall be deemed in the treasury and in the appropriate fund, do not apply to contracts for street improvements, when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement."

In this case also "the entire estimated cost and expense of the improvement" was to be paid from the fund realized from the sale of the bonds.

This case is, therefore, also distinguishable from the case which you submit.

It is urged in behalf of the contract in question that there now is, and at the time the certificate of the auditor was made, there was sufficient money in the treasury over and above the amount certified to, to pay the difference in the contract price and the amount certified, and that this additional sum can be paid out of the fire apparatus fund.

It does not appear, and I take it that the certificate of the auditor does not so show, that the amount certified was to be taken from any particular fund. In other words, when the auditor made his certificate, did he certify to funds which were in the treasury by reason of the bond sale, or to funds derived from the general revenue, or did he consider both sources in making his certificate. These facts are material in deciding this question, and the certificate itself must show the manner in which the particular thirty-seven hundred and fifty dollars was raised, if we are to apply the rule of exception laid down in 81 Ohio St. 66, to any part of the contract price. The presumption would be that the special fund raised by the bond issue would be exhausted first in contracting for purposes within the object of such bond issue, before the general revenues would be touched. In the absence of any other showing it would, therefore, be presumed that the amount certified to was to be taken from the fund raised by the bond issue, or at least to the full extent of the balance in such fund if such balance was not sufficient to make up the entire amount certified.

You state that the amount in the treasury other than that realized from the bond sale is about fifteen hundred dollars. If that is correct then part at least of the thirty-seven hundred and fifty dollars certified must be taken from the fund secured from the sale of bonds.

Let us apply the different situations that may arise. In applying these situations it must be remembered that the purpose of a certificate of the auditor is to have a certain sum set aside for the purpose of the contract or expenditure to be made, and this sum cannot be used for any other purpose until the contract or obligation is performed or cancelled.

If the thirty-seven hundred and fifty dollars was to be taken entirely from the bond sale, then the additional amount to be taken from the general revenue was not set aside for the purpose of this contract. There was no certificate as to this additional amount. The entire amount certified was not to be taken from the general revenues, because there does not seem to have been that sum in the treasury derived from the general revenues. It is intended to take about $1,500.00 from the general revenues. You then would have a certificate applicable partly to the bond fund and partly to the other fund, and it is now sought to take an additional amount, either from the bond fund, or from the general revenue. If the additional amount is to be taken from the bond fund, you have the situation of a certificate as to part of said bond fund and no certificate as to the other part. If the additional amount is to be taken from the general revenue, then you have no certificate as to that.

No situation presents itself that will not lead to confusion and doubt. The purpose of the certificate of the auditor is to secure certainty that there is a fund in the treasury to meet the obligations of the city. This certainty cannot be secured in your case by making the certificate applicable to only a part of an entire expenditure made on behalf of the city.

The rule stated in 81 Ohio St., 66 and 74 Ohio St., 323, is therein applied when the entire expenditure is to be made from the special fund created by the bond issue and the sale of the bonds. It is an exception to the requirement of Section 3806, General Code, and the exception made in the foregoing cases should not be extended without reason and authority therefor.

In case of the Village of Carthage vs. Diekmeier, 79 Ohio St., 323, it is held:

> "Where a municipal corporation, by sale of its bonds, creates a fund for the improvement of certain streets, and takes the necessary steps to receive and accept bids and to contract separately for the improvement of each of said streets, the following certificate filed by the clerk of the corporation at the time the bid is accepted and contract executed, to wit: 'I hereby certify that there is money in the village treasury in the fund from which the above fund is proposed to be drawn for payment of the village portion of the improvement and not appropriated for any other purpose sufficient to pay for the same. L. Hall, village clerk,' is not in compliance with Section 2702 (old number), Revised Statutes, in that it is not certified that a specified sum of money required for the contract to improve the street 'is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose.'
>
> "Where the above defect in the certificate is discovered before the execution of the contract, and the clerk of the corporation, in the presence of the municipal council and with its knowledge and consent, amends the certificate by inserting therein, although in figures, the sum of money required for the contract, and the certificate so amended is filed and recorded as required by said section, and the contract then executed, said certificate is a limitation on the amount to be paid on the contract for that street, beyond which the corporation is not liable to the contractor."

A certificate that sufficient money is in the treasury to pay the obligation and not otherwise appropriated, is not sufficient. The amount must be specified, and the amount so specified is a limit upon the amount to be paid upon the contract. The fund in the last cited case was raised by a bond issue for the improvement of certain streets. Separate contracts were entered into for each street, and a certain amount of the fund appropriated to each street. On pages 340 and 341, Price, J., says:

> "It is contended that the certificate without the figures is according to the language of the statute, and therefore sufficient; that the statute does not require a definite sum to be certified as being in the treasury, but that it is a compliance to certify that there is *enough* in the treasury unappropriated to other purposes, to meet the obligation or contract. If there was but a single contract or expenditure in contemplation, the claim might be tenable in such an instance, but this we do not decide. But in the present case it appears there were eighteen resolutions, including the one here involved, adopted at the same council meeting. The bids accepted were separate for the different streets, and separate contracts were executed for such streets. * * *
>
> * * * * * * * * * *
>
> "Whatever may be the correct view as to the meaning of this statute where a single contract is let, it seems to be a reasonable construction that there be a definite sum certified for each contract where there are several of the same species entered into at the same time to be paid from a theretofore gross fund. It would seem conducive, if not necessary to the safety of each contractor, that a definite sum be certified, because it is on the performance of that act by the

village clerk that the money to discharge the obligation is set apart and appropriated, and which 'shall not thereafter be considered unappropriated,' etc."

The court holds in this case that where there is more than one contract to be paid from a special fund, a certificate is required, in order that a certain portion of the specified fund may be appropriated to pay each contract. In your case it is evident that there was more than one contract. The six thousand dollar bond issue would be sufficient to pay for the fifty-five hundred and fifty dollar fire engine, if no other contract or obligation had been paid therefrom. In addition to having more than one contract, you also have the situation of paying part from the amount realized from the bond sale and a part from the funds secured from the general revenue of the city.

Where part of a contract is to be paid from a special fund set apart for the purpose of such contract and a part from the funds derived from the general revenue, a certificate of the city auditor that the money is in the treasury and not otherwise appropriated, is required as to the entire amount to be expended by such contract.

The certificate in your case was made as to thirty-seven hundred and fifty dollars and that is a limitation upon the amount that can be expended upon the contract in question. The contract price exceeds this amount and is therefore illegal and does not bind the city. The city auditor would not be authorized to pay the contract price.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

747.

OFFICES COMPATIBLE—CITY SOLICITOR AND PROSECUTING ATTORNEY.

There is not express statutory inhibition against one person holding both the office of prosecuting attorney and city solicitor at the same time.

And, inasmuch as the duties of the office do not conflict as to come within the common law rule of incompatibility, one individual may simultaneously hold both offices.

COLUMBUS, OHIO, November 30, 1912.

HON. C. W. WHITE, *City Solicitor, Gallipolis, Ohio.*

DEAR SIR:—Under date of November 22, 1912, you inquire of this department as follows:

"I am now serving as city solicitor and have another year yet to serve, and at the last election I was elected to the office of prosecuting attorney of this county, and I would like very much to have your opinion as to whether I can hold both offices."

There are certain offices which a prosecuting attorney cannot hold because of statutory inhibition.

Section 11, General Code, provides:

"No person shall hold at the same time by appointment or elec-

tion more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge, and justice of the peace."

This section does not prevent the prosecuting attorney from being also the solicitor of a city.

Section 2910, General Code, provides:

> "No person shall be eligible as a candidate for the office of prosecuting attorney, or be elected thereto, who is not an attorney and counsellor at law, duly licensed to practice in this state. No prosecuting attorney shall be a member of the general assembly of this state, or mayor of a city or village. No county treasurer, county auditor, county surveyor or sheriff, shall be eligible as a candidate for, or elected to, the office of prosecuting attorney."

This section prohibits the prosecuting attorney from being a mayor of a city or village, but says nothing as to city solicitor.

There is no statutory inhibition against the same person holding the positions of prosecuting attorney and city solicitor at the same time. The question arises, are the two positions incompatible?

The rule of incompatibility of offices is stated by Dustin, J., in case of State vs. Gebert, 12 Cir. Ct. N. S. 274, on page 275 of the opinion, where he says:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or, when it is physically impossible for one person to discharge the duties of both."

There are three grounds of incompatibility:

First—Physical impossibility of the same person performing the duties of both offices;

Second—When one office is subordinate to the other;

Third—When one office is in any way a check upon the other.

Whether or not it is physically possible for the same person to hold two offices at the same time must be determined from the facts and circumstances of each case.

In many counties in this state it would be physically possible for the same person to be prosecuting attorney of the county and at the same time to be solicitor of a city or village in such county. In other counties the duties required of these two officers would make this physically impossible. This department cannot determine the physical possibility or impossibility from the facts submitted.

The office of city solicitor is not subordinate to the office of prosecuting attorney, or vice versa.

In order to determine if these two offices are in any way a check upon each other it is necessary to look to the duties of the respective offices.

The city solicitor is the legal adviser and attorney of the city which is a separate and distinct body from that of the county of which the prosecuting attorney is the legal authority.

The duties of a city solicitor are prescribed in Section 4303, et seq., General Code, and these sections refer to his duties as the legal counsel of the city and have no reference to the county.

Section 4305, General Code, provides:

"The solicitor shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this title as legal counsel and attorney."

Section 4306, General Code, provides:

"The solicitor shall also be prosecuting attorney of the police or mayor's court. When council allows an assistant or assistants to the solicitor, he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court. The person thus designated shall be subject to the approval of the city council."

Section 4307, General Code, provides:

"The prosecuting attorney of the police or mayor's court shall prosecute all cases brought before such court, and perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county. The city solicitor or the assistant or assistants whom he may designate to act as prosecuting attorney or attorneys of the police or mayor's court shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow."

This latter section does not place upon the city solicitor when acting as police prosecutor any of the duties of the prosecuting attorney of the county. It prescribes the duties of the police prosecutor and requires that he shall perform the same duties "as far as they are applicable thereto, as required of the prosecuting attorney of the county."

In other words the city solicitor or his assistant is prosecutor in the police or mayor's court, and the prosecuting attorney of the county is the prosecutor before the county courts. Their duties as such prosecutors are similar but they act before different jurisdictions. They may be required to act in the same case, but in such event they act in different stages of such case.

The duties as prosecutor of the police or mayor's court are not a check upon the duties of the prosecuting attorney of the county.

Section 4308, General Code, provides:

"When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

Section 4311, General Code, provides:

"The solicitor shall apply in the name of the corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation, or the abuse of its

corporate powers, or the execution or performance of any contract in behalf of the corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption."

The duties devolving upon the city solicitor by virtue of these sections do not make the office of prosecuting attorney a check upon the office of city solicitor, or vice versa.

The duties of a prosecuting attorney are prescribed in Section 2914, et seq., General Code.

Section 2916, General Code, provides:

"The prosecuting attorney shall have power to inquire into the commission of crimes within the county and shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county, the probate court, common pleas court and circuit court. In conjunction with the attorney general, he shall also prosecute cases in the supreme court arising in his county. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and faithfully urge the collection until it is affected (effected), or found to be impracticable, and forthwith pay to the county treasurer all moneys belonging to the state or county, which come into his possession as fines, forfeitures, costs or otherwise."

Section 2917, General Code, provides:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in Section 2412. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensattion shall be paid from the township fund."

Section 2920, General Code, provides:

"The prosecuting attorney shall prepare in legal form the official bonds for all county officers, and see that the acceptance thereof by the proper authorities, the signing thereof, and all the endorsements thereon, are in conformity to law, and that they are deposited with the proper officer. The bond of no county officer shall be accepted or approved by the person or tribunal authorized to approve it, until the prosecuting attorney of the county has inspected it, and certified thereon that it is sufficient. In case of vacancy in the office of prosecuting attorney or of his absence or disability, such duties shall be discharged by the probate judge."

Section 2921, General Code, provides:

> "Upon being satisfied that funds of the county, or public moneys in the hands of the county treasurer or belonging to the county, are about to be or have been, misapplied, or that such public moneys have been illegally drawn, or withheld from, the county treasury, or that a contract in contravention of law has been, or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption, or that any property, real or personal, belonging to the county is being illegally used or occupied, or is being used or occupied in violation of contract, or that the terms of a contract made by or on behalf of the county are being or have been violated, or that money is due the county, the prosecuting attorneys of the several counties of the state may apply, by civil action in the name of the state, to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion of such illegal contract not fully completed, or to recover, for the use of the county, all public moneys so misapplied or illegally drawn or withheld from the county treasury, or to recover, for the benefit of the county, damages resulting from the execution of such illegal contract, or to recover, for the benefit of the county, such real or personal property so used or occupied, or to recover, for the benefit of the county, damages resulting from the non-performance of the terms of such contract, or to otherwise enforce it, or to recover such money due the county."

The duties prescribed in the foregoing sections for a prosecuting attorney are not incompatible with the duties of a city solicitor as being a check upon the one or the other office.

In proceedings for the annexation of territory to a city the duties of a city solicitor and of a prosecuting attorney of the county may be conflicting.

Section 3559, General Code, provides:

> "The council of the corporation, by a vote of not less than a majority of the members elected, shall pass an ordinance authorizing such annexation to be made, and directing the solicitor of the corporation, or some one to be named in the ordinance, to prosecute the proceedings necessary to effect it."

Section 3549, General Code, provides:

> "The petition shall be presented to the board of commissioners at a regular session thereof, and when so presented the same proceedings shall be had as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as required in case of an application to be organized into a village under the provisions of this division. The final transcript of the commissioners, and the accompanying map or plat and petition, shall be deposited with the auditor or clerk of the municipality to which annexation is proposed to be made, who shall file them in his office."

The proceedings directed to be prosecuted by the city solicitor by Section 3559, General Code, are to be had before the county commissioners by virtue of Section 3560, General Code, which reads:

"The application of the corporation to the county commissioners for such purpose shall be by petition, setting forth that, under an ordinance of the council the territory therein described was authorized to be annexed to the corporation. The petition shall contain an accurate description of the territory, and be accompanied by an accurate map or plat thereof."

Section 3561, General Code, provides:

"When the petition is presented to the commissioners, like proceedings shall be had, in all respects, so far as applicable, as are required in case of annexation on application of citizens in this chapter."

The prosecuting attorney is the legal adviser of the county commissioners. He may be called upon by the commissioners to advise them of their duties in the proceedings. The statutes, however, do not specifically require the prosecuting attorney to perform any duties in connection with such annexation proceedings.

This situation would not constitute the office of prosecuting attorney a check upon the office of city solicitor, nor make one subordinate to the other. It might raise a question of physical possibility to perform the duties of the two offices. This situation may never arise and as it applies to the physical possibility, the incompatibility must be determined when that situation arises.

The prosecuting attorney is a member of the budget commission.

Section 5649-3*b*, General Code, provides:

"The county auditor, the mayor of the largest municipality in the county as shown by the last federal census, and the prosecuting attorney shall constitute a board to be known as the budget commissioners, for the annual adjustment of the rates of taxation. The budget commissioners shall meet at the auditor's office in each county on the first Monday of June, annually and complete their work on or before the first Monday in July next following. Each member thereof shall be sworn, faithfully and impartially, to perform the duties imposed upon him by this act. Two members shall constitute a quorum. The auditor shall be the secretary of the budget commissioners and shall keep a full and accurate record of their proceedings. The auditor shall appoint such messengers and clerks as the board deem necessary, who shall receive not to exceed three dollars per day for their services for the time actually employed, which shall be paid out of the county treasury. The budget commissioners shall be allowed their actual and necessary expenses, such expenses to be itemized and sworn to by the person who incurred them, and paid out of the county treasury when approved by the budget commissioners."

Section 5649-3*c*, General Code, provides:

"The auditor shall lay before the budget commissioners the annual budgets submitted to him by the boards and officers named in Section 5649-3*a* of this act, together with an estimate to be prepared by the auditor of the amount of money to be raised for state purposes in each taxing district in the county, and such other in-

formation as the budget commissioners may request, or the tax commission of Ohio may prescribe. The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district, within the limits provided by law.

"When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such county, and of each township, city, village, school district, or other taxing district, returned on the grand duplicate, and place it on the tax list of the county."

The city solicitor has no official duties in connection with the preparation of the city's annual budget, except in his advisory capacity as legal counsel of the city. The mayor of a city has more to do in the preparation of the city's budget than the city solicitor, and yet the statute makes the mayor of the largest city in the county a member of the budget commission.

The duties of a member of the budget commission are separate and distinct from the duties of a city solicitor and also from the duties of a prosecuting attorney as such. These offices are not a check one upon another, and none of them are subordinate to the other.

I am of opinion, therefore, that where it is physically possible for the same person to perform the duties of city solicitor and prosecuting attorney of a county at the same time, the two offices are not incompatible and may be held by the same person at the same time.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

749.

PARKS—PURCHASE OF ADDITIONAL LAND AN IMPROVEMENT FOR WHICH PARK TRUSTEES MAY EXPEND FUNDS APPROPRIATED BY COUNCIL FOR "MAINTAINING AND IMPROVING PARK."

When council passes an ordinance appropriating $20,000 *for "improving and maintaining" a certain public park, this fund is subject to control by the park trustees under Section* 4072, *General Code.*

The purchase of additional land is an "improvement" for which said trustees may expend the money.

COLUMBUS, OHIO, December 20, 1912.

HON. GEORGE BUNTING, *City Solicitor, Warren, Ohio.*

DEAR SIR:—I am replying to yours of December 7, 1912, wherein you say that one Packard donated a park to your city, which from time to time has been improved by appropriations of money on the part of the city. You further say that the last ordinance appropriating $20,000 reads: "for the purpose of improving and maintaining the public park known as Packard park;" that the trustees desire to appropriate about six acres of land adjoining the present park.

You then inquire whether this additional tract of land can legally be paid for out of the above mentioned $20,000; and whether this six-acre addition to the original park is an "improvement."

In the first place, the trustees of this park cannot bring appropriation proceedings to acquire this six-acre tract. That must be done by the city, unless the owner, or owners thereof, convey the same to the city, which holds the title to all parks, whether by donation, conveyance, or appropriation.

The original park having been donated to the city, its care, custody, control and future are governed by Sections 4066, et seq., General Code, which provide for a board of trustees to manage the same. These sections are quite broad, and the trustees are vested with full control of the park, and all funds raised or acquired, in relation thereto.

Section 4071 General Code, provides for the meetings of the trustees, their records, rules, and that the auditor or clerk of the municipality shall be the clerk of the board.

Section 4072 enumerates the powers of the board as follows:

> "Such trustees shall have the entire management and control of such property or funds, all improvements of every nature within such parks, moneys derived from levies made for park purposes, moneys from the general fund appropriated by the council for such purposes, proceeds of bonds issued or sold for park purposes, and of moneys or other property donated to any such municipality for park purposes, all of which moneys shall be placed in a special fund called the 'park fund,' and shall be disbursed by the treasurer of any such city or village, only upon a warrant of the auditor or clerk, drawn in accordance with the order of the board of park trustees."

This is a far reaching section, and gives these trustees almost unlimited control over all "*park funds.*" It would seem that it makes no difference how the funds for "*park purposes,*" of the class to which this one belongs, are derived, the trustees are absolute masters of the disposition thereof.

They are given entire management and control of moneys *appropriated from the general fund by council for "park purposes."*

This "park fund" by Section 4072, is in the hands of the city treasurer as a *special fund*, and can only be disbursed by an order from the park trustees. So then this $20,000 is a "park fund" and the trustees can disburse it for "park purposes."

Is the acquiring of additional ground adjoining the old park an *improvement?* In my mind it clearly is. Anything which makes the old park greater, more commodious, better for the accommodation and convenience of the public, more beautiful by territorial extension, more valuable, is an *improvement.*

"Improvement" and "improve" in the dictionaries and law books (See 21 Cyc. 1743) are interpreted to mean: "to make better," "to increase," "to augment," "to make useful additions," "a valuable addition or betterment," etc.

So that in my opinion the $20,000 or fund is properly subject to be drawn upon by the park trustees, in payment for the six acres, when it becomes the property of the city, and a part of the old park, either by purchase or appropriation.

This is not a matter of narrow construction, but must be looked at in a practical manner under all the facts. When the council placed in the "park fund" of your city this amount of money, it conferred upon the park trustees the authority to pay therefrom any reasonable amount for acquired territory for park purposes, and the same would fall within the title of your ordinance, "for the purpose of improving and maintaining the public park known as Packard park."

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

753.

PRESIDENT OF COUNCIL VOTES IN CASE OF TIE—VACANCY FILLED BY APPOINTMENT BY MAYOR—RIGHTS OF COUNCIL TO PROVIDE FOR ELECTION IN QUESTION OF CITY CHARTER ON OWN INITIATIVE AND UPON PETITION OF ELECTORS—BALLOT TO CONTAIN FIFTEEN NAMES.

When a vacancy arises in the position of president of the council of a city, the same is to be filled by appointment by the mayor, under Section 4252, General Code.

Under Section 4272, General Code, the president of the council of a city is entitled to a vote in case of a tie vote on an ordinance or resolution.

Under proposal forty of the constitutional amendments, council may by a two-thirds vote of its members and on its own initiative, provide for an election upon the question of a city charter. But upon petition of ten per cent. of the electors, it becomes mandatory upon the council to provide for such submission, under the same proposal.

The phrase "provision shall be made thereon for the election of fifteen electors" requires that the ballot shall present at least fifteen names to be voted on by the electors.

COLUMBUS, OHIO, December 21, 1912.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—I have your letter of October 18, 1912, in which you ask:

"1. Whether the successor of the president of the council, in case of his resignation, should be appointed by the mayor or council?

"2. In case of a tie vote on an ordinance or resolution is the president of the council entitled to vote thereon?

"3. Should a petition of electors be filed with the council before it provides for submission to electors as to question of city charter?

"4. What is meant in proposal forty by the phrase "provision shall be made thereon for the election of fifteen electors?" How are they nominated, by whom, etc.?"

In reply would say, Section 4252 General Code reads:

"In case of death, resignation, removal or disability of any officer or director of any department of a city, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed."

In the absence of a specific provision of law for the filling of a vacancy occasioned by the resignation of the president of the council (which I am unable to find) the above section would govern, and the mayor would appoint.

Section 4272 General Code reads:

"The president of council shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation, and shall preside at all regular and special meetings of council, but shall have no vote therein except in case of a tie."

This answers your second question in the affirmative.

In proposal forty will be found this language:

"The legislative authority of any city or village *may* by a two-thirds vote of its members, and upon petition of ten per cent. of the electors *shall* forthwith provide, etc."

This I construe to mean that the council may, by a two-thirds vote of its members, and on its own initiative provide for such election; but upon petition of ten per cent. of the electors it becomes mandatory upon the council to provide for such submission.

Your fourth inquiry raises a question of fact rather than law, the phrase "provision shall be made thereon" refers to the ballot rather than the ordinance, and the ordinance should be so drawn that the ballot provided for the electors should give them an opportunity to select the fifteen electors who shall prepare the charter. A ballot without fifteen names upon it would probably not comply for the reason that it would not afford the electors an opportunity to select. One with a greater number than fifteen, with direction to the electors to vote for any fifteen of the names on the ballot, would no doubt be a ballot sufficiently complying with the amendment.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

754.

ASSESSMENTS—INJUNCTION AGAINST ASSESSMENT FOR STREET IMPROVEMENTS AT MORE THAN ONE-THIRD OF VALUE—REASSESSMENT BY COUNCIL.

Where assessments for street improvements under the foot front rule are made against property in excess of one-third value of the premises, the council, not having determined the value of the property and no committee having been appointed to assess values and determine benefits;

Held: It is best for the lot owner to enjoin and thus compel the council to reassess under Section 3902, General Code.

COLUMBUS, OHIO, December 20, 1912.

HON. R. E. MYGATT, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—In your letter of December 6th, you state that two assessments were made against the property of one Kate Murphy, under the foot-front rule; that the same were in excess of one-third of the value of the premises; that the council did not determine the value of the property, and no committee to assess values and determine benefits was appointed, and inquire:

> "Does the city council have such right to fix the value of land assessed for improvements when the assessment is made by the foot-frontage rule and rebate the amount of the assessment to an amount not exceeding one-third of such new valuation, and is there any method of correcting the error except by an injunction proceeding by the property owner in a court of competent jurisdiction?"

You call attention to the opinion of my predecessor in office found on page 1040 of "Opinions of Attorney General for 1910-1911," and state you have been following it.

Section 3902, General Code, reads:

> "When it appears to the council that a special assessment is invalid, by reason of informality or irregularity in the proceedings, or when an assessment is adjudged to be illegal, by a court of competent jurisdiction, the council may order a reassessment, whether the improvement has been made or not."

I can see no reason for taking a different view from that taken by Mr. Denman in his opinion referred to.

The question before him, however, was different from the one you present, in that it was there assumed that council had taken legislative action in the matter, while you state they did not do so.

Whether the omission to do the things mentioned by you (which, if done at the time of making the assessment might not have changed matters) would authorize action to be taken on account of "irregularity or informality" as set forth in Section 3902, is not now necessary to determine, although I incline to the view that it would; but as the easiest way out is for the lot owner to enjoin and thus compel the council to reassess, I think it the best course to be pursued.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

764.

ASSESSMENTS—CITY MUST PAY ONE-FIFTIETH OF COST BUT NOT FOR STREET INTERSECTION OF A SANITARY SEWER—BONDS FOR CITY'S SHARE MAY BE AUTHORIZED IN ORDINANCE PROVIDING BONDS FOR OTHER PURPOSES WHEN IMPROVEMENTS AUTHORIZED BY COUNCIL.

By virtue of Section 3820, General Code, the city is required to pay not less than one-fiftieth of all the cost and expense of a sanitary sewer and of a storm sewer; and in addition thereto the city is required to pay the cost of intersections of a storm sewer, but the city is not required to pay the cost of intersections of a private sanitary sewer with a street.

Where the construction of a sanitary sewer has been provided for and authorized and thereafter bonds are to be issued to pay the city's share, of the cost of such improvement, such bond issue may be provided for in an ordinance which provides for the issue of bonds to pay the share of the city of other street and sewer improvements, when such improvements have been authorized by council.

COLUMBUS, OHIO, November 18, 1912.

HON. CARL J. GUGLER, *City Solicitor, Galion, Ohio.*

DEAR SIR:—Your favor of October 26, 1912, is received in which you inquire:

> "*First.* Do the provisions of Section 3820, General Code, that the corporation must pay not less than one-fiftieth of the cost and expense of an improvement and the cost and expense of intersections apply to sewers both sanitary and storm water.
>
> "*Second.* Can the city by ordinance provide for a blanket bond issue to raise money to pay the city's cost and expense of improving various streets and in the same ordinance provide for bonds for the city's portion of the cost and expense for sanitary sewers if it is required to pay a part of the cost and expense?"

Section 3820, General Code, to which you refer, provides:

> "The corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections."

In case of Close vs. Parker, 20 Cir. Dec. 384, the third syllabus reads:

> "The provision of the Municipal Code as to improvements for which special assessments are made that "the corporation shall pay the cost of intersection" (Rev. Stat. 2373; Lan. 3604; B. 1536-213; Mun. Code, Sec. 53) has reference to the parts of street improvements at the intersections of streets, one with another. *It has no application to the crossing of a street by a sewer for local sanitary drainage.*"

This decision was affirmed without report as shown at 79 Ohio State 444.

In commenting upon this decision and its affirmance by the supreme court, Page and Adams say in a note to said Section 3820 of their Annotated General Code:

> "The decision in Ball vs. Portsmouth, 82 O. S. 151, given above, makes likely that the affirmance was for some other reason than the approval of the view herein expressed."

This seems to cast some doubt upon the correctness of the holding in the above case.

Wildman, J., in Close vs. Parker, supra, says on pages 387 and 388:

> "It is claimed also in the petition that the assessment is invalid in that there is no deduction for intersectons. In order that I may state the position of counsel for the plaintiff fairly, I read from his brief:
>
> * * * * * * * * * * * *
>
> " 'From paragraph 8 of the agreed statement it appears that the city was not charged with the cost of any intersection.'
>
> " 'If the crossing of the streets by sewer 930 forms intersections under the terms of the statute, it is conceded in Par. 7 of the agreed statement that the assessment is excessive by 9.93 per cent.'
>
> "The provisions of the Municipal Code of 1902, relied upon by counsel as changing the character of an intersection the construction of which is to be paid for by the city is Sec. 53 (Rev. Stat. 2373; Lan. 3604; B. 1536-213), which reads in part:
>
> (The court here quotes the provisions of Section 3820, General Code).
>
> " 'It will be noted that the word "intersections" is here used without definition, but by the former statute were clearly contemplated, as counsel agree, improvements extending along or in streets and the provision was that the city should pay the costs of such improvements in the squares made by the intersections of two streets. The examination that I have given to this matter leads my mind to the conclusion that the word had acquired at the time of the passage of the Municipal Code of 1902 a familiar meaning and that it had reference to intersections of the character described in the statute in force up to and at the time of the passage of the Municipal Code; and although the definition of "intersections" is dropped out, I think that the new section—53 of the Code—still had reference to the same class of intersections that had been before known.' "

Also on pages 388 and 389, he further says:

> "This entire legislation and adjudication as to intersections is based upon the idea that the part of the improvement at such intersections is connected with a street improvement to be paid for by assessment. If the property owners are benefited by the general street improvement, assessment is to be made upon such property owners along the street where the other expenses are being assessed. Upon the same principle, if a sanitary sewer is, at the intersection, still for the benefit of the people whose land it drains, although it crosses the street, the owners of the property drained should equitably

pay the expenses. The city derives no benefit from a sanitary sewer at the point of crossing a street. The city does not need it. It is not there to take off the surface water; it is not for the purpose of draining the street, but it is for the purpose of caring for the sanitary drainage of the lots which are assessed. Both upon authorities, so far as we are able to find them, and upon principle, as it seems to us, the cost of the improvement at the kind of interesection we have here, should not be paid by the city. To the extent that the city is in any way benefited by this sanitary drainage, as I have already suggested, the city does pay one-fiftieth of the cost."

The court bases its decision upon the ground that the city as a whole does not need the sanitary sewer and is not benefited by such sewer at the point it crosses the street. And for these reasons the city is not required to pay the cost of the intersection. This reasoning, as intimated by the court, does not apply to a sewer which drains the surface water and does not exempt the city from paying one-fiftieth of the entire cost. A storm sewer, as I take it, is used to drain the surface water.

The total assessment in this case was affirmed by the supreme court. From the above quotation from the opinion it appears that it was found in the agreed statement of facts that the city did not deduct for intersections and because of such failure to allow for intersections the "assessments is excessive by 9.93 per cent." The record in the supreme court is not before us, but in view of the above finding of fact, the supreme court could not have affirmed this decision and thereby make the entire assessment valid, without holding that the city was not required to pay for intersections in the case of a special assessment for the construction of a sanitary sewer.

In Ball vs. the City of Portsmouth, 82 Ohio St., 151, referred to in the above note as casting doubt upon the holding in Close vs. Parker, supra, it is held:

"The provision of Section 53, Municipal Code of 1902, which requires the corporation to "pay the costs of intersections" when streets are improved includes all manholes, catch basins and tiling at intersections."

This case arose out of an assessment for the improvement of a street and the manholes, catch basins and tiling at intersections were used for draining the surface water. There is no intimation that it was part of a sanitary sewer.

The court say on page 152:

"With respect to catch basins, manholes and tiling, their location in street improvements is determined by considerations which address themselves to engineers. When they are so located as to become a part of the intersections, the cost of their construction is imposed upon the city in terms which are too plain to admit of interpretation. If there were occasion to seek the reason for the provision of the statute it might be found in the fact that all that is included within the intersections is to be used in the improvement of the crossing streets when such improvements shall be made, and manifest inequality would result from assessing the cost of their construction upon property abutting upon the street first improved."

In Close vs. Parker, 20 Cir. Dec. 384, supra, the court refers to the provisions of the former statute. This is Section 2274 of the Revised Statutes. Said section read in Bates Revised Statutes of 1902, as follows:

> "That when the council of a city, except in cities of the first grade of the first class, and in cities of the first grade of the second class, determines to grade, pave, sewer, or otherwise improve a street, alley or other public highway, and the improvement crosses or intersects another street, alley or public highway, the council shall levy and assess a tax, in addition to that specified in the last section, upon the general tax list of all the taxable real and personal property in the corporation, for the estimated cost and expense of so much of the improvement as may be included in the crossing or intersection of such street, alley or highway, which amount the corporation clerk shall certify to the county auditor, and the same shall be enforced against such real and personal property as other taxes are enforced and collected; and such amount may be so certified, and such levy made, after the contract is let, or said improvement completed, and the provisions hereof shall apply to improvements already determined upon or ordered and for the payment of which special assessments have not been made."

This section applied to the improvement of a street, alley or other public highway and did not apply to a sanitary sewer.

The decision in Ball vs. The City of Portsmouth, supra, does not necessarily overrule the holding in Close vs. Parker, supra. The two cases are clearly distinguishable.

I am of opinion, therefore, that by virtue of Section 3820, General Code, the city is required to pay not less than one-fiftieth of all the cost and expense of a sanitary sewer and also of a storm sewer; and that in addition thereto the city is required to pay the cost of intersections of a storm sewer, but the city is not required to pay the cost of the intersection of a sanitary sewer with a street.

Your second inquiry is in reference to the right of the council to provide for the issue of bonds to pay the city's share of the cost of sanitary sewers by the same ordinance in which it provides for bonds for payment of the city's share of various street improvements.

In Heffner vs. Toledo, 75 Ohio St., 413, it is held:

> "An ordinance to provide for the issuing of bonds to pay the city's part of the cost of thirty-two street and sewer improvements, entitled: "An ordinance to provide for the issue of general street improvement bonds of the city of Toledo, state of Ohio, to pay said city's part of the cost and expense of improving sundry streets and alleys by paving, repaving, grading and macadamizing, and by constructing sewers therein and to pay the said city's part of the cost and expense of constructing such sewers," is not in conflict with the statutory requirement that "No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title."
>
> "A city is not authorized to issue bonds to provide a fund from which to pay its part of the cost of improvements that may from time to time be made, but it may, under Section 53 of the Municipal

Code of 1902, Section 1536-213, Revised Statutes, or under Section 2835, Revised Statutes, issue bonds to pay its part of the cost of specific improvements.

"The bonds authorized by Section 53 of the Municipal Code of 1902 cannot be provided for by resolution or ordinance until after the passage of an ordinance providing for the improvement.

"Under Section 2835, Revised Statutes, the council of the city may by a resolution or ordinance, passed by the affirmative vote of not less than two-thirds of the members elected or appointed thereto, provide for the issuing of bonds to pay the city's part of the cost of a specific improvement before the passage of a resolution declaring the necessity for the improvement."

By virtue of this decision the city is not authorized to issue bonds to provide a fund from which to pay its share of the cost of improvements which may from time to time be made.

The part of Section 1536-213, Revised Statutes, which authorized the city to issue its bonds for its share of the cost of improvements is now found in Section 3821, General Code, which reads:

"A municipality may issue and sell bonds as other bonds are sold to pay the corporation's part of any such improvement, and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon."

As held in the above case the bonds to be issued by virtue of Section 3821, General Code, cannot be issued "until after the passage of an ordinance providing for the improvement."

The provisions of Section 2835, Revised Statutes, referred to in the above case are now found in Sections 3939, et seq., General Code. As held therein bonds may be issued by a city under this section for its share of the cost of a specific improvement before the passage of an ordinance providing for the improvement. I take it that in your case it is desired to issue the bonds by virtue of Section 3821, General Code, after the improvement has been provided for.

Summers, J., says on page 425 of Heffner vs. Toledo, supra:

"The issuing of bonds to pay the city's part of the cost of such improvements is merely incidental to the making of the improvement, and council cannot provide for the making of the separate improvements without the concurrence of three-fourths of the whole number of members elected to council, unless the owners of a majority of the foot frontage to be assessed petition in writing therefor, and in that event the concurrence of a majority of the whole number elected is essential. And if a greater part of the cost of the improvement than that required by statute is to be paid by the corporation, it must be provided for in the resolution or ordinance providing for the improvement. It would seem, therefore, that the ordinance in question is not within the mischief intended to be prevented by the statute."

In this case the ordinance provided for the issue of bonds to pay the city's share of the cost of making thirty-two street improvements and for con-

structing sewers therein. The court decided that the bonds for such purpose could be provided for in one ordinance because the issuing of bonds to pay the city's share of the cost of such improvement was incidental to the improvement itself. So in the case of a sanitary sewer, the issuing of bonds by the city to pay its share of the cost is an incident to the improvement. The improvement is provided for by a separate proceeding. The same reason applies to each class of improvement.

I am, therefore, of the opinion that where the construction of a sanitary sewer has been provided for and authorized and thereafter bonds are to be issued to pay the city's share of the cost of such improvement, such bond issue may be provided for in an ordinance which provides for the issue of bonds to pay the share of the city of other street and sewer improvements when such improvements have been authorized by council.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

765.

CITY HALL—APPOINTMENT OF COMMISSION OF PROCURING LAND AND FURNISHING BY DIRECTORS OF PUBLIC SERVICE IS DIRECTORY AND NOT MANDATORY—BOND BY COMMISSIONERS TO CITY TO BE FIXED BY COUNCIL—SUPERVISION OF WORK BY DIRECTOR OF PUBLIC SERVICE.

When the electors of a municipality have authorized the building of a city hall, the director of public service may or may not, as he sees fit, employ a commissioner of five citizens of the city, under Section 4375, General Code, to act under his supervision in procuring land and furnishing said building.

Said Section 4335, General Code, is directory and not mandatory, as the word "may" is only to be construed as "must" or "shall" when the public good or a claim "de inre" demands such construction.

The members of the commission have power to make contracts and should be required by either council or the director of public service to give bond, the amount of which should be fixed by council under Section 4214, General Code.

Such bond is for the benefit of the municipality which is a corporation with power to sue and be sued, and should, therefore, be given to the city and not to the state.

All the work and proceedings of the commission are subject to the approval of the director of public service, who is an ex-officio member. His approval of the action of the commission may be made at any time after the action is taken.

COLUMBUS, OHIO, December 21, 1912.

HON. JOHN F. NEILAN, *City Solicitor, Hamilton, Ohio.*

DEAR SIR:—Your favor of November 21, 1912, is received in which you inquire:

> "The council of the city of Hamilton, Ohio, by resolution declared the necessity of issuing $200,000 worth of bonds for the purpose of erecting a public hall and public offices or city building. Since the amount of money required necessitated the submission of the ques-

tion to the qualified electors of the city of Hamilton, the said question was submitted to such electors on the 5th day of November, 1912, and more than two-thirds of the electors voting upon this proposition voted in favor of issuing the said bonds for the aforesaid purpose.

"The director of public service has written me, as city solicitor, in order that he may be advised as to his full duties with regard to employment of five citizens, or whatever number he may be authorized to employ, who shall constitute a commission for procuring the necessary land for the construction or for the furnishing of such city hall."

"I should like to have you advise me:

"First. Whether the director of public service ought not to proceed under Section 4335 of the General Code?

"Second. Whether in your opinion the provisions contained in Section 4335 are directory or mandatory?

"Third. Whether the director of public service is authorized to require the five persons employed by him and constituting the city building commission, to give bond for the faithful performance of their duties, and if said commission can be required to give bond, whether the said bond shall run to the city of Hamilton, or to the state of Ohio?

"Fourth. Whether the director of public service is required to meet with such commission, or may simply approve their action in any matter by making his approval a part of the record of such commission?"

Section 4335, General Code, provides:

"When a city has in contemplation or in process of construction or furnishing a city hall, the director of public service may employ five citizens of such city, to be named by him, not more than three of whom shall belong to the same political party, who shall constitute a commission, under his supervision and direction, for procuring the necessary land for the construction, or for the furnishing of such city hall."

This section applies when the city desires to construct a city hall. A city hall is a building to be used for municipal offices of the city. Such building in addition to the offices often contains a public hall.

Section 4339, General Code, provides:

"When a city has in contemplation or in process of construction a market house or houses or public hall in connection therewith, the director of public service may employ three citizens of the city, to be named by him, who shall constitute a commission."

This section applies to the construction of a market house or houses or a public hall in connection therewith. The public hall contemplated by this section is a hall in connection with a market house. It does not apply to the construction of a building such as you describe.

Section 4343, General Code, provides:

"When a city, or the county in which such city is located, has

in contemplation or in process of construction, buildings for public, municipal or county purposes within the boundaries of such city, the director of public service may employ three persons, to be named by him, of whom at least two shall be architects."

This is a general statute which will apply to any building to be constructed and used for municipal purposes. Section 4335, General Code, specifically provides for the construction of a city hall. It is a special statute for this purpose, and it should govern in such case as against the general statute.

If it is desired to appoint a commission to construct the city building in question the director of public service should proceed under Section 4335, General Code.

The provision of Section 4335, General Code, is that,

"the director of public service *may* employ five citizens of such city * * * who shall constitute a commission."

You ask if this provision is mandatory or if it is merely directory.

The word "may" is used and the ordinary construction of "may" is that it prescribes that which is directory.

At page 1160 of 36 Cyc. it is said:

"As a general rule the word 'may,' when used in a statute, is permissive only and operates to confer discretion, while the words 'shall' and 'must' are imperative, operating to impose a duty which may be enforced. These words, however, are constantly used in statutes without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the legislature as determined by the ordinary rules of construction. Thus the word 'may' should be construed to be mandatory whenever the public or individuals have a claim *de jure* that the power conferred should be exercised, or whenever something is directed to be done for the sake of justice or the public good; but never for the purpose of creating a right."

In Sifford vs. Beaty, 12 Ohio St., 189, Peck, J., says at page 194:

"In Schuyler Co. vs. Mercer Co., 5 Cowen, 24, the rule on this subject is said to be, 'that the word *may* means *must* or *shall* only, in cases where the public interests or rights are concerned, and where the public or third persons have a claim *de jure* that the power shall be exercised."

The word "may" as used in statutes usually implies a discretion and the usual construction is that the provision is directory and not mandatory.

Section 4324, General Code, provides:

"The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. He shall keep a record of his proceedings a copy of which, certified by him, shall be competent evidence in all courts.

Section 4325, General Code, provides:

> "The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship canals, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety or as otherwise provided in this title."

Section 4326, General Code, provides:

> "The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

By virtue of these sections the director of public service is authorized to supervise and manage the construction of public improvements.

It is my opinion that the director of public service may construct said city building under the authority granted by Sections 4324, 4325 and 4326, General Code, or, if he desires, he may appoint a commission of five citizens under the provisions of Sections 4335, et seq., General Code.

The word "may" as used in said Section 4335, General Code, is directory and is not mandatory. This is not a question of right or of public policy. It is a question of administration in the construction of this building.

Your third inquiry is in reference to the bond to be given by such commissioners.

Section 4338, General Code, provides:

> "The commissioners shall each receive such compensation, not to exceed five dollars each per meeting, as the director of public service may fix, but such compensation shall not in any case exceed twelve hundred dollars per annum each, which, together with the expenses of the commissioners shall be paid in the same manner as the cost of such city hall."

This section prescribes the method of fixing the compensation, but nothing is said about the giving of a bond.

Section 4214, General Code, provides:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe

in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

Section 4667, General Code, provides:

"The official bonds of all municipal officers shall be prepared by the solicitor. Except as otherwise provided in this title, they shall be in such sum as the council prescribes by general or special ordinance and be subject to the approval of the mayor, except that the mayor's bond shall be approved by the council, or, if it is not legally organized, by the clerk of the court of common pleas of the county in which the corporation or the larger part thereof is situated."

By virtue of Section 4214, General Code, council may fix the amount of bond to be given by each commissioner.

Section 4336, General Code, provides:

"Subject to the approval of the director of public service, such commissioners may acquire in the name of the city, by purchase or appropriation, land for city hall purposes, may employ architects and approve plans and specifications. They shall make in the name of the city all contracts necessary for the construction and furnishing of such city hall, which shall be made after advertisement for bidding, as provided by law for the making of other municipal contracts, and shall be subject to the approval of the director of public service. They shall keep a full record of their proceedings."

By virtue of this section, the commission, under the supervision of the director of public service, has the power to make contracts for the city. An officer having such power should give a bond for the faithful discharge of his duties.

The members of the commission may be required, either by council or by the director of public service, to give a bond. Council shall fix the amount of such bond.

The statute is silent as to the obligee in the bond of a municipal officer. In the case of county officers the statute usually provides that the state of Ohio shall be the obligee. A county, however, is but a quasi-corporation, while a municipality is a corporation in fact, with full power to sue by its corporate name.

Section 4308, General Code, provides:

"When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

The bond of a municipal officer is for the use and benefit of the municipality. The municipal corporation can sue in its corporate name and it is the proper obligee of such a bond.

The bond of the commissioners in question, if any, is required, should be given to the city of Hamilton.

You next inquire as to the manner in which the director of public service shall exercise his supervision over the work of the commission.

There are but four sections which apply to the commission in question. Three are given above. The other one is Section 4337, General Code, which reads:

> "Such commissioners shall select from their number a president, and they may appoint a clerk and other necessary employes, and, subject to the approval of such director, fix their compensation."

It will be observed that all the work and proceedings of the commission is subject to the approval of the director of public service.

The director of public service is not made an ex-officio member of the commission. The action of the commission upon a subject may be at a different time than the action of the director of public service on the same matter.

In my opinion the director of public service is not required to meet with the commission, although he may do so. His approval of the action of the commission may be made at any time after such action is taken.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

768.

TABERNACLE NOT AN ASSEMBLY HALL AND NOT WITHIN BUILDING CODE.

Under the doctrine of "noscitur a sociis" a temporary tabernacle constructed for revival purposes is not such an assembly hall as was intended to be included within the terms of Section 12600-2, *General Code.*

Such buildings were intended to be treated under the heading of "churches," with reference to which the legislature has as yet failed to act.

Such a building cannot, therefore, be held to come within the building code and is not required to be fireproof.

COLUMBUS, OHIO, December 24, 1912.

HON. E. K. WILCOX, *City Solicitor, Cleveland, Ohio.*

DEAR SIR:—Your favor of December 6, 1912, is received in which you inquire:

> "A committee representing various affiliated religious bodies here has presented plans to the office of the inspector of buildings covering the erection of a tabernacle, in which it is proposed to hold, for a period of six weeks, evangelistic services. The building, as designed, will accommodate four thousand persons, and it is proposed to erect it of frame construction, wooden sides and a wooden roof, overlaid with tar paper. The building code of the city of Cleveland prohibits the erection of a building of this sort and of this size. In view of the isolated location, however, and of the temporary use to which the

building is to be put, it has been thought that upon the advice of the inspector of buildings, and of the fire chief, the council of Cleveland might be willing to abate, in this exceptional instance, the application of the local regulation.

"Another difficulty arises, however, from the fact that in the opinion of the inspector of buildings the state building code also prohibits this building. The matter was laid before the mayor, and he expresses the opinion that whatever might be the possibility of relaxation of the local regulation, he was without power to relax in any particular the state regulation on the subject. It was then suggested that similar tabernacles either have recently been or are now in process of being erected in Columbus and other cities of the state, and that in all likelihood the question had been raised in your office as to whether the state building code, dealing with assembly halls covers such temporary buildings.

"At the request of the mayor, I am writing to ask whether in the opinion of your office the state building code does cover the case. Title I of the state building code covers assembly halls, and among other things groups within the definition of those words buildings in which more than one hundred persons assemble for the purpose of hearing lecturers or speakers. Comprehensive provision is made that all assembly halls having a seating capacity of a thousand or more must be of fireproof construction, so that if the proposed tabernacle building is an assembly hall within the meaning of the state code, it would be prohibited, unless of fireproof construction.

"The only argument suggested by those who appeal to the mayor on this subject which would exclude the proposed building from the operation of this clause is that the building is to be temporary, and after having been used for six weeks, is to be removed."

Section 12600-2, General Code, defines "Assembly Hall" as follows:

"Under the classification of 'assembly halls' are included *all buildings* or parts of buildings in which persons are assembled for entertainment or amusement, including halls used for lodge rooms or dancing, *and all places where persons congregate to* witness vaudeville, burlesque, dramatic or operatic performances, *to hear speakers or lecturers*, to listen to operas, concerts or musical entertainments in which no scenery is used and no motion pictures are thrown upon canvas, screens or walls, and seating one hundred (100) or more persons."

The real question to determine is whether the building described in your letter is an assembly hall under the statutory definition of the same as contained in the section of the act just quoted. You say that the building as designed will accommodate four thousand persons, and it is proposed to erect it of frame construction, wooden sides and a wooden roof, overlaid with tarred paper; and that it is proposed to hold in the building for a period of six weeks evangelistic services. You further advise as follows:

"It was then suggested that similar tabernacles either have recently been or are now in process of being erected in Columbus and other cities of the state."

Let me say in the beginning that the real test of the building seems to be the use to which it is to be put, and the opinion arrived at in this opinion is based solely on the facts stated in your letter, "that it is proposed to hold therein *evangelistic services*, and the further fact contained by inference in your letter that the building is to be what is known as a "tabernacle." To determine whether or not the building in question is embraced within the term "assembly hall" requires a consideration of more than an interpretation of the section itself which defines assembly halls were such section standing alone; it is necessary to go to the preamble of the section, found on page 588 of 102 Ohio Laws, as follows:

PREAMBLE

"Under part two which follows, will be found under their respective titles, the various classes of buildings covered by this code together with the special requirements for their respective design, construction and equipment.

Classes of Buildings

"The classification of the various buildings will be found under the following tiles, viz.:

"Title 1. Theaters and assembly halls.
"Title 2. Churches.
"Title 3. School buildings.
"Title 4. Asylumns, hospitals and homes.
"Title 5. Hotels, lodging houses, apartments and tenement houses.
"Title 6. Club and lodge buildings.
"Title 7. Workshops, factories and mercantile establishments.

"Buildings or parts of buildings used only for the specific purposes mentioned under their respective titles and classification shall be designed, constructed and equipped as called for under all of the sections coming under such title and classification.

"Buildings used for two or more different kinds of occupancy and combining the classifications covered under two or more different titles shall be designed, constructed and equipped according to all of the various sections of the different titles affecting such building or parts of such building.

"The detailed requirements of the above mentioned special requirements, together with standard devices, will be found in subsequent parts of this code."

It will be noted further that requirements were provided by the legislature for only the following:

"Title 1. Theaters and assembly halls.
"Title 3. School buildings."

The legislature for some reason failed, either by design or through inadvertence, to determine the requirements for the other titles, and much significance is to be attached to this. It will be noticed that the legislature provided as to what are included under the head of "school buildings" thus de-

fining school buildings, so that for the purposes of this act, in so far as the legislature went, it made its own definitions for terms, and doubtless will continue to do so when further legislation is enacted. These terms may or may not be identical with what are known as dictionary definitions as to such terms. Generally speaking, legislative definitions of terms are made for the purpose of removing doubt as to what is ordinarily included within a given term. In the present instance it appears in a way to have created, instead of removing, doubt. In my judgment, without reflecting on the considerations hereinafter referred to in reference to the word "church," it would be extremely doubtful whether a building used for the purposes you name would come under the head of buildings in which persons are assembled to hear speakers or lecturers in the light of the other subjects referred to under the head of assembly halls.

You will observe under the classification of assembly halls are included:

> "* * * all buildings or parts of buildings in which persons *are assembled for entertainment or amusement, including halls used for lodge rooms or dancing, and, all places where persons congregate to witness vaudeville, burlesque, dramatic or operatic performances, to hear speakers or lecturers, to listen to operas, concerts or musical entertainments* * * *"

Through this rings the idea of entertainment and amusement, or for purposes temporal rather than spiritual. The maxim "*Noscitur a Sociis*" applies. It is true that there is no limitation on the word speakers or lecturers, but we have to consider it in the light of its surroundings, and its surroundings are "entertainment, amusement, lodge rooms, dancing, vaudeville, burlesque, dramatic or operatic performance, and likewise operas, concerts and musical entertainments."

If it were a place where lecturers were given on some general subject as a business proposition, or where speaking was held under circumstances in which the exercises are commonly referred to as "Speeches," doubtless the section would apply; or a lecture in the sense where tickets are sold by the management when the lectures are given. I do not gather that the building is to be used for any of the purposes I have indicated."

I suppose that under the head of "similar tabernacles erected in Columbus and other cities of the state" you refer to what are known as "Mr. Sunday's tabernacles." The Sunday exercises do not seem to me to be embraced within the scope of the things contained in the section defining assembly halls. They are entirely of a religious nature, and if I am rightly informed are akin to what are commonly known as "revivals" without being, as I understand it, in charge of any particular denomination. The exercises consist of singing hymns, prayer services, the delivery of a sermon, and last but by no means the least indicia of a religious exercise, the taking up of a collection. The whole affair is voluntary.

> "Webster defines an 'evangelist' as 'an occasional preacher having no fixed charge, a traveling missionary, as, among the Disciples of Christ, a minister who organizes church societies and sets churches and their officers in order; especially among various Protestant denominations, a minister or layman who goes about from place to place preaching at special services to awaken religious interest and produce conversions."

So that, as I understand it, the only difference between one of these

buildings and a regular church is that the former are temporary in character. If the building you describe were an assembly hall the fact that it was to be used temporarily would be immaterial; its use for assembly hall purposes temporarily would violate the law just as well as if used permanently. The exercises at these evangelistic meetings, as I understand it, are no wise different in their general nature from revival exercises in Methodist churches. I am speaking now of their general scope.

Another distinction might perhaps be drawn, and that is the exercises are, as before said, non-denominational in character. This difference, however, does not detract from the main idea, and that is in the contemplation of the building code such tabernacles are left to be embraced under the head of Title 2—Churches. Had the legislature finished with the work of the building code and given us a definition of churches, the cloud would be removed, but in my judgment a legislative body in providing for the requirements as to tabernacles would be much more likely to put them under the genus *churches* than under the genus *assembly halls* because of the very nature of the exercises.

What is a tabernacle? Webster defines tabernacle as:

> "A slightly built or temporary habitation; a transient shelter, a tent. Jewish Antiquity. A structure of wooden framework covered with curtains, carried through the wilderness in the exodus, as a place of sacrifice and worship."

It will thus be seen that originally the word referred to habitation; it really means a hut or shed; by reason of its temporary nature—a church, but for temporal purposes was called a "tabernacle," but its real nature is to be determined by the services. The tabernacle is no less a church because of its temporary qualities.

On account of the importance attached to this question I have given it most careful consideration, appreciating the fact that such structures are sometimes dangerous and quite frequently pronounced unsafe by the police authorities. In respect to the building code and the safety of the health and life of the public, I regard it as my duty to be exceedingly careful lest any provision of the statutes in respect to the public's safety be frittered away by interpretation, but after the most careful consideration I am firmly pursuaded that the legislature has failed to make provision for the requirements as to the construction of the kind of buildings to which you refer. Until the legislature acts on the question, the public must rely upon the safety and welfare promised in the hereafter rather than the safety which the building code is designed to afford.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

773.

MUNICIPAL CORPORATIONS—CONTRACT IN EXCESS OF $500.00 WITHOUT CERTIFICATE OF AUDITOR, VOID—MONEY VOLUNTARILY PAID BY CITY CANNOT BE RECOVERED, HOWEVER, IN ABSENCE OF FRAUD.

When a city council has entered into a contract for repairs to a heating system in a public building in an amount exceeding $500.00, *without advertising for bids and without the certification of the auditor to the effect that there are sufficient funds in the treasury unappropriated to any other purpose, such contract is void and the city cannot legally pay for the same.*

When money has been voluntarily paid on such contract, however, when there is no evidence of unfairness or fraud in the making or execution of the contract, there can be no recovery from the city of the money so paid. Since the debt in this case is an honest one, payment is advised. Such procedure should not, however, be accounted as a precedent.

COLUMBUS, OHIO, December 24, 1912.

HON. ARTHUR J. WHITE, *City Solicitor, Delaware, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 29, 1912, which is as follows:

> "I am enclosing you a transcript of the proceedings leading up to the question of the payment of the bills of Wolfley, Marnell, Williams & Co., of this city.
>
> "This matter was brought to your attention some time ago by the city auditor, the city engineer and myself and you advised us at that time that this firm could not legally collect the money due them.
>
> "This transcript contains the resolution of council authorizing the board of control to enter into a contract for heating the city building; the contract for heating as entered into by the service director, in which contract is found the clause providing for the repairs to be made to the heating system; the resolutions of council to borrow money to pay for these repairs; the opinions of the city solicitor in regard to the payment of the bills in excess of $500.00 and the resolution of the present city council authorizing the city auditor to pay the balance due this firm with interest.
>
> "Under the provisions of the contract for heating the city building, the firm of Wolfley, Marnell, Williams & Co. was employed to make the necessary repairs to the heating system. It seems at the time they were employed, no estimate could be given of the probable cost of the work, but that the same was to be done by day's work. Council provided $500.00 for the payment of the work, but found this is not enough, and another note for $600.00 was issued. When this amount was used up and there were still unpaid bills, council refused to borrow any more money and there is now a balance due this firm of $689.50, for the payment of which there has been no provision made.
>
> "It seems that these bills are just and should be paid. Will you kindly render me your opinion as to whether this firm can be paid?"

Your letter discloses that the Delaware city council authorized the board of control to enter into a contract with the Delaware Electric Light, Heat & Power Company, for heating the city building, by resolution passed November 15, 1910; that in accordance with said resolution, on the twenty-first day of November, 1910, the city of Delaware, through its board of control, entered into a contract, as party of the second part, with the said the Delaware Electric Light, Heat & Power Company, as party of the first part. Section 3 of said contract provides as follows:

> "The second party agrees to overhaul the heating system now installed within the city hall building and put it in good order under the supervision and approval of first party, and after the overhauling, repairing and changing has been done, the first party will accept same and give a written approval and acceptance; stating in said acceptance that the second party has put the heating system in good order, suitable to first party for heating the building, after which, if any further changes should become necessary by reason of remodeling the building or changing the radiating surface, or any other changes or repairs to said heating system, the second party will before making such changes notify the first party and the first party will, without cost, direct the changes of the system and all changes must be done according to the direction of first party, and will upon notice of said changes, approve the same in writing. But the expense thereof shall be paid by said second party."

Your letter, and the exhibits thereto attached, further disclose that, for the purpose of making the said repairs, as set forth in Section 3 of said contract, the council of the city of Delaware, by resolution, passed October 18, 1910, authorized the proper city officials to borrow money and issue notes, chargeable to the city of Delaware, Ohio, in the sum of $500.00, to be used in repairing the heating system in the city hall building of said city; and that on November 15, 1910, the city council of said city of Delaware, passed another resolution, authorizing the proper city authorities to borrow money and issue notes, chargeable to the city of Delaware, Ohio, in the sum of $600.00, for the purpose of repairing and improving the heating system of the city hall building of said city. A third resolution was passed by said city council, on April 8, 1912, authorizing the city auditor to pay $689.50 to the firm of Wolfley, Marnell, Williams & Company, said amount being the balance due for repairing and putting in good order the heating system of the Delaware city hall. Said resolution is as follows:

> "Be it resolved by the council of the city of Delaware, state of Ohio:
>
> "Section 1. That the auditor of the city of Delaware, Ohio, be and he is hereby authorized and directed to pay the sum of $689.50 with interest from February 1, 1911, to Wolfley, Marnell, Williams & Co., in settlement in full to date of all claims held by said Wolfley, Marnell, Williams & Co., against the city of Delaware."

The expenditure involved in making such repairs was in excess of $500.00; and in this opinion we are only concerned with the procedure of the city of Delaware in making said repairs to the heating system in the city hall building. In making said repairs it was incumbent upon the officials of the city of Delaware to proceed as directed by the municipal code. The director of

public service, in the present instance, entered into a contract for such repairing and by reason of the fact that the amount involved exceeded $500.00 in amount; therefore, the expenditure should have been first authorized by ordinance of council of said city, after which the director of public service could have entered into a written contract with the lowest and best bidder, after advertising for bids for not less than two nor more than four consecutive weeks, in a newspaper of general circulation within the city, as provided in Section 4328, General Code, which is as follows:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than a compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

It does not appear that the provisions of the so-called "Burns law," now Section 3806, General Code, were followed. Such provisions require that before any contract, agreement or other obligation for the expenditure of money is entered into, or before any ordinance, resolution or order, for the expenditure of money, shall be passed by the proper municipal authorities, the auditor or clerk of such municipality shall first certify to council or to the proper board that the money required for such contract, agreement, or other obligation, or to pay such expenditure, is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose. Said Section 3806 of the General Code is as follows:

> "No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

The Ohio supreme court, in construing the above quoted sections, holds that a municipality cannot obligate itself except in strict accordance with the statutes of Ohio.

> "1. A contract entered into by a municipal corporation, by which, in its own behalf, it undertakes to pay for the construction of a sewer in one of its streets, the cost of which exceeds five hun-

dred dollars, imposes no valid obligation on the corporation, unless it has advertised for bids according to the requirements of Section 2303, Revised Statutes.

"2. Nor will such contract impose on a corporation a valid obligation even if bids were advertised for pursuant to said Section 2303, unless the auditor, or clerk, of the corporation, as the case may be, 'shall first certify that the money required for' that purpose 'is in the treasury to the credit of the fund from which it is to be drawn,' etc., as required by Section 2702, Revised Statutes.

"3. Where either of such requirements has been omitted the municipality will not by the acts of its officers be estopped to set up such omission as a defense to an action brought against it on such contract."

Lancaster vs. Miller, 58 O. S. 558 (Syllabus 1, 2 and 3).

At page 575 of the opinion in this case the court say:

"It would be idle to enact those statutes, and afterward permit their practical abrogation by neglect or other misconduct of the officers of the municipality. If such effect should be given to such acts of municipal officers it would defeat the operation of the statutes. The strict enforcement of these provisions may occasionally cause instances of injustice; it is possible that municipal bodies may secure benefits under a contract thus declared void and refuse to make satisfaction. In the nature of things, however, these instances will be rare. Those who deal with public agencies entrusted with the management of municipal affairs, usually experience liberal treatment. Such agencies are not stimulated to acts of injustice by cupidity. Self-interest, that great motive to overreaching, is absent. If, however, cases of hardship occur, they should be attributed to the folly of him who entered into the invalid contract. The gateways of municipal prodigality should not be left wide open, because an attempt to narrow them may cause an occasional instance of seeming hardship.

"While there is implied municipal liability at common law, the statutes of this state provide the manner in which contracts, agreements, obligations and appropriations shall be made and entered into by municipalities, and they cannot be entered into otherwise than as provided by statute."

Wellston vs. Morgan, 65 O. S. 219 (1st Syl.).

It is unfortunate that the above quoted sections were not followed. Even though the bills referred to in your inquiry are just, nevertheless a municipal corporation is without authority to expend money except in the manner authorized by statute; and I am, therefore, of the opinion that the unpaid bills, referred to by you, cannot legally be paid, for the reasons above set forth.

Coming now to the final disposition of this case, it is a pity there is not some effective remedy provided by law to cast full responsibility upon those who proceed, in utter disregard of the statutes, in the making of contracts. It is most distressing to an official to be put in the attitude of having to explain why an honest debt should not be paid. It is equally distressing to witness the attempt, on the part of officials, to shift responsibility. I verbally advised

the committee that waited on me that no objection would be made by this department to the payment of whatever part of this bill is an honest debt, or to all of it, if it is an honest debt. Under the principle laid down in the case of State ex rel. Hunt, Prosecuting Attorney, vs. Fronizer, et al., 77 O. S. 7, if deficiencies exist in the contract, through inadvertence, there being no claim of unfairness of fraud in the making, or fraud or extortion in the execution of such contract, for work done or labor performed; and if the city has received and is holding the benefits of the contract, and the city voluntarily pays the bill, no recovery for the amount so paid can be had.

If, therefore, the proper authority in your city sees fit to pay this bill in so far as the same is just, no recovery can be had, and the matter, for all practical purposes can be legally regarded as closed. I do not like to give countenance to this principle of law, and suggest it here only upon the theory that without its application an honest debt might go unpaid; and, further, the payment of this bill, under these circumstances, is not to be regarded as a precedent for your city authorities in the future.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Village Solicitors)

3.

ORDINANCES—SIGNATURE OF PRESIDING OFFICER NOT NECESSARY—RIGHT TO FIX AND CHANGE COMPENSATION OF AN OFFICER DURING INCUMBENCY.

The purpose of the signature of the presiding officer of the council to an ordinance is merely that of authentication and verification of an ordinance. Such signature is not absolutely necessary to the validity of an ordinance.

2. *Where there is no compensation definitely fixed for an office, the compensation therefor may be fixed during its incumbency.*

The authority which has the right to fix compensation of an officer may change such compensation if such change is made before the officers enter upon the duties of their office.

COLUMBUS, OHIO, January 2, 1912.

HON. O. D. EVERARD, *Solicitor, Barberton, Ohio.*

DEAR SIR:—Your favor of December 25, 1911, is received in which you ask an opinion upon the following:

> "I have been requested by the council of the city of Barberton to write you for an opinion with reference to the following matters:
>
> "Barberton is one of those municipalities which by virtue of the last federal census became a city after thirty days from the date of the issuance of the proclamation of the secretary of state. As such city it became the duty of the council to fix the salaries of the incoming officials which was accordingly done by an ordinance duly passed as required by law. This ordinance was not signed by the mayor he claiming that the council had no legal right to fix the salaries of the new officials. The council did not mandamus him but instructed the ordinance to be published without his signature. Does this ordinance become a valid ordinance?
>
> If this ordinance is invalid, or in case of the failure of the council to pass an ordinance fixing the salaries of the new officials, and the newly elected officials qualify as required by law, can such new city officials legally pass an ordinance fixing their own salaries? Can they legally pass an ordinance fixing the salaries of the mayor, solicitor, treasurer and council?"

On December 1, 1911, an opinion was rendered you upon the power of the council of Barberton to fix the salary of incoming officers, and also that it was an official duty of the mayor of a village to authenticate by his signature all ordinances passed by council over which he presided, and that this duty could be enforced by mandamus.

It appears that the mayor still refuses to sign the ordinance and that he has not been mandamused.

Section 4227, General Code, provides:

> *"Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council.* Or-

dinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

Section 4255, General Code, provides:

"The mayor shall be elected for a term of two years, commencing on the first day of January, next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. He shall be the chief conservator of the peace within the corporation, and shall have the powers hereinafter conferred, perform the duties hereinafter imposed, and such other powers and duties as are provided by law. He shall be the president of the council, and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie."

The mayor of a village is the presiding officer of council and as such should authenticate all ordinances, resolutions and by-laws.

His failure or refusal to so sign will not invalidate an ordinance otherwise regularly passed.

The sixth syllabus in case of Blanchard vs. Bissell, 11 O. S. 96, reads:

"An assessment of taxes made pursuant to an ordinance passed by a city council, is not rendered invalid by the omission of the presiding officer of the council to sign the ordinance."

On page 103, Scott, J., says:

"* * * We are strongly inclined to think that the signature of the presiding officer was not essential to the validity of an ordinance of this kind. It is admitted to have been regularly passed, by the proper body, and to have been duly recorded by the proper officer. And though it be true, that the statute directs him to authenticate all ordinances by his signature, it does not follow that his signature is essential to their validity."

In case of Street Railway Company vs. Street Railway Company, 3 Cir. Dec., 493, the 9th syllabus reads:

"The official signatures of the presiding officers of the two boards constituting the city council are not essential to the validity of a city ordinance. Where the names of such officers have been attached, before publication, to an ordinance which has been duly passed, by the city clerk, without express authority, but in accordance with a custom and practice of long standing, the record thereof regularly made by the city clerk is competent evidence of the existence of such ordinance."

The purpose of the signature of a presiding officer to an ordinance is that of authentication and verification of an ordinance. It is a ministerial act, and not a legislative or judicial act. The mayor of a village has not the veto

power. His duty in reference to ordinances is that of presiding officer of council. He has no power to approve or disapprove the same.

The ordinance in question is not invalid because of the failure of the mayor to sign the same.

The answer to your first question practically disposes of your second inquiry. However, I will state the principles governing the same.

Section 4213, General Code, provides:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

On page 558 in case of State vs. Kennon, 7 O. S. 547, Brinkerhoff, J., says:

> "Again, it is said that no fees, salary or other compensation, is annexed to the discharge of the duties devolved by statute upon these defendants. This is true; and it is also true that compensation to them hereafter is nowhere by these statutes prohibited or precluded. That they shall not hereafter receive any compensation for services by them rendered and expenses incurred under these acts, is nowhere made a condition of their acceptance of the trusts reposed in them. *There is nothing to prevent their applying to the legislature for compensation, nor to prevent the legislature from awarding it.*"

In case of State vs. Carlisle, 16 Low Dec., 263, the syllabus reads:

> "While an officer cannot attack the constitutionality of a statute under which he has received compensation for his official acts, yet where such statute has been held unconstitutional in another proceeding and such officer enjoined from receiving the salary provided thereunder, he will be entitled to the compensation provided by an act passed to take the place of such unconstitutional statute; *and such amendatory act will not come within the constitutional inhibition forbidding the legislature to charge the salary of an officer during his existing term.*"

On page 266, Evans, J., says:

> "State vs. McDowell, 19 Neb. 442 (27 N. W. Rep. 433) was a case in which at the time of the relator's election no salary or compensation had been fixed for the services of that officer. During his incumbency his salary was fixed at $300 per annum.
>
> "The court held the act valid—'That as there was no salary fixed, the act providing for such after his election was not an act either increasing or decreasing his salary.'
>
> "The same rule was held in Purcell vs. Parks, 82 Ill., 346. See Machem, Public Officers 858.
>
> "The reason for the above holding is, that if there is no salary definitely fixed, or if no salary whatever has theretofore been provided, then there is no salary to increase or diminish by an act providing for a salary during an incumbency.
>
> "As our constitution provided, 'No change therein shall affect the salary of any officer during his existing term.'

"If there is no salary at all, or none definitely fixed, then legislation providing a salary during his term could not affect any change, for there is none existing to affect."

The case of State vs. Cappeller holds that where a law is passed reducing the salary of an officer after his election and qualification but before he enters upon the duties of his office, such law is constitutional.

The principles of law are these:

Where there is no compensation definitely fixed for an office the compensation therefor may be fixed during the incumbency of an officer.

The authority which has the right to fix compensation of an officer may change such compensation if such change is made before the officer enters upon the duties of his office.

By applying the above principles, you can determine the right of council to fix the salaries. The facts submitted are not sufficient to answer your question specifically.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

19.

OFFICES INCOMPATIBLE—COUNCILMAN—PUBLIC OFFICE OR EMPLOYMENT.

Section 4218 General Code provides "No member of council shall hold any other public office or employment," and its terms extend to all public offices and employments.

A councilman may hold neither the office of member of a board of United States pension examiners, township physician nor jail physician.

COLUMBUS, OHIO, January 15, 1912.

HON. ELI H. SPEIDEL, *Village Solicitor, Batavia, Ohio.*

DEAR SIR:—Under date of January 5, 1912, you requested my opinion upon the following statement of facts:

"At the regular municipal election held on November 7, 1911, one Dr. G. S. VanHorn, was elected a member of the council of the village of Batavia, Clermont county, Ohio. Dr. VanHorn is now a member of the board of United States pension examiners, and he is also one of the township physicians for Batavia township, employed or appointed by the township trustees. Is he eligible for the office of councilman under the provisions of Section 4215 of the General Code of Ohio?

"At the same election, Dr. James K. Ashburn was also chosen as a councilman. Dr. Ashburn now has a contract with the county commissioners as jail physician for the county jail. Is he eligible for the office of councilman under the provisions of the same section of the General Code?"

Section 4218 of the General Code of Ohio, which prescribes the qualifications of a village councilman, reads as follows:

"Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office. (96 vs. 82 par. 1965.)"

The words of this statute are, in my judgment, a sufficient answer to your question, since it is expressly provided therein that no member of the council may hold any other public *office or employment*, except that of notary public and member of the state militia.

My conclusion in this regard is further strengthened by the decision of the circuit court in the case of State ex rel. vs. Gard, 29 C. C. 426, 8 C. C. (n. s.) 599, which decision was affirmed, without report, by the supreme court of Ohio in Vol. 75 at page 606 of the Ohio State Reports. Jelke Jelke, in rendering the opinion, on page 432, says:

"We are of the opinion that the inhibition against persons holding public office or employment is not limited to office in or employment by the municipality, but extends to all public office and employment. This is evidenced by the exception of notaries public and members of the militia."

I am, therefore, very clearly of the opinion that a village councilman may not legally hold any of the positions mentioned in your inquiry.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

58.

ASSESSMENTS—CORNER LOTS—FEET FRONT—ASSESSMENT ON BOTH STREETS.

A corner lot may be assessed for the payment of its share of any improvement upon which it abuts but, may not be assessed under the foot frontage plan upon a greater number of feet front than there are in the actual front of the lot.

It is customary to assess corner lots for improvements on both streets, but according to the same number of feet front.

COLUMBUS, OHIO, January 15, 1912.

HON. CHAS. J. FORD, *Village Solicitor, Geneva, Ohio.*

DEAR SIR:—Answering your letter of December 16th, receipt whereof is acknowledged, I beg to state that in my opinion a corner lot may be assessed for the payment of its share of any improvement upon which it abuts, but, of course, may not be assessed under the foot frontage plan upon a greater number of feet front than there are in the actual front of the lot. In other words, the number of feet in front of the lot is the number of feet upon the basis of which the lot may be assessed for its share of any improvement upon which

it abuts. This point was virtually decided in Haviland vs. City of Columbus, 50 O. S. 471, the leading case upon the subject. The exact question never seems to have been raised in any adjudicated case, but to my personal knowledge it is customary to assess corner lots for improvements on both streets; also, of course, according to the same number of feet front.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

84.

PETITIONS FOR BEAL LAW ELECTION—ADDITION AND WITHDRAWAL OF SIGNATURES—RULE AS APPLIED TO ROSE LAW.

At any time prior to the action of the council upon a petition for a Beal law election under Section 6147, General Code, signatures may be added to or withdrawn therefrom.

COLUMBUS, OHIO, January 23, 1912.

HON. REUBEN R. FREEMAN, *Counsel for the Village of Kingston, Chillicothe, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of January 15th, wherein you submit for opinion thereon, the following question:

> "May electors who have signed a petition for a Beal law election (General Code, Section 6147) withdraw their names from such petition before an election is ordered by council?"

I desire, in the first instance, to express my pleasure and thanks for your own expression of opinion on the question, and the memoranda of authorities submitted.

The question of the right of the petitioner on a Beal law petition to withdraw his name therefrom, before final action by council, and after the filing of the same, was decided in the affirmative in a case arising in Highland county, Haynes et al. vs. The Village of Hillsboro, 3 N. P. N. S. 17. The opinion of Probate Judge Hughes, in that case, is entitled to much weight, by reason of the exhaustive research evidenced by his opinion, and the number of authorities examined and commented upon therein. His opinion has been cited with approval by a number of nisi prius courts. Judge Hughes held the law to be:

> "It is the privilege of electors signing a petition for a Beal law election to withdraw their names from the petition, either with or without the consent of council, at any time before the election is ordered; and where such withdrawals reduce the number of signatures remaining on the petition to less than the requisite forty per cent. of the qualified voters, jurisdiction of council to order an election is lost."

Section 6127 of the General Code, which is the provision authorizing a Beal law election, provides:

> "When, in a municipal corporation divided into wards, qualified electors in a number equal to forty per cent. of the number of

votes cast therein at the last preceding general election for state and county officers, or when, in any other municipal corporation, qualified electors in a number equal to forty per cent. of the votes cast therein at the last preceding general election for municipal officers, petition the council thereof for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such municipal corporation, such council shall order a special election to be held at the usual place or places for holding elections therein in not less than twenty days nor more than thirty days from the filing of such petition with the mayor of such municipal corporation or from the presentation of such petition to the council thereof. Thereupon such petition shall be filed as a public document with the clerk of such municipal corporation and preserved for reference and inspection."

In volume 97, Ohio Laws, at page 87, will be found the act known as the Brannock law. Section 1 of that act provides in part as follows:

"Whenever forty per cent. of the qualified electors of any residence district of any municipal corporation shall petition the mayor of such municipal corporation, or a common pleas judge of the county for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such residence district, such mayor or common pleas judge shall order a special election to be held in not less than twenty and not more than thirty days from the filing of such petition with the mayor of the municipal corporation or common pleas judge of the county."

Now, while that law has been repealed, it received some additional interpretation, and owing to the fact that the language is strikingly similar to the wording of the present Beal law, it is apparent that decisions upon provisions of the so-called Brannock law would be equally applicable to like provisions of the Beal law. Judge Morris of the Lucas county court of common pleas, in the case of In re Petition for Special Election in Toledo, decided August 10, 1904, and found reported in 2 N. P. N. S., 469, wherein a similar question arose under the Brannock law, held, among other things:

"Names may be withdrawn from the petition or added to it by the filing of a duplicate petition at any time before the order thereon is made."

In the case of Cole vs. City of Columbus, 2 N. P. (n. s.) 570 (another Brannock law case), Judge Black says:

"It is quite true that persons, before the mayor or judge have acted, may add their names to or withdraw their names from the petition."

I am of the opinion that the real intent of the law is that at the time council proposes to act, and, under the statute, to "order a special election," it then must first find that forty per cent. of the qualified electors, as required by law, are on the petition; that the determination of this fact is jurisdictional; that until that very time, persons so desiring may withdraw their names from the petition.

This view is emphasized by the fact that the legislature in the so-called Rose county local option law, Section 6113, General Code, has provided, among other things, that "no elector shall be permitted to sign his name to such petition after it is filed, or withdraw his name from such petition after it is filed, unless such signature was secured through fraud." Likewise, Section 6149 of the act providing for local option in residence districts contains the following language:

> "No elector will be allowed to add his name to a petition after it is filed, or withdraw his own or authorized signature from a petition unless he can prove to the mayor or judge that it was secured through fraud or misrepresentation."

There would have been no necessity for such provisions in the sections last above referred to, if language similar to that employed in the Beal law could not be held to allow the withdrawal of names that had been theretofore signed.

In view of the decision of Judge Hughes, reinforced by the conceded necessity of specifically providing against the withdrawal of names on a petition, except under given circumstances, in the acts known as the Rose law and the Jones law, I am constrained to hold that electors who have signed a petition for a Beal law election may, up until the time that council orders the election, withdraw their names from the petition.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

113.

HEALTH OFFICER OF VILLAGES—APPOINTMENT BY BOARD AND APPOINTMENT BY COUNCIL—NECESSITY TO BE AN ELECTOR.

A health officer appointed by the board of health of a village under Section 4408, General Code, is not an officer but serves rather in the nature of an employe of a board.

A health officer, however, who is appointed to act in the place of a board of health by the village council, under Section 4404, General Code, is an officer of the village and is within the contemplation of Section 4666 General Code, which requires all officers to be electors.

COLUMBUS, OHIO, February 6, 1912.

HON. R. G. PORTER, *Solicitor, Toronto, Ohio.*

DEAR SIR:—Under favor of January 5, 1912, you ask an opinion upon the following:

> "I write to ask your opinion as to whether or not a doctor, who has been in this country many years, a Canadian by birth, and who is not as yet naturalized, can be elected by the village council as health officer under a proper ordinance?
>
> "Under the statute, or Ellis' Municipal Code, Section 187, page

417, there is nothing said about members of boards of health or health officers being citizens of the United States and qualified voters of the municipality as other officers of a city or village.

"But under article 15, Section 4 of the constitution we find that no person shall hold office unless he be an elector. Is this an office as is contemplated by the constitution?"

Section 4404, General Code, provides for the appointment of a health officer by a village council as follows:

"The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. *But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations* or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

Section 4408, General Code, provides for the appointment of a health officer by a board of health as follows:

"The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. The board may appoint a clerk, and with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city as it deems necessary."

Section 4666, General Code, provides that officers of a corporation shall be electors, as follows:

Each officer of the corporation, or of any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector within the corporation, except as otherwise expressly provided, and before entering upon his official duties shall take an oath to support the constitution of the United States and the constitution of Ohio, and an oath that he will faithfully, honestly and impartially discharge the duties of the office. Such provisions as to official oaths shall extend to deputies, but they need not be electors."

I take it from your letter that the village council of Toronto has determined to appoint a health officer to act instead of a board of health as it is authorized to do by Section 4404, General Code.

The council fixes the salary and term of office of such health officer appointed by it. The powers and duties of such health officer are the same as that of the board of health. In fact he takes the place of the board of health.

There is considerable difference between the health officer appointed by the village council in accordance with Section 4404 General Code, and the

health officer appointed by the board of health as provided by Section 4408, General Code. The first is appointed by the village council; he is the head of the department of health of the village; he has a definite term of office, fixed by council; his duties and powers are prescribed by statute; he performs the same duties, has the same powers and the same responsibilities as the board of health, in fact he might be termed the board of health of the village, if such term could be applied to a position filled by one person. The health officer appointed by the board of health has no term of office; he is under the control of the board of health which prescribes his duties and fixes his compensation.

In State vs. Massillon, 14 Cir. Dec. 249, it is held that a health officer is not an officer. The first syllabus reads:

> "A health officer, appointed by a board of health, as provided by Section 2115 Revised Statutes (4408 Gen. Code) is not an officer or appointee, in contemplation of Section 1717 Revised Statutes, and the board of health may increase or diminish his salary while he is in office."

On page 252, Voorhees, J., says:

> "It will be observed that the duties of the appointee or health officer are not prescribed by statute. He is the servant of the board of health that makes the appointment. He is under their absolute control and direction; and in addition to that, they fix his salary. His salary is at the will of the board of health. His term of office is at their will; they may terminate it at their pleasure."

After further discussing the nature of his employment, Voorhees, J., says on page 253:

> "* * * Now, that being the nature of the employment, perhaps it is a misnomer here to call him an officer at all. He is more like an employe or servant of the board of health."

We have seen the differences in the duties and powers of the health officer appointed by the board of health and the health officer appointed by the village council. The rule in the above case cannot apply to the health officer appointed by the village council under Section 4404, General Code.

In case of State vs. Wichgar, 17 Cir. Dec., it is held:

> "A member of a municipal board of health is an officer of the municipality, and as such ineligible to the office of district physician during his term and for one year thereafter, and he cannot therefore recover for services rendered in such capacity."

The court in a per curiam opinion, says on page 744:

> "A member of the board of health of a municipal corporation is an officer of such corporation, and under Lan. R. L. 10668 (R. S. 6976, * * * to the appointment of district physician by such board during the term for which he was appointed or for one year thereafter, and although rendering services as such physician cannot recover compensation therefor."

The members of boards of health are officers of the municipality. If a village had a board of health, as it may have under Section 4404, General Code, there would be no question that the members thereof would be officers of the village. The health officer, appointed by council, takes the place of the board of health and has the same powers and duties. The same reasons, therefore, that makes a member of the board of health an officer, makes the health officer who takes the place of the board, an officer.

The health officer of a village, appointed by council by virtue of Section 4404, General Code, is an officer of such village.

Section 4666, General Code, supra, provides that all officers of a municipal corporation shall be an elector within the corporation. This provision applies to the health officer appointed by council.

A person who is not an elector of the village cannot be appointed to the position of health officer of such village to act instead of the board of health as provided by Section 4404, General Code.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

147.

MUNICIPAL CORPORATION, NEWLY INCORPORATED—REFUSAL OF CLERK-ELECT TO QUALIFY—FILLING OF VACANCY BY ELECTORS —POWERS OF COUNCIL TO HIRE ASSISTANTS, ETC.—POWERS AND METHODS OF CODIFYING COMMISSION.

When a clerk-elect of a newly incorporated village refuses to qualify, there is no remedy by which his position may be filled until the next general election.

The change of the word "municipality" to the word "city" by the codifying commission in Section 4252, General Code, providing for the filling of such vacancy, unequivocally restricts such powers to the mayor of a city, as the language of that section is clear and free from ambiguity. Though the failure to extend this power to villages is the result of inadvertence or mistake, it can be supplied only through the legislature and by no means by the judicial or executive branch of government.

The vacancy can therefore only be filled by the municipality, and only through its electors.

Under Section 4280, the council may appoint one of its members to act as clerk, but only for the performance of certain duties referred to therein.

The only remedy is to induce the clerk to qualify. The council may then relieve his duties by the exercise of its power to employ assistants and to apply the salary intended for the clerk or a portion thereof, to the purpose of compensating such assistants.

COLUMBUS, OHIO, February 10, 1912.

HON. GEO. THORNBURY, *Solicitor, Bethesda, Ohio.*

DEAR SIR:—Under favor of January 12, 1912, you ask an opinion of this department upon the following:

"I have been retained as solicitor for the village of Bethesda,

Ohio, just incorporated, and the first election of officers was held on January 6, 1912.

"The clerk elected refuses to serve and I have been asked who has the power of appointment to fill the vacancy. In the Municipal Code of Ohio, Section 228, this power seems to be placed with the mayor, but in Section 4252 of the General Code, the word "municipality" as used in the Municipal Code is changed to the word "city," and probably does not cover a village.

"I would thank you to advise me who should appoint the clerk.

"Section 194 of the Municipal Code provides that the village council shall fix the salaries of all officers of the village, but such salary shall not be increased or diminished during their term of office.

"The officers of the village of Bethesda were sworn in on January 11. Will the present council have power to fix salaries for mayor, clerk, treasurer and marshal until the next officers are elected or until the term of the present officers expires?

"Please inform me whether or not the present council can fix salaries for the above officers."

Section 4252, General Code, referred to by you, provides:

"In case of death, resignation, removal or disability of any officer or director in any department of a *city*, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed."

This section was known as 1536-1006, in Bate's Revised Statutes, and provided as follows:

"In case of death, resignation, removal or disability of any officer or director in any department of any *municipality*, the mayor of such *city* shall fill the vacancy by appointment, and said appointment shall continue for the unexpired term and until a successor shall be duly elected and qualified, or until such disability is removed."

In carrying this section into the General Code the word "municipality" was changed to "city." There is no provision of statute authorizing any officer or body, or board to make appointments to fill vacancies which may exist in village offices.

The rule of construction of statutes which have been revised by a general codification of the statutes as was done in the adoption of the General Code is set forth in the following authorities:

The first syllabus in case of State, ex rel., vs. Commissioners of Shelby County, 36 Ohio St., 326, is as follows:

"Where an act of the legislature, or several acts in pari materia, have undergone revision, the same construction will prevail as before revision, unless the language of the new act plainly requires a change of construction, to conform to the manifest intent of the legislature."

On pages 329 and 330 of the opinion, Boynton, J., says:

> "The latest expression of legislative will must govern. And upon rules of construction equally well settled, the two acts as incorporated into the Revised Statutes have the same effect, and must receive the same interpretation as they received before the revision took place. The court is only warranted in holding the construction of a statute which has undergone revision, to be changed, when the intent of the legislature to make such change is clear, or the language used in the new act plainly requires such change of construction to be made.
>
> "Neither an alteration in phraseology nor the omission or addition of words in the latter statute necessarily require a change of construction. Conger vs. Barker, 11 Ohio St., 1; Sedgw. on Stat. and Const. Law, 299, 365; Williams vs. The State, 35 Ohio St., 175. The intent to give to the new act a different effect from the old, should be clearly manifested."

The above case is cited with approval in case of Stevenson vs. State, 70 Ohio St., 11, by the court on page 15 of the opinion, where it says:

> "* * * and the rule is well established by the repeated adjudications of this court that 'in the revision of statutes neither an alteration in phraseology nor the omission or addition of words in the latter statute, shall be held necessarily to alter the construction of the former act. And the court is only warranted in holding the construction of a statute, when revised, to be changed, when the intent of the legislature to make such change is clear, or the language used in the new act plainly requires such change of construction.'"

When the rule of construction laid down in the above cases is to be applied is set forth by Minshall, J., in case of Heck vs. State, 44 Ohio St., 536, when he says on pages 537 and 538 of the opinion:

> "Where the language used in a revised statute is of such doubtful import as to call for a construction, it is both reasonable and usual to refer to the statute or statutes from which the revision has been made. *But where the language is plain, and leads to no absurd or improbable results, there is no room for construction, and it is the duty of the courts to give it the effect required by the plain and ordinary signification of the words used, whatever may have been the language of the prior statute, or the construction placed upon it.* State, ex rel., Pugh vs. Brewster, 44 Ohio St., 249; The United States vs. Bowen, 100 U. S. 508; Allen vs. Russell, 39 Ohio St., 336; Rich vs. Keyser, 54 Pa. St. 86. If the plain language of a revised statute is to be departed from, whenever the language of the prior one may require it, then it may be asked, what is gained by a revision: The definition of crimes must, in such cases, be sought, not in the statutes as they are found to exist, but in the language of those that have been repealed. *The more rational rule must be, as we think, to resort to the prior statute for the purpose of removing doubts, not for the purpose of raising them.*"

The effect of changes made by the late codifying commission in the statutes as adopted by the legislature, is shown by Spear, J., in case of State vs. Toney, 81 Ohio St., 130, when he says at pages 139 and 140 of the opinion:

> "* * * Nor is it accurate to treat the change in the statute as the work of the codifying commission? Their codification was submitted to, considered by, and adopted by the law making body of the state, the general assembly. It should not receive any less respect because the change may have been recommended by three commissioners learned in the law instead of being proposed in the first instance by some single member of the general assembly, and after all is said, the enactment receives its vigor and force as law by reason of its enactment by the general assembly, no matter from what source the inspiration came."

Applying the rules of construction to the statute under consideration: There is no doubt or ambiguity in said Section 4252, General Code, when read by itself. The language is plain and clearly limits its application to vacancies in city offices and departments. The doubt arises when it is discovered that there is no similar power for filling vacancies in village offices. It is probable that the omission of such power from the statutes was due to inadvertence or to a mistake. But, whatever the cause of the omission we can only construe the statutes as we find them. If there is an omission of a power of appointment which should exist, it is for the legislative, and not the executive or judicial, branch of the government to supply such omission.

It is a principle of law that a corporation, private or public, has an inherent power to fill vacancies which may exist in its offices.

In case of Kearney, et al., vs. Andrews, 10 N. J. Eq., 70, the second and third syllabi read:

> "The power of filling vacancies being incident to a corporation, it has the right by its by-laws, to prescribe the manner in which such vacancy shall be filled, provided it is not inconsistent with the design of the charter.
>
> "The city council of Perth Amboy have no right to elect its own members; the law declares that the members constituting the city council shall be elected by the electors of the city by ballot. The city council cannot confer this authority elsewhere, nor can they usurp it themselves."

On pages 72 and 73, the Chancellor, in delivering the opinion of the court, says:

> "At the annual election, three aldermen and six members of the common council, the number designated by the charter, were duly elected. One of the aldermen and one of the members of the common council, so elected, neglected to take and subscribe the oaths or affirmations required within ten days after the election. The city council thereupon passed a resolution to fill these vacancies, for the reason of such neglect, on the part of the members elected, in not taking their oaths of office. Freeman and White were then elected to fill the vacancies, and were sworn into office. *Their election was unlawful. There is no mode designated by the charter by which vacancies*

are to be supplied. The power of filling vacancies being incident to a corporation (Angell and Ames c. 83, Kyd 79; 2 Kent 277), it has the right by its by-laws, to prescribe the manner in which such vacancy shall be filled, provided it is not inconsistent with the design of the charter, and does not infringe its provisions. Newling vs. Francis, 3 T. R. 189. *But the city council had no right to declare who should be the electors. No authority is by the charter, given to that body, to elect its own members;* and, by the common law, there is no such incident appertaining to it, as a constituted body, under the charter which creates it. The law declares that the members constituting the city council shall be elected by the electors of the city by ballot. The city council cannot confer this authority elsewhere, nor can they usurp it themselves. *If the power to supply vacancies is incident to this corporation it must be exercised by the body at large. They only have the power to elect their officers, when no other mode is designated.*"

On page 74, the Chancellor further says:

"*It does not follow that because such power to fill vacancies is incident to the corporation of 'the inhabitants of the city of Perth Amboy,' therefore, the 'city council,' a board of officers of that corporation in whom certain powers of the body corporate are specifically and exclusively vested, are authorized to supply a vacancy in the office of mayor, or alderman, or member of common council, because, virtute officii, they compose the body of officers who are designed the 'city council.'*"

Section 4279, General Code, provides for the election of a clerk of a village, as follows:

"The clerk shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation."

The corporate body has a right, incident to its powers, to fill vacancies in office. The General Code, in its provisions for villages, which might be termed the village charter, provides that the clerk of the village shall be elected by the electors of the corporation. The electors of the corporation are the voting power of the corporation at large and they may as an incident to their power, fill vacancies in office by election thereto. This power of filling vacancies has not been delegated to any officer, or board of officers. Neither is there any provision of statute authorizing a special election to fill such vacancies. In the absence of such statute, or other legal provision, there is no means by which the will of the electors of the corporation can be ascertained, in order to fill such vacancy.

Section 4280, General Code, provides:

"The clerk shall attend all meetings of council, and keep a record of its proceedings and of all rules, by-laws, resolutions and ordinances passed or adopted, which shall be subject to the inspection of all persons interested. *In case of the absence of the clerk, the*

council shall appoint one of its members to perform his duties for the time."

In addition to the duties herein prescribed the clerk of a village must discharge the duties which are prescribed by Sections 4283 to 4292 of the General Code, which duties are likewise prescribed for the auditor of a city. The power granted to council in Section 4280, General Code, to appoint one of its members to perform the duties of the clerk for the time in case of his absence, applies only to the duties of the clerk set forth in said Section 4280, and does not authorize council to appoint one of its members to perform the other duties of the clerk.

Section 4216, General Code, provides:

> "At the first meeting in January of each year, the council shall immediately proceed to elect a president pro tem. from their own number, who shall serve until the first meeting of the council in January next after his election. *From time to time the council may provide such employes for the village as they may determine, and such employes may be removed at any regular meeting by a majority of the members elected to council.* When the mayor is absent from the village or is unable for any cause to perform his duties, the president pro tem. of council becomes acting mayor, and shall have the same powers and perform the same duties as the mayor."

Under the foregoing section council is authorized to provide employes for the village. The clerk of the village is an officer of the village with important duties to perform and he is elected by the electors thereof. He cannot be termed an employe, so as to authorize council to provide a clerk of the village under the above section.

Section 3536, General Code, provides for a special election in the case of the first election of officers of a new corporation, as follows:

> "The first election of officers for such corporation shall be at the first municipal election after its creation, and the place of holding the election shall be fixed by the agent of the petitioners. Notice thereof, printed or plainly written, shall be posted by him in three or more public places within the limits of the corporation, at least ten days before the election. The election shall be conducted, and the officers chosen and qualified, in the manner prescribed for the election of township officers, *and the first election may be a special election* held at any time not exceeding six months after the incorporation, and the time and place of holding it shall be fixed by such agent, and notice thereof shall be given as is required herein for the municipal election."

The election held on January 6, 1912, was no doubt held by virtue of this section. It cannot apply to special elections to fill vacancies in office.

Section 4840, General Code, limits special elections as follows:

> "Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a

> regular election in such county, township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

The statutes do not provide a remedy for the dilemma in which the village finds itself by the refusal of the clerk-elect to qualify and accept the office. There is no power lodged in any officer, board of officers, or body of any kind to make an appointment to fill the vacancy. There is no provision of statute authorizing the holding of a special election to fill such vacancy. This is a matter for the legislature to remedy by an amendment of the statute.

But one solution presents itself. That is to persuade the clerk-elect to qualify and accept the office to which he was elected. He should do this as a public duty. The council could provide an employe who could perform the detail work of the office. The salary and compensation of the clerk and employe could be so arranged by council, so as to make the expense to the village no greater than the salary of the clerk would otherwise be. If the clerk-elect refuses to qualify, there is no remedy.

Your second question is answered by an opinion rendered to O. D. Everard on January 2, 1912, a copy of which is herewith enclosed.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

169.

INITIATIVE AND REFERENDUM ACT—"GENERAL ELECTIONS" AND "REGULAR ELECTION" DEFINED.

The term "general election" is defined by Section 4948, General Code, to be the November election in the years when state and county officers are elected. "Regular elections" are generally understood to be other elections held in November of each year except those for special purposes.

Under the initiative and referendum act, however, these terms are used synonymously and refer to the elections held in November of each year.

COLUMBUS, OHIO, February 26, 1912.

HON. I. Q. JORDAN, *Village Solicitor, Wilmington, Ohio.*

DEAR SIR:—Under date of January 20, you desire my opinion as to the meaning of the words "next regular election" and the words "next general election" as used in the initiative and referendum act, 102 Ohio Laws 521.

Under Section 4948, General Code, the words "general election" are defined for the purposes of the chapter in reference to primary elections as follows:

> "The words 'general election,' the November election in the years when state and county officers are to be elected."

This as far as I am aware is the only definition to be found in the statutes in reference to general elections, but said definition is only used in reference to the provisions in regard to primary elections as found in the General Code.

The words "regular election" refer to what is now the election held in November of each year and in contradistinction of any such elections that might be called for particular purposes.

The words "general election," as I view it, within the meaning of the initiative and referendum act are synonymous with the words "regular election," and I am of the opinion that the words "general election" refer to the election held in November of each year.

That the words "next general election" and "next regular election" are used synonymously in said act appears to me to be very clear when we consider Section 2 thereof.

In the first paragraph of Section 2 it is provided that the clerk shall certify ordinance, etc., granting a franchise, creating a right, involving the expenditure of money, or exercising any other power delegated by the general assembly to the officers having control of elections who shall submit the same to the electors at the *next general election.*

The second paragraph thereof provides that certain of the ordinances also embraced in the first paragraph thereof shall not become effective in less than sixty days, and that after a petition is filed the clerk shall certify the fact of the filing to the officers having control of elections who shall cause said ordinance or resolution to be voted on at the *next regular election.*

If a petition is filed under the initiative and referendum act to refer an ordinance, etc., set out in the second paragraph of Section 2 it would be difficult, if not impossible, to ascertain under which paragraph thereof such a petition was filed, and if the term "next general election" and the term "next regular election" are not synonymous there is no way of ascertaining which election is meant at which the people should vote upon such ordinance or resolution.

For the reasons stated, I am of the opinion that the words "next general election" and "next regular election" are used in the initiative and referendum act to refer to what is now the November election of each year.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

170.

INITIATIVE AND REFERENDUM ACT—APPOINTMENT OF POLICEMEN BY MAYOR—REFUSAL BY COUNCIL TO CONFIRM.

Appointments of policemen by the mayor of a village are subject to confirmation by the council and when council refuses to confirm, the action is not amenable to initiative and referendum provisions and the appointment can in no wise be valid.

COLUMBUS, OHIO, February 26, 1912.

HON. R. G. PORTER, *Village Solicitor Toronto, Steubenville, Ohio.*

DEAR SIR:—Under date of January 5, 1912, you submitted for my opinion the following:

> "Suppose a mayor appoints certain police for the village and council refuses to confirm one, giving no reasons, the appointee being a man of excellent character and ability, but because the mayor is a Socialist and the appointee is of the same party, the council being Republican refuses to confirm, giving no reason for so acting, can the

mayor call an election under the new law, called the initiative and referendum and permit the people to decide the matter? Or how can the mayor override the will of council and have his appointee to serve with salary?"

As I view the provisions of the initiative and referendum act such act does not apply to the matter concerning which you write. It does not seem to me to be an ordinance, resolution or measure exercising any power delegated to the municipal corporation by the general assembly, although it is by law provided that the appointments by the mayor shall be subject to the confirmation of council.

The powers, as I understand the first paragraph of the section, refer solely to the legislative power of such council, nor do I think that the confirmation by council can be considered within Section 3 of said act.

Furthermore, Section 3, as I view it, does not apply to the village council in that it provides that all other acts of the city council not included within those specified in Section 2 of this act shall also remain inoperative for sixty days after passage. Even though it should be held that Section 3 of the initiative and referendum act should be extended likewise to acts of a village council, yet in this instance if a referendum petition were permitted to be filed upon the refusal of council to confirm an appointment by the mayor it would require the matter to be submitted to the people at the next general election for their vote thereon, and would thus override the discretion of council in its confirmation of appointments and would make the position an elective one rather than an appointive one. This I do not believe was the intent of the framers of the initiative and referendum act.

I am, therefore, of the opinion the matter is not one concerning which the mayor can call an election under the new law.

You further inquire:

"How can the mayor override the will of council and have his appointee to serve with salary?"

Section 4384, General Code, provides in part as follows:

"When provided by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

It will be seen from an examination of the above that the appointments by the mayor of policemen are subject to the confirmation of council. Therefore, I do not know of any way that a policeman appointed by the mayor can serve and receive his salary unless his appointment has been confirmed by council. The law makes it a positive requirement that the appointments by the mayor shall be subject to the confirmation of council.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

177.

MUNICIPAL CORPORATIONS—COUNCIL—CONTROL OVER PUBLIC SERVICE COMPANIES—POWERS TO IMPOSE CONDITIONS UPON RIGHT TO USE STREETS—AUGLAIZE POWER COMPANY.

A municipal corporation has only such powers as are conferred by statute to control the disposition of a product of a private corporation such as the Auglaize Power Company. Where, however, such municipal corporation has authority to refuse or grant permission to enter upon the use of its streets, it may attach as a condition precedent to such permission, any reasonable or proper obligations or restraints.

COLUMBUS, OHIO, March 6, 1912.

HON. H. R. DITTMER, *Attorney for the Village of Napoleon, Napoleon, Ohio.*

DEAR SIR:—Your communication dated February 28, 1912, is received in which you enclose copy of a proposed ordinance granting to The Auglaize Power Company of Toledo, Ohio, the right to erect its towers, poles, wires, etc., on a certain defined right of way through the village of Napoleon, and also in which you state that the object of this company is to pass through the village for the purpose of disposing of its power at a point beyond the village, and that it is not their desire to sell any electricity whatever in said village for any purpose except to an electric railroad; and also state that the village owns its own electric light plant, and that said plant is heavily bonded, and if this company should be permitted to enter the village for the purpose of passing through the village, and on account of such permission to enter the village said company would then be permitted to compete with the village plant, and state further that under Sections 9192, 9193, 9194 and 9195 of the General Code of Ohio it is optional with the village whether or not said company can enter at all, and if it is possible for said company, after being granted a right of way through the village, to sell any electricity without the consent of the council, that the village does not desire to permit said company to pass through it for the reason that it is the object of the village to protect its municipal plant, and you request my opinion upon the following questions:

First. Is Section 3 of the copy of the proposed ordinance binding and enforceable upon said company?

Second. Under said Section 3 would it be possible for said company to sell any electricity in said village except to electric railroads even along the right of way described in said ordinance without the consent of said council as provided in said section?

Third. If the above Section 3 does not prohibit said company from selling its electricity or power in said village unless consented to by said council, I would appreciate a suggestion from you as to a proper manner for this village to protect itself.

It is exceedingly doubtful, as I view it, whether Section 3 of the proposed ordinance is enforceable, but after considering the matter very fully I have concluded that if Section 3 of said ordinance is eliminated and there is attached to the first section of said proposed ordinance the following condition:

> "Provided, however, that the above permission and authority hereby granted by said village to said company is upon the express condition and understanding that no wire of any kind whatever shall

be attached to or connected with the wires of said company within said village and used under the above grant for the transmission of electricity through the same without the consent of the council thereof,"

making such proviso a condition of the grant, that the same would be valid and enforceable.

I believe this answers your inquiries including your request for a suggestion as to how the matter may be cared for in the event that Section 3 of the proposed ordinance might be unenforceable.

While a municipal corporation has no power, excepting that expressly conferred by statute, to control the manner of disposition of a product within its limits, yet it has full power where it has authority to grant or refuse permission to enter a village for any given purpose, to attach to such permission any reasonable and proper condition, and especially to limit its consent to the use of its streets and public places to such use and by such instruments and agencies as may in its judgment impose burdens thereon which are not unreasonable.

The substitute which I have suggested is strictly within the power of the municipality, as above defined, while Section 3 of the ordinance which I have suggested be eliminated therefrom, amounts virtually to a regulation of the business of the power company not contemplated by any of the statutes, and at least is a condition which has no relation to the nature of the municipality's title to or control over its streets and public places.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

179.

OFFICES COMPATIBLE—MARSHAL AND STREET COMMISSIONER, SANITARY POLICEMAN AND JANITOR—POWER OF APPOINTMENT OF SUCH POSITIONS—MAYOR AND COUNCIL.

A street commissioner must be appointed by the mayor and his appointment confirmed by council.

A sanitary policeman must be appointed by the board of health. Council may appoint a janitor.

An ordinance of council, therefore, appointing one individual to fill all of these positions, is illegal in so far as it violates these rules.

The mayor may appoint the marshal as street commissioner, by special provision of statute and as not any of the aforesaid positions are incompatible with the others, a single individual may hold all offices, if properly appointed.

COLUMBUS, OHIO, March 9, 1912.

HON. WALTER S. STEVENSON, *Solicitor, Leipsic, Ohio.*

DEAR SIR:—Your favor of February 6, 1912, is received, in which you ask an opinion upon the following:

"I herewith enclose Sections 4 and 6 of ordinance No. 261, passed as stated in said ordinance.

"On the 2d of January at a recessed meeting of the council two veterans of the civil war made application for the positions of street commissioner, sanitary policeman and janitor of the city hall. The mayor after reading ordinance No. 261 decided to follow the ordinance. The veterans referred to now insist that the ordinance is invalid and of no effect and that Sections 12893 and 12894 of the General Code of Ohio should and does govern in the matter of filling these positions.

"As solicitor of the village of Leipsic, I have been instructed by the council to take the matter up with you and if possible ascertain whether or not the said ordinance is of any force and effect. Is this ordinance binding on the mayor of the village?"

Section 4 of the ordinance submitted provides:

"That the salary of the marshal shall be $180.00 per annum payable monthly and he shall give bond in the sum of $800.00

"And it is further provided that the marshal shall act and is hereby constituted and appointed street commissioner in and for the said village of Leipsic and he shall receive as his salary as said street commissioner the sum of $10.00 per month payable monthly; and it is further provided that the said marshal shall be and is hereby constituted and appointed sanitary policeman, to act under the instruction of the board of health of the said village; and he shall receive as his salary the sum of ten dollars per month payable monthly; and it is further provided that the said marshal shall be and is hereby constituted and appointed janitor in and for that part of the city building which is under the jurisdiction and used by the said village of Leipsic; and he shall receive as his salary as such janitor the sum of $5.00 per month; and it is further provided that the said marshal as such street commissioner, sanitary policeman and janitor shall be under the supervision and control at all times of the council of the village of Leipsic and the board of health; and upon failure of his part to perform the duties requested of him as such street commissioner, sanitary policeman and janitor then in that event the council may at any time when he fails to perform the duties aforesaid as street commissioner, sanitary policeman and janitor refuse to pay and withhold from him for such failure that part of his salary due him for such service under the conditions of this ordinance."

The question asked is as to the legality of this part of the ordinance. This section, in effect fixes the salaries of the marshal, street commissioner, sanitary policeman and the janitor, and it also virtually appoints the street commissioner, sanitary policeman and janitor for the village of Leipsic. By virtue of this ordinance such appointments are made by council.

The council has the right and authority to fix the salaries of these positions. Has it the right to fill the positions by appointment?

Section 4363, General Code, provides for the appointment of the street commissioner as follows:

"The street commissioner shall be appointed by the mayor and confirmed by council for a term of one year, and shall serve until his successor is appointed and qualified. He shall be an elector of the

corporation. Vacancies in the office of street commissioner shall be filled by the mayor for the unexpired term. In any village the marshal shall be eligible to appointment as street commissioner."

By virtue of this section the mayor appoints the street commissioner and the council confirms the appointment. Both the mayor and the council must concur before the appointment is legal. The council has no authority to make the appointment, its authority is confined to the approval of the appointment when made by the mayor. However, the statute makes the marshal eligible to appointment as street commissioner, and the mayor may appoint and council confirm his appointment as such street commissioner.

Section 4411, General Code, as amended in 102 Ohio Laws, page 44, provides:

"The board may also appoint * * * as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation require, and such persons shall have general police powers, and be known as the sanitary police, but the council may determine the maximum number of employes so to be appointed."

The board herein referred to is the board of health. The board of health appoints the sanitary police. An appointment of a sanitary policeman would not be legal, if made by council.

Section 4216, General Code, provides:

"At the first meeting in January of each year, the council shall immediately proceed to elect a president pro tem. from their own number, who shall serve until the first meeting of the council in January next after his election. From time to time the council may provide such employes for the village as they may determine, and such employes may be removed at any regular meeting by a majority of the members elected to council. When the mayor is absent from the village or is unable for any cause to perform his duties, the president pro tem. of council becomes acting mayor, and shall have the same powers and perform the same duties as the mayor."

The council of a village is authorized by the above section to provide employes of the village and to appoint the same. The power to appoint, however, does not cover elective officers, nor officers whose appointment is otherwise provided for.

The council has a right to provide for and appoint a janitor, but it has no right to appoint a street commissioner and a sanitary policeman. That part of the ordinance providing for the appointment of the janitor is within the power of council.

The statute makes the marshal eligible to appointment as street commissioner. The positions of sanitary policeman and of janitor are not of themselves inconsistent with or incompatible with each other or with the positions of marshal or street commissioner. It is possible then for the same person to fill these positions if it is physically possible for him to perform the duties pertaining to each office. But the appointments must be made in the manner provided by law.

The appointment by the council of the marshal to fill the positions of street commissioner and sanitary policeman is unauthorized and is illegal. Such appointments should be made respectively by the mayor and board of health.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

213.

ASSESSOR IN VILLAGE OF TOWNSHIP ORGANIZATION—NECESSITIES FOR QUALIFICATION—APPROVAL OF BOND BY TOWNSHIP TRUSTEES AND FILING WITH TOWNSHIP CLERK—EFFECT OF FILING BOND WITH VILLAGE CLERK.

A person elected assessor in a village of a township organization has, by virtue of Section 3353, General Code, until the third Monday of April following his election to file his bond with the township clerk and fulfill the other legal requirements for qualification.

When such person has erroneously filed his bond with the mayor, he may nevertheless properly qualify at any time prior to the time limit aforesaid by having his bond approved by the township trustees and by filing the same with the township clerk.

COLUMBUS, OHIO, March 23, 1912.

HON. CHARLES S. BELL, *Village Solicitor, Elmwood Place, Ohio.*

DEAR SIR:—Your favor of February 24, 1912, is received in which you inquire as follows:

> "Mr. C. J. Z. was duly elected in November last to the office of assessor in the east precinct of this village. He filed his expense account, as provided by the corrupt practices act, and executed a bond and took oath of office.
>
> "The bond in question was approved by the mayor of the village and filed with the village records. The question has arisen as to whether or not Z.'s bond was filed in the proper place, it being contended that it should have been filed with the clerk of the township in which the village of Elmwood is situated.
>
> "In this connection, I would call your attention to Sections 3349 to 3368, inclusive, of the General Code of Ohio.
>
> "If, in your opinion, this bond should have been filed with the clerk of the township, will it be in order for me to authorize the village clerk to turn this bond over to the township clerk?
>
> "If the office for assessor for the east precinct is vacant by reason of the bond being filed with the mayor of the village, who, in your opinion, has the appointive power to fill such vacancy?"

Section 3350, General Code, provides for the bond of an assessor of personal property as follows:

> "Before entering upon the discharge of his duties each such assessor shall give bond, payable to the state, with two or more free-

hold sureties approved by the trustees, in such sum as they determine, not less than one thousand dollars, and conditioned for the faithful and impartial discharge of his duties. Such bond, with his oath of office endorsed thereon, shall be deposited with the township clerk. If an assessor is appointed by the county auditor the amount of his bond, not less than one thousand dollars, may be fixed and the sureties therein approved by the auditor, or by the trustees."

By the provisions of this section the assessor-elect is required to give bond before entering upon the discharge of the duties of his office. The bond must be approved by the trustees of the township and filed with the clerk of the township with his oath of office endorsed thereon. An assessor who was elected last November has not yet entered upon the discharge of the duties of his office.

Section 3351, General Code, provides:

"In municipal corporations divided into wards, an assessor shall be elected in each ward. In a township composed in part of a municipal corporation, the county commissioners, by order entered on their journal, may constitute the territory outside such municipal corporation one or more assessor districts. In each ward and assessor district an assessor shall be elected, biennially, in accordance with law, and shall take the same oath, give the same bond and perform the same duties as township assessors. Nothing herein shall interfere with the duties devolving upon deputy state supervisors of elections."

This section governs the election of assessors in municipalities divided into wards, and assessor districts as constituted by the county commissioners. The oath and bond are to be the same as provided for township assessors.

Section 3352, General Code, provides:

"If a person elected assessor in any ward or precinct of a municipal corporation not having a township organization, fails to give bond and take the oath of office for one week after his election, or in the event of removal from the ward or precinct after his election, the office shall be deemed vacant, or should there be at any time a vacancy in such office from any cause, the county auditor shall fill such vacancy by appointing an elector of such ward or precinct to the office of assessor."

This section applies to a municipal corporation not having a township organization. From you letter it appears that the village of Elmwood Place is situated in a township which has a township organization. Section 3352 cannot apply to your situation.

Section 3353, General Code, provides:

"Immediately upon the assessor qualifying, the clerk shall notify the county auditor of such fact. If the county auditor does not receive such notice on or before the third Monday of April, he shall regard the office as vacant, and fill it as provided by law."

When an assessor qualifies it is the duty of the township clerk to im-

mediately notify the county auditor. If the auditor does not receive such notice on or before the third Monday in April the office shall be regarded as vacant. The assessor in question has not yet forfeited his office by virtue of this section.

In the case of State vs. Cappeller, 3 Bull, 853, it is held that although an assessor may be elected in a municipal corporation, he is nevertheless a township officer.

Section 3265, General Code, provides as follows:

> "If after receiving notice of his election or appointment, a person elected or appointed to a township office fails to take the oath of office and give bond within the time required by law, he shall be deemed to have declined to accept, and the vacancy shall be filled as in other cases."

Other sections govern as to when the bond shall be given.

It is my conclusion that the assessor of personal property is a township officer; that the bond of such assessor should be approved by the board of trustees of the township and filed with the clerk of the township.

While such bond should be filed and approved as soon after election as convenient, the assessor-elect may give bond and take the oath of office at any time prior to his entering upon the discharge of the duties of his office, but if the county auditor does not receive notice, on or before the third Monday in April, from the clerk of the township, that such assessor has qualified, the office shall be deemed vacant.

In your case the assessor-elect has not yet forfeited his office, and will not be deemed to have forfeited his office until the county auditor has failed to receive notice of his qualification on or before the third Monday in April. His bond should be approved by the board of trustees and filed with the clerk of the township.

In justice to him and to those who elected him, he should be notified that his bond should be approved by the township trustees and filed with the clerk of the township. He has shown an intention to properly qualify for the position, and he should be given opportunity to file his bond in the proper place and have the same approved.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

256.

MAYOR OF VILLAGE, EDITOR AND PUBLISHER OF ONLY NEWSPAPER—CRIMINAL PROHIBITION—PUBLICATION BY COUNCIL IN ANY NEWSPAPER OF GENERAL CIRCULATION.

In a village wherein the mayor is editor and publisher of the only weekly newspaper printed and published therein, publication of village notices, resolutions, ordinances, etc., cannot be made in said newspaper by reason of the prohibitions of Section 3808, General Code, under penalty of criminal action. The mayor's paper will, therefore, be presumed to have refused to make such publications and under authority of Section 4676, General Code, such publications may be made in any newspaper of general circulation in the village.

COLUMBUS, OHIO, March 30, 1912.

HON. JACOB LINE, *Solicitor, Mt. Blanchard, Ohio.*

DEAR SIR:—Your favor of February 15, 1912, is received in which you inquire as follows:

> "Our present mayor is the editor and publisher of the Mt. Blanchard Journal, a weekly newspaper printed and published in the village, and is the only one printed or published here. Under the code no officer shall become interested in any contract, etc., which you are familiar with. Now the code also provides that certain resolutions, ordinances, etc., shall be published in a newspaper printed and published in the corporation if any, and another statute prescribes for the fees to be paid for such advertising.
>
> "Now what we wish to know if it is legal to pay the mayor, who is the editor of the paper, for such publications out of the funds of the corporation?
>
> "If it is not legal to pay him how can we make these ordinances and resolutions legal without publishing them?"

The supreme court of Ohio has held that there must be an express contract entered into for the publication of ordinances, resolutions and other legal notices by a municipal corporation.

The first syllabus in case of McCormick vs. City of Niles, 81 Ohio St., 246, reads:

> "The liability of a municipal corporation to pay for the publication of ordinances, resolutions and legal notices required by law to be published, must rest on express contract, and not upon a mere account for the rendition of such services."

Furthermore, the fees fixed by statute for legal publications are the maximum fees, and it is not only permissible but desirable that a better rate be secured when possible.

Section 3808, General Code, provides:

> "No member of council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A vio-

lation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

Section 12910, General Code, provides:

"Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

The mayor is an officer of the village. The foregoing statutes make it a penal offense for an officer to be interested in a contract with the village for the expenditure of money. The mayor as such officer cannot be interested in a contract for the publication of ordinances and other legal notices. A contract entered into with him would be illegal and void.

The sixth syllabus in case of Bellaire Goblet Co. vs. Findlay, 3 Cir. Dec., 205, reads:

"Contracts entered into between a board of gas trustees of a municipality and an incorporated company, when a member of the board of gas trustees is at the same time an officer and personally interested in the incorporated company, are against public policy, and void, the statute making it penal being equivalent to a prohibition."

The situation which presents itself is this: In the village of Mt. Blanchard, there is a newspaper printed, but this paper is not now qualified to publish legal notices of the village, because the mayor is the owner and publisher of such newspaper.

Section 4232, General Code, provides:

"In municipal corporations in which no newspaper is published, it shall be sufficient publication of ordinances, resolutions, statements, orders, proclamations, notices and reports, required by this title to be published, to post up copies thereof at not less than five of the most public places in the corporation, to be determined by the council, for a period of not less than fifteen days prior to the taking effect thereof. Advertising for bids for the construction of public improvements shall be published in at least one newspaper of general circulation in the corporation for not less than two nor more than four consecutive weeks. Notices of the sale of bonds shall be published in such manner and for such time as is provided in this title for the sale of bonds by a municipal corporation, when not sold to the sinking fund. The clerk shall make a certificate of such posting and the time when and places where done, in the manner provided in the preceding section, and such certificate shall be prima facie evidence that the copies were posted up as required.

Section 4676, General Code, provides:

"Where in this title a notice is directed to be published in a newspaper, and no such paper is published at the place mentioned, or if such newspaper is published at the place, but the publisher refuses on tender of his usual charge for a similar notice, to insert it in his newspaper, a publication in any newspaper of general circulation at such place shall be sufficient. Nothing in this section shall be construed to dispense with posters where they are provided for."

The title herein referred to is the one relating to municipal corporations.

Your situation does not come within the provisions of Section 4232, supra, because there is a newspaper published in the village, although it is not now qualified to make the publications.

Neither does Section 4676, General Code, exactly cover your situation. However, under the penal statutes, above quoted, it would be the duty of the mayor, as owner and publisher of the paper to refuse to publish such notices in his paper, even if tendered to him. In such case the statute does not intend that a tender should be made, as it would be useless ceremony. Under the circumstances it would be presumed that the mayor would refuse to make such publications if tendered him.

It is, therefore, my opinion that the village authorities may act as if the mayor had actually refused to insert such notices upon tender of the usual charge. The advertisements can then be inserted, as prescribed by Section 4676, General Code, in some newspaper of general circulation in the village.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

260.

EXTRA COMPENSATION TO VILLAGE TREASURER FOR JOURNEY TO COUNTY SEAT—POWERS OF COUNCIL.

Whether or not the village treasurer in going to the county seat, by direction of council, to make an advance draw of funds, is entitled to special compensation and mileage for the same depends on whether or not the ordinance of council providing for the compensation or salary of that official grants the right to such extra compensation.

COLUMBUS, OHIO, March 29, 1912.

HON. THOMAS EUBANK, *Village Solicitor, New Madison, Ohio.*

DEAR SIR:—Replying to your letter of March 18th, in which you ask whether or not, in my opinion, the village treasurer, in going to the county seat, by direction of council, to make an advance draw of funds, is entitled to special compensation and mileage for the same, I beg to state that in my opinion the answer to this question depends upon the ordinance fixing the compensation of the treasurer.

The services referred to are clearly within the regular duties of the treasurer, and if his compensation as prescribed by the ordinance of council is in the nature of a simple salary, no provision being made for reimbursement of expenses incurred by him, then, in my judgment, he is not entitled to any ex-

penses, nor to any special compensation in connection with or for such services.

On the other hand, if the salary ordinance authorizes the treasurer to be reimbursed for expenses incurred by him he is entitled to such reimbursement; and if the ordinance under which he draws compensation provides a scale of fees or special compensations for particular services, and this particular service is one of those enumerated therein, then, of course, the treasurer is entitled to such special compensation as is provided for in the ordinance.

I refer you to Section 4219, General Code, which expressly authorizes the council to "fix the compensation and bonds of all officers * * * in the village." The word "compensation" has a very broad significance and may be applied to a simple salary or to a scale of fees for separate services.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

272.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—NO CHARGE FOR WATER SUPPLIED VILLAGE FOR EXTINGUISHING FIRES—WATERWORKS BONDS—WHEN WITHIN LONGWORTH ACT.

By provision of Section 3963 General Code, the board of trustees of public affairs may not collect any sum from the village for supplying water for extinguishing fires.

Bonds issued by a vote of the people for waterworks purposes must be taken into consideration in ascertaining the two and one-half per cent. limitations of the Longworth act in its present form, when the income from the waterworks is insufficient to cover the operating expenses and interest charges and to pass a sufficient amount to the sinking fund to retire the bonds as they become due.

COLUMBUS, OHIO, March 30, 1912.

HON. C. M. BABST, *Village Attorney, Crestline, Ohio.*

DEAR SIR:—You have submitted to this office for opinion thereon, the following questions:

> "May the board of trustees of public affairs of a village charge and collect from the village any sum for supplying water for extinguishing fires?
>
> "Are bonds of a village issued by a vote of the people for waterworks purposes to be taken into consideration in ascertaining the two and one-half per cent. limitation of the present form of the so-called Longworth act, 102 O. L., 265, when the income from the waterworks is not sufficient to cover the cost of all the operating expenses and interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due?"

Answering your first question, I beg to state that Section 3963, General Code, as amended 102 O. L., 94, provides as follows:

> "No charge shall be made by the director of public service in

cities, or by the board of trustees of public affairs in villages, for supplying water for extinguishing fires, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes. * * *"

This question seems conclusive of your first question. My opinion, in accordance therewith, is that the board of trustees of public affairs of a village may not lawfully charge the village for water for extinguishing fires.

Your second question resolves itself into two subsidiary questions. The old Longworth act, so-called, Section 3945 of the General Code, repealed by the act found in 102 O. L., 262, exempted all bonds issued by a vote of the people, from consideration in ascertaining the then limitations of one and four per cent. of the act of which said section was a part. (Cleveland vs. Cleveland, 13 U. S. n. s., 436, affirmed 83 C. S., 482.) Said section 3945 of the General Code, upon which this holding was based was as follows:

"Such limitations of one per cent. and four per cent. hereinbefore prescribed shall not affect bonds lawfully issued for such purposes upon the approval of the electors of the corporation."

As I have already indicated, this section was repealed by the act of 1911 and no language similar to that of the first clause thereof is to be found in that act. What seems to be the parallel provision of the act of 1911 is section 11 thereof, therein designated as Section 3949, General Code, which in full is as follows:

"The 'net indebtedness' prescribed in sections three and ten of this act shall be the difference between the par value of the outstanding and unpaid bonds and the amount held in the sinking fund for their redemption. In ascertaining the limitations of one per cent., four per cent. and eight per cent. herein prescribed, the following bonds shall not be considered:

"a. Bonds issued prior to April 29, 1902.

"b. Bonds issued to refund, extend the time of payment of, or in exchange for, bonds representing an indebtedness created or incurred prior to April 29, 1902.

"c. Bonds issued in anticipation of the collection of special assessments, either in original or refunded form.

"d. Bonds issued for the payment of obligations arising through emergencies caused by epidemics, floods or other forces of nature.

"e. Bonds issued to meet deficiencies in the revenues, as provided for in Section 3931 of the General Code.

"f. Bonds issued for the purpose of purchasing, constructing, improving and extending waterworks when the income from such water works is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due."

I have mentioned these matters and quoted the statutes not because they are conclusive of the question, but principally for the purpose of pointing out certain distinctions.

It would naturally be supposed that the catalogue set forth in Section 11 of the act of 1911 is exhaustive, and that all bonds, excepting those enumerated therein are to be counted in ascertaining the limitations of one, four and eight

per cent. (now, of course, one, two and one-half and five per cent. respectively). This inference seems most appropriate in view of the express reliance of the circuit court in the Cleveland case upon the language which has been eliminated from the revised act.

Upon careful examination of the whole act of 1911, however, I have reached the conclusion that it would be unsafe to rely upon the consideration just mentioned as a basis for a final opinion.

The circuit court in the Cleveland case went no farther in the consideration of that case than was necessary to decide it. That is to say, it found express language in the act which offered sufficient ground for holding that bonds issued by a vote of the electors ought not to be counted in ascertaining the then limitations of one and four per cent. of the Longworth act.

In fact, a careful examination of the phraseology of other sections of the then existing law will disclose, I think, that this express exemption, so to speak, was necessary in order to exclude such bonds from the limitation in question.

Section 3939, as in force prior to the last amendment, provided in part as follows:

> "When it deems it necessary, the *council* of a municipal corporation * * * may issue and sell bonds * * * for any of the following specific purposes: * * *"

Section 3940 provides, *inter alia,*

> "* * * the total bonded indebtedness created in any one fiscal year under the authority of the preceding section, by a municipal corporation shall not exceed one per cent. of the total value * * *"

Section 3941 provides that:

> "When such council * * * deems it necessary in any one fiscal year to issue bonds * * * in an amount greater than one per cent. of the total value * * * it shall submit the question of issuing bonds in excess of such one per cent. to a vote of the qualified electors * * *"

Section 3942 provides that:

> *"The net indebtedness incurred by a municipal corporation for such purposes shall never exceed four per cent. of the total value * * * unless the excess of such amount is authorized by vote of the qualified electors of the corporation.* * * *"

Section 3954 provides:

> "No municipal corporation shall create or incur a net indebtedness under the authority of this chapter in excess of eight per cent. * * *."

The limitation of four per cent. under the old law was, therefore, without the express exemption formerly contained in Section 3945 upon the "indebtedness incurred for such purposes" no matter how it was incurred.

Without further discussing the proposition, it seems to me evident that

if Section 3945 had been eliminated from the former law, bonds issued by a vote of the people would have had to be counted in ascertaining the limitation of four per cent. (which, of course, corresponds to the present two and one-half limitation).

I have quoted the sections of the old law in order that the verbal differences between them and those of the present law might the more clearly appear.

Section 3939 of the act of 1911 is substantially identical in phraseology with the corresponding sections of the preceding law. The same is true of Section 3940. Many differences appear, however, between the language of Section 3941 and succeeding sections of the new law and that of the corresponding sections of the old law.

Section 3941, as section 3 of the act of 1911 is designated, provides as follows:

> "The net indebtedness created or incurred by *council* under the authority granted *it* in Section 1 of this act, and in an act passed April 29, 1902, * * * together with its subsequent amendment, shall never exceed four per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation."

Here there is what might be termed a "break" in the statute.

The power of council to issue bonds in any one year is not further qualified or enlarged. It is not provided that council may issue more than one per cent. in any one year by a vote of the electors, nor that more than four per cent. may be issued at any one time by a vote of the electors. It is simply that council shall have power to issue up to one per cent. in any one year or up to four per cent. at any one time, and under the peculiar language of this section, the four per cent. limitation is expressly placed upon the indebtedness created *"by council under the authority granted it."*

Now I have pointed out that under the former law, the four per cent. limitation was upon the "net indebtedness incurred by a municipal corporation" so, that this would include bonds issued under authority of the vote of the electors, as well as bonds issued by council under its independent authority.

I have, therefore, reached the conclusion that the phrase "under the authority granted to it * * * in an act passed April 29, 1902, * * * together with its subsequent amendment" does not aptly refer to bonds issued under the Longworth act by a vote of the people. Certainly it does not refer to bonds issued under the act of 1911 by a vote of the people, and it is at least clear that it is the intention, so far as this one section is concerned, to limit the four per cent. (which, of course, has become the two and one-half per cent.) limitation of the law *to bonds issued by council itself.*

Consideration of the remaining sections of the amended act make this last conclusion perfectly plain. Section 3942 provides as follows:

> *"In addition to the authority granted in Section one* (1) *of this act and supplementary thereto, the council of a municipal corporation * * * may issue and sell bonds * * * upon obtaining the approval of the electors * * *."*

It is significant that council may at any time invite the approval of the electors under this section whether it has reached its one per cent. limitation or its two and one-half per cent. limitation or not. Council might issue bonds under this section by the approval of the electors even if there were no out-

standing bonded indebtedness whatever. In this respect the present law is fundamentally different from the former one, and the conclusion which I have already expressed, to the effect that authority of council under the present law to issue bonds on the vote of the electors is entirely independent from its authority to issue bonds without such vote, is completely justified.

It will not be necessary to quote further from the new law. I have said enough, I think, to indicate that in my opinion the limitation of two and one-half per cent. is not applicable to bonds issued by a vote of the electors. I do not think that the question is even doubtful in spite of the seeming application of the rule of enumeration and exclusion afforded by the catalog contained in Section 11 of the act of 1911. That rule does not apply and said Section 11 is without necessary application for the sufficient reason that if Section 11 were not in existence at all, there would be no ground whatever for holding that bonds issued by a vote of the people are to be counted in ascertaining the two and one-half per cent. (or four per cent.) limitation of the act of 1911.

It is my opinion, therefore, that the bonds of which you speak in your second question are not to be counted or taken into consideration in ascertaining whether or not the council has reached the limit of its authority to issue bonds without a vote of the people.

Different sections of the Longworth act were amended and re-enacted more than once during the last session of the general assembly. I have not complicated this opinion by discussing these various acts, as the act which I have referred to is the last expression of the will of the general assembly, excepting possibly as to section 3939, and all prior acts are merged into it.

The above conclusion might make it unnecessary to answer the second of the two questions into which your inquiry divides itself. I have, however, given some consideration to this question, and I am of the opinion that it is sufficiently answered by paragraph "F," of Section 11, above quoted.

In this connection I beg to advise that in my opinion a waterworks plant for which bonds are outstanding must first produce sufficient income to pay all operating expenses, which are the first charges against the same. Then there must be in existence a sinking fund, and the income of the waterworks plant, after paying operating expenses, must be sufficient to pass an amount to this sinking fund large enough to pay interest charges and the installments of principal falling due from time to time. If the income from the plant is insufficient, measured by the above requirements, outstanding bonds issued for the purpose of purchasing, constructing, improving or extending the plant or the distribution system must be counted in ascertaining the limitations of the whole act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

310.

PUBLICATION OF NOTICES OF CONTRACTS—CODE SECTIONS 4229 AND 4221 NOT CONFLICTING.

Contracts entered into by the council of a village by virtue of Section 4221 General Code, are not governed by the general provisions of Section 4229 General Code, providing for publications of notices of contracts once a week for four consecutive weeks. By virtue of the express proviso of Section 4229 General Code, "except as otherwise provided in this chapter," such notices must be made for "not less than two nor more than four consecutive weeks" as provided by Section 4221 General Code aforesaid.

COLUMBUS, OHIO, April 24, 1912.

HON. C. M. BABST, *Solicitor, Crestline, Ohio.*

DEAR SIR:—Under date of January 15, 1912, you inquire as follows:

> "There seems to be considerable conflict between the time required for publication in bond sale notices.
>
> Under Section 3924, G. C., sale notices of bonds should be advertised in two newspapers in the county for 30 days; and under Section 4229, G. C., notices of bond sales should be published once a week for four consecutive weeks.
>
> "I desire to know which of these should be followed.
>
> "Also as to the time notice of sale of contract should be made.
>
> "Section 4221 requires publication for not less than two nor more than four consecutive weeks; and section 4229 requires once a week for four consecutive weeks.
>
> "I desire to know which of these should be followed."

Your first question is answered by an opinion rendered to the bureau of inspection and supervision of public offices on April 2, 1912, a copy of which is herewith sent you.

Your second question raises the same point that was considered and passed upon in an opinion to the bureau of supervision of public offices, under date of April 6, 1912. This latter opinion, however, dealt with contracts entered into by the director of public service and the director of public safety.

Section 4221, General Code, prescribes how contracts shall be entered into by the council of a village, as follows:

> "All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder *after advertising for not less than two nor more than four consecutive weeks in* a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

Section 4229, General Code, provides:

> "*Except as otherwise provided in this title*, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, and for the following times: The statement of receipts and disbursements required shall be published once; the ordinances and resolutions once a week for two consecutive weeks; proclamations of elections once a week for two consecutive weeks; *notices of contracts and of sale of bonds once a week for four consecutive weeks;* all other matters shall be published once."

Section 4221 requires that notices of contracts shall be published "for not less than two nor more than four consecutive weeks," while Section 4229 provides that "notices of contracts" shall be published "once a week for four consecutive weeks."

Section 4229, General Code, contains the proviso, "except as otherwise provided in this title."

The proposition as to which section controls where there is a special and a general statute upon the same subject, is considered in reference to statutes requiring publication by county officials in case of Schloenbach vs. State, 53 Ohio St., 345.

On page 346, the court say:

> "* * * The duty of the commissioners in regard to the publishing of their report is governed wholly by Section 917 of the Revised Statutes, and that section does not afford authority for either ordering such report published in a German newspaper, or paying for the same. See Cincinnati vs. Brickett, 26 Ohio St., 49."

Section 917, Revised Statutes (now Section 2511, General Code), therein referred to, was a special statute which required publication in two newspapers, while a general statute (now Section 6253, General Code) authorized an additional publication in a German newspaper. The court held that the special statute controlled.

The present question can be distinguished from that in 53 Ohio St., 345. The general statute in that case did not refer to the publication authorized by the special statute. In the present situation the general statute, Section 4229, General Code, refers to "notices for contracts" which is the same matter specially covered by Section 4221, General Code.

But the proviso in Section 4229, General Code, "except as otherwise provided in this title" exempts the contracts authorized by Section 4221, General Code, from its provisions.

Contracts entered into by the council of a village by virtue of Section 4221, General Code, are not governed by the provisions of Section 4229, General Code. Such contracts should be advertised for not less than two nor more than four consecutive weeks, as required by Section 4221, General Code.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

329.

INITIATIVE AND REFERENDUM ACT—"EXPENDITURE"—"EMERGENCY" —ORDINANCE PROVIDING FOR SPRINKLING AND SWEEPING OF STREETS THROUGH ASSESSMENTS UPON PROPERTY HOLDERS—ORDINANCE AUTHORIZING CONTRACT FOR ONE YEAR NOT A CONTINUING ORDINANCE.

An ordinance providing for the sprinkling and sweeping of streets, the costs of which are to be paid by special assessments upon abutting property, involves an expenditure of money, must remain inoperative for sixty days under Section 2 of the initiative and referendum act and therefore may not be declared an emergency measure.

An ordinance passed February 6, 1911, providing for a contract for labor and implements which contract was not to extend for more than one year, is not a continuing ordinance and cannot at the expiration of that year authorize a second contract by council.

COLUMBUS, OHIO, May 6, 1912.

HON. ARTHUR B. SIMONS, *Solicitor, Richwood, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 27th, wherein you ask me two questions:

> "*First*: Whether or not under Section 4227-3 an ordinance providing for the sweeping and sprinkling of streets, the costs of which is to be paid by special assessment upon the abutting property would be classed as an emergency measure, and take effect immediately, and if so what effect would a repeal by vote of the people have upon contracts made for such work?"

The second paragraph of Section 4227-2 General Code provides that no ordinance involving the expenditure of money shall become effective in less than sixty days after its passage. An ordinance providing for sweeping and sprinkling of streets, the cost of which is to be paid by special assessment upon abutting property would be an ordinance involving the expenditure of money although said ordinance provides that the costs of sweeping and sprinkling is to be paid by special assessment upon abutting property. I am, therefore, of the opinion that such an ordinance cannot be classed as an emergency measure to take effect immediately under Section 4227-3 General Code for the reason that it is an ordinance included within those specified in Section 2 of the act as remaining inoperative for sixty days. Such being the case there is no necessity of considering what effect a repeal by the vote of the people would have upon contracts made for such work.

Second: You next inquire whether or not the council could now act under an ordinance, a copy of which you enclose, which ordinance was passed February 6, 1911. An examination of said ordinance, being ordinance No. 302, discloses that Section 1 provides that council direct and authorize the mayor and clerk to enter into contract for and employ the necessary labor for and to purchase the necessary tools and implements for sprinkling, sweeping and cleaning certain streets of the village, which streets are set out.

Section 2 of said ordinance provides:

> "That contract for same shall not extend for more than one year from date of contract."

Section 3 of said ordinance provides:

"That the costs and expenses of said sprinkling, sweeping and cleaning of said streets shall be assessed upon the abutting properties according to the foot frontage thereof, and upon the Columbus, Delaware & Magnetic Springs Railway shall be assessed one cent per lineal foot within said village limits."

Section 4 of said ordinance provides:

"That certificate of indebtedness of the village of Richwood, Ohio, shall be issued in amount equal to not more than $1,000.00 in anticipation of collection of assessments levied to cover cost of said sprinkling, sweeping and cleaning."

As such ordinance specifies that the contract for sprinkling, sweeping and cleaning the streets shall not extend for more than one year from the date of the contract and as it further specifies that the certificate of indebtedness of the village shall be issued in an amount not more than $1,000.00 in anticipation of the collection of assessments, I am of the opinion that such ordinance was operative only for the term of the contract specified in Section 2, which was made in pursuance of said ordinance, to wit: not more than one year from the date of said contract, and, therefore, that council could not act under the ordinance as a continuing ordinance. In other words, as I view said ordinance, it provided solely for a general contract to be made thereunder for the term of not more than one year, and that as soon as said contract was made such provision of the ordinance was executed and does not give council the right to make any further contract after the expiration of the first contract so made.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

330.

INITIATIVE AND REFERENDUM ACT—"EXPENDITURE"—"EMERGENCY" —ORDINANCE APPROVING BILLS FOR CURRENT EXPENSES—ORDINANCE AUTHORIZING BOARD OF HEALTH TO PURCHASE EMERGENCY BUILDING FOR SCARLET FEVER PATIENT.

An ordinance approving bills for current expenses for labor and repairs on streets and for telephones, electric lights, etc., does not involve an expenditure of money within the meaning of the initiative and referendum act, and it is legal to pay such bills once in two weeks by a suspension of the three readings rule through a vote of five out of six members of the council.

An act cannot be declared an "emergency" unless it fulfills the definition of that term.

An ordinance authorizing the board of health to contract for the use of a building required as an emergency for detention of scarlet fever patients, involves an "expenditure of money" and under Section 2, paragraph 2 of the initiative and referendum act must remain inoperative for sixty days and cannot be declared an emergency measure.

COLUMBUS, OHIO, May 13, 1912.

HON. CHARLES A. HAMMOND, *Solicitor, Oberlin, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 14th, wherein you desire my ruling in reference to the initiative and referendum act, especially in reference to Section 4227-2 and 4227-3 General Code as follows:

> *First*: You inquire whether an ordinance passing bills for the payment of labor on the streets, light accounts payable under a contract with a lighting company, bills for equipment for the fire department, telephone bills, bills for material to make repairs on the streets and sidewalks, and in fact, bills for all those week to week expenditures which must be made to properly care for the municipality's needs, should be passed as an emergency measure and receive a vote of three-fourths of the council."

As the passing of such ordinance is solely for the approval of bills for materials and services theretofore rendered to the village, I am of the opinion that such an ordinance could not be considered as an ordinance involving the expenditure of money. It is true that it authorizes the payment of such bills but if such an ordinance were to be considered within the initiative and referendum act it would absolutely block the administration of municipal affairs in a village.

The passage of such ordinance is purely in an administrative capacity by council and is not in any sense legislative. For that reason I am of the opinion that such an ordinance is not within the purview of the initiative and referendum act. If it were to be considered as an ordinance involving the expenditure of money it could not under paragraph two of Section 4227-2 be declared to be an emergency measure. You state that it has been the custom to pass such bills once in two weeks by a vote of five out of six members of council and under a suspension of the three readings rule and you wish to know whether such action is strictly legal. I am of opinion that it is.

Second: You wish to know whether we can give you any more definite rule in relation to emergency measure than that given in the statute.

I know of no more definite rule that I can give you in relation thereto, but beg to state that I have heretofore rendered an opinion to Hon. N. M. Greenberger, city solicitor, Akron, O., under date of October 25, 1911, in reference to my interpretation of emergency measure as follows:

> "While it is true that Section 2 of the initiative and referendum act foregoing set forth declares that certain acts may take effect immediately, provided they be declared by council to be an 'emergency measure' yet I do not believe that council can declare an act to be an emergency measure which could not be considered under the definition of 'emergency' to be such. In other words, I do not believe that council by mere declaration that a measure is an emergency measure can so constitute it if the definition of 'emergency' did not apply to such measure."

"Emergency" is defined by the Century dictionary as follows:

> "A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances."

Again,

> "A sudden or unexpected occasion for action; exigency; pressing necessity."

Again,

> "Something not calculated upon; an unexpected gain."

"Emergency" is defined by Webster to be:

> "A condition of things happening suddenly or unexpectedly; an unforeseen occurrence; a sudden occasion."

Again,

> "Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency."

> "The facts stated in your letter do not give rise, as I view it, to any emergency, and, consequently, an ordinance thereunder could not be considered as an emergency measure."

Third: You ask in what class is the semi-annual appropriation ordinance.

I have heretofore decided in an opinion rendered to Hon. C. C. Middleswart, Marietta, Ohio, under date of November 3, 1911, that the semi-annual appropriation ordinance is not within the purview of the initiative and referendum act.

Fourth: You state if the board of health certifies the immediate need of an emergency building for detention of scarlet fever patients and the council passes an ordinance authorizing the board to make a contract with some prop-

erty owner for the use of a building at a stipulated price would such an ordinance be one involving the expenditure of money, and under section 2, paragraph two of said act not become effective for sixty days?

If said ordinance is one authorizing the board to make a contract for the use of a building for a stipulated price it is my opinion that such an ordinance is one involving the expenditure of money, and being such, of course, could not be declared to be an emergency measure under the provisions of Section 4227-3.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

331.

SALARY, INCREASE AND DECREASE OF—STREET COMMISSIONER—TERM OF OFFICE—INITIATIVE AND REFERENDUM ACT—SUSPENSION OF EFFECT OF ORDINANCE FOR SIXTY DAYS AND UNTIL GENERAL ELECTION UPON FILING OF REFERENDUM PETITION.

The term of office of the street commissioner, under Section 4363 General Code, does not commence until his appointment by the mayor and confirmation by the council.

An ordinance passed by council decreasing the salary of that officer during the time intervening between the appointment and the confirmation, is not, therefore, within the prohibition of Section 4219 General Code against increase of salary during term of office.

Such ordinance involves an "expenditure of money" and therefore does not take effect until the expiration of sixty days after its passage. Until such time, the street commissioner takes under the old ordinance.

When a referendum petition is duly filed the effect of the ordinance is suspended until the "next general election." If such ordinance is defeated at the election, the old ordinance will remain in effect.

COLUMBUS, OHIO, May 6, 1912.

HON. E. R. YOUNG, *Legal Counsel, Ripley, Ohio.*

DEAR SIR:—Under date of February 17th you wrote me as follows:

> "On the fifth day of December, 1902, there was passed by the council of the incorporated village of Ripley, Ohio, ordinance No. 107, being 'an ordinance fixing the compensation and bonds of the officers of the village.'
>
> "That part of said ordinance which relates to the office of street commissioner, is as follows: 'The salary of the street commissioner shall be twenty dollars per month, payable monthly; and he shall give a bond in the sum of five hundred dollars.'
>
> "On the twelfth day of January, 1911, one D. M. was duly appointed, confirmed and qualified as street commissioner and entered upon the duties of said office.
>
> "Section 4363 of the General Code relates to the office of street commissioner, and is in substance as follows:
>
> " 'Shall be appointed by the mayor and confirmed by council for a term of one year and shall serve until his successor is appointed

and qualified.' On the eleventh day of January, 1912, at a regular meeting of said council the mayor reported that he had appointed the said D. M. street commissioner for the coming year.

"Said appointment was *not* confirmed by council, but said council then forthwith proceeded to and did then duly pass an amendment to said ordinance No. 107, with reference to the office of street commissioner, which amendatory ordinance is as follows:

"'AN ORDINANCE No. 152.

"'Amending an ordinance passed on the fifth day of December, 1902, entitled "An ordinance fixing the compensation and bonds of the officers of the village.

"'Be it ordained by the council of the incorporated village of Ripley, Brown county, state of Ohio:

"'Section 1. That ordinance No. 107, passed on the fifth day of December, 1902, being an "Ordinance fixing the compensation and bonds of the officers of the village," and recorded on page 135 of the records of ordinances of said village, be amended so as to read as follows:

"'Section 2. The salary of the street commissioner shall be five dollars per month, payable monthly; and he shall give a bond in the sum of fifty dollars.

"'Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

"'L. V. WILLIAMS, *Mayor.*

"'Passed January 11, 1912.

"'D. W. Lemon, Clerk.'

"Said ordinance, after having been duly passed on said eleventh day of January, 1912, was then at that time signed by the mayor and clerk, and afterwards published as required by law.

"At the next regular meeting of the council on the sixth day of February, 1912, the mayor again reported to the council as unfinished business that he had appointed the said D. M. street commissioner, and said appointment was then confirmed by council.

"The said appointee, who had been holding said office under his former appointment of January 12, 1911, duly qualified, on the ninth day of February, 1912, and again entered upon the duties of said office.

"On the tenth day of February, 1912, the said D. M. filed with the clerk of said village a 'petition for the referendum' of said council ordinance No. 152, signed by the required number of electors of said village, ordering the submission of such ordinance to the vote of the electors at the next regular election to be held on the fifth day of November, 1912; and said clerk, pursuant thereto, on the seventeenth day of February, 1912, certified said ordinance of the board of election for the purpose of having the same submitted to the electors at the next regular election.

"Section 4219 of the Code provides in substance: 'Council shall fix the compensation * * * of all officers. The compensation so fixed shall not be increased or diminished during the term for which any officer * * * may have been elected or appointed.'"

Upon the above state of facts you submit six several questions for my opinion as follows:

"1. Does the term 'appointed' as used in the latter section, include confirmation and qualification (i. e., giving bond)?

"2. The fact that the officer was appointed, but was not confirmed until after the passage of the ordinance reducing the salary, does the ordinance come within the inhibition of section 4219 G. C.?

"3. If the ordinance does not take effect under the 'initiative and referendum law' (O. L. 102, p. 521) until sixty days after its passage, does the officer draw a salary of $20.00 per month for the sixty days, or does he draw a salary of $5.00 per month for this time?

"4. If the ordinance is suspended until the next regular election by the filing of the 'petition for referendum,' what salary should be drawn by this officer until the matter is determined by the electors?

"5. What is meant by the next regular election as referred to in the 'Crosser' law?

"6. If the new ordinance is rejected by the electors does the former ordinance which it attempted to repeal remain in effect?"

I shall consider question one and question two together. Section 4219 General Code as set out in your letter states that the compensation fixed by council shall not be increased or diminished *during the term* for which the officer may have been elected or appointed. This inhibition is against council enacting any legislation during the term of said officer, changing the salary of such officer. From your inquiry it would appear that the mayor appointed the said D. M. as street commissioner for the coming year. The authority to so appoint is found in Section 4363 General Code set forth in your letter which states that such commissioner shall be appointed by the mayor and *confirmed by council* for the term of one year.

The question, therefore, arises as to when the *term* of such D. M. as street commissioner would begin. If his term was to begin only upon his appointment by the mayor and confirmation by council and would be for the period of one year after such confirmation, his *term* would not commence until council had duly confirmed his appointment.

I am of the opinion on reading Section 4363 G. C., that it means that the term of the street commissioner shall only begin after appointment and confirmation by council and continue for the term of one year from such confirmation, and that until such confirmation by council, said council was duly authorized to increase or diminish the compensation of such appointee. I do not, therefore, think it necessary to decide whether the term "appointed" as used in Section 4219 G. C. includes confirmation and qualification as I am of the opinion that the term of such officers would begin upon confirmation by council. The term having so begun the question as to when the officer qualified would be immaterial.

In answer to your second question, I am of the opinion that the ordinance passed January 11, 1912, does not come within the inhibition of Section 4219.

You next inquire if the ordinance does not take effect under the initiative and referendum act until sixty days after its passage does the officer draw his salary of $20.00 per month for the sixty days, or does he draw a salary of $5.00 per month for this time. As I have heretofore given it as my opinion that an ordinance fixing a salary is an ordinance involving the expenditure of money, and, therefore, does not go into effect until sixty days after its passage thereof, I am of the opinion that the officer would draw his salary

under the old ordinance until the going into effect of the new ordinance as decided in the opinion to Hon. H. W. Houston, city solicitor, Urbana, Ohio, under date of December 29, 1911.

Fourth: Your fourth question is as follows:

> "If the ordinance is suspended until the next regular election by the filing of the 'petition for referendum,' what salary should be drawn by this officer until the matter is determined by the electors?"

I have heretofore decided in an opinion to Hon. F. X. Frebis, prosecuting attorney, Georgetown, Ohio, under date of April 26, 1912, copy of which we herewith enclose, that upon the filing of a petition for referendum in reference to any ordinance the operation of said ordinance remains suspended and does not become effective until the said ordinance is duly adopted by the electors at the next regular election. Therefore, in answer to your fourth question I would say that the officer in question, since the operation of the ordinance is suspended, would draw the salary fixed by the old ordinance until the new ordinance was adopted by the electors, a referendum petition having been filed in reference to said new ordinance.

Fifth: You next inquire what is meant by "next regular election" as referred to in the "Crosser" law?

In answer thereto I herewith hand you copy of opinion to Hon. I. Q. Jordan, village solicitor, Wilmington, O., under date February 26, 1912, which fully covers the question.

Sixth: You next inquire if the new ordinance is rejected by the electors, does the former ordinance which it attempted to repeal remain in effect?

On examination of the ordinance of January 11, 1912, as set forth in your letter it is entitled "An ordinance amending an ordinance passed on the fifth day of December, 1902." Section 1 of said ordinance provides "That ordinance No. 107 * * * be amended so as to read as follows * * *."

If the new ordinance is rejected by the electors, I am of the opinion that it is as if it were never enacted, and consequently, the former ordinance which it attempts to amend would remain in full force and effect.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

349.

INITIATIVE AND REFERENDUM ACT—COUNCIL—CONTRACT WITH LIGHT COMPANY—ORDINANCE PROVIDING FOR ADDITIONAL LIGHTS INVOLVES "EXPENDITURE."

When a village has in existence a contract with a light company calling for 100 arc lights, with provisions for additional lights upon demand, and the council passes an ordinance designating the location of 180 lights, which number included the first hundred as well as 80 additional lamps provided for in said ordinance, said ordinance involves an expenditure with reference to the additional lights and is subject to suspension under the initiative and referendum act.

The ordinance is to be voted on as a whole and should it fail at election, conditions would remain the same as before the election.

COLUMBUS, OHIO, May 10, 1912.

HON. I. Q. JORDAN, *Village Attorney, Wilmington, Ohio.*

DEAR SIR:—Under date of March 11th you enclose as copy of light contract between the village of Wilmington and the Wilmington Water & Light Company; also a copy of the resolution passed by the council preceding the present council on the last night of its existence, to wit: December 30, 1911, concerning which a petition for referendum has been duly filed.

You desire to know whether or not the present council is justified in paying the Water & Light Company any part of their bill while the resolution is pending under the referendum, and if so, how much, and further as to what the electors will vote on under the petition for referendum at the next general election.

Upon a consideration of the contract entered into by the village of Wilmington with the Water & Light Company, which is designated in the contract as the United Water & Light Company of New Jersey, and which contract runs for a period of ten years from February 1, 1903, the rights in which contract the Wilmington Water & Light Company succeeded we note that said contract was for one hundred (100) arc lights in all with the provision that the said Water & Light Company "shall from time to time furnish such additional electric lights as the village council may order under the provisions of the contract." I understand both from your letter and from conversation with you that there had been no additional lights ordered by council beyond the one hundred lights provided for in the contract until the passage of the resolution of December 30, 1911.

The resolution of December 30, 1911, states as follows:

"RESOLUTION.

"WHEREAS, The village council of the village of Wilmington, Ohio, have from time to time, ordered various extensions of the lines of the lighting plant, and have directed the lighting committee to locate and caused to be placed tungsten and arc lamps on said extensions, and at various intermediate points; and,

"WHEREAS, A committee of the citizens have purchased and donated to the village various arches for lighting purposes, some of which have taken the places of arc lamps at some of the locations where said arches have been located and placed by order of council; therefore be it

"*Resolved*, That the locations of the various lights and arches on said system within the village shall be as hereinafter designated, and that said Wilmington Water & Light Company is instructed and directed to maintain lights at said places in accordance with the ordinance contracting with said company for the lighting of the streets, alleys, ways and commons of the village of Wilmington.

"The following arches and lights to burn all night every night: (Specifying thirty-five [35] lights.) The following lights to burn all dark hours until midnight. (Specifying one hundred and forty-five [145] lights.)"

I note that said resolution seeks to designate one hundred and eighty (180) lights, or in other words, eighty (80) more than was provided for in the original contract. Said resolution is based on the assumption, as it appears to me from a reading thereof, that council had prior to the adoption of said resolution ordered under the provisions of the contract additional electric lights. I am assured, however, by you that such is not the case, but that the resolution in question seeks to designate eighty (80) lights in addition to the one hundred (100) lights provided for in the contract. Such being the case, and as such an ordering of additional lights by council would necessarily require that the village pay for the same the resolution involves the expenditure of money, as I view it.

You asked whether or not the council is justified in paying the Water & Light Company any part of their bill while the resolution is pending under the referendum. The payment for the number of lights which were properly contracted for at the time of the passage of the resolution of December 30, 1911, would be legal for the reason that the same is a proper charge against the village under the provisions of the contract. I do not undertake to state exactly how many lights this would make.

You inquire as to what the electors will vote on under the petition for referendum which has been filed. The electors will vote whether or not such *resolution* should be adopted in its entirety. They will not vote on the question of additional lights, but on the resolution itself. If included in such resolution are those lights which have been properly contracted for, and included therein are those which had, prior to the resolution in question, not been contracted for the referendum thereunder would not affect the contract for the lights which had been properly contracted for. The electors will vote on the resolution as a whole and will either adopt or reject the same. If the resolution is rejected at the polls it will be the same as if it never existed, and the only rights that the light company would have would be those which had been acquired prior to the passage of said resolution.

All that I have said in reference to the light contract would apply equally as well to the water contract, a copy of which I do not have before me, but the facts concerning which I understand are the same as in reference to the light contract.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

365.

"VOLUNTEER FIREMEN"—EXEMPTION FROM MUNICIPAL AND STATE ROAD LABOR.

A volunteer fire department as intended by the statues providing for exemption from municipal or state road labor, is one whose members are not appointed by the mayor and who receive no compensation for their services.

COLUMBUS, OHIO, May 3, 1912.

HON. GEORGE W. ROSE, *Village Solicitor, Glouster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 20, 1912, which is as follows:

> "Section 3375, General Code, exempts from performing two days' labor on the public highways, persons coming under certain conditions, among which are:
>
> "'Any person who is a member of any fire engine, hook and ladder, hose or other company, for the extinguishment of fire or the protection of property at fires, under the control of the corporate authorities of any municipal corporation, and who receives no pay for such services during the time he may continue an acting member of such company,' etc.
>
> "Section 3738, General Code, exempts:
>
> "'Active members of volunteer engine companies not exceeding thirty, and of hose companies not exceeding twenty,' etc.
>
> "We have this situation in the village of Glouster. We have a fire chief appointed by the mayor and confirmed by council who receives $5.00 for every fire he attends where there is an actual fire and it is necessary to throw water, and $2.50 where a run to a fire is made and no water thrown. This fire chief has a company of fourteen firemen whom he selects and these firemen are paid $2.00 for each fire attended where it is necessary to throw water, and $1.00 where they make a run, and no water is thrown.
>
> "I desire to ask your opinion as to the following:
>
> "1st. What constitutes a volunteer fire company?
>
> "2nd. Is that of Glouster a volunteer company?
>
> "3rd. Which section of the General Code governs as to this particular case?
>
> "4th. Would you consider the fire chief and the members of the fire company exempt or liable for the performance of two days' labor upon the public highway?"

In reply I desire to call your attention to the following pertinent sections of the General Code:

> "Section 4389. In each village having or hereafter establishing a fire department, the head thereof shall be a fire chief, appointed by the mayor for a term of two years, and shall be an elector of the corporation.
>
> "Section 4390. Council may provide for the employment of such firemen as it deems best and fix their compensation, or for the services

of volunteer firemen. All firemen other than volunteers, shall be appointed by the mayor for terms of one year with the advice and consent of the council.

"Section 4394. No active volunteer fireman or one who has served five years consecutively as a volunteer fireman shall be required to serve on juries or perform military duty in time of peace or labor on highways."

Section 4390 makes clear two distinctions between regular firemen and volunteer firemen. The first sentence gives council the authority to "provide for the employment of such firemen as it deems best and to fix their compensation, *or for the services of volunteer firemen.*" In the clause giving authority to council to employ regular firemen, the right to provide compensation is expressly recognized; whereas, the clause governing the appointment of volunteer firemen excludes any mention of the compensation.

Another distinction to be observed is that, all firemen *other than volunteers shall be appointed by the mayor for a term of one year with the advice of council.*"

From the statement of facts in your letter, it appears that the chief of the fire department was appointed by the mayor and confirmed by council as required by Section 4389; that the members of the fire department were selected by the chief, and that a certain compensation is provided for their services in attendance at fires.

I am, therefore, of the opinion that a volunteer fire company is one whose members are not appointed by the mayor, and who receive no compensation for their services and accordingly, the fire department of Glouster is not a volunteer company.

The two sections of the General Code cited by you which govern labor on highways are as follows:

"Section 3375. Except honorably discharged soldiers who served in the United States army during actual war, pensioners of the United States government, acting and contributing members of companies, troops and batteries of the Ohio national guard during membership, and members of a fire engine, hook and ladder, hose or other company, for the extinguishment of fire or the protection of property at fires, under the control of the corporate authorities of any municipal corporation, who receive no pay for their services as such acting members, each male person between the age of twenty-one and fifty-five years, able to perform or cause to be performed the labor herein required, shall be liable annually, to perform two days' labor on the highways, under the direction of the road superintendent of the road district in which he resides. (98 vs. 328, Sec. 4).

"Section 3738. The council of any municipal corporation may require each able-bodied male person between the ages of twenty-one and fifty-five years, resident of the corporation, or territory attached as herein provided, to perform by himself or substitute, in each year, two days' labor upon the streets and alleys of such corporation, or upon the public roads or highways that lie within such attached territory, which labor shall be instead of the two days' labor required to be performed upon roads and highways. Active members of volunteer engine companies not exceeding sixty-four, of hook and ladder companies not exceeding thirty, and of hose companies not exceeding twenty, shall be exempt from the performance of such labor during

such membership, and, having served faithfully as such for five consecutive years, shall be exempt for five years thereafter. Such labor may be commuted by the payment of three dollars to be expended where the labor should have been applied. (92 vs. 162, Sec. 1.)

Under the latter section council may require able-bodied male persons between the ages of twenty-one and fifty-five years to perform two days' labor on the streets and alleys of the corporation with the exception, among others, of "active members of volunteer engine companies, etc.," and said section also states expressly that "such labor shall be instead of the two days' labor required to be performed on the roads or highways." When council adopts an ordinance providing for the performance of such labor on the streets and alleys all persons, other than those who come within the exceptions, are bound to perform the same under Section 3738, in which event they are exempted by the express provisions of said Section 3738, from performing labor on the highways as required by Section 3375. The chief and members of the Glouster fire department, not being volunteer firemen as above defined are required to perform labor on the streets and alleys of the corporation, providing council has adopted an ordinance requiring such labor; otherwise they are liable to perform labor on the roads and highways under Section 3375 when required so to do by the road superintendent of the road district in which they reside.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

410.

NEWSPAPERS—PUBLICATION OF ORDINANCES, RESOLUTIONS, ETC.—VILLAGE CLERK, EDITOR AND PROPRIETOR OF ONLY NEWSPAPER—POSTING IN FIVE PUBLIC PLACES.

When the only newspaper published, and the only newspaper of general circulation in a village is disqualified from publishing notices and ordinances, and resolutions, because the village clerk is the editor and proprietor thereof, the publications may be made by posting copies of the resolutions, ordinances, etc., in five of the most public places in the village, as prescribed by Section 4232, General Code.

COLUMBUS, OHIO, May 14, 1912.

HON. ROY E. LAYTON, *Solicitor of Waynesfield, Wapakoneta, Ohio.*

DEAR SIR:—Your favor of May 6, 1912, is received, in which you state as follows:

"Mr. E. B. Y. is the editor, publisher and sole proprietor of the W. C., a weekly newspaper, the only newspaper published in said village and perhaps the only newspaper of general circulation in such municipality. Mr. Y. is also the village clerk. That being the only newspaper published in the village, as I understand it the law is practically mandatory that all resolutions, ordinances, notices, etc., requiring publication shall be published in that newspaper. I might add, however, that the village has no contract with this or any other newspaper for such publication but the printing has been given to it as a matter of course.

"Now the question is, would Mr. Y. be civilly or criminally liable or both, if any ordinances, resolutions or notices should be printed in his paper, and for which of course he would be paid. On the other hand would any legislation be valid if the printing were done in some other newspaper published in another town when the law requires that such publication shall take place in a newspaper published in such municipality. Or is the only alternative for Mr. Y. to resign as village clerk or do the public printing for nothing?"

The greater part of your inquiry is covered by an opinion given to Jacob Line on March 30, 1912, a copy of which is herewith enclosed.

You state that this newspaper is probably the only newspaper of general circulation in the village. If there is no newspaper of general circulation in the municipality other than the one published by the village clerk, the village is without a newspaper qualified to publish ordinances, resolutions, and other notices required to be published.

Section 4232, General Code, provides:

"In municipal corporations in which no newspaper is published, it shall be sufficient publication of ordinances, resolutions, statements, orders, proclamations, notices and reports, required by this title to be published, to post up copies thereof at not less than five of the most public places in the corporation, to be determined by the council, for a period of not less than fifteen days prior to the taking effect thereof. Advertising for bids for the construction of public improvements shall be published in at least one newspaper of general circulation in the corporation for not less than two nor more than four consecutive weeks. Notices of the sale of bonds shall be published in such manner and for such time as is provided in this title for the sale of bonds by a municipal corporation, when not sold to the sinking fund. The clerk shall make a certificate of such posting and the time when and places where done, in the manner provided in the preceding section, and such certificate shall be prima facie evidence that the copies were posted up as required."

Section 4676, General Code, provides:

"Where in this title a notice is directed to be published in a newspaper, and no such paper is published at the place mentioned, or if such newspaper is published at the place, but the publisher refuses on tender of his usual charge for a similar notice, to insert it in his newspaper, a publication in any newspaper of general circulation at such place shall be sufficient. Nothing in this section shall be construed to dispense with posters where they are provided for."

Section 4232, General Code, provides that when no newspaper is published in a municipal corporation, copies of ordinances, resolutions, and the other notices therein enumerated shall be posted at not less than five of the most public places in such corporation. Section 4676, General Code, provides, however, that where no newspaper is published at the place mentioned, such notices may be published in some newspaper of general circulation therein.

There is a newspaper published in the village, but this newspaper is dis-

qualified from publishing such notices. The statute has reference to a newspaper qualified to make the publications. It appears that there is no newspaper of general circulation therein other than the newspaper of the village clerk. The situation of the village is the same as if there was no newspaper published, or of general circulation in such village.

The law does not contemplate that the village clerk shall resign his position, in order that the ordinances may be published in his newspaper. Such a ruling would disqualify the owner of a newspaper under such circumstances from holding an office in the village.

Where the only newspaper published and of general circulation in a village is disqualified from publishing notices and ordinances and resolutions for such village because an officer of the village is the editor and proprietor of such newspaper, and there is no other newspaper of general circulation in such village, the ordinances, resolutions and other notices, may become legal by posting copies of the same in five of the most public places in such village as prescribed by Section 4232, General Code.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

414.

VILLAGE SOLICITORS—SERVICES GOVERNED BY CONTRACT—CANNOT BRING SUIT TO COMPEL COUNCILMANIC DUTY FOR TAX PAYER.

The services of a village solicitor are governed by his contract and when his contract provides for "services for the village or any of its officials," such solicitor is not in a situation to bring an action in behalf of a tax payer against the village council to compel it to provide adequate street drainage, under Sections 4311-4313, *General Code.*

Under Section 4314, *General Code, the tax payer himself may bring such suit, and the solicitor must defend the council in the proceeding.*

COLUMBUS, OHIO, May 28, 1912.

HON. THOMAS EUBANKS, *Solicitor, New Madison, Ohio.*

DEAR SIR:—Your favor of May 6, 1912, received. You state that you have been requested by the tax payers of your village to bring an action against your council to compel them to provide adequate drainage for one of your streets. You also state that the terms of your employment as solicitor are that you are to perform all legal services for the village or its officials; that you receive a stipulated sum for your services with an additional fee for court work.

You inquire whether you have the same legal right that a city solicitor has to bring an action of injunction or of mandamus, under authority of Sections 4311 and 4313, General Code, without being ordered to do so by council.

Section 4311, General Code, provides as follows:

> "The solicitor shall apply in the name of the corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption."

Section 4313, General Code, is as follows:

> "In case an officer or board fails to perform any duty expressly enjoined by law or ordinance, the solicitor shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty."

I have already held in a former opinion construing Section 4220, General Code, which provides for the employment of legal counsel for a village, that the counsel so employed is not an officer; that he is only an employe and, as such employe, is only bound to the performance of the things he has contracted to do and perform.

You are, by the terms of your contract, to perform all legal services *for the village or any of its officials.* The village is your client and your employer and you cannot represent the tax payers in a proceeding to mandamus the council until you are relieved from employment by the village.

Sections 4311 and 4313, General Code, were formerly Sections 1777 and 1778, Revised Statutes.

The supreme court of the state of Ohio in the case of Pierce vs. Higgins (79 O. S., p. 14) said in reference to these sections, that, "their terms presupposed the presence of a solicitor and officer on whom a request to bring a suit can be made. The petition shows that the village of Piketon had no solicitor. It was impossible, therefore, to comply with that requirement. * * *"

Section 4313, General Code, provides that "in case an *officer* fails to perform any duty expressly enjoined by law or ordinance, the solicitor shall apply to a court * * * to compel the performance of such duty."

Your village has no such officer as a solicitor. You are employed by the village and the nature of your employment is the same that exists between any client and an attorney.

Section 4314, General Code, provides a remedy and a course to pursue when there is no solicitor.

Section 4314 provides in part as follows:

> "* * * and any tax payer of any municipal corporation in which there is *no solicitor* may bring such suit on behalf of such corporation. No such suit or proceeding shall be entertained by any court until the tax payer shall have given security for the costs of the proceedings."

Having no solicitor, any tax payer of your village can bring an action of mandamus in your case providing the facts and the law warrant it, on giving security for the costs of the proceeding.

If this suit is brought, you, having been employed to represent the village in all court proceedings, can represent the council in this action; but you cannot bring an action of mandamus or injunction under authority of Sections 4311 and 4313, General Code, as they do not apply to your situation.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

421.

VILLAGE POLICE—POWER OF MAYOR AND COUNCIL TO APPOINT AND REMOVE—APPOINTMENT WITHOUT SPECIFICATION OF TERM—RIGHT OF INCUMBENT TO HOLD OVER UNTIL PROPER REAPPOINTMENT IS MADE.

When there is in existence in a village, an ordinance authorizing the members of the police department to be appointed by the mayor subject to the confirmation of council, providing that they may hold the office for the time appointed, unless sooner discharged for cause, and until their successors are duly appointed and confirmed, the fact that such officers were appointed and confirmed without the specification of a definite term, is not fatal to the holding of the office. Officers so appointed hold, subject to the will of the appointing power, and until reappointment is properly made, the present incumbents hold over.

Such officers may be removed by the mayor for cause, under Section 4384, General Code. This power is discretionary with the mayor and a provision of ordinance attempting to remove this decretion by empowering council to order the mayor to so remove or discharge, is invalid.

COLUMBUS, OHIO, June 1, 1912.

HON. CARL ARMSTRONG, *Solicitor of Mingo Junction, Steubenville, Ohio.*

DEAR SIR:—Your favor of May 14, 1912, is received, in which you ask an opinion of this department as follows:

> "I enclose you a statement of fact arising in the village of Mingo Junction, Ohio, concerning which the opinion of your office is desired by council.
>
> "It is a case of holding over of members of the police force; the mayor has reappointed the old members—the council refuses to confirm and the members hold over by virtue of their previous appointment.
>
> "How to get rid of them is the question before the council, and the mayor and members are at variance on the question."

The statement of facts enclosed shows that two members of the police force were appointed and confirmed in January, 1910; in January, 1912, the new mayor reappointed these two members and council refuses to confirm the appointments. The two members in question are still members of the police force.

The manner of appointing policemen for a village is prescribed by Section 4384, General Code, which provides:

> "The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

The statute does not fix the term of office for the policemen.

Under the authority granted by this section council has passed an ordinance organizing the police department.

Section two of the ordinance submitted by you, provides:

> "The members of the police department shall be appointed by the mayor, and confirmed by council, and *shall hold office during the time for which they shall be appointed unless sooner suspended or discharged;* and each police officer other than the marshal shall receive for his services as such, a salary not to exceed $70.00 per month payable monthly out of the safety fund of this village."

Section 4 of said ordinance provides:

> "Police officers appointed under this ordinance shall enter upon their duties as directed by the mayor *and shall continue in office as members of such department until their successors are duly appointed, qualified and confirmed.*

The ordinance does not fix a definite term of office, but states that they "shall hold office during the time for which they shall be appointed." It further provides that they "shall continue in office—until their successors are duly appointed, qualified and confirmed."

The question arises as to whether the failure of council to fix a definite term of office for the policemen invalidates the ordinance.

Article 2, Section 20 of the Ohio Constituion, provides:

> "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his term, unless the office be abolished.

In case of State vs. Board of Education, 12 Cir. Dec., 333, it is held:

> "The term 'officer' as used in Sec. 20, Art. 2, of the constitution, providing that the general assembly shall not affect the salary of any officer during his existing term, does not refer to such officers as members of a board of school examiners or to officers of a municipal corporation, such as mayor, marshal, clerk, treasurer, etc., but to those created and whose salaries are fixed by the general assembly."

The provision of Section 20, Article 2, of the Constitution, does not require that a term of office be fixed for a policeman of a village.

The ordinance in question was passed March 28, 1909. This was prior to the adoption of the General Code.

Section 1536-860, Revised Statutes, which is now Section 4384, General Code, supra, contained this provision at the time of the passage of the ordinance:

> "Council may provide for such deputy marshals, policemen, night watchmen and special policemen as it may deem best, and fix their duties, periods of service, bonds and compensation, and they shall be appointed by the mayor, and confirmed by the council and may be removed by him for cause which shall be stated in writing to council."

By the authority therein conferred council could provide for policemen and

fix their periods of service. Section 4384, General Code, does not specifically authorize council to fix the period of service, but provides that the mayor shall appoint the policemen "when provided for by council." Under either provision council may fix a definite term of office, but are not required to do so.

Throop on Public Offices, says at Section 307, of his work:

> "Where a statute authorizes a city council to regulate the 'manner of appointment and removal' of the city officers, this authorizes the council to fix the terms of their respective offices; and the council may thus fix the terms by providing that the offices shall be held during good behavior."

At Section 386 of Dillon on Municipal Corporations, fifth edition, it is said:

> "But when the statutory authority which is conferred upon the council is not merely to make an appointment, but to provide for the creation and to regulate and control a department, or to make ordinance to regulate and define the manner of the appointment and removal of officers, the council may in connection with the exercise of the powers conferred upon it, fix, by ordinance, the term for which the officers shall be appointed, and the tenure of the office will continue for the prescribed term, so long as the ordinance remains unrepealed."

The authority granted to council in Section 4384, General Code, to provide for deputy marshals and policemen is sufficient to authorize council to fix the term for which they shall be appointed, provided that the statute does not otherwise provide the term of office.

In the case of City of Oklahoma City vs. Dean, 15 Okla., 139, it is held:

> "Policemen in cities of the first class in the territory of Oklahoma are not appointed for any definite length of time. Succeeding administrations in such cities, under the provisions of Section 7, Chapter 12, Article 1, Wilson's Statutes, have the power and it is their duty to appoint certain officials, among them policemen, and when such appointment has been made, and the appointee has qualified and entered upon the duties of the office, the term of his predecessor in office expires, as under the provisions of such statute the term of such officers is made to expire when their successors are chosen."

Gillette, J., quotes the statute and comments upon the same on page 140 as follows:

> "Section 7, Chapter 12, Article 1, Wilson's annotated Statutes provides:
>
> "The mayor shall appoint, by with the consent of council, an assistant city marshal, a city engineer, a city physician and such policeman and other officers as the mayor and council may deem necessary. The officers so appointed shall hold their office until their successors are chosen and qualified.
>
> "We think this language susceptible of only one construction, to wit: That the mayor and council of each succeeding administration in a city of the first class, shall appoint the officers named, who shall

hold their office until their successors are chosen and qualified. Such officers are not appointed for any specified term. Their power to act ends with the qualification of their successors who have been chosen and qualified."

The statute in the above case provided for the appointment of the officers but did not fix a definite term. It provided that they should hold their office until "their successors are chosen and qualified." The court held that their term was ended when their successors were appointed and qualified.

In our situation the statute provides for the appointment when the officers are provided for by council. Council in pursuance of the authority granted by the statute, has provided for the positions and states that the appointees shall "continue in office until their successors are duly appointed, qualified and confirmed." The situation is similar to that in the Oklahoma case. The term of service as fixed by council terminates when the successors are appointed and qualified, unless they are sooner suspended or discharged.

It is usual to fix a definite term of office. This condition, however, is not essential to the creation of an office.

This principle is recognized when the following rules are stated to govern when no definite term is fixed.

In Parsons vs. Breed, 126 Ky. 759, it is held:

"Where neither the constitution nor the statutes fix the term of office, the appointee holds at the pleasure of the appointing power, though it attempts to fix a definite term.

In Fox vs. Ault, 26 Mo. App. 673, it is held:

"A municipal office, held for no definite period of time, is one held at the will of the authority which conferred it, and may be vacated at any time."

In 28 Cyc. at page 503, the rule is stated:

"The term of office of policemen is often fixed by statute, and when so fixed it cannot be changed by ordinance. Where the duration of their appointment is not fixed, policemen hold their office at the pleasure of the appointing power, provided there is no constitutional limitation upon the duration of official terms."

The failure to fix a definite term of office is not fatal to the position. Under the provisions of Section 1536-860, Revised Statutes, above quoted and of Section 4384, General Code, council may or may not fix a definite term of service. The ordinance in question is not invalid because it does not fix a definite term of appointment. The provision in Section 4 of the ordinance that they shall continue in office until their successors are appointed and qualified, will permit the old appointees to hold over.

You ask how they can be removed. Section 4384, supra, provides a way of removal by the mayor. But as the mayor desires their reappointment, it is apparent that he declines to remove them.

Section 4263, General Code, provides:

"The mayor shall have general supervision over each department

and the officers provided for in this title. When the mayor has reason to believe that the head of a department or such officer has been guilty in the performance of his official duty of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness, he shall immediately file with the council, *except when the removal of such head of department or officer is otherwise provided for,* written charges against such person, setting forth in detail a statement of such alleged guilt, and, at the same time, or soon thereafter as possible, serve or cause to be served a true copy of such charges with the person against whom the charges are made. Such service may be in person or by leaving a copy of the charges at the office of such person, and due return thereof made to council, as is provided for the return of the service of summons in a civil action."

This section contains the provision, "except when the removal of such head of department or officer is otherwise provided for." The removal of a policeman of a village is otherwise provided for by Section 4384, General Code, and Section 4263, General Code, would not therefore apply to them.

By virtue of Section 4216, General Code, council has a right to remove employes. Said section reads:

> At the first meeting in January of each year, the council shall immediately proceed to elect a president pro tem. from their own number, who shall serve until the first meeting of the council in January next after his election. *From time to time the council may provide such employes for the village as they may determine, and such employes may be removed at any regular meeting by a majority of the members elected to council.* When the mayor is absent from the village or is unable from any cause to perform his duties, the president pro tem. of council becomes acting mayor, and shall have the same powers and perform the same duties as the mayor."

The power of council to remove as provided in this section applies to employes who are provided for and appointed by council. It does not authorize council to remove policemen who are appointed by the mayor.

The ordinance attempts to provide a means of discharging these policemen by action of the council.

Section 5 of the ordinance provides:

> "It shall be competent for the mayor at any time to suspend or discharge any or all of the members of the police department of this village and report his said action to council with reasons therefor. And if council by vote sustain such suspension or discharge, said officer or officers so suspended or discharged shall receive no compensation from the date of said action by the mayor. It is further provided that the council may at any time order and direct the mayor to suspend or discharge any member of the police department and unless the mayor complies with said request within ten days council may by a vote of two-thirds of all members elected to council discharge such officer or officers.

Section 4384, General Code, provides that the mayor may remove the

policemen for cause, while Section 5 of the ordinance authorizes council to order the mayor to suspend or discharge them. The effect of this provision of the ordinance would be to control in a measure the right of the mayor to remove as given him by Section 4384, General Code. The right to remove carries with it a discretion in the removing power. That is, he may either remove or retain. An effort by council to act under the provision of Section 5 of the ordinance to require the mayor to remove would be an interference with his right to remove as given him by the statute. This provision of the ordinance is, therefore, unauthorized and council cannot act under the same.

The statutes do not authorize council to file charges against these policemen.

The policemen are appointed by the mayor, but such appointments must be confirmed by council. In order to make an appointment legal and complete both the mayor and council must concur in such appointment, that is, the mayor must appoint, and the council must confirm. The appointment of the present force by the present mayor was not complete as council failed to confirm. The persons in question cannot serve under the new appointment, but they can hold over under their former appointment.

The policemen may hold their positions until legally removed or until their successors are appointed, qualified and confirmed.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

423.

PUBLIC UTILITIES—POWER OF MUNICIPAL CORPORATION TO ERECT ITS OWN LIGHT AND WATER PLANT WHEN FRANCHISE WITH PRIVATE COMPANY IS IN EXISTENCE—PURCHASE OF LIGHT PLANT.

A village has the right to erect its own light or water plant regardless of the fact that there is still under duration, a franchise granted private companies for these purposes.

In the case of the electric light plant, however, the village is required, under Section 3990, General Code, to purchase the private company's plant with the consent of its owners.

COLUMBUS, OHIO, June 11, 1912.

HON. O. H. STEWART, *Village Solicitor, Middleport, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of May 8, in which you state that the village of Middleport is considering the matter of establishing its own water and electric light plant. You also state that a private company is supplying the village with water, and another private company is supplying light.

The water company's contract for city hydrants has expired; but the light company's contract is still in force. You then ask the following questions:

> "1. Has the village of Middleport, under the laws of the state, a legal right to establish a competing municipal water and light plant?

"2. To what extent, if any, would the village be liable to the private companies (Pomeroy & Middleport Water Supply Co. and the Mutual Electric Light Co.) should the village establish its own electric light and water plant?

"Please mention the liability and responsibility as toward each company.

"3. To what extent could the municipal system compete with the private companies for business?"

You further ask what application Section 3990 of the General Code, and 47 O. S. page 52, have to the matters. In reply I desire to state:

Municipal corporations, such as Middleport, have only such powers as are delegated to them by statute, in relation to the matters covered by your inquiry.

The enumerated powers of such corporations are embraced in Title XII, Division II, Chapter I, of the General Code. To this chapter we must look for authority, if any, conferring powers upon your village to do the things under consideration. If this chapter does not specifically provide for these things, and is silent on the subject, then your village has no power to proceed along that line. On the other hand, if this chapter provides for these matters, your village may follow the provisions of the same in a legal manner.

Let us take up the sections, applying to this subject, seriatim.

Section 3616 of the General Code, provides:

"All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3618, G. C., provides for the right

"To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat, to procure everything necessary therefor, and to acquire by purchase, lease or otherwise, the necessary lands for such purpose, within and without the municipality."

Section 3619, G. C., provides for the right

"To provide for a supply of water, by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs and waterworks, for the protection thereof, and to prevent unnecessary waste of water, and the pollution thereof. To apply moneys received as charges for water to the maintenance, construction, enlargement and extension of the works and to the extinguishment of any indebtedness created therefor."

Electric Works

Section 3990 of the General Code provides:

"The council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the ex-

> pense of the corporations, or purchase any gas or electric works already erected therein, but in villages where gas works or electrical works have already been erected by any person, company of persons, or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein."

The section further provides for condemnation proceedings in case of inability to agree, and says that the existing contract shall be considered as an element of valuation in fixing the compensation to be paid for such gas or electric works.

I think it will not be controverted that no municipality has the right, and never did have, under the municipal laws, to grant an exclusive franchise to any electric or waterworks company.

This being so, the municipality has never parted with its right to construct its own waterworks, or electric light plant; and can operate the same in competition with existing plants, except it must purchase the elecric light plant.

Nothing appears in the statute requiring the village to purchase the water plant; therefore, it can install, maintain and operate the same and compete for business with the existing company.

These companies, when they accepted their franchises and entered into their contracts, did so with full knowledge of the law, and are bound by its provisions, the same as if expressed in such contracts and franchises.

If your village follows the law as above set out, and establishes its own municipal plants (purchasing the electric plant), there is no liability or responsibility from it to either company. Of course, these matters must be done by ordinance or resolution, submitted to the people, as other matters of like nature are, and must be in strict conformity to the statutes. The 47 O. S., page 52 is a leading case in Ohio, and is quoted with approval in 48 O. S. 136, 137 and 142; 76 O. S. 338-339; see North Springs Water Co. vs. City of Tacoma, 47 L. R. A., page 214. In that case the supreme court of Washington held in its 2d syllabus as follows:

> "A grant of a franchise to a water company, without any words of exclusion or of limitation upon the right of the city, does not preclude the city from subsequently establishing waterworks of its own, although the result may be to destroy the value of the franchise."

This case cites the 47 State, supra, and also 18 O. S. 262.

The 47 O. S. case, p. 52, went to the supreme court of the United States, and the doctrine affirmed. See 146 U. S. 258.

I believe I have covered the ground of your inquiry.

Very truly yours.

TIMOTHY S. HOGAN,
Attorney General.

428.

WATERWORKS BONDS—SINGLE ORDINANCE MAY NOT PROVIDE FOR BOTH PURCHASE AND IMPROVEMENT OF WATERWORKS—DISTINCT PURPOSES.

The mere fact that, to Section 3940, General Code, there has recently been added the words "that the bonds enumerated in Section 3939, General Code, may be issued for any and all purposes," does not exclude the mandatory provision of Section 4226, General Code, against any by-law, resolution or ordinance containing more than one subject.

Since, therefore, the improvement of waterworks and the purchase of waterworks are distinctly different subjects, provision for bonds for both purposes may not be included in a single ordinance.

COLUMBUS, OHIO, May 28, 1912.

HON. JAMES I. BOULGER, *Solicitor of Frankfort, Chillicothe, Ohio.*

DEAR SIR:—Your favor of May 15, 1912, is received in which you inquire of the following:

> "The supreme court has held in the Elyria case, 57 Ohio St., that municipalities could not issue bonds under one ordinance both for the erection and purchase of waterworks. Since then Section 3940 of General Code was passed authorizing issue of bonds for any or all of purposes enumerated in Longworth act. Under this I have come to conclusion that a municipality may provide in a single ordinance for purchase and improvement of a waterworks plant. Besides do not believe that this conflicts with Elyria case."

Section 3940, General Code, to which you refer, provides as follows:

> "Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation, under the authority conferred in the preceding section, shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation."

The provisions of this section were formerly found in Section 2835, Revised Statutes. The Elyria case, to which you refer, was decided in January, 1898. At that time the provision now found in Section 3940, General Code, to wit, "such bonds may be issued for any or all such purposes," was not in the statute, nor did the statute contain any similar provision. This provision was first inserted in the amendatory act of April 29, 1902, as set forth in 95 Ohio Laws 318. It was not as a matter of course considered in the Elyria case.

In that case, which is styled, The Elyria Gas and Water Co. vs. City of Elyria, 57 Ohio St., 374, it is held in the fourth syllabus:

> "The purchase of waterworks, and the erection of new ones, are distinct measures, requiring different proceedings; and a resolution of council which combines both as one, and provides for the submission, in that form, of the question of the issue and sale of the

bonds of the municipality for both purposes combined, is unauthorized, and ineffectual for either purpose; nor can it be made effectual for either, by the elimination of the other in the proceedings subsequent to the resolution. It is the policy of the statute that each measure for which it is proposed to issue and sell the bonds of the corporation shall stand on its own merits, unaided by combination with others, and that it be voted upon as an independent measure, by the council and electors, uninfluenced by such combination."

On page 380, Williams, J., says:

"The power conferred by the statute on the council, is to issue and sell the bonds of the municipality 'for the erection or purchase of waterworks.' The two purposes are entirely distinct. The purchase of waterworks necessarily implies that they have already been erected, and are at present existing property, the subject of sale and purchase; while the erection of waterworks can only have reference to their future construction. That a municipal corporation may own two plants, one acquired by purchase, and another erected by it, or, after having acquired one in the former mode, may proceed to erect a new plant, is not questioned. But their acquisition by these two different methods require different proceedings. And, it is the policy of the statute that the proposition for each separate improvement shall stand on its own merits, unaided by combination with any other measure, and be so acted upon by the council in the first instance, and then, if adopted, be so submitted for approval by the electors that each may be voted upon as a separate measure, uninfluenced by combination with others."

The provisions of Section 3939, General Code, are substantially the same as those under consideration in the above case. This section enumerates 27 different purposes for which bonds may be issued. It provides in part as follows:

"When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes:

* * * * * * * * * * * *

"11. For erecting or purchasing waterworks for supplying water to the corporation and the inhabitants thereof."

These improvements and purposes for which bonds may be issued may require different proceedings and it would not be possible to include them in the same proceeding. As said in the Elyria case, supra, the erection of waterworks, and the purchase of waterworks are distinct and separate projects and require different proceedings to carry them into effect.

The only words of Section 3940, General Code, which could possibly be construed to change the rule laid down in the Elyria case, are these: Such bonds may be issued for any or all of such purposes.

By these words the legislature has not attempted to change the rule as laid down in the Elyria case. It has not stated that bonds may be issued in the same proceeding, or by virtue of the same proceeding, for two or more of the purposes enumerated in Section 3939, General Code. Neither can it be inferred from the language used, that it meant to authorize the issue of bonds for two or more of the purposes enumerated, by virtue of the same proceeding.

If the legislature intended to provide any such rule it could have used language which would have left no doubt as to its meaning. In Section 3842, General Code, the legislature has expressly authorized the council to include one or more streets or alleys in one ordinance when it provides for the sprinkling, cleaning or sweeping of streets. Said section reads:

> "The council of a city upon the recommendation of the director of public service, or the council of a village, may provide by ordinance for sprinkling with water, sweeping or cleaning of such streets or alleys, or parts thereof. For the purpose of carrying out the provisions of this section and of the three next preceding sections, one ordinance may be made to include one or more streets or alleys, or parts thereof, and one or more of the powers granted by such sections."

The words used in Section 3940, General Code, now under consideration, are general and cannot be construed to authorize council to issue bonds for two or more of the purposes enumerated in Section 3939, General Code, by virtue of the same proceeding. This section deals with bonds and the purposes for which they may be issued. It does not attempt to regulate the proceeding or manner in which they may be authorized. It does not purport to regulate the manner in which the purposes may be carried out.

If such bonds may be issued in the same proceeding, it must be founded upon some other ground. Section 3940, General Code, does not change the rule enunciated in 57 Ohio State, 374, the Elyria case.

In the Elyria case council attempted to provide for the issue of bonds for the erection and purchase of waterworks. In your case you desire to purchase and improve the waterworks. You do not state whether the plant to be improved is the one to be purchased, or whether it is a plant already in operation by the village. In either event, the question arises as to whether these are the same subject or different subjects.

Two subjects cannot be included in the same ordinance as provided in Section 4226, General Code, which provides:

> "No ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title. No by-law or ordinance, or section thereof, shall be revived or amended, unless the new by-law or ordinance contains the entire by-law or ordinance, or section revived or amended, and the by-law or ordinance, section or sections so amended shall be repealed. Each such by-law, resolution and ordinance shall be adopted or passed by a separate vote of the council and the yeas and nays shall be entered upon the journal."

The provisions of this statute are held to be mandatory in case of Heffner vs. City of Toledo, 75 Ohio St., 413, wherein Summers, J., says at page 423 of the opinion:

"The requirement of Section 1694 that 'No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title,' evidently was suggested by the provision of Section 16 of Article 2 of the Constitution that : 'No bill shall contain more than one subject, which shall be clearly expressed in its title.' The latter provision has been held to be directory (Pim. vs. Nicholson, 6 Ohio St., 174), and if the former were so it would not require further consideration, but it has been held mandatory (Bloom vs. City of Xenia, 32 Ohio St., 461; Campbell vs. City of Cincinnati, et al., 49 Ohio St., 463)."

The first and second syllabi of this case read:

"The statutory requirement that 'No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title,' was intended to prevent the uniting in one ordinance of diverse subjects or measures and effecting its passage by uniting in its support all those in favor of any, and to prevent the adoption of ordinances by the votes of councilmen ignorant of their contents.

"Whether an ordinance is violative of the statutory requirement that 'No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title,' is to be determined not by its form, but in the light of the mischief the statute was intended to prevent."

In your case the proceedings concern waterworks, but they concern separate features of waterworks. In the Elyria case the proceeding was in reference to waterworks, but the court held that the erection of waterworks was different subject than the purchase of waterworks. They were distinct propositions and required different proceedings.

The improvement of waterworks and the erection of waterworks are both public improvements. The proceedings and steps required for the improvement of waterworks are substantially the same as are required for the erection of a waterworks. Both come under the head of public improvements. In one case you have a waterworks to start with and in the other you have not. The method of procedure would be the same.

It might be observed further that Section 3939, General Code, does not specifically mention the improvement of waterworks. It authorizes the issue of bonds for the erection or purchase of waterworks.

Again, if the waterworks to be improved is a different plant than the one to be purchased, you would have two different subjects. On the other hand, if the plant to be purchased, is the one to be improved, the council would be providing for the improvement of a plant which is not yet under its control.

As there is no difference in the procedure required for the improvement or erection of a waterworks, the principles laid down in the Elyria case would apply as well to the one as to the other. The improvement of waterworks, or the erection of waterworks, require different proceedings than the purchase of a waterworks.

The improvement and purchase of waterworks cannot, therefore, be provided for in the same proceeding.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

432.

SMITH ONE PER CENT. LAW—LIMITATIONS TO LEVY FOR YEAR 1910 AND SIX PER CENT. INCREASE FOR 1912—INTEREST AND SINKING FUND LEVIES WITH AND WITHOUT VOTE OF PEOPLE BEFORE AND AFTER JUNE 1, 1912.

Under Section 5649-2 *and* 5649-3 *of the Smith one per cent. law, the limitations measured by the amount of taxes levied within a taxing district in the year* 1910, *plus six per cent. for the year* 1912, *etc., do not include levies for interest and principal of any bonds issued before June* 1, 1912, *nor do they include any such levies issued after June* 1, *when authorized by a vote of the people.*

All other levies are included, however, which are made within the territorial limits of the taxing district whether by state, county, township, school district, special taxing district, road district, etc., excepting emergency levies under Section 5649-4.

The six per cent. increase for 1912 *need not be apportioned among the taxing districts according to any rule, except that the budget commission may not exercise a discrimination with respect to the taxing districts.*

Levies for bonds not voted upon by the people and made after June 1, 1912, *are included not only within the limitations of* 1910, *and the additional six per cent. for* 1912, *etc., but also are included within the two, three and five mill limitations.*

COLUMBUS, OHIO, June 6, 1912.

HON. WILLIAM O. MATHEWS, *Solicitor of the Village of Bay*, 1007 *Williamson Building, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication of May 20, in which you ask my opinion as to whether or not under Sections 5649-2 and 5649-3 of the Smith one per cent. law, so-called, the limitation measured by the amount of taxes levied within a taxing district in the year 1910, plus 6 per cent. for the year 1912, etc., includes levies for interest and principal of bonds issued after June 1, 1911.

The statutory provisions in question are as follows:

> "Section 5649-2. * * *, the *aggregate* amount of taxes that may be levied on the taxable property in any county * * or other taxing district, for the year 1911, and any year thereafter, *including taxes levied under authority of Section* 5649-1 *of the General Code*, and levies for * * all other purposes, shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein * * for all purposes in the year 1910, provided, however, that the maximum rate * * that may be levied for all purposes * * shall not in any one year exceed ten mills * * * and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people.
>
> "Section 5649-3. * * * the intent and purpose of this act being to provide the total amount of taxes which may be levied in the year 1911 or in any year thereafter, for all purposes, shall not ex-

ceed in the aggregate, the total amount of taxes levied in the year 1910 plus six per cent. thereof for the year 1912 * * * or such less amount as may be produced by the levy of a maximum rate of ten mills on each dollar of the tax valuation of the taxable property therein * * * whether such taxes be levied for the same or other purposes, except to the amount of such levies as may be made *for interest and sinking fund purposes as provided in Section* 5649-2 *of the General Code.* * * *"

In Section 5649-2, it will be observed that levies under Section 5649-1 are referred to and included within the first limitation therein defined. Said section provides as follows:

"Section 5649-1. In any taxing district, the taxing authority shall levy a tax sufficient to provide for sinking fund and interest purposes."

Without discussing the grammatical construction, of the two sections above quoted, elaborately, I beg to state that I am of the opinion that the following propositions are true:

First. The limitation measured by the 1910 taxes is not upon the amount which may be levied by a village as such in any year; it is rather upon the amount which may be levied within the territorial limits of the village by state, county, township, school district, village and any special taxing district, such as road districts, etc., combined. The increase of six per cent. for the year 1912 is based upon this total, and it does not necessarily follow that such increase must be apportioned among the several districts levying within the same territory in proportion to the levy made by them therein. Under such circumstances it is possible to conceive of such six per cent. increase being given entirely to one of the taxing districts. This is for the budget commission to decide, though in deciding it, that body must not discriminate among the taxing districts.

Second. The 1910 tax limitation includes all levies for all purposes whatsoever, excepting emergency levies under Section 5649-4, and additional levies voted by the people under Section 5649-5. That is to say, all interest and sinking fund levies to provide for the payment of bonded indebtedness, whether incurred before or after June 1, 1911, must be made within this limitation. This is the principal question concerning which you inquire.

Third. Levies for interest and sinking fund purposes to provide for bonded indebtedness created prior to June 1, 1911, are created thereafter under authority of a vote of the people, while within the limitation measured by the 1910 taxes, are outside of the ten-mill limitation. That is to say, if in a taxing district the amount of taxes levied in the year 1910 divided into the duplicate for the year 1911 or for the year 1912 produces a rate in excess of ten mills, this excess may be used for interest and sinking fund levies for the purposes aforesaid, but not any ordinary or current uses. On the other hand, however, levies for interest and sinking fund purposes to retire and provide for bonds issued after June 1, 1911, without a vote of the people are within both the ten-mill limitation and that measured by the 1910 taxes. In fact, such levies are within all four of the limitations of the Smith law.

As you state in your first letter that the village is considering the question of issuing bonds for a specific purpose without a vote of the people, I must advise you that, interest and sinking fund levies to provide for such bonds must

be made not only within the limitation of the 1910 taxes, but also within the ten-mill limitation of Section 5649-2-3, supra, and within the five-mill limitation of Section 5649-3*a*.

The above will be found, I think, in strict accord with the decision of the supreme court in the case of State, ex rel., vs. Sanzenbacher, 84 O. S., unreported.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

433.

POLICEMEN AND FIREMEN IN VILLAGES—POWER OF COUNCIL TO REGULATE APPOINTMENT BY MAYOR AND FIX TERM OF OFFICE—WHERE NO TERM FIXED, SALARY MAY BE INCREASED.

Section 4384, General Code, confers upon the council the power to regulate the number and manner of the appointments, and the term of office of the members of the police and fire department which are to be appointed by the mayor.

Where council has not provided any definite term, council is not prohibited, by the terms of Section 4219, General Code, from increasing the salaries of such appointees during their incumbency.

COLUMBUS, OHIO, June 14, 1912.

HON. J. H. C. LYON, *Solicitor of Lowellville, Youngstown, Ohio.*

DEAR SIR:—Your favor of June 12, 1912, is received in which you inquire:

> "I am solicitor of the village of Lowellville, Mahoning county, and a question has arisen as to whether or not night policemen and day policemen, who were assigned for the purpose and are not elected officers can receive a higher salary than that which they were to receive under the ordinance they provided when they took office."

The manner of providing policemen for a village is prescribed by Section 4384, General Code, which provides:

> "The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

In order to have policemen of a village council must provide therefore by ordinance. The statute does not fix their term of office. By virtue of Section 1536-860, Rev. Stat., which is now Section 4384, General Code, supra, council was specifically authorized to fix the term of office of policemen. Said section provided in part:

> "Council may provide for such deputy marshals, policemen, night

watchmen and special policemen as it may deem best, and fix their duties, periods of service, bonds and compensation, * * *"

By the authority therein conferred council could provide for policemen and fix their periods of service. Section 4384, supra, does not specifically authorize council to fix the period of service, but it provides that the mayor shall appoint the policemen "when provided for by council." Under either provision council may fix a definite term of office, but are not required to do so.

Throop on Public Offices, says at Section 307, of his work:

> "Where a statute authorizes a city council to regulate the "manner of appointment and removal" of the city officers, this authorizes the council to fix the terms of their respective offices; and the council may thus fix the terms by providing that the offices shall be held during good behavior."

At Section 386 of Dillon on Municipal Corporations, 5th edition, it is said:

> "But when the statutory authority which is conferred upon the council is not merely to make an appointment, but to provide for the creation and to regulate and control a department, or to make ordinance to regulate and define the manner of the appointment and removal of officers, the council may in connection with the exercise of the powers conferred upon it, fix, by ordinance, the term for which the officers shall be appointed, and the tenure of the office will continue for the prescribed term, so long as the ordinance remains unrepealed."

The authority granted to council in Section 4384, General Code, to provide for deputy marshals and for policemen is sufficient to authorize council to fix the terms for which they shall be appointed.

Your inquiry is as to the power of council to increase the salaries of the village policemen, after their appointment and qualification.

Section 4219, General Code, provides:

> "Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

The provisions of this section will prevent council from increasing or diminishing the salary during the term for which the policemen were appointed. The question arises as to the term for which they were appointed. The ordinance must be looked to in order to ascertain if a definite term of service has been provided for the policemen.

If the ordinance has provided a term of office the salary cannot be increased during the term for which such policemen were appointed. If, however, the ordinance has not provided a term of office, such salary may be increased during the incumbency of the policemen.

In case of State vs. Massillon, 14 Cir. Dec., 249, Voorhees, J., says at page 252 of the opinion:

> "The statute now applies to cases where there is an increase during the term. The word 'term' has significance, as we think, under that section of the statute. It simply means to limit. That is, during the period that the office is limited, during that period his salary shall not be increased. But in this case there is no limit fixed by law. It is at the pleasure of the board of health that gives the health officer his position. It is at their pleasure. It is not a term, for the reason there is no limit to it. It may be likened unto a tenancy at will, not a term, because it has no limitation. Therefore it would be difficult to bring such an employe within the terms of Section 1717, Revised Statutes, prohibiting an increase of salary of an officer during his term, whether he be elected or whether he be appointed."

In case of Stage vs. Coughlin, 12 Nisi Prius, N. S., 419 (Ohio Law Rep. of May 6, 1912), the syllabus reads:

> "Members of the police and fire departments of a municipality are not appointed for a 'term' within the meaning of Section 4213, P. & A. Anno. General Code, and having no fixed or definite term the restriction as to changes in salaries does not apply to them, and council has power to increase or diminish their salaries after appointment."

This latter decision was in reference to the salaries of the policemen and firemen of a city who are under civil service.

The right of council to increase the salaries of the policemen in question during their present service, will depend upon the provisions of the ordinance as to the term of their appointment. If the ordinance fixes a term of office council cannot increase the salary during the term for which the incumbent is appointed. If, however, the ordinance does not fix a term of office council may change the compensation during the incumbency of the position.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

436.

MORTGAGE ON PROPERTY OF P. C. C. & ST. L. RY. CO.—NOT BARRED BY STATUTE OF LIMITATIONS WHEN DATE OF MATURITY NOT FIXED.

When the mortgage, under date of 1890, *was given on the property of the P. C. C. & St. L. Ry. Company in Covington, Ohio, no time was fixed for the maturity of the debt. Said mortgage has, therefore, not been barred by any statute of limitations and the property when sold is subject to the same unless the mortgage is released.*

COLUMBUS, OHIO, June 20, 1912.

HON. J. GUY O'DONNELL, *Solicitor for Village of Covington, Troy, Ohio.*

DEAR SIR:—Under date of May 10, 1912, you inquired of me as follows:

"The village of Covington, Miami county, Ohio, of which I am the solicitor, has issued bonds to purchase real estate to be donated to the state of Ohio for an armory site; an option has been secured on a site that has been approved by the armory board as the most suitable for such building.

"The site is a part of the old right of way of the P. C. C. & St. L. Railway Company and which was included in the blanket mortgage that covers all of its property, they sold it in this condition to a man by the name of Powell of whom the village will purchase; there is no way at this time of getting the mortgage released off of this lot, it does not occur to us that there is any danger by reason the mortgage and the village is willing to purchase it as it stands, provided there will be no obection from your department when the same is deeded to the state.

"If you can fully understand this matter from this letter, I should like to hear what you have to say in reference to the matter, or I shall be pleased to write you further in the matter if you deem it necessary, * * *."

In response to my request for additional information you recently furnished data showing that said mortgage bears date October 1, 1890, and was given for a consideration of $75,000,000 to the Farmers Loan & Trust Company of New York, and William Jackson, of Indianapolis, trustee.

No time seems to have been fixed for the maturity of the debt, and accordingly said mortgage is still in full force and effect as a valid lien against said land, and an action thereon is not barred by any statute of limitations of this state.

The copy of the portion of said mortgage, which you have submitted to me, provides that it shall cover "all rights of way, station grounds, gravel pits, stock yards, *and other lands*" of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and clause 8 provides:

"It shall and may be lawful for said railway company, its successors and assigns, and with the consent and approval in writing of the trustee for the time being, at any time or times hereafter, to exchange for other property, or to sell any part of the hereby mortgaged estates and premises free and clear from the lien or the cumbrance of this indenture, and to convey the same without liability on the part of the grantee for the disposition made of the price paid or property received in exchange; provided, however, that evidence of the propriety of such proposed sale or exchange shall be given to the trustee by certificate in writing of one of the officers, or by resolution of the directors of the railway company, and that the proceeds of any sale so made shall, at the option of the railway company, be invested by it, either in the equipment of any remaining part of the mortgaged premises, or in the purchase by said railway company of other property, real or personal, which property so purchased, as also any that may be acquired in exchange as aforesaid, by the railway company, shall be subject to all the trusts hereby declared (including that of sale or exchange) of the property in this indenture described and shall be conveyed in mortgage by the railway company to the trustee for the time being, so to be held; or in the purchase of bonds hereby secured at the same time, and in the same manner as in the purchase

of bonds for the sinking fund, which bonds, so purchased shall be forthwith cancelled and retained by the railway company."

Although the foregoing gives authority to the mortgagor to sell or exchange any part of the mortgaged property, the same cannot be done without the consent and approval, in writing, of the trustee, and there is nothing before me to show that such consent was obtained prior to the sale of this property to Powell.

In view of the fact that the state of Ohio will expend a considerable sum for the building of an armory at Covington I cannot see my way clear to approve the title to this proposed site, unless the mortgage covering it is released, or the consent, in writing, of the trustees to said sale is first obtained.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

440.

PUBLIC IMPROVEMENTS—STATE PROPERTY MAY NOT BE ASSESSED WITHOUT LEGISLATIVE AUTHORIZATION.

In the absence of express authorization of the legislature, property belonging to the state may not be assessed for public improvements, and no such authorization is made in Ohio.

COLUMBUS, OHIO, June 20, 1912.

HON. F. M. HAMILTON, *Legal Counsel for Village of Lebanon, Lebanon, Ohio.*

DEAR SIR:—Under date of May 8, 1912, you submitted three propositions to this department for opinion, and under date of May 10, 1912, your first two questions were answered by sending you a copy of an opinion on said questions rendered previously to your request. Your third question, however, was not answered. Such third question you state as follows:

"How may the proportionate share of street improvement be obtained from the abutting state property, to wit, Armory property?"

The legal proposition involved is whether or not state property may be assessed for street improvements.

Section 3812 (101 O. L. 134) provides, in part, that the "council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefitted lots or lands in the corporation, any part of the entire cost of and expense connected with the improvement of any street * * *."

Section 3846 of the General Code provides that no part of the cost or expense connected with such work shall be paid by the municipal corporation, except when the whole or any portion of a street or alley, upon which work shall be done, passes by or through a public wharf, market space, park, cemetery, structure for the fire department, waterworks, school building, infirmary, market building, workhouse, hospital, house of refuge, gas works, public prison, or any other public structure or public grounds within and belonging to the corporation.

It will be seen, by a reference to the sections above cited and the other sections of the Code relating to the subject of the improvement of streets on

the assessment plan, that there is no provision specifically exempting state property from being assessed for such improvement. It will further be seen that there is no provision of law, other than the general provision that council may assess upon abutting, adjacent and contiguous and other specially benefited lots or lands, that the property of the state shall be included within the property assessed.

While it is true that under Section 5351 of the General Code the real and personal property belonging exclusively to the state is exempt from taxation, yet, an assessment under the decisions, is not considered as a tax as used in said Section 5351.

Dillon on Municipal Corporations, Section 1446, lays down the following principle:

> "The principle which makes property of the state, or any of its political or municipal subdivisions, nontaxable under general statutory provisions, and, in the absence of a positive direction therefor, according to the great weight of authority, also precludes the imposition of a special assessment for a street or other local improvement upon such property, unless there is positive legislative authority therefor."

The principle seems to be that no assessment can be levied against the property belonging to the state, unless the legislature has given specific authority so to do, and that mere general words, such as are used in Section 3812 supra, are not construed to include the property of the state, for the reason that the state is the sovereign, and general language should not be construed as including the sovereign itself.

In an opinion rendered by this department November 30, 1909, to the Hon. Harry E. Garn, City Solicitor, Fremont, Ohio, the then attorney general gave as his opinion that state property may be assessed for municipal improvements in proper cases. I am unable to give my assent to such opinion, believing, as I do, that as the legislature has not specifically provided for the assessment of state property the same is exempt.

In either view of the case, however, no collection of assessment could be made against the state property except by a petition to the legislature for the payment of the same, as there is no authority in law to subject the property of the state for the payment of assessments. This conclusion was also reached in the opinion of my predecessor above referred to.

I am, therefore, of the opinion that there is no way to obtain the proportionate share of street improvement from abutting state property, except as the legislature may decide to pay the same.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

473.

BOARD OF PUBLIC AFFAIRS—NO POWER TO FURNISH FREE WATER TO COUNCIL FOR STREET IMPROVEMENTS—MAY TURN OFF WATER IN EVENT OF NON-PAYMENT OF RENTAL.

The purposes for which free water may be supplied by the board of trustees of public affairs having been specified in Section 3903, General Code, and street improvements not being included as one of said purposes, said board has not only the right but is bound in duty, to charge a rental to council for water used for said purposes.

Said board has the same powers as the director of public service in cities and is, therefore, empowered to make and enforce reasonable rules and regulations and among them to turn off the water in the event of non-payment of rentals. Such a regulation may be enforced against council.

COLUMBUS, OHIO, June 22, 1912.

HON. CHARLES J. FORD, *Legal Counsel, Geneva, Ohio.*

DEAR SIR:—Under date of April 18th, you submitted two questions as follows:

First: Whether the trustees of public affairs in a village would have a right to charge council for water used in the construction of street improvement, such council having previously agreed with the contractor that he should have free water, and

Second: If the trustees have such power whether in the event of council refusing to pay such bill said trustees would have the right to refuse to allow council to turn on the water.

From subsequent correspondence between us I assume that it was distinctly understood by each and every bidder submitting a bid for the work of such street improvement that the village was to supply free water, and I, therefore, consider it solely in reference to your question as to whether or not the trustees could require payment by the council for water used in street construction.

Section 3963, General Code, as amended 102 Ohio Laws 94, provides:

> "No charge shall be made by the director of public service in cities, or by the board of trustees of public affairs in villages, for supplying water for extinguishing fires, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of the public school buildings; but, in any case where the said school building, or buildings, are situated within a village or cities, and the boundaries of the school district include territory not within the boundaries of the village or cities in which said building, or buildings, are located, then the directors of such school district shall pay the village or cities for the water furnished for said building or buildings."

The legislature in enacting Section 3963 General Code, *supra.*, has seen fit to designate exactly the purposes for which free water shall be supplied

by the board of trustees of public affairs and under the general rule of law "Expressio unius est exclusio alterius" the legislature not having seen fit to provide that free water can be furnished for street improvement, I am of the opinion that the board of trustees of public affairs have the right to charge for water used in the construction of street improvement; not only that they have the right but, for the reason above stated, it is the duty of such trustees so to do.

Second: In answer to your second question I herewith enclose you copy of opinion rendered to the bureau of inspection and supervision of public offices, under date of June 20, 1912, wherein it is held that the powers of the trustees of public affairs are the same as those vested in the director of public service of a city, in relation to waterworks, under Sections 3956-3981 General Code.

Section 3957 General Code provides as follows:

> "Such director may make such by-laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the waterworks. Such by-laws and regulations shall have the same validity as ordinances when not repugnant thereto or to the constitution or laws of this state."

The board of trustees of public affairs being authorized under my holding in the opinion herewith enclosed and under Section 3957 General Code to make such by-laws and regulations as said trustees deemed necessary for the safe, economical and efficient management of the waterworks, I am of the opinion that such trustees may make such reasonable rules and regulations in regard to the matter, which rules and regulations shall be of uniform operation, and that after they so do or have done the council in the case in question would stand on an equal footing with any other person or persons.

I am, therefore, of the opinion that if there is such rule or regulation the board of trustees of public affairs would have the right, in the event of council refusing to pay such bill, to refuse to allow the water to be turned on.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

487.

ANNEXATION PROCEEDINGS—BALLOTS THROWN OUT IN ELECTION NOT COUNTED IN DETERMINING "MAJORITY VOTING AT ELECTION"—ORDINANCE OF COUNCIL APPROVING REPORT OF ANNEXATION COMMISSION NOT WITHIN INITIATIVE AND REFERENDUM.

The expression of an elector's intention is an essential element in a "vote" and ballots which are thrown out in an election are, therefore, not to be included in estimating a "majority of the electors voting at an election," as intended by Section 3569, General Code, relating to elections upon the question of annexation of a municipal corporation.

An ordinance of council formally approving a report of the commissioners appointed to arrange for annexation, is not subject to the initiative and referendum act for the reason that:

1. *The question has already been voted upon by the electors and such action would enable fifteen per cent. to defeat the will of the majority.*

2. *Should council fail to approve the report, the county commissioners are authorized to act for the corporation in approving the report. The approval of said plans by the council is a duty, therefore, and not a delegated power.*

3. *The legislature by enabling the county commissioners to act in place of council, made it possible for council to evade the possible operation of the initiative and referendum and therefore did not intend its application.*

COLUMBUS, OHIO, June 26, 1912.

HON. STANLEY K. HENSHAW, *Village Counsel of Hartwell, 514 Main Street, Cincinnati, Ohio.*

DEAR SIR:—Under date of May 1st, you stated that at the last general election the village of Hartwell, Hamilton county, Ohio, by a majority of five voted to be annexed to the city of Cincinnati, and that seventeen votes were thrown out and not counted.

You further state that Section 3569 General Code, reads in part as follows:

> "If a majority of the electors of each corporation, voting on the question so submitted, is in favor of annexation, the council of each shall thereupon cause the result to be certified to the other corporation."

And you inquire whether or not such majority means a majority of the valid votes or a majority of the votes actually cast.

The language used in Section 3569 General Code is "a majority of electors voting on the question so submitted."

In order to ascertain the majority it is necessary, of course, to ascertain the total number of electors who have voted upon the question.

Webster defines a "vote" as follows:

> "A wish, choice, or opinion of a person or body of persons, the expression of a wish, desire, will, preference or choice in regard to any measure proposed in which the person voting has an interest; that by which will or preference is expressed in election."

Webster defines "ballot" as follows:

> "A ball used for voting; a piece of paper or other thing used for the same purpose."

Century dictionary defines the term "vote" as follows:

> "The formal expression of a will, preference, wish or choice in regard to any measure proposed; that by which will or preference is expressed."

Century dictionary defines a "ballot" as follows:

> "A ticket or slip of paper, sometimes called a voting paper, on which is written or printed an expression of the electors' choice as between candidates or proposition to be voted for. A method of secret voting by means of small balls or by means of printed or written ballots which are deposited in an urn or box, called a 'ballot box.'"

A "vote," therefore, is the expression of a will, preference, wish or choice of an elector, and a "ballot" is merely the instrument or means of expressing such will, preference, wish or choice.

In the case of State ex rel. vs. Green, 37 O. S. 230, of the opinion, the court say:

> "A vote is but the expression of the will of the voter."

In a case entitled In re Contest of South Charleston, Ohio, election, 50 W. L. B. 175, the court holds in the fifth syllabus as follows:

> "A vote is the expression of a choice; a ballot is a written or printed slip of paper upon which a choice may or may not be indicated; hence ballots upon which no choice is indicated are not votes, and are not to be considered in determining what is a majority of all votes cast."

At page 178 of the opinion, the court very ably differentiates between a vote and a ballot, as follows:

> "A ballot is a printed or written slip of paper upon which a choice may or may not be expressed. The casting of these ballots not properly marked was not the casting of a vote, and consequently the number of votes is not the total number of ballots on which the expression of a choice is indicated."

It is necessary, therefore, to differentiate between the *vote* and the *ballot*, and I, therefore, assume that your question means whether or not Section 3569 General Code means *majority of votes* cast or a *majority of ballots* cast.

The casting of a ballot not properly marked is not the casting of a vote as it is not indicative of the will or choice, preference or wish of the elector, and the total number of ballots found in the ballot box cannot be considered as the total number of votes cast unless each and every one of such ballots has been properly marked. Where no will is expressed no vote is cast.

I am, therefore, of the opinion that the language used in Section 3569 General Code in view of the definition given by the various dictionaries, and in view of the construction given to language similar to that used in Section 3569 General Code by the courts said language means a majority of the valid votes cast on the subject and does not mean majority of the ballots cast at such election.

Those whose ballots were not properly marked cannot be considered as voting on the question submitted any more than an elector who has absented himself from the polls.

Second: You next state that Section 3571 General Code provides that the council of the municipal corporation proposed to be annexed shall approve within three weeks the report of the commissioners, which approval must be made by an ordinance duly passed. You desire to know whether such ordinance ratifying the action of the commissioners is one that comes within the provisions of Section 4227-2 General Code, which is Section 2 of the initiative and referendum act.

From an examination of the statutes providing for the annexation of one municipal corporation to another it will be seen that there are provisions therein made for the submission of such question to a vote of the electors, and that if upon such submission the question is carried commissioners shall be appointed by the council of each corporation to arrange the terms and conditions of annexation, and report the result to the council of their respective corporations; that further in the event that the commissioners of a municipal corporation proposed to be annexed fail to agree to arrange terms with the annexation commissioners of the annexing municipality within a specified time that the county commissioners shall appoint commissioners for said purpose.

Section 3571 General Code provides as follows:

> "When the report of the commissioners is approved by ordinances passed by each corporation, certified copies thereof, signed by the presiding officer of the council and the respective auditors or clerks of each corporation, and authenticated by the corporate seal of each, if any there be, shall be filed in the office of the auditor or clerk of the corporation to which annexation is proposed to be made. Should the council of the municipal corporation proposed to be annexed fail, for a period of three consecutive weeks after the report of the commissioners is filed with it, to approve the same, it is hereby made the duty of the county commissioners of the county in which said municipal corporation is located to act for said corporation and they are hereby, for that purpose invested with all the powers conferred upon the council in this section and in the event that the report is made to the county commissioners as provided in the next preceding section, then said county commissioners are authorized to approve said report by resolution; provided further that when any municipal corporation is annexed, all contracts existing and in force in any form as valid and subsisting obligations upon any such municipal corporation at the time of such annexation is consummated, shall not extend beyond the original limits of such annexed municipal corporation by virtue of such annexation."

Upon an examination of said section it will be noted that unless the council of the municipal corporation proposed to be annexed approves within three weeks the report of the commissioners the duty devolves upon the county commissioners to act for said corporation. While Section 4227-2 pro-

vides that "any ordinance, resolution or other measure of a municipal corporation granting a franchise, creating a right, involving the expenditure of money, or exercising any other powers delegated to such municipal corporation by the general assembly shall be submitted to the qualified electors upon the filing of a referendum petition," yet I do not believe that the ordinance in question approving the report of the commissioners is within the purview of said act:

First: Because the question of annexation has already been submitted to the electors under an election held for that purpose, and the electors having authorized it, steps taken subsequent to such authorization are merely ancillary, and to hold that such an ordinance approving the report of the commissioners is subject to referendum would give fifteen per cent. of the electors of such municipality the power to prevent the carrying out of the will of the majority.

Second: Section 3571 General Code provides that when the report of the commissioner is approved by ordinances passed by each council certified copies thereof shall be filed in the office of the auditor or clerk of the corporation to which annexation is proposed to be made, and that should council of the municipal corporation proposed to be annexed fail for three weeks after the filing of such report to approve the same it is made the duty of the county commissioners to act for said corporation.

The peculiar provision of the statutes substituting the county commissioners for the city council on the failure of the city council to approve the report appears to me to make it the duty of council to approve the report and does not leave any discretion in it so to do. It being a duty devolving upon council and not a power delegated thereto, I am of the opinion that for that reason such ordinance is not within the provisions of Section 4227-2.

Third: The substitution of the county commissioners for the city council on the failure of the city council to approve the report of the annexation commissioners also leads me to the conclusion that the said ordinance approving said report is not within the provisions of Section 4227-2, General Code, as I cannot conceive that the legislature would have intended to so include it for the reason that if it were to be considered as within the provisions of said section and council did not want to have the same subject to referendum, it would only have to fail in its duty of approving the ordinance, thereby transferring its duties to the county commissioners, the action of which commissioners would not be subject to review by referendum petition.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

494.

BANKS AND BANKING—BANKRUPTCY OF INCORPORATED AND PRIVATE BANKS—DEPOSIT OF BONDS BY BANK AS SECURITY FOR DEPOSIT OF MUNICIPAL FUNDS CANNOT BE A PREFERENCE.

A bank incorporated under the laws of Ohio cannot be adjudged a bankrupt. A private bank, however, may become bankrupt.

Inasmuch as in order to constitute a preference a transfer must be made to pay a pre-existing debt, a village may receive municipal bonds owned by a private bank as security for the deposit therein of municipal funds, without danger of creation of a preference, or of liability to nullification on the ground of fraud.

COLUMBUS, OHIO, June 28, 1912.

HON. HOMER W. HAMMOND, *Village Solicitor, Columbiana, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter wherein you state:

> "Mr. E. T. Coyle, our village treasurer, has consulted me as to whether he should have additional security from the bank in which he keeps the village funds other than bonds of the same bank, which he afterwards deposits in a safety deposit with them."

The letter of Mr. Coyle, to which you refer, reads as follows:

> "As treasurer of the village of Columbiana, O., and treasurer of the Columbiana village school district, I am depositing the funds of both in the Union Banking Company, they agreeing to furnish me with indemnity bond or other securities, indemnifying me against loss on account of having said moneys on deposit with said bank.
>
> "The officers of the bank have given me some municipal bonds owned by the bank, which bonds I am to hold as security.
>
> "The question now arises, is this, any security, or in case the bank would fail would the United States court order that I return these securities on the ground of fraud, or that the bank would have no right to prefer one creditor to the disadvantage of the general creditors."

In reply thereto I desire to state, that the deposit of funds of a municipal corporation is regulated by Sections 4295 and 4296 of the General Code, as follows:

> "Section 4295. The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by a deposit of bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; bonds of the state of Ohio or of any other state

of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States and as to which there has been no default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible, providing the issuing body politic has not defaulted at any time since the year 1900 in the payment of the principal and interest of any of its bonds, said security to be subject to the approval of the proper municipal officers, in a sum not less than ten per cent. in excess of the maximum amount at any time to be deposited, but there shall not be deposited in any one bank an amount in excess of the paid in capital stock and surplus of such banks, and not in any event to exceed one million dollars. And whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depositary laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits

"Section 4296. In such ordinance the council may determine the method by which such bids shall be received, the authority which shall receive them, and which shall determine the sufficiency of the security offered, the time for the contracts for which deposits of public money may be made, and all details for carrying into effect the authority here given. Proceedings in connection with such competitive bidding and the deposit of money shall be conducted in such manner as to insure full publicity, and shall be open at all times to the inspection of any citizen. As to any deposits made under authority of an ordinance of the council, pursuant hereof, if the treasurer has exercised due care, neither he nor his bondsmen shall be liable for any loss occasioned thereby."

It will be observed that Section 4295 gives council authority to provide by ordinance for the deposit of the funds of the municipality, and said section recognizes as sufficient security for the funds so deposited any of the following:

The bond of a surety company authorized to do business in this state; bonds of the United States, of the state of Ohio, and of any municipal corporation or township in which there has been no default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible, providing the issuing body politic has not defaulted at any time since the year 1900.

Council is authorized by Section 4296 to determine the method of receiving bids, and tc designate the authority who shall determine the sufficiency of the security offered, and proceedings in connection with the bidding for funds and the deposit thereof shall be conducted in such manner as to insure full publicity.

The letter of Mr. Coyle does not disclose whether the Union Banking Company is a private bank or a bank incorporated under the laws of Ohio. If it is the latter, it cannot be adjudged a voluntary or involuntary bankrupt, because the bankruptcy law expressly excepts banking corporations from the operation of its provisions.

Assuming, however, that it is a private bank, it would be subject to the bankruptcy law.

A transfer, in order to constitute a preference, must be made by an insolvent debtor to a creditor with the intent to prefer such creditor over other creditors of the same class.

As I view it, such transfer, in order to constitute a preference under the bankruptcy law, must be made to pay a pre-existing debt, that is, a debt owing prior to the making of the transfer, and not one created simultaneously therewith.

The relation of debtor and creditor did not exist between the village of Columbiana and the Union Banking Company prior to the deposit of funds, and the delivery of the bonds by the bank was collateral security for the deposit of funds, so that in no sense can the delivery by the bank of bonds owned by it to the municipality, to secure the funds deposited by the latter with the bank, be regarded as a preference, nor could the same be set aside on the ground of fraud.

Said bonds should be retained in the custody of the treasurer, and, in the event of the failure of the bank, I am of the opinion that the claims of the municipality to such bonds would be paramount to the claim of general creditors.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

556.

TAXES AND TAXATION—SMITH ONE PER CENT. LAW—LONGWORTH ACT—BOARD OF EDUCATION AND MUNICIPAL BOND ISSUES AUTHORIZED BY ELECTORS MUST BE LEVIED FOR AT EXPENSE OF CURRENT EXPENSES—WATERWORKS BONDS WHEN RETIRED BY EARNINGS OF PLANT.

Whether or not levies for bonds issued upon a vote of the people prior to the passage of the Smith law are to be counted in establishing the 15-mill limitation, must now in view of the Putnam county circuit court decision, be deemed an open question.

Neither levying authorities nor the budget commission may contemplate the authorization of electors and unless such election has been held all bonds must be held to be within the limitation of the Smith law.

When a bond election has been held by both a school district and the council, the budget commission must permit a levy for such bonds in both cases, even though such action be at the expense of the allowance for current expenses to either or both subdivisions.

Bonds issued for waterworks purposes by a municipality must be held to be within the one per cent., two and a half per cent. and five per cent. limitations of the Longworth act, until it has been satisfactorily established that the income from such works is sufficient to retire such bonds and to cover cost of operating expenses. Such bonds if authorized by the vote of the people are not within the one per cent. and two and a half per cent. limitations of said act regardless of the carning capacity of the waterworks.

Only bonds of the municipal corporation are to be taken into consideration in estimating the limitations of the Longworth act. Those of a board of education must, therefore, be disregarded.

COLUMBUS, OHIO, July 25, 1912.

HON. O. H. STEWART, *Village Solicitor, Middleport, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 5th and that of June 15th, requesting my opinion upon the following facts and the questions arising thereunder:

"The board of education of the village of Middleport and the council of the village itself are both preparing to submit bond issues to the vote of the people; the one for school building purposes, the other for the purpose of establishing a municipal water and light plant. The present tax levy for all purposes is fourteen mills.

"1. May a levy for the purpose of paying the bonds be made over and above an aggregate of fifteen mills?

"2. Has either of the two taxing districts a superior right before the budget commission to have a levy for sinking fund purposes as would be required under authority of such election?

"3. Has the board of education a right to have a levy for sinking fund and interest purposes on account of a contemplated issue made?

"4. Would the facts as I have stated them preclude either or both of the taxing districts in question from issuing the bonds proposed to be issued?"

You also submit certain questions not arising from the above facts:

"5. What proof is required as to the satisfaction of the conditions mentioned in paragraph 'F' of Section 11 of the so-called Longworth act as revised 102 O. L. 265?

"6. Are the limitations of the Longworth act ascertained by combining the bonded indebtedness of the corporation and the board of education, or, are the bonds of the corporation as such alone taken into consideration?"

Answering your first question I beg to state that this department has uniformily held that the fifteen-mill limitation of Section 5649-5b of the so-called Smith one per cent. law is all-inclusive, with the exception of emergency levies made under authority of Section 5649-4, 101 O. L. 431. However, the circuit court of Putnam county has taken a different view of this question, at least as to levies to provide for bonds issued prior to the time the Smith law went into effect. The case in which this decision was rendered is at present pending in the supreme court, and until the decision of that court is rendered I presume the question will have to be regarded as open. My advice would be, however, not to exceed fifteen mills in any taxing district, as such action is sure to result in litigation.

Answering your second question I beg to state that inasmuch as neither the village or board of education has, as yet, received authority from the electors to make the contemplated bond issue, neither set of levying authorities has any right, as such, to anticipate the favorable action of the people by a tax levy. That is to say, unless before the budget commission acts finally one or both of these propositions carries, the levy for the purpose of meeting the bonds which will be issued if they carry, cannot be treated as a levy for interest and sinking fund purposes necessary to provide for indebtedness created by the vote of the people. Hence, the board of education would have no authority until its proposition has been approved by the electors to make any levy for sinking fund purposes whatsoever; while the council could not increase its sinking fund levy for the purpose of anticipating a favorable decision of the electors and have that increase exempted from the ten-mill limitation upon the ground that it is a levy to provide for bonded indebtedness created by the vote of the people.

As between the abstract purposes of school buildings and that of water and light plants, there can be no preference. The budget commission is not authorized to prefer the school district to the village upon any grounds of public policy.

The question as to the superiority of rights is to be governed, as I have already stated, by the results of the two elections. If both elections result favorably prior to the final action of the budget commission, then both sinking fund levies must be allowed at the expense of levies for current expenses. If one carries and the other is defeated, then the levy for the former must be made and that for the latter may not be made.

I have already answered the third question in part. Upon the assumption, however, that the board of education succeeds in getting the favorable vote on its proposition to issue bonds before the budget commission acts, I beg to advise that in that event it would be entitled, at all events to have a levy made for interest and sinking fund purposes regardless of any levy, or levies, made by the village for like purposes. The practical result would be that the levy for current expenses made by the board of education, or the village council, or both, would have to be cut down. That is to say, it is erroneous to assume that all sinking fund levies necessary to provide for bonded indebtedness created prior to the adoption of the Smith law, or thereafter by a vote of the people, must be made within the five mills represented by the difference between ten mills and fifteen mills. On the contrary, taxing districts may levy just as much for sinking fund and interest purposes as they may desire to levy, provided they reduce their levies for operating expenses proportionately if necessary in order that the fifteen-mill limitation may be observed.

Answering your fourth question I beg to state that in my opinion there is theoretically no impediment in the way of an issue of bonds by the municipal corporation or by the board of education, after the authority of the electors has been obtained. That is to say, the limitations of the Smith law do not affect the *power* to borrow money. The practical result of the existence of these limitations, in a given case, may be seriously to affect the *ability* of the municipality or school district to dispose of its securities. That is to say, because the taxing district has so nearly exhausted its levying power under the Smith law and is forced to make so small a levy for current expenses, purchasers of municipal securities may not wish to buy the proposed bonds. This difficulty, however, is practical and not theoretical.

Answering your fifth question I quote Section 11 of the amended Longworth act in so far as it applies to your question:

> "* * * In ascertaining the limitations of one per cent., four per cent. and eight per cent. herein provided, the following bonds shall not be considered:
> * * * * * * * * * * * *
> "f. Bonds issued for the purpose of purchasing, constructing, improving and extending waterworks when the income from such waters is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due."

The question which you submit here has never been passed upon by our courts, and the statute being a peculiar one I know of no authority upon the point in any jurisdiction. Apparently bonds issued for "the purpose of purchasing, constructing, improving and extending waterworks" must be counted

in ascertaining the respective limitations mentioned in the section until it does appear, as a matter of fact, that the waterworks is producing an income sufficient to cover the cost of operating expense and interest charges and to pass a sufficient amount to a sinking fund to retire the bonds as they become due. I am inclined to the view that this is a question of fact and that the ascertainment of this fact is not subject to estimation in advance. That is to say, if the municipal corporation has no waterworks and issues bonds for the purpose of acquiring such a public utility, the bonds at the time of issue must be counted in ascertaining all the limitations of the Longworth act. If it subsequently appears from the practical operation of the plant, under the rates fixed by the council or the director of public service, that the conditions of paragraph "F" of Section 11, supra, are fulfilled, then such bonds are taken out of the list of bonds which must be taken into consideration in ascertaining the limitations in question. So it would appear by lowering the water rate, for example, council might bring back again into the catagory of bonds which must be counted in ascertaining the limitations, some bonds which had at one time been exempt from such consideration.

I am of the opinion that there must be a demonstration of the problem suggested in paragraph "F," Section 11, before bonds issued for the purpose of acquiring waterworks may be exempted from consideration in ascertaining the limitations of one per cent., four per cent. (now two and one-half per cent.), and eight per cent. (now five per cent.), prescribed by the so-called Longworth act as re-enacted.

In this connection I beg to enclose herewith copy of an opinion rendered to Hon. C. M. Babst, solicitor of the village of Crestline, in which I hold that bonds issued for the purpose of acquiring waterworks, if issued on the authority of a vote of the people, are not to be counted in ascertaining the limitations of one per cent. and four per cent. (or two and one-half per cent.) prescribed by the act, regardless of whether or not the conditions enumerated in paragraph "F" are fulfilled.

Answering your sixth question I beg to state that the bonded indebtedness of a board of education is not to be taken into consideration in ascertaining "the net indebtedness" of a municipal corporation under the Longworth act. The two taxing districts are separate and distinct, and it is only "bonds * * issued by the council" (Section 2, Longworth act, 102 O. L., 263), "net indebtedness created or incurred by council" (Section 3 of said act), and "net indebtedness created or incurred by a municipal corporation" (Section 10 of said act) that are limited in this manner.

Very truly,
TIMOTHY S. HOGAN,
Attorney General.

ADDENDUM:

The common pleas court of Putnam county sustained our view in the case referred to. Judge Kinder of the circuit court, dissented from the opinion of the latter court.

563.

LONGWORTH ACT—COUNCIL—BONDS IN EXCESS OF ONE (1) PER CENT. OF TOTAL TAXATION VALUE WHEN AUTHORIZED BY ELECTORS MAY BE ISSUED AFTER CLOSE OF FISCAL YEAR.

When issue of bonds in excess of one per cent. of the total value of all property has been authorized by vote of electors under 3941, *G. C., the statutes do not intend that such issue must necessarily be made within the fiscal year. The limitations of the statutes with reference to the fiscal year refer solely to bonds issued without a vote of the people.*

COLUMBUS, OHIO, August 2, 1912.

HON. CLARENCE G. HERBRUCK, *Solicitor Village New Berlin, Ohio, Canton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 24th and your subsequent letter of June 27th submitting for my opinion thereon the following question:

> "On April, 1911, the council of the village of New Berlin submitted to the electors of the village a proposition for the issuance of bonds for the purpose of constructing waterworks in excess of 1 per cent. of the taxable value of the property of the village. The ordinance declaring it necessary to issue the bonds, recited that it was necessary 'to issue and sell bonds in the fiscal year beginning January 1, 1911,' for the purposes mentioned. No bonds were in point of fact issued during the year 1911. May the bonds so authorized now be issued and sold?"

The solution of the question submitted depends upon the construction of Section 3939, etc., of the General Code of 1910. Said sections having been amended in material particulars on May 10, 1910, 101 O. L. 432, and having been repealed and re-enacted on May 26, 1911, 102 O. L. 262, which said repeal and revision being subsequent in point of time to the holding of the election in question does not of course affect the question.

Section 3940, General Code, provided in 1910 as follows:

> "Such bonds may be issued for any or all of such purposes, but the total bonded indebtedness created in any one fiscal year under the authority of the preceding section, by a municipal corporation shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation, except as hereafter provided in this chapter."

Section 3941 provided as follows:

> "When such council, by resolution or ordinance passed by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, deems it necessary in any one fiscal year to issue bonds for all or any of the purposes so authorized in an amount greater than one per cent. of the total value of all the property in such municipal corporation as listed and assessed for taxation, it shall submit the question of issuing bonds in excess of such one per cent. to a

vote of the qualified electors of the municipal corporation at a general or special election in the manner hereafter provided in this chapter."

Section 3942 provided as follows:

"The net indebtedness incurred by a municipal corporation for such purposes shall never exceed four per cent. of the total value of all the property in such corporation, as listed and assessed for taxation, unless the excess of such amount is authorized by vote of the qualified electors of the corporation in the manner hereafter provided."

As you state there has never been any judicial construction of the statutes quoted with respect to the question you submit. I think the question is to be answered, however, having regard to the obvious purpose and intent of the statute rather than upon any strictly technical construction thereof. So that while it is true that Section 3941, as in force at the time the election was held, did provide that "when * * * council * * * deems it necessary in any one fiscal year to issue bonds * * * in an amount greater than one per cent. of the total value of all the property in such municipal corporation * * * it shall submit the question," etc., this reference to the issuance in the fiscal year is to be taken in connection with other provisions of the statutes in *pari materia.*

Section 3940 provided that council might issue bonds in any one fiscal year without a vote of the people in an aggregate amount not exceeding one per cent. of the total value. Section 3941 then is to be construed, in my judgment, in connection with this provision as requiring council to submit an issue of bonds which together with the bonds already issued in the fiscal year in which council acts, will result in an aggregate indebtedness exceeding one per cent. of the total tax value of the property of the corporation. Such bonds may not be issued in that year without a vote of the people. Once the vote of the people is had, however, I am of the opinion that it constitutes sufficient authority for council to issue the bonds thereunder at any time. It is only by strict construction and strained inference that the phrase "in any one fiscal year" as used in Section 4931, supra, can be regarded as a limitation upon the time within which the bonds when once authorized may actually be issued. It is rather a limitation upon the time within which they *may not be issued without a vote of the people.* The inference of which I speak is to be rejected because of the underlying purpose and intent of the statute as I have tried to define it.

For the foregoing reason I am of the opinion that the recital in the ordinance declaring it necessary to issue the bonds in question does not prevent the council, having received the authority of the electors, from proceeding to make the issue at such time as is most convenient to it. I am strengthened in this conclusion by the fact that the proposition submitted to the people under Section 3952 and Section 3953, General Code, is not required to specify the year in which the bonds shall actually be issued.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

568.

STREET COMMISSIONER MUST BE APPOINTED BY MAYOR—COUNCIL MAY NOT EMPLOY OVERSEER.

A street commissioner must be appointed by the mayor and confirmed by the council under 4363, G. C., and council is not empowered to employ an overseer or supervisor to perform the duties of that office.

COLUMBUS, OHIO, August 12, 1912.

HON. ROBERT C. MYERS, *Solicitor of the Village of New Boston, Portsmouth, Ohio.*

DEAR SIR:—In your letter of January 17th, you make the following request for my opinion thereon:

> "As solicitor of the village of New Boston, Scioto county, Ohio, I submit the following facts and questions for your opinion:
>
> "No street commissioner was appointed by the mayor for said village at any time during the past four (4) years under provision of Section 4363 of the General Code, nor has the present mayor made any appointment under the provision of this section.
>
> "During this period the duties of street commissioner have been performed by a supervisor or overseer employed by council, who has been considered as an employe of council.
>
> "In making this employment the council has assumed to act under what it considered its authority conferred upon it by Section 3714 of the General Code.
>
> "At the last meeting of the village council held on the 15th, inst., council, on motion, employed such overseer or supervisor upon a monthly compensation. It is considered by council that this man is under its direct supervision and control.
>
> "No. 1. Is the employment of this person within the scope of the powers of council?
>
> "No. 2. Is his employment and the appropriation of funds and funds hereafter appropriated for his compensation legal, under the conditions above stated?"

Section 3714 of the General Code, is as follows:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts, within the corporation, and shall cause them to be kept open, in repair and free from nuisance."

This is a general section providing that municipal corporations shall have special power to regulate the use of the streets and that council is to have the care, supervision and control of such streets. It does not specify in what way this control is to be exercised nor how nor under what supervision the same are to be repaired or improved; but this matter is covered by subsequent statutes. In villages by Sections 4363 to 4365, inclusive. These sections are as follows:

"Section 4363. The street commissioner shall be appointed by the mayor and confirmed by council for a term of one year, and shall serve until his successor is appointed and qualified. He shall be an elector of the corporation. Vacancies in the office of street commissioner shall be filled by the mayor for the unexpired term. In any village the marshal shall be eligible to appointment as street commissioner.

"Section 4364. Under the direction of council, the street commissioner, or an engineer, when one is so provided by council, shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wards, landings, market houses, bridges, viaducts, sidewalks, sewers, drains, ditches, culverts, ship channels, streams and water courses. Such commissioner or engineer shall also supervise the lighting, sprinkling and cleaning of all public places, and shall perform such other duties consistent with the nature of his office as council may require.

"Section 4365. Such street commissioner or engineer shall have such assistants as council may provide, who shall be employed by the street commissioner and shall serve for such time and for such compensation as is fixed by council."

There is no provision in the statutes for the appointment of a supervisor or overseer to perform the duties of street commissioner, and therefore, the only officer who should perform these duties is the officer named by the statute, that is, the street commissioner who must be appointed by the mayor and confirmed by council. Council has no right to appoint a street commissioner, nor does Section 3714 give it the right to appoint some person to act as street commissioner, giving him some other name, and thus avoiding Section 4363, which provides that such commissioner shall be appointed by the mayor.

Answering your first question, therefore, would say that under the facts detailed in your letter the employment of a supervisor or overseer is not within the scope of the powers of council.

Answering your second question I would say that the employment of this person and the appropriation of funds for his compensation under the conditions as detailed in your letter are not legal.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

569.

INCORPORATION OF VILLAGE—FAILURE TO ELECT CLERK AND TREASURER—DUTY OF AGENT OF PETITIONERS TO CALL ANOTHER ELECTION FOR TREASURER—DESIGNATION OF CLERK FROM COUNCIL MEMBERSHIP.

When a village has been newly incorporated and there has been a failure to provide for a treasurer and a clerk among its officers; held:

There is no statutory provisions for the appointment of a treasurer by the mayor and it is necessary for the agent of the petitioners for incorporation to call another election for the purpose of electing a treasurer to receive the village share of the public funds.

Under Section 4280, G. C., the council may designate one of its own members to act as clerk pending the proper election of that official.

COLUMBUS, OHIO, August 3, 1912.

HON. F. L. WELLS, *Solicitor, Village of Stratton, Wellsville, Ohio.*

DEAR SIR:—I have your letter of July 8th, wherein you state:

> "I write you as attorney for the village of Stratton, Jefferson county, Ohio. This village was recently incorporated and has had an election following the provisions of Section 3536 of the General Code.
>
> "Through some misunderstanding they failed to elect a clerk and a treasurer, having been informed by officers of an adjoining village that these positions were filled by the village council. I have been engaged to make application for a division of funds under Section 3544 of the Code and desire first to properly fill the office of treasurer of the village. Does the mayor have authority under the general provisions of Section 4252 to appoint a treasurer, and if not what is our proper method of procedure? Section 4280 of the Code provides in the case of absence of the clerk the council shall appoint one of its members to perform his duties for the time and I have had council designate one of their own number to act as clerk until the date of the next election. Is this proper?"

The situation existing in the village of Stratton is unusual and without precedent so far as diligent research has revealed.

Section 3536 of the General Code is a part of the general chapter relating to the incorporation of villages, and is as follows:

> "The first election of officers for such corporation shall be at the first municipal election after its creation, and the place of holding the election shall be fixed by the agent of the petitioners. Notice thereof, printed or plainly written, shall be posted by him in three or more public places within the limits of the corporation, at least ten days before the election. The election shall be conducted, and the officers chosen and qualified, in the manner prescribed for the election of township officers, and the first election may be a special election held at any time not exceeding six months after the incorporation, and the time and place of holding it shall be fixed by such agent, and notice thereof shall be given as is required herein for the municipal election." (R. S., Sec. 155.)

Section 4252 provides:

> "In case of death, resignation, removal or disability of any officer or director in any department of a city, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed or duly elected and qualified, or until such disability is removed. (97 V. 78 Sec. 228.)

The title of an act may be taken into consideration in ascertaining its meaning. You will observe that certain sections of the municipal code are under the title "cities," others under the title "villages" and others under the title "cities and villages." Section 4252 occurs under the title "cities." This considered in connection with the wording of the section itself leads to the conclusion that its provisions are applicable to cities alone and cannot be extended to include villages. Even if said section were held to apply to villages, the mayor could not appoint a treasurer in a case where there had never been such officer, because by its terms, said section presupposes the existence of a *prior* incumbent in the office before the vacancy could be filled.

I do not find any statute similar to Section 4252 prescribing what officer or body is empowered to fill vacancies in village offices.

It was the duty of the agent of the petitioners for incorporation to have included the clerk and treasurer in the call for the election of officers in the first instance. Not having done so, it is my opinion that said agent's powers are not completely exhausted, and he may proceed to call another election for the purpose of choosing such officers, and it is his duty to do so to the end that the village may not be deprived of its portion of the public funds by reason of not having a treasurer to receive them.

I am further of the opinion that the designation by council of one of its own members to act as clerk pending the election of a clerk was legal and proper under Section 4280 of the General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

602.

VACANCY IN OFFICE OF VILLAGE MARSHAL CAN ONLY BE FILLED BY REGULAR ELECTION.

There is no authority in the statutes for the filling of a vacancy in the office of a village marshal. Said vacancy can only be filled by regular election.

COLUMBUS, OHIO, August 10, 1912.

HON. AUGUSTUS W. MITHOFF, *Solicitor of Sugar Grove, Lancaster, Ohio.*

DEAR SIR:—Under date of July 31, 1912, you state:

> "A village marshal was elected in 1909, qualified and took his office in January, 1910, resigned in December, 1911, and resignation accepted.

"In 1911, a candidate was elected, but refused to qualify in January, 1912, or at any other time.

"The mayor appointed a resident of the village to fill the vacancy and the council refuses to allow him any salary, on the ground that the mayor has no power to fill vacancy.

"The question now presented is, who has the power to fill a vacancy in the office of marshal of the village?"

The marshal of a village is an elective officer, as provided in Section 4384, General Code, which provides:

"The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

The right to fill vacancies in an elective village office was considered by this department in reference to the position of village clerk in an opinion given to Hon. George Thornbury, solicitor of Bethesda, on February 10, 1912, in which it was held that no officer or board of a village had any right to fill such vacancy by appointment. It was further held that there was no authority to hold a special election. The same situation is presented in the case of a village marshal.

The mayor of a village has no authority to make an appointment to fill a vacancy in the office of village marshal. As there is no authority of statute to fill the vacancy, it cannot be filled until the regular election in November, 1913.

A copy of the opinion above referred to is herewith enclosed.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

611.

HEALTH OFFICER IN VILLAGES—PAY CEASES WHEN BOARD OF HEALTH ABOLISHED—HEALTH OFFICER IN PLACE OF BOARD OF HEALTH CANNOT BE APPOINTED WITHOUT CONFIRMATION OF STATE BOARD OF HEALTH.

When council abolished a board of health, the office of the health officer appointed by the board, terminates and his pay ceases from the date of the abolition of the appointing power.

When council appoints a health officer to serve instead of a board of health, under Section 4404, General Code, that appointment is not complete and such health officer may not receive pay until confirmation is made by the state board of health.

COLUMBUS, OHIO, September 10, 1912.

HON. CHARLES J. FORD, *Village Solicitor, Geneva, Ohio.*

DEAR SIR:—Your letter of August 7th received. You say that your council has recently decided, under the provisions of Section 4404, General Code, to do away with your local board of health and appoint in its place a health officer to act instead of such board of health, subject to the approval of the state board of health; that the old board of health, appointed Mr. A. health officer and he has served up to this time and performed all the duties of the office; that the council in the first place appointed Mr. A as health officer in place of the local board of health and submitted his appointment to the state board of health but said board refused to confirm his appointment; that the council at their last meeting appointed Mr. B as health officer and his appointment has been submitted to the state board of health.

You inquire whether Mr. A is entitled to pay for services rendered as health officer up to the time when Mr. B is to be confirmed by the state board of health and qualifies for the office.

Sections 4404 and 4408 of the General Code, provide as follows:

> "Section 4404. The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be the president by virtue of his office. But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character are required to be published, made by such health officer, shall be approved by the state board of health."
>
> "Section 4408. The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. The board may appoint a clerk, and with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city as it deems necessary."

Under authority of Section 4404 your council at one time established a village board of health, and the board of health, acting under Section 4408,

appointed Mr. A as health officer. Mr. A by virtue of his appointment by the village board of health was the health officer of your village until his term expired or he was removed, or until his office was abolished. The village council has recently, by appropriate proceedings, abolished the village board of health, and under Section 4404, appointed Mr. A as health officer, and the state board of health refused to approve his appointment. Thereupon the council appointed Mr. B and the state board of health has not acted on his appointment.

By reason of the action of the council in doing away with the village board of health the term of office and employment of every officer and employe of the board ended, as their authority to act came from the board, and when the board was abolished its authority, as well as the authority of its appointees, ended.

Answering your question specifically, I am of the opinion that Mr. A is not entitled to pay for his services after the date of the abolition of the village board of health by the village council.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

653.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—POWERS OF TO CONTRACT FOR AND SUPERVISE WATERWORKS—FILTRATION PLANT—AUTHORIZATION OF CONTRACT BY COUNCIL.

When the voters of a village have authorized a bond issue for the purpose of installing a filtration plant, a board of trustees of public affairs shall be appointed in accordance with Section 4357, General Code, which board shall have the supervision and control of such waterworks.

Under 2301, the board of trustees are given the powers of the waterworks trustees. Such trustees are not mentioned in the statutes, however, and these powers are construed to be the same as those vested in the director of public service of cities.

Though the director of public service has power to contract the defect aforementioned in 2301, General Code, would make this power in the board of trustees of public affairs doubtful. It is, therefore, advised that a contract by the board of trustees of public affairs for the installation of a filtration plant be first authorized by council.

In case of dispute between the council and the board as to the location of the plant and the making of the contract, the council is superior authority.

COLUMBUS, OHIO, October 7, 1912.

HON. F. H. PELTON, *Solicitor for the Village of Willoughby, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 6, 1912, which is as follows:

> "As solicitor for the village of Willoughby I would appreciate it if you would enlighten me in the following respects:
>
> "A bond issue has just been affirmatively voted upon for the installing of a filtration plant, and the ordinance for the issuing of bonds will be passed Monday night. There seems to be considerable difference of opinion between the mayor and council on the one hand,

and the board of trustees of public affairs on the other, as to what are the duties of each in regard to entering into contracts, supervising the work of construction, locating the plant, etc., and whose is the final say.

"I am frank to say that the statutes, to me at least, are far from clear as regards the power of the board of trustees of public affairs of villages, and any light you can give me by reference to judicial decisions, or from opinions rendered by your office would be greatly appreciated."

Sections 4357, 4358 and 4361 of the General Code, provide as follows:

"Section 4357. In each village in which waterworks, an electric light plant, artificial or natural gas plant, or other similar public utility is situated or when council orders waterworks, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years.

"Section 4358. When the council, in accordance with the provisions of this chapter, establishes a board of trustees of public affairs, the mayor of the village shall appoint the members thereof, subject to the confirmation of the council. Such appointees shall hold their respective offices until their successors have been elected according to law and such successors shall be elected at the next regular election of municipal officers held in such village.

"Section 4361. The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of waterworks, and such other duties as may be prescribed by law or ordinances not inconsistent herewith."

You will note that when council orders waterworks to be leased, purchased or constructed, it must establish, at such time, a board of trustees of public affairs of the village, which shall consist of three members, residents of the village, who shall be elected for a term of two years. You will note also that after the establishment of the board of trustees of public affairs the members thereof shall be appointed, and shall hold their respective offices until the next regular election, when their successors shall be elected; showing the intent of the legislature—that the construction of the waterworks of a village shall be under the supervision and control of the board of trustees of public affairs.

The powers of the board of trustees of public affairs are found in Section 4361, General Code, above quoted. There is a manifest defect in this section, which confers upon the board of trustees of public affairs of villages *all the powers of waterworks trustees*, whereas there are no such officers as waterworks trustees mentioned in the code.

I had occasion to construe Section 4361 in an opinion addressed to Hon. Allen C. Aigler, village solicitor of Bellevue, Ohio. I held, in that opinion, that the powers of the trustees of waterworks are the same powers now vested in the director of public service of cities, by Sections 3956 to 3981, General Code; and that these powers are the statutory powers of the board of trustees

of public affairs of villages. I also held in that opinion that the board of trustees of public affairs has such powers as may be conferred upon it by ordinance of council.

The powers of the director of public service of a city, in reference to waterworks, are found, as above stated, in Sections 3956 to 3981, General Code. The powers of the director of public service in regard to making contracts for waterworks are found in Section 3961, General Code, which provides:

> "Subject to the provisions of this title, the director of public service may make contracts for the building of machinery, waterworks, buildings, reservoirs and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, and for all other purposes necessary to the full and efficient management and construction of water works."

It has been held, in the case of Yaryan vs. The City of Toledo, 8 O. C. C. R. 1, that:

> "The preparation by the board of public service of plans, estimates, specifications and profiles for a new municipal waterworks system, in accordance with a determining ordinance by council, is not an exercise of legislative power, and authority so to do is conferred upon such board and may be exercised by it, notwithstanding Section 127 of the Municipal Code which provides that all power unless otherwise provided is to be exercised by council."

You will note, in the Yaryan case, that the plans, estimates and profiles for a new municipal waterworks system were prepared by the board of public service, in accordance with a determining ordinance by council.

Section 4221, General Code, provides as follows:

> "All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

This section states the manner in which contracts may be made by the village, and gives the village council power to contract. A contract made by the village council should be entered into through its officers; it should be entered into by the village mayor and clerk, as provided by said section. All contracts of the village should first be authorized by council. It may authorize the board of trustees of public affairs to enter into a contract, and then, and in that event, it would be the duty of the board of trustees of public affairs to enter into the contract according to law.

There is no question but that the director of public service, in cities, would have the right to enter into a contract for the installation of a filtration plant,

supervise the work of construction and locate the plant. But there is some doubt, because of the defect in Section 4361, heretofore referred to, as to whether the board of trustees of public affairs has any statutory authority. I would, therefore, advise that your village council first authorize the contract for the installation of the filtration plant. It may then direct that the contract be entered into through the mayor and clerk, or it may authorize the board of trustees of public affairs to enter into the contract.

Under Section 4361, there is no doubt but that the village council may confer upon the board of trustees of public affairs the power to make contract for the installation of the filtration plant, and to supervise the work of construction, locate the plant, etc.; and, in view of the defect in said section, if council desires that the board of trustees of public affairs do this work, it should pass an ordinance to that effect. However, in case of dispute as to the location of the filtration plant, and the making of the contract, I am of the opinion that the village council is the superior authority.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

658.

CEMETERY TRUSTEES MAY NOT CHARGE TO CREATE A PARTICULAR FUND FOR CARE OF A SPECIAL LOT—CREATION OF PERMANENT FUND BY GIFT OR DONATION.

The statutes do not authorize cemetery trustees to make a charge in the sale of a lot out of which to create a particular fund for the care of a special lot. Charges for the care of lots must be kept in a general fund for the care of all lots.

The only means of creating a particular fund for the care of a special lot or lots is by private donations or gifts, as set forth in Section 4168, General Code, providing for the creation in this manner of a "permanent fund" for this purpose.

COLUMBUS, OHIO, September 13, 1912.

HON. CHARLES J. FORD, *Village Solicitor, Geneva, Ohio.*

DEAR SIR:—I acknowledge receipt of yours of August 21, 1912, in which you say:

> "The joint cemetery trustees of the township have brought to me the question as to whether they have a right to provide by their rules and regulations that a certain sum should be set aside from the proceeds of each lot sold for the purpose of keeping up said lot."

You then ask whether in my opinion this could be done legally.

The cemetery in question is evidently what is called a "union cemetery," established under Sections 4183, et seq., General Code.

The powers of cemetery trustees, and all their relations to the trusts imposed upon them, in the care and management of the resting place of the dead, entrusted to their care, are statutory; and unless clearly expressed in the law there can be no exercise thereof. They are limited and circumscribed by statutory law, and cannot create any new relations with parties, however desirable, which the strict letter of the law omits to empower them to do.

Your proposition, if approved or carried out, would empower the cemetery

trustees to set aside a sum from the sale of *each lot* for the keeping up of that *particular lot*. Thus there would have to be kept a separate account as to individual lots and the care of each. This idea is wholly impracticable, unprovided for by law, and would result in discrimination, if the trustees so elected. They might say we will retain a certain sum in *one case*, and a greater or less sum, in *another*. The idea of the law is that all moneys coming into the hands of the trustees, whether by taxation or sale of lots, shall constitute a *general fund* for the benefit of the cemetery *as a whole and all the lots therein*.

The only means of creating such a fund for the care of a *particular lot*, is by private donations or gifts, as set forth in Section 4168, General Code. This is called a "permanent fund" for the care of lots, and all who seek *special* care of their lots, must pursue this course.

There is no doubt but that the cemetery trustees can appropriate from the sale of lots such sums as they may deem proper for the care of lots in general, or any other lawful purpose. Section 4166, General Code, says:

> "No more shall be charged for lots than is necessary to reimburse the corporation for the expense of lands purchased or appropriated for cemetery purposes and to keep in order and embellish the grounds."

If it were the intention of the legislature that charges might be made in the sale of lots, out of which to create a particular fund for the care of each lot, it should have said so.

There being no law authorizing such a proceeding, I am of the opinion that no such agreement on the part of the trustees can be made.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

688.

COUNCIL—SEMI-ANNUAL APPROPRIATIONS MAY BE COMPELLED BY MANDAMUS—NO PERSONAL LIABILITY FOR FAILURE TO PERFORM.

In accordance with the general rule that where an official, obligated to perform a trust or station, has a discretion as to the manner of its performance, he may be compelled by mandamus to perform the duty, council may be compelled by mandamus to make the semi-annual appropriations as required by Section 5649-3d, General Code.

The statutes do not provide any personal liability to the councilmen for failure to perform such duty.

COLUMBUS, OHIO, October 26, 1912.

HON. O. H. STEWART, *Solicitor for the Village of Middleport, Pomeroy, Ohio.*

DEAR SIR:—Your favor of October 15th received. You state in your communication that the council of the village of Middleport refuses to make the semi-annual appropriation as required by Section 5649-3d of the General Code, and ask me to state the personal liability of each councilman in disregarding the provisions of this statute.

Section 5649-3*d*, General Code, provides as follows:

> "At the beginning of each fiscal half year the various boards mentioned in Section 5649-3*a* of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the toal amount fixed by the budget commissioners, exclusive of receipts and balances."

Under Section 5649-3*d*, just quoted, it becomes the duty of the council of each municipal corporation, at the beginning of each fiscal half year, to make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and no expenditures shall be made during the six months following except those made from and within such appropriations and balances thereof.

Before the passage of the Smith law the authority to make the semi-annual appropriations was found in Section 3797, General Code, which provided as follows:

> "At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made from and within such appropriations and balances thereof."

It was held in the case of State, ex rel., vs. Lewis, 6 O. N. P. 198, that the provisions of Section 3797, General Code, were mandatory, and that a taxpayer might enjoin expenditures if such provisions were not complied with.

It is a well settled principle of law that, wherever an officer has discretion to do or not to do a thing, mandamus may not be resorted to, to compel him to exercise that discretion; but where, exercising a trust or station, he has a discretion as to the mode or manner of performing some duty, and refuses to exercise the discretion at all, he may be compelled by mandamus to do so.

While I am inclined to the view that mandamus would lie against the councilmen of the village of Middleport, to compel them to pass the semi-annual appropriation ordinance, yet, I am not called upon to decide that question at this time. As to the personal liability of each councilman in disregarding the provisions of Section 5649-3*d*, General Code, Section 4670, General Code, provides the remedy for misfeasance or malfeasance in office, but that section does not apply; neither do I find any other provision of the General Code applicable to your situation.

I am, therefore, of the opinion that there is no personal liability on the part of the councilmen of the village of Middleport for their failure to pass the semi-annual appropriation ordinance; but I see no reason why any councilman should refuse to do his duty in that behalf.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

712.

VILLAGE MARSHAL—VACANCY MAY NOT BE FILLED IN VILLAGE BY APPOINTMENT NOR BY SPECIAL ELECTION—SALARY FOR OFFICE MAY BE INCREASED WHEN VACANT—DEPUTY MARSHALS AND POLICEMEN MAY BE APPOINTED.

There is no authority for the filling of a vacancy in the office of the village marshal and there is no authority to call a special election.

Under Section 4384, General Code, however, the mayor may appoint and have supervision and control over deputy marshals and policemen, when provided for by council.

The inhibition of Section 4213, General Code, against change of salary of officers, clerks and employes, during the term for which they were elected or appointed, affects the rights only of existing incumbents and does not prohibit the change of a salary fixed for an office when such change does not affect the salary of a present incumbent during his term. The salary fixed may, therefore, be increased when a vacancy exists in such positions.

COLUMBUS, OHIO, November 6, 1912.

HON. C. B. MCCLINTOCK, *Solicitor of Brewster, Canton, Ohio.*

DEAR SIR:—Under date of October 23, 1912, you inquire as follows:

> "The council in its appropriation ordinance made January, 1912, fixed the salary of the marshal of the village at $175.00 per year. By reason of so many arrests in this village, and by reason of the office consuming so much of a man's time, the council and mayor have been unable to secure any one to act as marshal of the village at that salary. As all railroad towns, it is a town where there is much violation of the law. At present we have no marshal of the village.
>
> "I write to learn if there is any possible way by which the salary of the marshal of said village can be increased. The salary when it was fixed at $175.00 was fixed for two years. The statutes expressly provide that the salary of an officer shall not be increased or diminished during his term. It leaves our village in a bad predicament in regard to the enforcement of the law.
>
> "What would you advise me to do as the legal advisor of said village?"

It appears further that the marshal first elected has resigned and that several appointments have been made by the mayor and confirmed by council, all of whom have resigned.

The first difficulty to present itself is the want of power in the mayor or council or any other village officer to fill a vacancy in the office of village marshal.

This was passed upon by this department in an opinion given to Hon. Augustus W. Mithoff, solicitor of Sugar Grove, in reference to a marshal. Also in an opinion given to Hon. Geo. Thornbury, solicitor of Bethesda, on February 10, 1912, it was considered in reference to a village clerk.

There is no authority to fill a vacancy in the office of the village marshal and there is no authority to call a special election. This has been determined in the foregoing opinions, copies of which are herewith enclosed.

It is expected that the next legislature will cure this defect. In that event the right to increase the salary will become material.

Section 4213, General Code, provides:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

This section prohibits an increase or decrease in the salary of an officer during the term for which he was elected or appointed.

In your case there is no officer filling the position. All those who have been elected or appointed have resigned.

The inhibition is against the change of an officer's salary during his term. It is not an inhibition against the change of the salary fixed for an office. This inhibition affects the rights of incumbents and not those who have not been elected or appointed.

As there is no incumbent council may now change the salary of the office of village marshal and this change when and while operative will be the salary of any incumbent thereafter appointed or elected. It will be the salary of any one appointed to fill the present unexpired term. The unexpired term, however, cannot be filled until the same is authorized by the incoming legislature.

The council should proceed to fix the salary so that it will become operative before any appointment is made.

As no appointment can be made before the first of January the appropriation ordinance of 1912 can have no bearing upon the question.

While there is no authority to fill a vacancy in the office of a village marshal, your situation may be relieved by virtue of Section 4384, General Code, which authorizes the mayor of a village to appoint deputy marshals and policemen when provided for by council. Such appointees are subject to confirmation by council.

Said Section 4384, General Code, provides:

> "The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

Section 4385, General Code, provides:

> "The marshal shall be the peace officer of the village and the executive head under the mayor of the police force. The marshal, deputy marshals, policemen or night watchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers not inconsistent with the nature of their offices as are conferred by ordinance."

By virtue of this section the marshal is the executive head of the police force of the village under the mayor. No marshal can now be appointed. This will not prevent the village from providing for and having deputy marshals or policemen.

If a village had established a police force, and the same was in full or-

ganization, and thereafter the marshal should resign, and his position could not be filled, that fact would not terminate the police force. The members of the force would proceed to perform their duties as before, but under the immediate direction of the mayor. The mere fact that the department has no executive head would not prevent it from carrying on its work. The marshal is the executive head, under the mayor, of the police force. If there is no marshal, and none can be provided, as in this case, I am of the opinion that the mayor could act directly with the police force, instead of through a marshal.

It is my opinion that the council may provide for such number of policemen or deputy marshals as may be needed and that the mayor may appoint the same by virtue of Section 4384, General Code, with the confirmation of council. Such policemen or deputy marshals would have power to make arrests and to preserve the peace.

As council has power to establish a police force, it may also abolish the same at its pleasure. Your difficulty as to enforcement of the law may be solved by council providing a police force.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

725.

INCORPORATION OF VILLAGES—NO POWER TO REPAY FEES PAID BY AGENT OF PETITIONERS—TIME OF INCORPORATION—MAKING OF TRANSCRIPTS OF RECORD BY COMMISSIONERS AND RECORDER—FEES OF RECORDER—NOMINATION OF CANDIDATES AT PRIMARY AND BY PETITION——ASSESSMENT OF VILLAGE TERRITORY FOR TOWNSHIP TAXES.

As the same is not provided for by statute, the newly incorporated village is not obligated to repay to the agent of the petitioners fees paid by him in advance, nor may it assume such repayment.

Under Sections 3525 *and* 3524, *General Code, the incorporation is completed when a record has been made by the recorder of the transcripts of the proceedings of the commissioners, to wit: Sixty days after the transcripts have been filed with him.*

Under Section 3525, *General Code, the recorder is required to make and certify two transcripts of the record and submit them to the secretary of state and the agent of the petitioners, immediately after the record has been made in the proper book of his records in his office as provided by Section* 3524, *General Code.*

Under Sections 3540 *and* 2778, *General Code, the recorder is entitled to twelve cents per hundred words for making transcripts of the record and for certifying a copy from the records.*

By virtue of Section 4949, *candidates for elective office for voluntary political parties or associations must be made at a primary election, if in the territory which contains the village, the political party or association cast at least* 10 *per cent. of the entire vote at the next preceding general election. Where there is a special election the statute specifically provides that a primary shall be held for nomination of candidates at such election. Independent candidates and candidates of parties, other than those above specified may be nominated by petition by virtue of Sections* 4950 *and* 4996, *General Code.*

Under 5646, *General Code, the property within the village is still a part of the township and may be assessed for township taxes.*

COLUMBUS, OHIO, October 18, 1912.

HON. RUPERT HOLLAND, *Solicitor of Walbridge, Toledo, Ohio.*

DEAR SIR:—Under date of October 7, 1912, you submit the following questions to this department for answer:

> "*First.* General Code, Section 3540, allows fees to be demanded in advance of the agent of the petitioners. Can the village later, when fully organized, by vote of council, legally assume repayment to the agent of these and other expenses required by law in the matter of the creation of the village?
>
> "*Second.* Is the village under legal obligations to assume and repay the agent these expenses required by law to bring it into existence?
>
> "*Third.* Must the transcripts provided for in General Code, Section 3525, be made and certified before the village is organized?
>
> "*Fourth.* Is the fee for each transcript the same in amount as the fee for the original recording?

"*Fifth.* Can nominations for offices in organization by special election be made by petition, or is a primary legally necessary?

"*Sixth.* Is it proper to assess the village property for the general tax fund of the township within which said village is located?

"*Seventh.* Is it proper to assess the village property for any of the said township taxes?"

Under date of October 12, you submit an eighth inquiry.

"*Eighth.* What date should be considered the date of 'incorporation,' when the county commissioners make their decree to that effect, or when the official recording is done?"

Section 3540, General Code, to which you refer, provides:

"Each officer shall receive for the services required of him under this division, the same fees he would be entitled to for similar services in other cases. Unless such fees are paid in advance, for services under this chapter, by the agent of the petitioners, of whom demand may be made, and by some person interested for services under other chapters of this division, the officer shall not be required to perform the service."

Section 3517, General Code, prescribes who may obtain the organization of a village, as follows:

"The inhabitants of any territory laid off into village lots, a plat of which territory has been acknowledged and recorded as is provided with respect to deeds, or the inhabitants of any territory which has been laid off into such lots and surveyed and platted by an engineer or surveyor who certified thereon, under oath, to its correctness, and which is recorded as is provided with respect to deeds, or the inhabitants of any island or adjacent islands, or parts thereof, or of such island or islands or parts thereof, and adjacent territory, may obtain the organization of a village in the manner provided in this title. When such village is organized upon any island or islands, it may be done without reference to the number of permanent inhabitants embraced within such territory, and without such plat having been first made. No corporation under this chapter shall embrace within its limits the grounds or improvements of any county or city infirmary."

Section 3518, General Code, provides:

"Application for such purpose shall be made by petition, which, except as provided in the last preceding section, shall be signed by not less than thirty electors, residing within the proposed corporate limits, and addressed to the county commissioners, accompanied by an accurate map of the territory.

Section 3519, General Code, provides:

"The petition shall contain: 1. An accurate description of the territory embraced within the proposed corporation, and it may

contain adjacent territory not laid off into lots. 2. The supposed number of inhabitants residing in the proposed corporation. 3. The name proposed. 4. The name of a person to act as agent for the petitioners, and more than one agent may be named therein."

The petitioners are the persons who are seeking to form the corporation. This is a voluntary obligation upon their part. The petitioners are required to select an agent. This agent is required by Section 3540, General Code, to pay the fees of the officers who are required to perform duties in connection with the incorporation proceedings. There is no specific provision of statute which authorizes the village, after its incorporation to repay to the agent of the petitioners the amount he has paid for such services.

Section 176, subdivision 13, General Code, provides for the amount of the fee to be paid to the secretary of state, as follows:

"The secretary of state shall charge and collect the following fees for official services:

"13. For filing copy of papers evidencing the incorporation of a municipal corporation, or of annexation of territory by a municipal corporation, five dollars, to be paid by the corporation, the petitioners therefor, or their agent."

Under this section the fee of the secretary of state may be paid either by the corporation, the agent, or by the petitioners. There is no provision, however, that the money shall be refunded by the corporation if the fee is paid by the agent or by the petitioners.

The rule is laid down in 28 Cyc., page 177, as follows:

"But a newly created city or other municipality does not become liable for the debts of a purely voluntary association, contracted for public improvements falling within the limits of the municipality, or otherwise, unless such liability is imposed by the legislature."

A village has only such powers as are granted it by the legislature or which are necessarily implied. It is an organization of limited jurisdiction and powers. Its authority to expend money must be found in the acts of the legislature. The legislature has not authorized the village to refund to the petitioners or to their agent the amount necessarily expended by them in securing the organization of the village.

It is, therefore, my opinion that the village has no authority to repay any such expense, and that it is under no obligation to assume such obligations.

This disposes of your first and second questions. Your third question is:

"Must the transcripts provided for in General Code, Section 3525 be made and certified before the village is organized?"

Section 3525, General Code, provides:

"When the record is made, the corporation shall be deemed the village of ....., to be organized and governed under the provisions of this title. Thereupon the recorder shall make, and certify under his official seal, two transcripts of the record, one of which he shall forward to the secretary of state, and, on demand, deliver

the other to the agent of the petitioners, with a certificate thereon that the duplicate has been forwarded to the secretary of state. When a municipal corporation is organized by the election of its officers, notice of its existence shall be taken in all judicial proceedings."

Section 3522, General Code, provides:

"Upon such hearing, if the commissioners find that the petition contains all the matters required, that its statements are true, that the name proposed is appropriate, that the limits of the proposed corporation are accurately described and are not unreasonably large or small, that the map or plat is accurate, that the persons whose names are subscribed to the petition are electors residing on the territory, that notice has been given as required, that there is the requisite population for the proposed corporation, and if it seems to the commissioners right that the prayer of the petition be granted, they shall cause an order to be entered on their journal to the effect that the corporation may be organized."

Section 3523, General Code, provides:

"The commissioners shall cause to be entered on their journal all their orders and proceedings in relation to such incorporation, and they shall cause a certified transcript thereof, signed by a majority of them, to be delivered, together with the petition, map and all other papers on file relating to the matter, to the recorder of the county, at the earliest time practicable."

Section 3524, General Code, provides:

"The recorder shall file the transcript and other papers in his office, and at the expiration of sixty days thereafter, unless enjoined as herinafter provided, he shall make a record of the petition, transcript, and map in the proper book of records and preserve in his office the original papers delivered to him by the commissioners, certifying thereon that the transcript, petition, and map are properly recorded."

If the county commissioners grant the prayer of the petition they are required to file a transcript of their orders and proceedings, and the map and other papers with the county recorder. These are filed by the recorder and held for sixty days before a record is made. Unless he has been enjoined, he shall make a record of the petition, transcript and map, at the expiration of said sixty days.

Section 3525, General Code, then provides, that, "when the record is made," "thereupon the recorder shall make" two transcripts of the record. The word "thereupon" refers to the time when the record is made.

In 38 Cyc., page 283, one of the definitions of "thereupon" is given:

"As an adverb of time, without delay or lapse of time; immediately without delay; immediately after that;—

Reading this section with the above definition, it means that when the

record is made the recorder shall, without delay, make and certify two transcripts of the record.

The transcripts should be made and one of them forwarded to the secretary of state as soon as can be done after the record is completed.

While considering Section 3525, General Code, your eighth question will be answered.

Section 3536, General Code, provides:

> "The first election of officers for such corporation shall be at the first municipal election after its creation, and the place of holding the election shall be fixed by the agent of the petitioners. Notice thereof, printed or plainly written, shall be posted by him in three or more public places within the limits of the corporation, at least ten days before the election. The election shall be conducted, and the officers chosen and qualified, in the manner prescribed for the election of township officers, and the first election may be a special election held at any time not exceeding six months after the incorporation, and the time and place of holding it shall be fixed by such agent, and notice thereof shall be given as is required herein for the municipal election."

It is apparent from this section that the incorporation is completed before the election of officers. The first sentence of Section 3525, General Code, supra, determines the date of the incorporation. This sentence reads:

> "When the record is made, the corporation shall be deemed the village of ....., to be organized and governed under the provisions of this title."

The decree of the commissioners is but one step in the incorporation proceedings. After their decision the recorder holds the papers for sixty days awaiting proceedings to prevent the incorporation. The procedings are held in abeyance during this period. It is completed when the record is made.

The date of the incorporation will be the date when the record is completed by the county recorder.

Your fourth inquiry is:

> "Is the fee for each transcript the same in amount as the fee for the original recording?"

Section 3540, General Code, supra, provides in part:

> "Each officer shall receive for the services required of him under this division, the same fees he would be entitled to for similar services in other cases."

Section 2778, General Code, provides:

> "For the services hereinafter specified, the recorder shall charge and collect the fees provided in this and the next following section. For recording mortgage, deed of conveyance, power of attorney or other instrument of writing, twelve cents for each hundred words actually written, typewritten or printed on the records and for indexing it, five cents for each grantor and each grantee therein; for cer-

tifying copy from the record, twelve cents for each hundred words. The fees in this section provided shall be paid upon the presentation of the respective instruments for record upon the application for any certified copy of the record."

Section 2779, General Code, provides:

"For recording assignment or satisfaction of mortgage or discharge of a soldier, twenty-five cents; for each search of the record, without copy, fifteen cents; for recording any plat not exceeding six lines, one dollar; and for each additional line, ten cents."

Section 2779, General Code, fixes the fee for recording a plat. The map of a village is in fact a plat of the village. Section 2779, General Code, then governs the fee to be charged for recording the map.

Section 2778, General Code, fixes the fee for recording an instrument of writing at twelve cents per hundred words. The same fee is fixed for certifying a copy from the records. The transcript of the record required by Section 3525, General Code, is in fact a certified copy of the record. The recorder is required to make two transcripts of the record. The fees for the record and for the transcript are the same. He is entitled to the regular fee for each transcript made by him.

Your fifth question is:

"Can nominations for offices in organization by special election be made by petition, or is a primary legally necessary?"

The officers to be nominated by primary election are enumerated in Section 4949, General Code, as follows:

"Candidates for member of congress, and for all other public elective offices, delegates provided for herein and members of the controlling committees, of all voluntary political parties or associations, which at the next preceding general election polled in the state or any district, county or subdivision thereof, or municipality, at least ten per cent. of the entire vote cast therein, shall be nominated or selected in such state, district, subdivision or municipality, in accordance with the provisions of this chapter, and persons not so nominated shall not be considered candidates and their names shall not be printed on the official ballots. Delegates, and party controlling committees whose members have not been so selected, shall not be recognized by any board or officer."

Section 4950, General Code, provides:

"Nothing in this chapter shall repeal the provisions of law relating to the nomination of candidates for office by nomination papers, and no elector shall be disqualified from signing a petition for such nomination of candidates for office by nomination papers, because such elector voted at a primary provided for herein to nominate candidates to be voted for at the same election or because such elector signed nomination papers for such primary.

Section 4963, General Code, provides:

> "Primaries under this chapter to nominate candidates for county offices or to select delegates to nominate candidates for state or district offices, shall be held in each county at the usual polling places on the third Tuesday of May of even-numbered years, and primaries held to nominate candidates for township and municipal offices, justices of the peace and members of the board of education shall be held in each county at the usual polling places on the first Tuesday after the first Monday in September of odd-numbered years."

Section 4964, General Code, provides:

> "When a call is issued for a special election, the date of the primary shall be fixed at the same time and in the same manner by the authority calling such special election, which primary shall be held at least two weeks prior to the time fixed for such special election. Nomination papers for such election shall be filed at least ten days before the date for holding such primary, and after such election is called at least five days shall be allowed for circulating and filing nomination papers."

By virtue of Section 4949, General Code, all candidates for an elective office for voluntary political parties or associations must be made at a primary election, if such party or association has cast at least ten per cent. of the entire vote at the next preceding general election in the district, in this case, the municipality.

It might be urged that there was no municipality in existence at the time of the last general election. That is true. This provision, in my opinion, refers to the territory which is to compose the new village. If in that territory a political party or association has cast at the next preceding general election at least ten per cent. of the entire vote cast therein, such political party or association must make its nominations by primary elections. When there is a special election the statute specifically provides that a primary shall be held for nomination of candidates at such election. The statute makes no exceptions as to any offices that may be nominated by a political party that comes within the terms of Section 4949, General Code. This section includes all elective officers.

Section 4996, General Code, provides:

> "Nominations of candidates for any county, township, municipal or ward office may be made by nomination papers, signed in the aggregate for each candidate by not less than three hundred qualified electors of the county or fifty electors of the city or twenty-five electors of the township, ward or village, respectively. In counties containing annual registration cities, such nomination papers shall be signed by petitioners not less in number than one for each fifty persons who voted at the next preceding general election in such county."

Section 4950, General Code, specifically retains the right to nominate by petition. Political parties, however, that cast at least ten per cent. of the entire vote at the next preceding election cannot avail themselves of this method of nominations.

Therefore, candidates of political parties or associations that cast at least

ten per cent. of the entire vote polled in the territory of the proposed village at the next preceding general election must be nominated by primary election. Independent candidates and candidates of other parties may be nominated by petition.

Your sixth and seventh inquiries are:

> "Sixth. Is it proper to assess the village property for the general tax fund of the township within which said village is located?
>
> "Seventh. Is it proper to assess the village property for any of the said township taxes?"

Section 5646, General Code, provides:

> "The trustees of each township, on or before the fifteenth day of May, annually, shall determine the amount of taxes necessary for all township purposes, and certify it to the county auditor. The county auditor shall levy, annually, for township purposes, including the relief of the poor, but not including the support of common schools, or the payment of the interest and principal of the debts of the township, such rates of taxes as the trustees of the respective townships certify to him to be necessary, not exceeding one mill on each dollar of the taxable valuation of the property of the township, which does not exceed two hundred thousand dollars, eight-tenths of one mill on each dollar of such taxable valuation exceeding two hundred thousand dollars, and not exceeding three hundred thousand dollars, one-half of one mill on each dollar of such taxable valuation exceeding three hundred thousand dollars, and not exceeding five hundred thousand dollars, four-tenths of a mill on each dollar of such taxable valuation exceeding five hundred thousand dollars, and not exceeding eight hundred thousand dollars, one-fourth of one mill on each dollar of such taxable valuation exceeding eight hundred thousand dollars, and for the payment of the interest and principal of the debts of the township, such sum as the trustees may determine is necessary for that purpose."

The tax to be levied by this section is levied upon the property in the township. When a part of the territory of a township is taken to form a village such territory is not thereby taken from the township. It is still a part of the township. Township officers have jurisdiction over the territory in their township which is included in a village. Justices of the peace have jurisdiction therein. In construing the statutes pertaining to the relief of the poor by the township this department has held that the township trustees should grant relief to persons residing in a municipality within such township.

The property of a village is a part of the property of the township in which such village is located and is liable to be assessed for taxes levied for township purposes.

There is a special statute governing a township when the boundaries of a township and a municipal corporation are identical. It is assumed in your case that the boundaries are not identical.

Very truly,

TIMOTHY S. HOGAN,

Attorney General.

751.

VILLAGE SOLICITORS—SERVICES FIXED BY CONTRACT—COMPENSATION NEED NOT BE NAMED IN CONTRACT.

The duties of a village solicitor are fixed by contract and he may receive extra compensation for such services as are not stipulated for in his contract.

It is not necessary that compensation be fixed before the services are performed.

COLUMBUS, OHIO, December 13, 1912.

HON. O. H. STEWART, *Solicitor for the Village of Middleport, Pomeroy, Ohio.*

DEAR SIR:—Under date of November 29th, you wrote to me in part as follows:

> "Our village employes a solicitor whose duties are to attend council meetings, give advice, prepare ordinances, resolutions, etc., for which the village pays the modest sum of $75.00 a year.
>
> "I would like to know if the solicitor is entitled to extra compensation in defending suits brought against the village.
>
> "Our village has been sued by the water company. It is an important suit. I have been formally instructed by council to look after the interests of the village.
>
> "Also, in the hiring of an attorney or in the instruction of the solicitor to prosecute or defend a suit, should a contract be entered into formally, fixing the compensation or are the instructions of the council sufficient to establish a contract, with compensation to be fixed at the end of the service, or must the compensation be agreed upon in the first place?"

There is no office in a village corresponding to that of solicitor in a city, but Section 4220 of the General Code, authorizes the village council to "provide legal council for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

The relation between a village and the legal counsel employed by it by virtue of the authority granted by Section 4220 is contractual and such legal counsel is not required to perform any service not included in his contract. If your contract does not include the work of defending the village in law suits brought against it, I am of the opinion that it is within the power of the village council to provide extra compensation for such services. I am also of the opinion that the instruction of council by way of resolution authorizing you to defend the village in the suit brought against it by the water company is sufficient upon which to found a claim for your services after they are rendered. It is not necessary, in my judgment, that the compensation to be paid should be fixed in advance of the rendition of the services.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

755.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—MAKING OF CONTRACTS AND SELLING OF BONDS FOR BUILDING A DAM IS VESTED IN VILLAGE COUNCIL.

A contract for building a dam across a river should be made and the proceeds of bonds sold for the same should be expended by the village council and not by the board of public affairs.

COLUMBUS, OHIO, December 6, 1912.

HON. CHARLES J. FORD, *Solicitor, Geneva, Ohio.*

DEAR SIR:—Your letter of November 26th, in which you inquire whether the proceeds of the $10,000.00 bonds sold for building a dam across Grand river should be expended by the council or turned over to the trustees of public affairs and expended by them is at hand, and in reply I would say that in the absence of an express provision granting the power to contract for this improvement it is the duty of the council to make the same.

The expression found in Section 4361, of the General Code, granting the trustees of public affairs all the powers of water works trustees does not, to my mind, include the right to determine the character of this dam and the power to make a contract for its construction.

I, therefore, agree with your conclusion that the council should make the contract and that it should be executed as provided by Section 4221 of the General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

759.

OFFICES COMPATIBLE—COUNTY SURVEYOR AND MEMBER VILLAGE BOARD OF PUBLIC AFFAIRS—OFFICERS INCOMPATIBLE—MEMBER AND CLERK OF VILLAGE BOARD OF TRUSTEES OF PUBLIC AFFAIRS.

Since the offices of county surveyor and trustee of public affairs of a village are not in any way subordinate to each other, and neither being a check upon the other, and not being physically impossible of performance by one and the same person, they are not incompatible and may be held by a single individual at the same time.

It is contrary to the policy of the law to permit an officer to use his official appointing power to place himself in office. Therefore, the board of public affairs cannot appoint one of their own members clerk of the board.

COLUMBUS, OHIO, December 9, 1912.

HON. S. W. DAKIN, *Village Solicitor, Yellow Springs, Ohio.*

DEAR SIR:—I herewith acknowledge receipt of your letter of September 3, 1912, wherein you inquire as follows:

"Is it incompatible for a person to hold a county office and at the same time hold the office of board of trustees of public affairs of a village?

"Can a member of such board draw salary as clerk when the ordinance establishing such board provides that they shall not receive any salary as members of said board?"

On September 12, 1912, we wrote you asking that you state what county office is being held by the party holding the office of member of the board of trustees of public affairs, and we also requested in the same letter that you forward to us a copy of the ordinance referred to in your letter of inquiry. In reply thereto we received from you on September 27, 1912, the following communication:

"I herewith enclose copy of ordinance establishing a board of trustees of public affairs. My opinion is, that being a member of said board, the clerk cannot draw a salary as clerk, being prohibited from drawing salary under the ordinance, a copy of which is enclosed. The other question is as to whether it is incompatible to hold a county office, and at the same time hold the office of trustee of public affairs, the office being county surveyor. As far as I can see there is no incompatability in holding this office and at the same time be a member of the board of trustees of public affairs. I may be wrong in these matters, is the reason for asking your opinion. Thanking you for your prompt attention, etc."

Answering your first question I will say that I have carefully looked into the constitutional and statutory provisions of our state, and I do not find any prohibition against one and the same person holding at the same time the office of county surveyor and the office of member of the board of trustees of public affairs of a village. Section 2783 provides as follows:

"No person holding the office of clerk of court, sheriff, county treasurer or county recorder, shall be eligible to the office of county surveyor."

In my opinion said statute does not preclude a person from holding at the same time one of the offices therein mentioned and another office not therein mentioned—the prohibition in said statute is against holding more than one of the offices therein mentioned, and by clear implication it follows that the prohibition is not intended to be extended to holding one of the enumerated offices and another office not therein enumerated at the same time.

Under former rulings of this department, in the absence of such a prohibition, the same person may hold the two offices at the same time provided they are not incompatible. The rule of incompatibility is laid down in the case of State vs. Gebert, 12 CC., n. s., 274, by Judge Dustin, at page 275, of the opinion as follows:

"Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

Therefore, in order to determine whether or not the aforesaid offices are

incompatible it is neccesary to look to the statutory duties of each. Section 2792, of the General Code, determines the duties of county surveyors as follows:

> "The county surveyor shall perform all duties for the county now or hereafter authorized or declared by law to be done by a civil engineer or surveyor. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction or repair of all bridges, culverts, roads, drains, ditches and other public improvements, except buildings, constructed under the authority of any board within and for the county. When required by the county commissioners, he shall inspect all bridges and culverts, and on or before the first day of June of each year report their condition to the commissioners. Such report shall be made oftener if the commissioners so require."

Other duties which county surveyors are to perform are found in Sections 2793 to 2822, inclusive, of the General Code, and are in substance as follows: The inspection of all public improvements made under authority of the board of county commissioners; keeping of complete records of estimates and summaries of bids received and contracts for various improvements; the survey of the land situated in two or more counties, to keep records of the surveys made by himself, or his deputies for the purpose of locating any land or road lines or fixing any corners or monuments; to transcribe any and all dilapidated maps and records of plats and field notes of surveys from records of the common pleas, probate or other courts; to make and keep up in a manner convenient for reference complete indices to all the records in his office; to survey all lands which have been sold for taxes which lie within his county, and other duties contained in the above mentioned sections.

As to the statutory duties of the members of the board of trustees of public affairs, Section 4361 provides as follows:

> "The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of waterworks, and such other duties as may be prescribed by law or ordinances not inconsistent herewith."

The general provisions referred to in section governing the management of waterworks are found in Sections 3955 to 3981, inclusive, of the General Code.

Said offices not being in any wise subordinate to each other, and neither of them being a check upon the other, and not being physically impossible of performance by one and the same person—I am of the opinion that the offices of county surveyor and trustee of public affairs of a village are compatible and can be held by one and the same person at the same time.

Your second question is: "Can a member of such board draw a salary as clerk when the ordinance establishing such board provides that they shall not receive any salary as members of said board?" In reply thereto, Section 4357 of the General Code, provides when the board of trustees of public affairs in a village can be established, as follows:

> "In each village in which waterworks, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders waterworks, an electric light plant, natural or artificial gas plant or other similar public utility, to be con-

structed, or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

Section 4219 of the General Code provides that the council of the village shall fix the compensation of all officers, clerks and employes, except as otherwise provided by law, as follows:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

In exercising its prerogative under authority of said statutes, the council of your village passed and adopted the following ordinance:

"An ordinance to establish a board of trustees of public affairs for the village of Yellow Springs, Greene county, Ohio.

"Sec. 1. Be it ordained by the council of the village of Yellow Springs, state of Ohio, that there be, and there is hereby established in said village a board of trustees of public affairs, who shall be residents of said village. Said board shall consist of three members and shall have all of the powers and perform all of the duties provided and required by law for such boards.

"Each member of said board shall receive for the year next after their appointment the sum of fifty dollars for said year; and thereafter no compensation. Said salary shall be paid quarterly in four equal sums. Before entering upon their duties as such trustees, each member of said board shall enter into a proper bond in the sum of five hundred dollars ($500) to the approval of the mayor of said village.

"Said board shall for the time being be appointed by the mayor, subject to the approval of the council and each of said members shall hold office until their successors are duly and legally elected after their appointment

"Sec. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

"Passed July 16, 1909."

Unquestionably the council has the authority to fix the salary and compensation of said members of the board of trustees of public affairs as provided in said ordinance, to wit, $50.00 for the year next after their appointment, and thereafter no compensation. Said salary or compensation could only mean that the members appointed in the first instance by the mayor shall receive compensation, and said compensation shall be for just the one year after their appointment. It follows, therefore, that members of said board to be elected at subsequent municipal elections shall receive no compensation or salary for the reason that said ordinance does not provide for such salary or compensation.

However, your question does not involve the right of such member to draw a salary as such, but does involve his right to draw a salary by virtue of his being appointed clerk of the board of public affairs of your village. Your question presupposes that the board of public affairs has the right and the authority to appoint one of its members as clerk of its board. This would not be in accordance with the principles of law as I believe them to be, and in support thereof I herewith cite the following authorities:

> "It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office. So that even in the absence of a statutory inhibition all officers who have the appointing power are disqualified for appointment to the office to which they may appoint."—29 Cyc., page 1381.
>
> "A member of the board of health cannot be appointed by the board sanitary policeman and hold both positions at the same time. Such appointment is illegal and void and the party is not entitled to compensation for his services as such sanitary policeman."—State, ex rel., Henry vs. City of Newark, 6 Ohio Nisi Prius, p. 523.

If such member were to be appointed clerk of the board of public affairs it would give him, as such member of the board of public affairs power to vote and possibly the deciding power in the adoption of rules defining his own duties, would invest him with visitorial power over himself and would make him an inspector of his own records, books and also accounts if he should have any. In other words, such appointment would make him a judge over his own cause and this would have the effect of controverting the very checks and safeguards which the law has provided against fraud and peculation.

> "Where a member of the board of directors of a county infirmary was by said board appointed to the office of superintendent of the county infirmary, he still continuing to hold the office of director,
>
> "*Held*, that the duties of the two offices are incompatible and cannot be legally held by the same person at the same time, and such appointment was, therefore, illegal and void."—State, ex rel., vs. Taylor, 12 O. S. 130.

Furthermore, Section 4360 of the General Code, provides as follows:

> "The board of trustees of public affairs shall organize by electing one of its members president. It may elect a clerk, who shall be known as the clerk of the board of trustees of public affairs."

If the legislature had intended to give such board of public affairs authority to elect one of its members clerk of such board it would have said so in the same unmistakable phraseology as was employed in the case of the election of one of its members as president.

Therefore, inasmuch as such member is ineligible to be elected as clerk, he, of course, could not draw a salary as such clerk, and the fact that such ordinance, as above quoted establishing said board of public affairs, provides that they shall not receive any salary as members of said board is not determinative of the question.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

771.

LEVIES FOR INTEREST AND SINKING FUND PURPOSES INCURRED AFTER PASSAGE OF SMITH LAW WITHOUT VOTE OF PEOPLE NOT EXEMPTED FROM LIMITATIONS—ASSESSMENTS CANNOT BE MADE IN EXCESS OF ONE-THIRD OF LOT VALUE EXCEPT UPON PETITION.

Levies for interest and sinking fund purposes incurred after the passage of the Smith law without vote of people, are not exempted from the five-mill, ten-mill, nor the "amount levied in 1910" *limitations of the Smith law with reference to municipal corporations.*

Under Section 3819, *General Code, in the absence of a petition of the kind described in Section* 3836, *General Code, no assessment upon any property can be made which will exceed in amount thirty-three and one-third per cent. of the value of the property after the improvement is made. In case of a petition, under Section* 3836, *General Code, the signers can be assessed without limit, while those who do not sign may not be assessed in an amount exceeding thirty-three and one-third per cent. of the tax value of their lots. In no event, however, can any lots be assessed beyond the extent of the benefit actually conferred.*

COLUMBUS, OHIO, December 17, 1912.

HON. J. R. FITZGIBBON, *Solicitor for the Village of Hartford, Newark, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 30th, in which you request my opinion on the following questions:

> "1. What is the limitation of the Smith law, applicable to a levy by a municipal corporation for interest and sinking fund purposes to discharge an indebtedness created without a vote of the people after the passage of the act?
>
> "2. May an assessment for street improvements, made according to the number of feet front, exceed in the aggregate, as to any one tract of real estate, 33 1-3 per cent. of the value of the tract?"

Answering your first question I beg to state that Section 5649-2, General Code, one of the sections of the so-called Smith one per cent. law, provides very explicitly two limitations upon the amount and rate of taxation which may be levied in the aggregate upon the taxable property in a taxing district, viz.: The amount of taxes levied therein in the year 1910, and a rate of ten mills. From the latter limitation and not from the former certain interest and sinking fund levies are exempted, viz.: Those necessary to provide for indebtedness created prior to the passage of the act, i. e., prior to June 2, 1911, or thereafter by a vote of the people.

Section 5649-3*a* provides certain interior limitations which operate upon the rate which may be levied by a village, for example, for village purposes. The supreme court in the case of State, ex rel., vs. Sanzenbacher, 84 O. S. —, unreported, has held that the interest and sinking fund levies exempt, so to speak, from the ten-mill limitation, are also exempt from these interior limitations.

It is very clear, however, from a reading of the entire Smith law, which is too lengthy for quotation here, that nowhere is there any inference to the effect that sinking fund and interest levies necessary to provide for the indebt-

edness created *after* the passage of the act *without* a vote of the people are exempted, so to speak, from any of the limitations. Such levies, on the contrary, must be made within all the limitations of the law. A municipal corporation, therefore, must make its levies for interest and sinking fund purposes necessary to provide for indebtedness so created, both within the five-mill limit of Section 5649-3*a* and within the ten-mill limit of Section 5649-2, as well as within the 1910 tax limit of the same section.

As to these last two limitations it may also be said that they are concurrent and that the section cannot be construed as authorizing cumulative levies equal to the amount raised in 1910 plus ten mills as suggested in your letter as your view of the same.

Answering your second question I beg to state that it is provided by Section 3819, General Code, that:

> "The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes within a period of five years, to exceed thirty-three and one-third per cent. of the *actual value therof after improvement is made.*"

It is very clear that these limitations apply to all assessments made in the regular way, according to any of the three methods of assessing provided for in Section 3812.

> Pike vs. Commissioners, 36 O. S. 213.
> Hays vs. Cincinnati, 62 O. S. 116.

The only exception to the rule set forth in Section 3818 is that incorporated in Section 3836, General Code, which provides in general that when a petition subscribed by three-fourths in interest of the owners of abutting property, agreeing that the entire cost of the improvement may be assessed against the abutting property, the total cost of the improvement may be divided between the signers and those who fail to sign, the only limitation being, that those who do not sign shall not be assessed an amount exceeding thirty-three and one-third per cent. of the tax value of the land.

These two sections, in my opinion, exhaust the possibilities of proceeding to improve a street by assessment on abutting property. In the absence of a petition of the kind described in Section 3836 no assessment upon any property can be made which will exceed in amount thirty-three and one-third per cent. of the value of the property after the improvement; in case of a petition under Section 3836 the signers can be assessed without limit, while those who do not sign may not be assessed in an amount exceeding thirty-three and one-third per cent. of the tax value of their lots, and in no event, of course, beyond the extent of the benefit specially conferred.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(Miscellaneous)

6a.

WORKMAN'S COMPENSATION ACT—EMPLOYE INJURED OUTSIDE OF STATE MAY NOT SUE EMPLOYER WHO HAS ACCEPTED TERMS OF ACT.

Under Section 1465-57, *General Code, providing for injuries or death "wherever occurring," and Section* 1465-59, *General Code, using the terms "wherever such injuries have occurred," an employe doing the work of an employer who has accepted the terms of the workman's compensation act, who has notice of such acceptance as provided by the act and who is injured in the course of his employment, whilst outside of this state, is not permitted to sue such employer for said injury.*

COLUMBUS, OHIO, January 4, 1912.

THE STATE LIABILITY BOARD OF AWARDS, *Columbus, Ohio.*

GENTLEMEN:—Your favor of November 16, 1911, is received in which you ask an opinion upon the following:

> "We have had frequent inquiries as to whether the act of May 31, 1911 (102 O. L. 524), applies to such employes of an Ohio employer as may, at the time of receiving an injury, be employed outside of the territorial limits of the state of Ohio.
>
> "We have a letter from The Stacey Manufacturing Company, of Cincinnati, the business of which company is manufacturing and installing artificial gas plants, etc., containing such inquiry, which we herewith enclose. This company employs a large number of men, many of whom are engaged outside of the state of Ohio.
>
> "The construction this board has placed upon Sections 20-1 and 20-2 of the act in question is that employes of an Ohio employer injured while engaged in work outside of the territorial limits of Ohio do not come under the provisions of the law. However, the number of inquiries we have received as to this particular question indicates that it is of great importance, and we therefore ask a ruling from your department upon the question."

The letter enclosed states the facts as follows:

> "We have been studying the provisions of Green law and believe that we are ready to take advantage of the act. There are certain features in our business that are not fully covered by this law, for instance, ninety per cent. of all our orders for gas holders, steel water and oil tanks are fabricated here and erected and finished complete in other states by mechanics who are sent from here. Should such employe elect to avail himself of the provisions of this law, be injured while performing work outside of this state, be barred from bringing an action against us?"

Sections 20-1 and 20-2 of the state liability act referred to by you are known as Sections 1465-57 and 1465-58, respectively, of the General Code.

"Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employe, *wherever occurring*, during the period covered by such premiums, provided the injured employe has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employe of his right of action aforesaid.

"Each employer paying the premiums provided by this act into the state insurance fund shall post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such payment; and the same when so posted, shall constitute sufficient notice to his employes of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted."

Section 1465-58, General Code, provides:

"For the purpose of creating such state insurance fund, each employer who employes five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employes in this state, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the state liability board of awards. The said employers for themselves and their employes shall make such payments to the state treasurer of Ohio, who shall receive and place the same to the credit of said state insurance fund. *The premiums provided for in this act shall be paid by the employer and employes in the following proportions, to wit: Ninety per cent. of the premium shall be paid by the employer and ten per cent. by the employes.* Each employer is authorized to deduct from the pay roll of his employes ten per cent. of the said premiums for any premium period in proportion to the pay roll of such employes; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employe showing the amount which has been deducted and paid into the state insurance fund."

Section 1465-59, General Code, provides:

"The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, that have been injured in the course of their employment, wheresoever *such injury has occurred*, and which have not been purposely self-inflicted, or to their dependents in case death has ensued."

In fixing the place where an injury may occur in order to come within the provisions of this act, Section 1465-57, General Code, contains the clause "for injuries or death of any such employe, wherever occurring," and Section

1465-59, General Code, the clause, "that have been injured in the course of their employment, wheresoever such injury has occurred." The question arises, do these provisions grant jurisdiction over injuries which occur without the state, when the contract of employment is made in Ohio, and the employe is working temporarily in another state?

There is no specific provision of the act which grants jurisdiction over injuries occurring without the state. Do the words above quoted grant such jurisdiction?

The liability act creates a state insurance fund for the benefit of injured workmen and their dependents. Section 1465-58, General Code, requires that ninety per cent. of the premiums shall be paid by the employer and ten per cent. thereof by the employe. The act is not compulsory. The employer may or may not accept the provisions of the act. An employe who has notice that the employer has paid the premiums provided for, and remains in the employ of such employer, thereby chooses to accept the provisions of the act.

Upon the acceptance, therefore, of the employer and the employe of the provisions of the act and the payment of the premiums to the state insurance fund, their rights thereto are in the nature of a contract of insurance by which they agree to settle all liabilities for injuries by the provisions of the liability insurance act.

The words "wherever occurring" and "wheresoever such injury has occurred," are inclusive and controlling of the places where such injury may occur. They apply at any location at which the employe may be injured in the course of his employment, whether at the factory or establishment of the employer, or other place.

An employe who accepts the provisions of the liability act and pays his portion of the premiums required, and who is injured in the course of his employment while temporarily without the state is subject to the provisions of said act and is barred from bringing an action for recovery of damages against his employer.

It will be noted further that Section 1465-58 provides "for the purpose of creating such insurance fund each employer who employes five or more workmen or operatives regularly in the same business or in or about the same establishment, and his employes in this state having elected to accept the provisions of this act, shall, etc." Unquestionably the man who contracts in this state with a firm in this state and who receives his orders either mediately or immediately from officers in this state is an employe in this state just as much as special counsel from the attorney general's office on duty in Washington, D. C., acting for the state, is an officer of this state.

The expression "employes in this state" coupled with the expression in Section 1465-67, "for injuries or death of any such employe" wherever occurring, discloses the purpose of the act, and that is, if one be an employe within the state he is to be compensated for an injury wherever occurring. Unless this meant to give him a contract right out of Ohio as well as in Ohio, the expression "wherever occurring" would be mere surplusage. I think that in view of the fact that courts have no extra territorial jurisdiction the provision, "*wherever occurring*," is intended to bring employes in the state within the provisions of the act without reference to where they happen to be engaged at the time.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

32.

TAXES AND TAXATION—RAILROAD COMPANIES AND OTHER PUBLIC UTILITIES—EXCISE AND FRANCHISE TAX—INTRASTATE AND INTERSTATE BUSINESS.

Railroad companies and other public utilities doing business in this state, which have no intrastate earnings are not liable for the minimum excise tax of $10.00 *or for any other tax.*

Such companies are liable, on the other hand, for the annual franchise tax under Sections 106-115 *of the act of May* 31, 1911.

COLUMBUS, OHIO, December 6, 1911.

THE TAX COMMISSION OF OHIO, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 4th, requesting my opinion upon the following questions:

> "(1). Is a railroad company, or other public utility, doing business in this state, which has no intrastate earnings, liable for a minimum tax of $10.00, or any other tax?
>
> "(2). If a railroad company, or other public utility, doing business in this state, which has no intrastate earnings, is, in your opinion, not liable for any excise tax, is it liable for an annual fee as a domestic or foreign corporation for profit under the provisions of Sections 106-115, inclusive, of the act of May 31, 1911?"

The following provisions of the act of May 31, 1911, are of interest in this connection:

> "Section 81. (103 O. L., 244.) Each public utility, except express, telegraph and telephone companies, and street, suburban and interurban railroad and railroad companies, doing business in this state, shall, annually, on or before the first day of August, and each street, suburban and interurban railroad and railroad company, shall, annually, on or before the first day of September, * * * make and file with the commission a statement * * *
>
> "Section 83. In the case of each railroad company, such statement shall also contain the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending the thirtieth day of June next preceding, from whatever source derived, for business done in this state, including therefrom all earnings derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state.
>
> "Section 88. On the first Monday of October, the commission shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such railroad company for such year.
>
> "Section 97. In the month of November, the auditor of state

shall charge for collection, from *each railroad company*, a sum in the nature of an excise tax, *for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the commission, as the gross earnings* of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking four per cent. of all such gross earnings, which tax shall not be less than ten dollars in any case.

"Section 129. An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act * * * shall not be subject to the provisions of Sections 106 to 115, inclusive, of this act" (which said Sections 106 to 115, inclusive, provide for the payment of annual fees by domestic and foreign corporations for profit).

Upon a consideration of the excise tax sections above quoted, it is reasonably clear to me that the intention of the legislature is to tax the privilege of carrying on intrastate business; whether because of supposed constitutional difficulties or other reasons, the legislature has expressly avoided the semblance of taxing the privilege of doing an interstate public utility business. Therefore, while in my opinion every railroad company in the state must file a report with the commission so as to disclose whether or not any of its earnings are from intrastate business, and while Section 97, above quoted, provides that the auditor shall charge for collection "from each express and telegraph company a sum in the nature of an excise tax," yet, I am of the opinion that when it is ascertained that the railroad company is not exercising the privilege of carrying on intrastate business in this state, the auditor of state may not lawfully charge the minimum tax of $10.00 against said company.

In my opinion, however, a public utility which does a purely interstate business in the state of Ohio is required to pay the franchise tax imposed by Sections 106 to 115, inclusive, of the act of May 31, 1911. Exemption from this franchise tax, which is by Sections 106 and 110 of the act made in terms applicable to all domestic and foreign corporations, is extended to certain corporations by Section 1129 above quoted. This exemption, however, is accorded only to companies owning and operating a public utility and as such required to file reports with the tax commission and pay excise taxes upon their gross earnings or gross receipts.

Companies like those under consideration are owned and operated as public utilities in this state and are required by law to file reports with the tax commission, but they are not required to pay an excise tax upon the gross earnings—one of the elements necessary in order to qualify a company for exemption under Section 129 is therefore missing.

For all of the above reasons, which I have stated very briefly, I am of the opinion that railroad companies or other public utilities doing business in this state, which has no intrastate earnings, are not liable for the minimum excise tax of $10.00 or for any other excise tax, but that such railroad company or companies is liable for the annual franchise tax exacted under Sections 106 to 115, inclusive, of the act of May 31, 1911.

Although I have only quoted those sections relating to railroad companies, the above conclusion applies as well to other public utilities similarly situated as to railroad companies.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

491.

SMITH ONE PER CENT. LAW—FUNDING INDEBTEDNESS—RELIEF FROM LIMITATIONS BY GOOD ROADS DISTRICTS AND SCHOOL DISTRICTS.

When a good roads district formed from adjacent townships, under authority of Section 7095, et seq., General Code, by virtue of a bond issue becomes pressed by the limitations of the Smith law, its indebtedness may be extended, under Sections 7134-7136, General Code.

For relief against the Smith law limitation, a school district may:

First—Be favored by the budget commission as against other taxing districts, by failing to give other taxing districts levying within the school district territory, an amount equal to what they received in 1910, plus six per cent.

Second—By borrowing money from month to month, under Section 5656, General Code, to meet the salaries of teachers and other employes.

Third—By receipt of state aid to the amount of $40.00 per month for each teacher employed.

Fourth—By changing the boundaries of the school district by annexation and detachment of territory.

COLUMBUS, OHIO, July 3, 1912.

HON. RALPH BEARD, *Prosecuting Attorney, Youngstown, Ohio.*

MY DEAR SIR:—I beg to acknowledge receipt of your letter of June 27th, requesting my opinion upon the following questions:

> "1. Suppose that a good roads district has voted to issue bonds, which were not to become due until 1912, that is, the principal—that the payment of that principal by the 1910 levy would bring a total for taxes within that district greater than what was received in 1910, plus the six per cent. interest. How can the same be taken care of?
>
> "2. In a school district which has grown much more rapidly than the laws make provision for, and the school enumeration is about double what it was in 1910, and consequently the expense of maintaining the schools is about double, and the amount of taxes necessary for taking care of the schools will exceed the 1910 limitation; how can we take care of the excess? In this district, the teachers receive more than forty dollars per month, which puts them outside of the state aid."

I find that I cannot answer your first question unequivocally, because I do not know what you mean by the term "good roads district." This term might be used to designate several separate and distinct taxing districts provided for in the statutes. If, as seems most natural, you mean thereby to designate the good roads district formed from adjacent townships under authority of Sections 7095, et seq., General Code, I beg to call your attention to Section 7134 to 7136, inclusive. These three sections provide completely for the extension of the indebtedness of such a road district, and afford a convenient and efficacious method of keeping within the limitations of the Smith law, and at the same time providing ultimately for the payment of the indebtedness without necessitating the cutting down of levies for the current needs of the other taxing districts affected thereby.

Of course, if you do not refer to the road districts created under authority

of the above mentioned sections, the above advice does not apply at all. In that event, I should prefer a further and more definite statement of facts from you before venturing to express an opinion.

In answer to your second question I beg to suggest the following possible methods of relieving the school district, concerning which you inquire therein, and at the same time keeping within the limitations of the Smith law:

First—By failing to give the other taxing districts levying within the same territory as the school district an amount equal to what they received in 1910, plus 6 per cent. While this seems to contravene the rule enunciated by the supreme court in the case of State vs. Sanzenbacher, I am satisfied that a strictly proportionate reduction is out of the question, and that the budget commission may lawfully take into consideration the needs of the various taxing districts in reducing any or all budgets so as to enforce the limitation measured by the 1910 taxes. You will observe that this limitation is not upon the amount that may be levied *by* a taxing district, but upon the amount that may be levied *in* a taxing district by all the authorities levying therein. (See Section 5649-2, General Code.)

Second—By borrowing money under Section 5656 to meet the salaries of teachers and other employes of the board. This, you will observe is possible only from month to month as the salaries become due, because an indebtedness funded under this section must be a valid, legal and existing indebtedness before the power to borrow arises. Such claims are, by virtue of Section 5661, of the General Code, legal charges against the district, in the absence of a certificate that the money is in the treasury, etc., as otherwise provided by Section 5660. This action, of course, could not be taken by the budget commission, but the commission might take the possibility thereof into consideration in fixing the amount of the budget for the school district.

Third—By receipt of state aid. I enclose two opinions upon this subject, one of which is to the effect that the school district may receive state aid to the extent of $40.00 per month for each teacher, although some teachers receive more than that amount; and the other of which explains the application of the Smith one per cent. law to the weak school district law.

Fourth—By changing the boundaries of the school district by annexation and detachment of school territory, as provided by law, so that all the territory within the present boundaries of the school district will be apportioned among taxing districts that will be able to take care of the needs thereof within the limitations of the Smith law.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

555.

BAKESHOPS—REGULATION OF—CODIFICATION OF STATUTE—CLEAR CHANGE OF MEANING—CONSTITUTIONAL LAW.

The codifying commission through Section 1012 of the General Code, providing for the sanitary construction of bakeshops and prohibiting the use of cellars for the same has changed the requirements of the original Section 4364-71, R. S. Since, however, the language of said section is unmistakable the apparent meaning will control and its provisions will govern all bakeshops including those in existence prior to the change of the statute.

The constitutionality of the statute has been passed upon by the common pleas court and until such decision is reversed, it should be allowed to control. Notice before prosecution to offenders against the law is advised, however.

COLUMBUS, OHIO, July 29, 1912.

HON. THOMAS P. KEARNS, *State Inspector Workshops and Factories, Columbus, O.*

DEAR SIR:—You inquired of me verbally as to whether you should proceed against proprietors of bakeshops which were in operation at and prior to the time of the adoption of Section 1012, General Code, as codified.

Section 1012, General Code, is as follows:

> "All bakeries shall be drained and plumbed in a sanitary manner and provided with such air shafts, windows or ventilating pipes, as the chief inspector of workshops and factories or a district inspector directs. No cellar or basement shall be used as a bakery."

Your inquiry whether or not you should proceed is due to the claim made by some of those affected to the effect that Section 1012 of the General Code does not apply to proprietors of bakeshops in existence at the time of the adoption of the General Code, these proprietors basing the claim on the fact that said section before condification excepted cellars and basements then in use as bakeries.

The original act is found in Ohio laws, Volume 93, page 159. I do not deem it necessary to recite any of said act. It is found in Revised Statutes, Section 4364-71.

The first question that arises is, was it intended by the legislature to change the meaning of Section 4364-71, Revised Statutes, when Section 1012 of the General Code was adopted. I believe that it was the intention of the legislature to completely repeal said Section 4364-71, of the Revised Statutes and to substitute in lieu thereof Section 1012 of the General Code, and that the latter section means just what the language used therein clearly indicates without any reference to previous enactments. I quote from the case of Allen vs. Russell, 39 O. S., page 336, as follows:

> " 'But where all the general statutes of a state, or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have

been changed. * * * *Of course, if it is clear from the words that a change in substance was intended, the statute must be enforced in accordance with its changed form.'*

"There is quite a difference between code of laws for a state and a completion in revised form of its statutes. The code is broader in its scope, and more comprehensive in its purposes. Its general object is to embody as near as practicable, all the law of a state, from whatever source derived.

"When properly adopted by the law making power of the state, it has the same effect as one general act from the legislature, containing all the provisions embraced in the volume that is thus adopted. It is more than evidentiary of the law. It is the law itself."

Georgia Central R. R. Co. vs. State, 104 Ga. 831-841. 42 L. R. A. 518.

In addition to the authorities cited in support of this view I beg further to advise that I conferred with Hon. James E. Campbell and Hon. L. C. Laylin, two members of the codifying commission, and they both recall the codification of this particular statute and advise that it was the intention of the codifiers to leave no exceptions to Section 1012 of the General Code; that it was intended to make the section complete in itself. They inform me, too, that they explained this change to the legislative committee and said committee acted with full knowledge of the change intended; that the change was made largely at the instance of those who were charged with the enforcement of the former section, finding the same unsatisfactory and difficult of enforcement and rather an impracticable statute.

Further in support of this view is the decision of the common pleas court of Hamilton county, Ohio, which is to be found in the case of Joseph Benhardt vs. Edward Wise, constable, found in Ohio Law Reporter of June 10, 1912, page 545. The opinion of the court (Gorman judge) is as logical as it is lucid and explains clearly the intention of the legislature in enacting Section 1012 of the General Code, and discloses the purpose of such change.

As to the constitutionality of the statute, the opinion of the court in the same case completely answers all questions fairly to be made against the constitutionality of the statute and leaves no room for other than its rigid enforcement. I attach great importance to the opinion of Judge Gorman upon the question of the constitutionality of the statute, because he says that his first impression as to its constitutionality were to the contrary, but that after consideration of the case he is entirely satisfied with the validity of the statute. This court is the only one that has yet passed upon the constitutionality of the act, and in my judgment it becomes your duty when an act is held valid by the common pleas court to enforce it until reversed by a higher court.

In view of the fact that the case referred to has been treated by this department up to the present as a test case, and we think under all circumstances properly so, and in further view of the fact that this was doubtless so understood, at least in Hamilton county, I would suggest that you give notice of your intention to cause arrests to be made of all those who violate the section on and after a certain day to be determined by yourself.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

663.

JUDGE OF COMMON PLEAS COURT—VOTES CAST FOR CONGRESSMAN NOT INVALIDATED BY CONSTITUTION—STATE AND FEDERAL CANDIDACY DISTINGUISHED—CONSTITUTIONAL LAW.

The language of Art. IV, Section 14, of the Constitution of Ohio, prohibits judges of the supreme court and of the common pleas court to hold any other office under the authority of the state or of the United States.

Said provision also makes void all votes cast in behalf of such judicial officers for any elective office under the authority of this state, but does not invalidate votes cast for an office of the federal government.

A common pleas judge, therefore, is not required to resign in order that he may receive votes for the position of United States congressman.

COLUMBUS, OHIO, October 11, 1912.

HON. WARREN GARD, *Judge of the Common Pleas Court, Hamilton, Ohio.*

DEAR SIR:—I am in receipt of your letter of October 9, 1912, stating that your term as common pleas judge does not expire until January 1, 1913, that you are a candidate for congress in the third congressional district, and asking whether it is necessary for you to resign as common pleas judge before the election to be held on November 5, 1912, in order that the votes cast for you as candidate for congress may not be void.

I considered this question in a conference with Secretary of State Graves a few days ago, and we both at that time came to the conclusion that it would not be necessary for you to resign. Since receiving your letter I have given the matter further attention and feel confident that my first view was correct.

The question arises on account of the constitutional provision of Section 14, Article IV. This section, for the purposes of the question, may be paraphrased as follows:

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

The last sentence of this section was added to the provisions as they originally stood in Section 8 of Article III of the Constitution of 1802. In the limited time at my disposal in which to consider the matter, I have been unable to find any authorities bearing directly upon it, and therefore it seems to me that it must be decided by construing the language used in the constitution.

The first provision is clear, "*No judge of the supreme court or court of common pleas can hold any other office of profit or trust under the authority of this state or of the United States.*" But it must be noticed that in the following sentence the words "or of the United States" are omitted, and the provision simply reads,

> "All votes for either of them for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people, shall be void."

The only office referred to is an office under the authority of this state, and it would seem, as the words "or of the United States" are used in the preceding sentence to designate additional offices which a judge of the common pleas or supreme courts cannot hold, and as these words are omitted in designating the offices for which a candidate cannot have votes counted if he occupies the position of judge of the supreme court or the court of common pleas, that the prohibition does not extend to any offices except those under the authority of this state. The question therfore is, *Is the office of member of congress of the United States an office under the authority of the state of Ohio?*" Clearly it is not. The office is created by the Constitution of the United States; the qualification of its members are prescribed by the Constitution of the United States; and while by the Constitution of the United States authority is given to the respective states to provide for the time, place and manner of holding elections for senators and representatives, the power is reserved to congress to at any time make or alter such regulations except as to the places of choosing senators (Section 4, Article I, United States Constitution).

My opinion, therefore, is that there is no constitutional inhibition against a person holding the office of judge of the supreme court or of the common pleas court in Ohio becoming a candidate for the congress of the United States, and having all votes cast for him counted, but that in case of election thereto, such person must resign one of the offices before he can qualify for the other.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

730.

SENTENCE OF MURDER BY JUDGE UPON CONFESSION IN OPEN COURT —POWER OF COURT TO SENTENCE FOR LIFE INSTEAD OF DEATH WHEN EVIDENCE SHOWS FIRST DEGREE.

Section 13692, *General Code, providing that when the offense charged is murder and the accused is convicted by confession in open court, the court shall examine the witnesses, determine the degree of the crime and pronounce sentence accordingly, is intended primarily to permit the judge to decide not only the technical degree of the crime, but also its general nature, and includes the right of the judge to exercise the power to determine whether mercy ought to be recommended.*

The court is empowered by said statute, therefore, to make the punishment life imprisonment instead of death when it finds the crime to be murder in the first degree and deems it worthy of a recommendation of mercy.

COLUMBUS, OHIO, November 25, 1912.

HON. W. H. MIDDLETON, *Judge Court of Common Pleas, Waverly, Ohio.*

DEAR JUDGE:—I have your favor of the 20th inst., asking my opinion on the following question:

> "Where a defendant, under the provisions of Sec. 13692, G. C., confesses in open court to the crime of murder, the indictment being for murder in the first degree, and the court examines witnesses to

determine the degree of crime, has the court any authority, under the provisions of Sec. 12400, G. C., to fix the punishment at imprisonment in the penitentiary for life if the court determines the degree of crime to be murder in the first degree?"

Section 12400 General Code provides as follows:

"Whoever, purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree and shall be punished by death *unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life.*"

Section 13692 of the General Code, provides as follows:

"Upon an indictment, the jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it, if such attempt is an offense at law. When the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged and guilty of an inferior degree thereof. If the offense charged is murder, and the accused is convicted by confession in open court, the court shall examine the witnesses, determine the degree of the crime and pronounce sentence accordingly."

After a confession of the accused in open court the duty of the court seems to be limited to the examination of witnesses, the determining of the degree of crime and pronouncement of sentence accordingly. The real question is, therefore, as to the jurisdiction of the court in determining the degree of crime, whether in that connection the court is warranted in finding the accused entitled to a recommendation for mercy.

Although I have made diligent search I find no record of any opinion of the courts in any reported case. The adjudications and references to similar cases seem to hinge on the constitutionality of the statutes similar to Section 13692 of the General Code, but the opinions of the courts in these cases show a line of reasoning that is instructive.

The court, speaking through Mason, chief justice, in the case of McCauley vs. United States, Morris' Iowa Reports, Vol. 1, page 486, say:

"The statute declares 'that in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder or manslaughter, and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court to determine the degree of the crime, and shall pronounce sentence accordingly.' It appears that in the present case, on the trial below, after the testimony on the part of the prosecution had closed, the then defendant withdrew his plea of not guilty and pleaded guilty to the indictment, and was thereupon sentenced to be hung. Nothing appears on the record showing that witnesses were examined by the court after he had pleaded guilty, or that the court in any manner decided whether the offense were murder or manslaughter, as contemplated by the statute. This we think was an error.

"Had the trial before the jury proceeded and a general verdict of

guilty alone been rendered, it would have been clearly defective. The general plea of guilty only stands in the place of such a general verdict, and was so intended by the legislature. The law seems to regard manslaughter as a species of murder. On an indictment for the higher offense, a conviction may take place for the lower; neither a general verdict or a general plea of guilty is permitted where murder alone is charged in the indictment, but an enquiry and decision as to the more precise nature of the offense are rendered necessary. That enquiry and decision should appear of record."

The instructive feature of the foregoing opinion so far as the present matter is concerned is this: On indictment for a higher offense a conviction may take place for the lower; neither a general verdict or a general plea of guilty is permitted where murder alone is charged in the indictment, *but an inquiry and decision as to the more precise nature of the offense are rendered necessary.*

I have used this opinion not that it throws any light on the Ohio law, with which you are familiar, but because of the clear method of expression in this opinion as to the reason for the inquiry by the court. The law of Iowa on the subject seems in all particulars the same as that of Ohio. At this point I am clearly of the belief that the purpose of the statute is not limited to the mere fixing of the degree of the crime, such as murder in the first degree, murder in the second degree, manslaughter, etc., although, of course, this is necessary and its main feature. The inquiry and decision, as said, are for the purpose of ascertaining the more precise nature of the offense. In other words, the court takes the place of the jury for all purposes in the statutes and not for a part of the purposes. Section 12400, General Code, authorizes the jury to recommend mercy, and in case the jury recommends mercy punishment shall be imprisonment in the penitentiary during life. The assault on the constitutionality of these statutes authorizing open confession is amongst other things based on the deprivation of the right of the judgment of the jury. They have been upheld on the theory that men of sound mind may confess all the facts that a jury is called upon to inquire into, and it seems to me that if the court were denied the right to exercise any power which the jury might exercise and inquire into the nature of the offense good arguments would exist for the unconstitutionality of such statutes, and, therefore, every intendment is in favor of the proposition that a court in ascertaining the degree of the crime may consider whether or not the accused is entitled to the recommendation for mercy.

Since writing the foregoing I called upon Judge Evans of the common pleas bench of Franklin county, because I recollected that a man by the name of Castor, who killed a policeman some few years ago, entered a plea of guilty to murder in the first degree, and Judge Evans imposed the death penalty on him. The case was carried to the supreme court and the judgment of Judge Evans was affirmed. I inquired of the judge whether when he imposed the death penalty he considered the question you submit, and he advised me that while he gave the matter some consideration he imposed the death penalty because the case was one not calling for a recommendation, but he advised me that recently a similar case was before Judge Bigger of the common pleas court here, the case being that of The State of Ohio vs. Miner Anderson, and that Judge Bigger held that it unquestionably was the spirit of our statutes to give the common pleas judge the right to recommend mercy in his findings, and accordingly he made such a recommendation and imposed sentence of imprisonment for life. Prosecutor Turner advised me that the case came up during his term of office and that Judge Bigger made the ruling which I have described, and that

Judge Bigger had followed a precedent set some years ago by Judge Dillon in a similar case.

I will forward to you within the next few days the form of journal entry used by the court here which may save you some labor and be of some assistance to you in case you should impose the sentence of life imprisonment on the with all the laws of Ohio. As to foreign insurance companies, this compliance accused in the case you are to pass upon. The opinions that I have gone over here disclose the importance of the journal entry showing the action of the court in respect to his conclusions.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

571.

INMATES OF STATE INSTITUTIONS—CHARGE FOR KEEPING BECOMES PAYABLE FROM TIME PERSON BECOMES INMATE AND FROM TAKING EFFECT OF LAW.

The charge made by the state for the care and keeping of a patient in a state institution begins when the person becomes an inmate.

Under 1815-4 *of the General Code, the same charge for inmates being cared for at the time of the passage of this law became payable from May* 2, 1910, *i. e., the day when the act became a law.*

COLUMBUS, OHIO, July 23, 1912.

HON. S. G. MCADOO, *Probate Judge, Ashland, Ohio.*

DEAR SIR:—Your communication dated July 11, 1912, in which you request my opinion upon the following questions:

> "Under Section 1815 of the General Code, supplemented by 1815-4, does the charge made by the state for the care and keeping in a state institution begin when the patient is admitted or when his father, mother or guardian are notified?"

Second:

> "If the patient was an inmate of a state institution at the time this act became a law would the charges for his care begin when the act became a law or not until his father, mother or guardian were notified?"

was duly received, and in reply to your first question I desire to say that Section 1815-9 provides as follows:

> "It is the intent of this act that a husband may be held liable for the support of a wife *while an inmate* of any of said institutions, a wife for a husband, a father or mother for a son or daughter, and a son or daughter, or both, for a father or mother."

and under said section, just above quoted, there can be no question but what the liability attaches from the time the person becomes an inmate of any of said institutions of the state.

In answer to your second question I desire to say that I am of the opinion that under Section 1815-4 any person liable under the act referred to in your inquiry would become liable at the time the act became a law, and not at the time the father, mother or guardian was notified, because the section last above referred to provides, in part, as follows:

> "An order shall be issued to the persons who are determined liable for such payment, requiring them to pay monthly, quarterly or otherwise, as may be arranged, to the board such amount as it or the committee shall deem proper, but no order shall be issued compelling payment for the care of an inmate prior to May 2, 1910."

This section became effective on May 2, 1910, and it was the intent of the legislature that the liability should attach to all inmates of institutions at that time, but no charge should be made for the care or maintenance of any such inmates prior to said date.

Therefore, I am of the legal opinion that charges for the care of such inmates would date back to the time when the act became a law, although the father, mother or guardian were not notified until later.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

772.

TAXES AND TAXATION—COLLATERAL INHERITANCE TAX—EXEMPTION DOES NOT APPLY UNLESS CHILD RECOGNIZED AS ADOPTED HAS BEEN DECLARED A LEGAL HEIR—TAXATION OF SHARES OF STOCK IN FOREIGN INSURANCE COMPANY—EQUITABLE LIFE INSURANCE COMPANY—LISTING AT THE RESIDENCE OF SHAREHOLDER.

Under Section 5331, *General Code, the exemption from the collateral inheritance tax therein provided for, cannot apply to a devise to a person recognized as an adopted child, unless such child has been made a legal heir by the declaration before the probate court provided for in Section* 8598, *General Code.*

By virtue of Section 192, *General Code, a shareholder in a foreign corporation, two-thirds of whose property is taxed in Ohio and the remainder in another state or states, is not obliged to list his shares of stock in Ohio provided, "such corporation, as a fee for the privilege of exercising its franchise in Ohio, pays annually the same percentage upon its entire authorized capital stock that is required by law to be paid by a domestic corporation on its subscribed or issued capital stock."*

This proviso, however, is intended simply to incorporate the principle that a foreign corporation whose stock is entitled to exemption of two-thirds of its property is located in this state, must be one which has complied with all the laws of Ohio. The report and taxes paid by insurance companies supplies this requirement and if it can be shown therefore that two-thirds of the property of the Equitable Life Insurance Company is located in Ohio, and the balance taxed in other states, shares of stock in such company need not be listed in Ohio.

Otherwise, such shares must be listed under Section 5371, *General Code, in the taxing district in which the owner of the stock resides at the time of listing.*

COLUMBUS, OHIO, November 12, 1912.

HON. GEORGE M. HOKE, *Probate Judge, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 2, in which you request my opinion upon the following questions:

> "1. A lady takes a child, not related to her by blood or otherwise, to raise; she always regarded her and spoke of her as her *adopted* daughter, although there never was a legal adoption; on her death, she gives by will, all of her estate to this lady she had taken to raise and whom she always regarded as her adopted daughter. Is the property so devised to this supposed adopted daughter subject to the collateral inheritance tax, as provided in Section 5331, General Code?
>
> "2. A resident of this state owns some of the stock of the Equitable Life Insurance Company of New York, or, let us say, stock of any foreign company; should he list this stock for taxation in Ohio, and is it subject to taxation in this state and in the county in which he resides?"

Section 5331, General Code, contains the provision which governs your first question; it is, in part, as follows:

> "All property within the jurisdiction of this state * * * which pass by will or by the intestate laws of this state * * * to a person in trust or otherwise, other than to or for the use of the father, etc., * * * adopted child, *or person recognized as an*

adopted child, and made a legal heir under the provisions of a statute of this state * * * shall be liable to a tax * * *"

It will be observed that this provision is very explicit. While it withholds the application of the inheritance tax from devises to persons recognized as adopted children of the decedent, yet, the manner of the recognition must be as specified therein. In this respect the statute of Ohio is more strict than those of certain other states; for example, the New York statute of 1892 exempted from the collateral inheritance tax property passing to "any person to whom any such decedent, for not less than ten years prior to such transfer, stood in the mutually acknowledged relation of parent." Under such statute, of course, it was not necessary to show any formal act or proceeding, in order to entitle the taker of the estate to the classification of direct descendent.

The reference in Section 5331, supra, to "a person recognized as an adopted child and made a legal heir" is, evidently, to the proceeding provided for in Section 8598, General Code, which is, in part, as follows:

> "A person of sound mind and memory may appear before the probate judge of his county, and in the presence of such judge and two disinterested persons of his or her acquaintance, file a written declaration, subscribed by him, which must be attested by such persons, declaring that, as his or her free and voluntary act, he or she did designate and appoint another, naming and stating the place of residence of such person specifically, to stand toward him in the relation of an heir-at-law in the event of his or her death. * * * Thenceforward the person thus designated will stand in the same relation, for all purposes, to such declarant as he or she could, if a child born in lawful wedlock. The rules of inheritance will be the same, between him and the relations by blood of the declarant, as if so born; and a certified copy of such record will be prima facie evidence of the **fact stated therein, and** conclusive evidence, unless impeached for actual fraud, or undue influence."

While very little formality is required by this statute, it is essential that a declaration of some sort be made before the probate court, in writing, attested as therein prescribed. Bird vs. Young, 56 O. S. 210. This proceeding is separate and distinct from that of adoption as such; it has the effect of making the recognized heir capable of inheriting from the person making the declaration. This, however, of itself, would not be sufficient to render devises to the designated heir, or other inheritances by him, from the declarant, exempt from the collateral inheritance tax. Dos Passos on Inheritance Tax Law, Section 37, page 123; State vs. Hunnewell, 3 O. L. Rep. 52.

In other words, the question of inheritance, whether direct or indirect, within the ordinary acceptation of those terms, is quite distinct from the question of exemption from the collateral inheritance tax, although the phrase "collateral inheritance" is used to describe the tax in a general way. The words of Section 5331 will be taken in their ordinary and plain signification, and, especially in the absence of any tax upon direct inheritance, the statute will be construed, if at all, most strongly against any exemption which may be claimed.

Upon these principles, then, a mere mutual recognition, on the part of a decedent and a devisee, during the lifetime of the former, of the relation of parent and adopted child is insufficient to render the devise exempt from the collateral inheritance tax. Formal adoption, in the complete sense of the word,

is not necessary, in order to create an exemption, but the very least act which will have that effect is the proceeding provided by Section 8598, supra.

Answering your second question, I beg to refer you to the cases of Bradley vs. Bauder, 36 O. S. 28; Lee vs. Sturgis, 46 O. S. 153; Sturgis vs. Carter, 114; U. S. 511; Worthington vs. Sebastian, 25 O. S. 1, and Hubbard vs. Brush, 61 O. S. 252, all of which relate to the construction and application of the last sentence of what is now Section 5372, General Code. Succinctly stated, these cases are to the effect that if all of the property of a foreign corporation is taxed in Ohio, the owner of its shares need not list them for taxation here, but that if anything less than all the property of the corporation is taxed in Ohio, the shares, being separate interests, must be listed in Ohio.

This rule, however, has been, subsequently to the original enactment of what is now Section 5372, General Code, and its interpretation in these decisions, substantially changed, by the adoption of what is now Section 192, General Code, which is as follows:

> "No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation, if the holder thereof furnishes satisfactory proof to the taxing authorities that at least two-thirds of the property of such corporation is taxed in Ohio and the remainder is taxed in another state or states, provided such corporation, as a fee for the privilege of exercising its franchise in Ohio, pays annually the same percentage upon its entire authorized capital stock that is required by law to be paid by a domestic corporation on its subscribed or issued capital stock."

This last quoted section furnishes a complete rule by which your second question may be answered. If the Equitable Life Insurance Company of New York, has two-thirds of its properly in Ohio, and the remainder in some other states, and all of such property is taxed in the several states in which it is located, and satisfactory proof of these facts can be furnished to the taxing authorities, by the owner of its stock, then, the stock need not be listed; otherwise, the stock constitutes an investment and must be listed by its owner in Ohio.

The only serious question which arises here is that which is raised by the last proviso of the above quoted Section 192, General Code. Foreign insurance companies are not required to pay a fee for exercising the corporate franchise in Ohio, originally, or to pay annual fees for the continued exercise of the franchise in this state (See Sections 188 and 5518, General Code). I am of the opinion, however, that this proviso is intended simply to incorporate the principle that a foreign corporation, whose stock is entitled to exemption if two-thirds of its property is located in this state, must be one which has complied with all the laws of Ohio. As to foreign insurance companies, this compliance is effected by filing certain reports with the superintendent of insurance and paying certain taxes thereon, and not by paying a franchise tax upon the entire authorized capital stock.

Inasmuch, however, as I imagine that it cannot be shown that two-thirds of the property of the Equitable Life Insurance Company is located in Ohio, I do not apprehend that the question which I have just discussed will arise; and I suspect that, upon the principles laid down, the stock is clearly taxable.

Section 5371, General Code, provides explicitly for the place of taxation of

property of this kind. As will be observed, by consulting that section, such property should be returned for taxation in the taxing district in which the owner of the stock resides at the time of listing.

Very truly yours,
TIMOTHY S. HOGAN
Attorney General.

690.

AUTOMOBILES—DEALERS WHO HIRE OUTCARS FOR DEMONSTRATION MUST PAY SEPARATE LICENSE FOR EACH CAR SO LET OUT FOR HIRE.

Under Section 6301, *General Code, which provides a registration fee of* $10.00 *for each make of motor vehicle manufactured or dealt in and requires each individual car of such make to carry a general registration number assigned for such make, until the vehicle is sold or "let for hire," a company which deals in machines but contracts for demonstration services prior to sale, must separately register number and license all cars "hired out" for such demonstration purposes, as provided by Sections* 6294, 6298 *and* 6300, *General Code.*

COLUMBUS, OHIO, October 26, 1912.

HON. J. A. SHEARER, *State Registrar of Automobiles, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 18, 1912, wherein you state:

> "I am enclosing herewith to you some correspondence had with the Fischer Auto & Service Co., Cincinnati, O.
>
> "In reply to their letter of the 8th inst., I mailed to them copy of an opinion by Attorney General U. G. Denman, dated July 13, 1910, holding that dealer's registration tags could not be used upon motor vehicles operated in the taxi cab or livery business, a copy of which opinion is herewith enclosed to you.
>
> "From the letter of the Fischer Auto & Service Co., of the 14th inst., which is herewith enclosed, you will note that they do not think the opinion of Attorney General Denman will apply in their case, with reference to operating motor trucks, which you will note from their letter of the 8th inst., herewith enclosed, is for both pleasure and business purposes.
>
> "In their letter of the 14th inst., they request that this correspondence be submitted to you for an opinion, which, at their request, I am now doing, having notified them accordingly."

The correspondence discloses that the Fischer Auto & Service Co. is a dealer in motor pleasure cars and trucks, and that in order to convince prospective customers of the merits of its goods, has established a series of demonstrations of trucks, for which a fixed contract price is charged. Upon request said company submitted additional facts relative to the nature of its contract, as follows:

> "1. Certain machines of a particular make are used for demonstration purposes solely and a different machine of the same make is later sold to the prospective purchaser unless it so happens that the machine with which demonstration is made is adaptable to

the needs and purposes of the prospective purchaser, in which event the sale price is fixed accordingly as explained in the following answer:

"2. Contract price for a demonstration is deducted from the purchase price of the machine only where the same machine under demonstration is sold and where demonstrations are not limited to a day or two. The demands for the various bodies in different businesses and individual tastes will make it possible only occasionally to sell demonstrating truck to prospective purchaser."

The contention of this company is that it has the right to use the numbers assigned to it as a dealer on the motor vehicles used for demonstration purposes, pursuant to the arrangement described above.

The law regulating the registration of motor vehicles is found in Sections 6290 to 6310, inclusive, of the General Code.

Section 6294 requires that every owner of a motor vehicle, operated or driven upon the public road or highways of the state shall, annually, before January 1, of each year, cause to be filed in the office of the secretary of state an application for registration for the following year, accompanied by a registration fee of $5.00 for each gasoline or steam motor vehicle, and $3.00 for each electric motor vehicle. When this is done the secretary of state is required, by Section 6298, to assign to such vehicle a distinctive number, and issue to the owner thereof a certificate of registration and two placards having printed thereon such distinctive number in the manner prescribed by Section 6300, which placards must be displayed on the front and rear of the motor vehicle.

Section 6301 provides that a manufacturer or dealer shall pay a registration fee of $10.00 for each *make* of motor vehicle manufactured or dealt in, whereupon the secretary of state is required to assign to each *make* so manufactured or dealt in a distinctive number, which must be carried and displayed on each motor vehicle while it is operated on the public highway, and until it is "sold *or let for hire.*"

The facts submitted to me conclusively show, in my judgment, that the arrangement whereby the Fischer Auto & Service Company make a charge for the demonstration of its machines constitutes a letting thereof for hire, within the meaning of Section 6301, General Code; and, accordingly, I am of the opinion that machines, when a charge is made for their use, should be separately registered.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

740.

PAROLE OF PRISONERS BY BOARD OF ADMINISTRATION—RELEASE MUST BE COMPATIBLE WITH WELFARE OF SOCIETY.

The words of Section 2172, General Code, providing that the judgment of the board of administration, in granting parole to a prisoner shall be based upon the "record and character of the prisoner as established in the penitentiary" are directory merely and not mandatory, and such language is subservient to and must be controlled by the further requirement of the same statute, to the effect that a prisoner shall not be released on parole unless in the judgment of the board his release "will not be incompatible with the welfare of society."

COLUMBUS, OHIO, November 22, 1912.

HON. H. R. PROBASCO, *Attorney-at-Law, Cincinnati, Ohio.*

MY DEAR SIR:—Your letter of September 13th, relating to the matter of the application of Charles L. Warriner, a prisoner confined in the Ohio penitentiary, made to the Ohio board of administration for parole, together with copies of letters written by you and received by you from said board, was duly received.

I apprehend you are aware of the fact that it is a rule of this department not to advise individual citizens or attorneys-at-law relative to matters pertaining to the action taken by any board or state officer, but I am extending the courtesy to you as attorney for Mr. Warriner of expressing to you my views in construing Section 2172 of the General Code, which reads as follows:

> "A prisoner shall not be released upon parole either conditionally or absolutely, unless, in the judgment of the board of managers, his release will not be incompatible with the welfare of society. Such judgment shall be based upon the record and character of the prisoner as established in the penitentiary."

For the reason that I am confident that should I fail to give you my opinion on this matter, the board of administration would ask for the same, I, therefore, deem it not only a courtesy but a saving of time to give you my opinion.

I cannot agree with your views upon the subject as I believe that in the enactment of the latter clause of said section by the legislature, which reads, "such judgment *shall* be based upon the record and character of the prisoner as established in the penitentiary," it was the intention of the legislature to vest a discretionary power in the board of managers, now the board of administration as its successor, in relation to forming its judgment, as the whole section must be read together and no prisoner shall be released upon parole either conditionally or absolutely *unless* in the judgment of the board of managers his release will not be incompatible with the welfare of society, and the words of the latter clause referred to in said section are, in my opinion, affirmative and relate to the manner in which the power or jurisdiction vested in said public board is to be exercised, and do not limit the power or jurisdiction itself and, therefore, should be construed to be directory rather than mandatory.

There seems to be no universal rule by which directory provisions under all circumstances may be distinguished from those which are mandatory, but it seems to be generally taken as a well fixed rule that in each case the char-

acter of the statute is determined by consideration of its language taken in connection with the purpose which the legislature had in view by its enactment.

I cannot see wherein any other construction than the above stated can be placed upon said section with safety to the public or to the welfare of society, and I do not think that the legislature intended to deprive the board, in forming its judgment as to whether or not the release of any prisoner upon parole would be incompatible with the welfare of society, of taking into consideration the character of the prisoner as established in the penitentiary and also the character of the man as it may appear to the members of the board, for a prisoner who may be eligible in every other respect, and whose conduct and record for obedience to the rules and regulations of the penitentiary while confined therein, may nevertheless be of such a character that it would be incompatible with the welfare of society to release him from said institution upon parole.

While I do not assume to know anything about the character of the prisoner referred to in your letter I am absolutely of the opinion that said statute is directory and that the board is vested with a discretionary power in matters parole to the extent that I have indicated, and should it not be so many vicious and bad men, prisoners in the Ohio penitentiary, might behave themselves long enough to become eligible to parole, and although their release would be incompatible with the welfare of society, the public would have no relief.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

538.

TAXES AND TAXATION—APPROPRIATION—CONTINGENT FUNDS COVER ONLY DEFICIENCIES FROM UNFORESEEN EMERGENCIES.

The contingent fund established under Section 3800 of the General Code, is dealt with under the head of appropriation, and is intended to cover only such deficiencies as arise from emergencies unforeseen by the appropriating body at the time of making the appropriation.

COLUMBUS, OHIO, July 22, 1912.

HON. STUART R. BOLIN, *City Solicitor, Columbus, Ohio.*

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

> "May deficiencies in detailed appropriation accounts be provided for out of the contingent fund established under Section 3800 of the General Code, if such deficiencies are or could be foreseen at the time of making the semi-annual appropriation?"

In my opinion a deficiency of the kind you specify, which might be foreseen at the time of making the semi-annual appropriation, may not lawfully be met out of the contingent fund established under Section 3800 of the General Code.

Said Section 3800 provides in part, as follows:

> "In making the semi-annual appropriation and apportionment herein required, council may deduct and set apart from any moneys, not otherwise appropriated, such sum as it deems proper as a contingent fund to provide for any deficiency in any of the detailed appropriations, which may lawfully and by any unforeseen emergency happen. Such contingent fund or any part thereof may be expended for any such emergency only by ordinance passed by two-thirds of all the members elected to council and approved by the mayor. * * * "

It is essential to the validity of an expenditure from the contingent fund that the deficiency intended to be supplied thereby shall happen "by unforeseen emergency." In order that an emergency may be such, and may be "unforeseen," within the meaning of this provision, it must be one which is unexpected and entirely out of the ordinary. It must arise by virtue of the happening of an event unusual in its nature, and such as ordinarily is not contemplated at the time of making the appropriation.

> Ampt vs. Cincinnati, 1 N. P. 379.

The sole question which arises here, as I understand your letter, is, as to whether or not the foresight, in the reasonable exercise of which the needs of the city are determined, is, within the meaning of Section 3800, that of the appropriating body or that of the levying authority. It is contended that that is an "unforeseen emergency," which, in the reasonable exercise of the power of the council and the administrative authorities of the city, is not contemplated

by them when the levy for municipal purposes is fixed, as provided by law. I do not concur in this view, but rather in the view stated in your opinion submitted to me.

Section 3800 of the General Code is in pari materia with Sections 3796 to 3799, inclusive, of the General Code (formerly Sections 42 and portions of Section 43 of the Municipal Code.) All of these sections relate to the appropriation and expenditure of the moneys of the corporation, as well of those funds derived from miscellaneous sources of revenue, as those derived from taxation.

It is true that all of these sections are found in the chapter relating to taxation, which begins with Section 3784 of the General Code, and the earlier sections of which, together with certain provisions of the so-called Smith one per cent. law, prescribe the machinery of making up the annual budget of the city; but, if it is possible to read Section 3800 in the light of either of these earlier sections, or of those more contiguous to it, I think the latter interpretation must prevail. The fact that said Section 3800 was formerly a part of Section 43 of the Municipal Code, which otherwise, at any rate, deals exclusively with appropriation, and not at all with levies or collections, must not be lost sight of.

But it is not necessary to look to other sections to determine the meaning of the provisions under consideration. On the face of the first sentence of Section 3800 it is obvious, I think, that that which is "unforeseen," within the meaning thereof, is such at the time of making the semi-annual appropriation. This sentence provides that the contingent fund may be set aside at the time of making the semi-annual appropriation. The provision as to time here specified controls the whole section in this particular.

Therefore, an emergency for which the contingent fund may be expended is an emergency "unforeseen in making the semi-annual appropriation."

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.