

35 CYC., 451, is as follows:

"In common parlance, 'shall' is a term which it is said has always had a compulsory meaning and in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future; but it may be used in the broad sense of 'must,' of which it is a synonym. As used in the statutes, the word is generally mandatory;  
\* \* \*"

By a reading of the above statute, we find that there are no words qualifying the word "shall" in this instance, and since there are no qualifying words or any other reference to these in the sections relating to the District Board of Health, this would be taken as mandatory.

It is the opinion of this department that it is mandatory that one of the members of the District Board of Health shall be a physician.

Respectfully,

C. C. CRABBE,

*Attorney General.*

201.

SECRETARY OF STATE—AUTHORITY TO ESTABLISH AGENCIES THROUGHOUT STATE FOR REGISTRATION OF MOTOR VEHICLES TERMINATED JANUARY 2, 1920—ACCOUNT TO STATE FOR LICENSE TAXES PAID SELF-APPOINTED AGENTS BY REGISTRANTS—LIABLE ON OFFICIAL BOND.

**SYLLABUS:**

1. *The authority conferred upon the Secretary of State by the act passed March 21, 1917 (107 O. L. 545) to establish agencies throughout the state to receive applications for the registration of motor vehicles and to collect license taxes from registrants, terminated on January 2, 1920, the effective date of the act passed December 16, 1919 (108 O. L., p. 1081).*

2. *The Secretary of State is liable on his official bond to account to the state for motor vehicle license taxes paid to his self constituted and appointed agents for the use of the state maintenance and repair fund on and after January 2, 1920, and appropriated by such agents to their own use.*

COLUMBUS, OHIO, March 29, 1923.

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

DEAR SIR:—Your letter of recent date relative to the authority of the Secretary of State to establish branch agencies outside of Columbus, for the purpose of receiving applications for registration and collecting annual license taxes under the motor vehicle registration act, and also his liability to account to the state for license taxes paid and collected at such agencies for the "State maintenance and repair fund," was duly received.

1. In 1912 Annual Report of the Attorney General, Vol. 1, p. 80, it was held in an opinion dated December 7, 1912, and addressed to the Secretary of State, that:

"The statutes are positive and clear in their direction that the office of the Secretary of State shall be located in Columbus, and that applications for automobile licenses must be filed in that office. The Secretary of State is not authorized, therefore, to maintain an office outside of Columbus for the purpose of receiving applications of automobile owners and doing other work incidental thereto."

The law in force at the time the opinion was rendered will be found in the act passed February 14, 1910, commonly and officially designated as the General Code of Ohio (sections 6290 et seq. thereof). It has been examined and found to fully justify the conclusions reached.

The opinion mentioned was based principally upon section 14225 G. C., which provides that the Secretary of State shall keep his office in Columbus, and also original sections 6294 and 6299 G. C., which required that applications for the registration of motor vehicles should be filed "in the office of the Secretary of State," and that said officer should file such applications in his office and keep a registration book or index for public inspection. Original section 6298 G. C. was not referred to in the opinion, probably because it did not at that time contain any language which could have been used to support a claim that the Secretary of State was authorized to establish branch agencies throughout the state. The section, however, might have been referred to in support of the conclusion reached in the opinion.

Very shortly after the foregoing opinion was rendered, and possibly to a certain extent on account thereof, original section 6298 G. C. was amended by an act passed April 26, 1913 (103 O. L. 764); and while the amendatory section, the same as the original section, still supported the conclusions that applications for registration should be filed in the office of the Secretary of State, and that registration fees should be paid to that official, it also authorized the Secretary of State to deliver to the registrants, "in such manner as the Secretary of State may select," certificates of registration and number plates at the postoffice or express office named in the respective applications. That amendment, however, did not go to the extent of authorizing the Secretary of State to establish branch agencies for the purpose of receiving applications for registration or for collecting registration fees.

Later on the particular phase of the subject now under consideration was brought to the attention of the General Assembly, and section 6298 G. C. was again amended by an act passed March 21, 1917 (107 O. L., p. 545), by adding thereto a sentence reading as follows:

"The Secretary of State may establish branch offices to receive and file applications for registration of motor vehicles, collect registration fees, issue certificates of registration and deliver number plates to the owners of such motor vehicles."

This last amendment, however, was short-lived, for the section was again amended by an act passed December 16, 1919 (108 O. L. 1081). The evident purpose, as well as the effect of the amendment was to strike out of the section the entire sentence just quoted. In other words, this last amendment restored the section, in substance and effect, to its earlier form.

The section has never since been amended, and hence has been in full force and effect from the effective date of the act passed December 16, 1919, to the present time, in the following form:

"Upon the filing of such application and the payment of the tax imposed by this chapter, the Secretary of State shall assign to such motor vehicle a distinctive number, and, without expense to the applicant, issue and deliver

to the owner in such manner as the Secretary of State may select, a certificate of registration, in such form as the Secretary of State shall prescribe, and two number plates, duplicates of each other, at the post or express office within the State of Ohio named in said application."

Considered alone, section 6298 G. C., as now in force, confers no authority upon the Secretary of State to establish branch agencies for the purpose of receiving applications for registration, or for collecting annual license taxes. The only possible authority or function which it authorizes him to exercise outside Columbus, is to be found in that part thereof which authorizes him to issue and deliver certificates of registration and number plates "in such manner" as he may select. And in this connection it should not be overlooked that the motor vehicle registration act in effect requires, first, that the application for registration shall be filed in the office of the Secretary of State (section 6294), and, second, that the annual license tax shall be paid to him (section 6291), as conditions precedent to the exercise of his authority to deliver certificates of registration and number plates, for it will be observed that his authority to make such deliveries is predicated "upon the filing of such application and the payment of the tax."

It remains to be considered whether any other sections of the motor vehicle registration act authorize the Secretary of State to receive applications for registration and to collect annual license taxes through branch agencies. A careful examination of the act not only fails to disclose any such authority, but, on the contrary, the collective effect of certain sections thereof compel the opposite conclusion, as follows:

Section 6291 G. C. (passed in its present form by the act of December 16, 1919, supra), which provides that the annual license tax "shall be paid to and collected by the Secretary of State at the time of making application for registration."

Section 6294 G. C. (as passed by the act last mentioned, and also as amended April 29, 1921; 109 O. L. 239), which provides that the application for registration must be filed, by mail or otherwise, "in the office of the Secretary of State."

Section 6299 G. C. (passed in its present form by the act of March 21, 1917; 107 O. L., p. 545), which provides that "the Secretary of State \* \* \* shall file such applications in his office," and shall register each motor vehicle in a book or index kept for that purpose, and that such book or index shall be kept in his office; and,

Section 6309 G. C. (as amended December 16, 1919, and again on January 28, 1920; 108 O. L., pp. 1082, 1165), which provides that the Secretary of State shall apportion the tax collections, and pay the state's portion thereof (50% under 6309-2), and also all registration fees, into the state treasury. At this point it may be stated that "all fees" and fifty per centum of "all taxes" collected under the motor vehicle registration act, belong to the "State maintenance and repair fund." The other fifty per centum of the taxes is for the use of registration districts. See section 6309-1 and 6309-2 (108 O. L., pp. 1083, 1166).

It will thus be seen that by reason of the sections referred to, when considered in connection with section 6298 G. C., the Secretary of State is not now, and since the effective date of the act of December 16, 1919, has not been, authorized to establish branch agencies outside of Columbus for the purpose of receiving applications for registration and collecting annual license taxes, and also that no authority has been conferred upon him to deliver number plates to registrants until after applications for registration have been filed in his office and the annual license taxes have been paid to him.

2. The next point for consideration is the effective date of the act passed December 16, 1919, and this involves, to a certain extent, not only the legislative history of the act, but also certain provisions of the state constitution.

The year book (108 O. L., p. 1084) discloses that the bill, after its passage, was filed by the Governor in the office of the Secretary of State on January 2, 1920. If the enactment was one providing for a tax levy, it was not subject to the referendum, and its operation was not postponed for a period of ninety days, but went into immediate effect on January 2, 1920. See section 1d, article II, Ohio Constitution, which provides that "Laws providing for tax levies, \* \* \* shall go into immediate effect. \* \* \* The laws mentioned in this section shall not be subject to the referendum."

Is the act of December 16, 1919, a law providing for a tax levy? An examination of the act discloses that it is. In the first place the title of the act (although not conclusive) states that it is such a law in the following language: "An act providing for the *levy* and collection of a *tax* on the operation of motor vehicles on the public roads and highways of this state, and for *such purposes* amending sections 6290, 6291, 6292, 6293, 6294, 6294-1, 6295, 6301, 6309," etc.

Not only the title of the act, but the context clearly discloses that it is a law providing for a tax levy. See especially section 6291 G. C., which expressly provides that "*An annual license tax is hereby levied* upon the operation of motor vehicles on the public roads and highways of this state. \* \* \* *Such tax* shall be at the rates specified in this chapter and shall be paid to and collected by the Secretary of State at the time of making application for registration as herein provided." This is followed by a specification of the tax rates levied and to be collected. Other provisions of the act might be referred to in this connection, but the foregoing, we believe, fully justifies the conclusion that the act under consideration is a tax levying law within the meaning of section 1d, article II, of the state constitution, and hence went into immediate effect on January 2, 1920. See also, *Graves v. James*, 18 C. C. (N. S.) 493, 494, in which the Court of Appeals characterized the act in its earlier form as a "privilege tax" law, and also as a "revenue measure."

3. The fact, however, that the Secretary of State established branch agencies outside of Columbus after the act of December 10, 1919, went into effect, and that his self constituted and appointed agents thereat collected license taxes from registrants, without authority of law, would not exonerate him from accounting to the state for taxes collected for its use by such agents and appropriated to their own use. Such taxes were, in such cases, paid by registrants to persons held out by the Secretary of State as being duly authorized to represent and act for him in the premises, and number plates belonging to the state were furnished by the Secretary of State and delivered to the paying registrants. The receipt of this money by such agents was, so far as the liability of the Secretary of State to account therefor is concerned, receipt by the Secretary of State, and he is estopped from denying the agency of his own appointees or their authority to represent him in receiving license taxes from registrants. He delegated to these agents, although without statutory authority, the performance of important duties which the law imposed upon him, and held them out to the owners of motor vehicles as proper persons with whom they could safely deal. Consequently, he is liable to account to the state for any money paid to such agents by registrants for the use of the state.

While the motor vehicle registration act does not require the Secretary of State to give bond, it does, however, impose upon him very important duties, the faithful performance of which, in my opinion, is covered by the official bond he is required to give to the state by section 156 G. C. That section reads as follows:

"Before entering upon the discharge of the duties of his office, the Secretary of State shall give a bond to the state in the sum of one hundred thousand dollars, with two or more sureties approved by the Governor, Auditor of State and Attorney General, conditioned for the faithful dis-

charge of the duties of his office. Such bond, with the approval of the proper officials and the oath of office endorsed thereon, shall be deposited with the Auditor of State and kept in his office."

It would be no defense to an action on the official bond to say that the act of the Secretary of State in establishing branch agencies, being unauthorized, was also unofficial, and hence not covered by his bond, because, as Judge Williams so aptly said in *Greenville v. Anderson*, 58 O. S. 478, "If acts of an officer are to be regarded as unofficial whenever they are illegal, an official bond could serve no useful purpose, for there can be no breach so long as he performs his duties according to law. It is only when some duty has been omitted or disregarded or improperly or illegally performed that a liability can arise." See also, *State v. McKinnon*, 15 C. C. (N. S.) 1, 6, where the court say that "It is too narrow a construction of an official bond to hold that it does not include liability for the consequences for illegal acts."

In my opinion, the conclusions cannot be escaped that if the Secretary of State established branch agencies outside of Columbus on and after January 2, 1920 (the effective date of the amendatory act of December 16, 1919, *supra*), for the purpose of receiving applications for the registration of motor vehicles and collecting annual license taxes, he acted without authority of law; that he is liable to account to the state for license taxes paid to his self constituted and appointed agents by registrants for the use of the state maintenance and repair fund on and after said date; and that failure to account therefor constitutes a breach of his official bond.

Respectfully,

C. C. CRABBE,

*Attorney General.*

---

202.

APPROVAL, BONDS OF JEFFERSON COUNTY, \$24,500, FOR STREET IMPROVEMENT, VILLAGE OF AMSTERDAM.

COLUMBUS, OHIO, March 29, 1923.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

---

203.

APPROVAL, BONDS OF VILLAGE OF MADISON, LAKE COUNTY, \$1,250, TO ACQUIRE AND EQUIP MOTOR FIRE TRUCK FOR FIRE DEPARTMENT.

COLUMBUS, OHIO, March 29, 1923.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*