

## VI.

OPINIONS OF THE ATTORNEY GENERAL FROM JANUARY 1, 1906, TO  
DECEMBER 31, 1906.

( To the Governor. )

## TERM OF OFFICE OF PROBATE JUDGE ELECTED NOVEMBER 7, 1905.

Term of office of probate judge elected November 7, 1905, is three years; constitutional amendment (Article XVII) adopted on same date did not affect such term.

January 4th, 1906.

*Hon. Myron T. Herrick, Governor of Ohio, Columbus, Ohio.*

DEAR SIR:— You have referred to me a letter received by you from W. E. Pardee, probate judge-elect of Summit county, in which he asks you, as governor, to issue a commission to him as probate judge for a term of four years, with a request for an opinion from this office as to your authority, by reason of the adoption of the biennial election amendment at the last election, to issue the commission for a longer period than three years.

The biennial election amendment fixes the term of office of a probate judge at four years and the first question to be determined is, does said amendment govern the term of a probate judge whose election was contemporaneous with its adoption? My judgment is that it does not, for the reason that said amendment cannot be considered to be adopted until after the election is over, therefore the term of office of a probate judge elected on the 7th day of November last would be governed by Section 7, Article IV of the constitution, which provides that the term of a probate judge shall be three years; that is, the provision of Section 7, of Article IV of the constitution would govern the election of a probate judge until after the adoption of the biennial election amendment which fixes the term of a probate judge at four years. If the contention that the biennial election amendment governs the term of office of a probate judge elected at the last November election is correct, then the election itself would be void for the reason that state and county officers, under the amendment, are to be elected in the even numbered years. In other words, if the amendment were to govern the term of a probate judge elected at the November election it would also govern the time of holding the election. In my judgment the term of office of a probate judge elected on the 7th of November last, is three years, as fixed by Section 7, Article IV, of the constitution.

The second question is, should the governor by reason of the fact that the amendment which fixes the term of a probate judge at four years is now in effect, issue the commission for four years? The amendment authorized the legislature to extend existing terms to conform thereto and does not, in itself, extend any existing term. While it fixes the term of a probate judge at four years, it does not operate as an extension of the tenure of an incumbent who was elected before its adoption; that is, the term of office of all probate judges elected after the adoption of the amendment shall be four years, but there can be no extension of the tenure of any incumbent who was elected for three years without legislative action, and then only if such extension is necessary to bring about the election of his successor in an even numbered year as required by Section 1 of the consti-

tutional amendment. Therefore, the operation of said amendment does not authorize you, as governor, to issue this commission for a longer term than three years.

Section 83 of the Revised Statutes provides that "upon producing to the proper officer authority a *legal* certificate," the governor shall issue a commission. The certificate of election filed with the Secretary of State in this case recites that "William E. Pardee was duly elected probate judge for the said county for the full term of four years," when it should recite that William E. Pardee was duly elected probate judge for the said county for the term of three years. The certificate is, therefore, in my judgment, illegal and you are not authorized to issue any commission until a legal certificate is produced to the proper officer.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### BOARD OF PUBLIC SAFETY — VACANCY IN — WHEN FILLED.

Vacancies in boards of public safety of municipal corporations filled after expiration of thirty days from first Monday in February.

February 2nd, 1906.

*Hon. John M. Pattison, Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Replying to your request for an opinion as to when you are authorized to act under Section 146 of the municipal code in filling vacancies in the board of public safety of any municipality, I beg to advise you that, in my judgment, such action cannot be taken until thirty days have elapsed after the first Monday in February, as provided in section 223 of said code.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### ATTORNEY GENERAL—DUTY OF, TO PROSECUTE VIOLATION OF LAW BY RAILROAD COMPANY.

Duty of commissioner of railroads and telegraphs to investigate complaint of violation of law by railroad company and to report to governor; authority of governor to require attorney general to prosecute railroad company for such violation of law.

February 21st, 1906.

*Hon. John M. Pattison, Governor, Columbus, Ohio.*

DEAR SIR:—You have referred to this department a letter from Messrs. Rheinstrom, Bettman, Johnson & Co., of Cincinnati, in which they state that the Commissioner of Railroads and Telegraphs has reported to you certain findings in the matter of their complaint against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Co., for alleged violation on the part of the railway company of Section 3340 of the Revised Statutes of Ohio; and you request information as to your duties in the premises.

Sections 248 and 248a of the Revised Statutes make it the duty of the Commissioner of Railroads and Telegraphs, upon complaint that any railroad com-

pany or officer thereof has violated or is violating any of the laws of the state, to examine into the matter and make report of his findings to the general assembly, if in session, otherwise to the governor.

Section 202 R. S., as amended March 31, 1904, (97 O. L., 59), provides what are the duties of the attorney general, and requires him, when requested by the governor or general assembly, to appear for the state in any court or tribunal in any cause in which the state is a party or in which the state is directly interested.

By virtue of the foregoing sections, the attorney general, upon requirement of the governor, will take such action as the facts and law may justify.

The letter of Messrs. Rheinstrom, Bettman, Johnson & Co., is herewith returned.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### DOG TAX — BILL TO MAKE SAME LIEN UPON REAL ESTATE.

House Bill No. 99, providing that the per capita tax on dogs shall be levied upon real estate upon which dog is kept, constitutional so far as affects real property owned by person keeping such dog; as affecting property upon which dog is kept by person not the owner of such property, *quaere*.

March 22nd, 1906.

*Hon. John M. Pattison, Governor of Ohio.*

DEAR SIR: — I am in receipt of copies of H. B. No. 99, passed by the general assembly on the 19th inst., entitled, "A bill to amend section 2833 of the Revised Statutes of Ohio as amended April 22nd, 1904, providing for a better collection of the per capita tax on dogs."

You have submitted the same to me for an opinion as to its constitutionality. The new matter inserted in the bill as amendatory of the existing act provides that the tax shall be levied upon and entered against the real estate upon which the dog is kept or harbored, and collected as are other taxes upon real estate. Whether this tax can be enforced as a lien against property in cases where a dog is kept thereon by a lessee or other person not the owner of the property, is a doubtful question.

The provision of the Dog tax making the tax a lien on property where the business of trafficking in intoxicating liquors is carried on, has been held constitutional by the supreme court.

*Anderson v. Brewster, 44 O. S., 576.*

Section 4275 which provides that a judgment for money lost at gambling shall be a lien on the property in cases "where the owner knowingly permits it to be used for gaming purposes" has also been sustained.

*Trout v. Marvin, 62 O. S., 132.*

All the considerations which made these taxes a proper lien on the property do not apply to the present tax. However, the law will have a valid operation in so far as it makes the tax a lien on property owned by a person who himself keeps or harbors a dog thereon.

In as much as the courts will enforce statutes so far as they are constitutionally made, rejecting only those provisions which show an excess of authority

by the enacting power, H. B. No. 99, as amended, is not, in my opinion, constitutional.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### RAILROAD COMMISSION — APPOINTMENT OF COMMISSIONERS.

Railroad commissioners may be appointed after the expiration of sixty days from the passage of the act creating such commission; provision of said act requiring such appointment to be made within sixty days directory merely.

May 15th, 1906.

*Hon. John M. Pattison, Governor of Ohio.*

DEAR SIR:— You have requested my opinion as to whether the power conferred upon you by H. B. No. 78, to appoint railroad commissioners may be lawfully exercised by you after the expiration of sixty days from the passage of the act. The act provides that:

“Within sixty days after the passage of this act the governor shall, by and with the advice and consent of the senate, appoint such commissioners, but no commissioners so appointed shall be qualified to act until so confirmed, unless appointed during the adjournment of said senate.”

Is the provision as to the time within which the appointments must be made mandatory or directory? The most satisfactory test by which to determine whether an act is directory or mandatory is, whether the prescribed mode of action is of the essence of the thing to be accomplished, or, in other words whether it relates to matter material or immaterial—to matter of convenience or substance. Clearly in the present case the provision as to time was inserted for the purpose of making the act go into operation at the earliest practicable moment. To hold that if for any reason the appointments should not be made within the sixty-day period they could not be made thereafter, would defeat the very purpose for which the provision as to time was inserted. It can make no material difference, nor change in any substantial particular, the effect of the act, if the commission is appointed a month earlier or a month later.

Statutes fixing the time for the doing of an act, and containing no negative words forbidding the doing of it afterwards, are considered as merely directory, where the time is not fixed for the purpose of giving a party a hearing or for some other important purpose.

James v. West, 67 O. S., 28.

State v. Board of Supervisors, 17 C. C., 396.

State v. Harris, 17 O. S., 608.

Lewis's Sutherland on Statutory Construction, section 612.

Fay v. Wood, 65 Mich., 390.

People v. Allen, 6 Wend., 486.

The opinion of the court in the case of *In re. Census Superintendent*, 15 R. I., 614, is directly applicable to the facts in this case. In that case the court says:

“The only question therefore is whether the governor, having failed to make the appointment within the prescribed time, could make it after-

wards. We think he could, for without the appointment the taking of the census, which is absolutely prescribed, would fail. We think the provision as to time must be considered as merely directory. The duty to appoint being paramount and essential we think that here, without doubt, the purpose was not to limit the power but to insure its timely exercise."

It is expressly provided by section 36, of H. B. No. 78, that:

"\* \* \* the power and duties conferred and imposed upon the railroad commissioner by laws in force at the passage of this act shall continue to be exercised by him until the commission provided for in section 1 of this act has been appointed and qualified, whereupon the office of commissioner of railroads and telegraphs is hereby abolished.

It is therefore my opinion that the appointments need not be made within the sixty day-period fixed by the act, but should be made within such period, or as soon thereafter as is practicable and convenient.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### BENEVOLENT INSTITUTION — EMPLOYES OF.

Combined normal and industrial department of Wilberforce University not a benevolent institution within the meaning of Section 629, R. S., prohibiting the employment in such institutions of persons related to the trustees thereof.

June 5, 1906.

*Hon. John M. Patterson, Governor, Columbus, Ohio.*

DEAR SIR:— You have referred to this department a communication from Mr. A. I. Bond, at Wilberforce, with regard to a law prohibiting the employment of persons in the benevolent, penal and reformatory institutions of the state who are related to any of the trustees of said institution. Also as to the application of such law to the combined normal and industrial department at Wilberforce University.

Section 629 of the Revised Statutes of Ohio contains a provision prohibiting the employment of any persons in any of the benevolent, penal or reformatory institutions of the state, or of any county therein, who are related by blood or marriage to any of the trustees of said institutions. Section 629, R. S., however, does not apply to the combined normal and industrial department at Wilberforce University, as said department is not classed among the benevolent institutions of the state.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## RIGHT TO BEAR ARMS.

Limitations which may be lawfully imposed upon the constitutional right of the people to bear arms.

June 14, 1906.

*Hon. John M. Pattison, Governor, Columbus, Ohio.*

DEAR SIR:— Your letter of recent date enclosing a communication addressed to you by G. W. Savage, Secretary-Treasurer of the United Mine Workers of Ohio, is received. The question submitted by you, through Mr. Savage's inquiry, is whether or not owners of coal mines have the right to employ armed men in and around their properties, traversing the public highways and public places, and whether or not coal miners have the right to arm themselves in the same manner.

Section 4 of Article 1 of the Constitution of Ohio provides that,

“ \* \* \* The people have the right to bear arms for their defense and security.”

Under this provision the people of Ohio, and all the people, are given the right, and the equal right, to carry arms for the purpose of self-defense and protection. There are certain limitations, however, which may be, and are, lawfully imposed upon the exercise of this right. In the first place, the arms must not be concealed. More than this, even if they are not concealed, they must not be borne or carried in such a manner as to constitute a menace or threat of a breach of the peace. If firearms or other weapons are carried in such a threatening manner as to imperil life or property or to provoke a riot or disturbance, the persons so carrying them are not protected by the provisions of the constitution of Ohio. In other words, while every citizen has the right to carry arms in defense of his life or property, yet if the situation in the coal mining regions of the state, to which you refer, should show that one or both of two hostile bodies of men are carrying arms so as to endanger the good order of the community, it would be the duty of the proper local authorities to enforce the law as against them, and the governor would be justified, if necessary, to use all the power at his command to avert the threatened danger.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## OHIO STATE SCHOOL FOR THE BLIND—ADMISSION OF NON-RESIDENT.

Trustees of the Ohio state school for the blind may admit non-residents upon terms imposed by such trustees.

July 12th, 1906.

*Hon. Andrew L. Harris, Governor of Ohio, Columbus, Ohio.*

DEAR SIR:— In reply to your request for an opinion as to whether a non-resident can be admitted to the Ohio State School for the Blind, I beg to advise you that the trustees of said institution have authority to admit non-residents, if be accommodation therefore, upon payment of such sum and upon such terms as the trustees may determine.

Section 668, R. S., provides:

“\* \* \* Nothing herein contained shall be construed to prohibit the admission of pupils who are not residents of Ohio, if there be accommodation therefor, upon the payment of such sums and upon such terms as the trustees may determine: and the money so received from pupils not residing in the state, shall be paid over to the steward, receipted for by him, and by him certified into the state treasury to the credit of the general revenue fund; and the steward shall make a correct record of all such moneys received by him in a book prepared for that purpose, which record shall be open for the inspection of any person wishing to examine the same.”

I return herewith the letter enclosed in your communication of July 11th.

Very truly yours,

C. P. HINE,  
*Assistant Attorney General.*

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#### SALARY OF GOVERNOR, HIS SECRETARY AND EXECUTIVE CLERK.

Lieutenant governor succeeding to office of governor after compensation of said office increased may receive compensation to which predecessor entitled, during remainder of term for which predecessor elected; secretary and executive clerk appointed by him upon succeeding to office of governor entitled to compensation provided by the legislature during incumbency of their predecessors.

July 26th, 1906.

*Hon. Andrew L. Harris, Governor of Ohio, Columbus, Ohio.*

DEAR SIR:— I am in receipt of the following communication from Mr. Lemert, your executive clerk:

“I am directed by the Governor to submit to you the questions as to what salary Governor Harris, Secretary Flickinger and myself are entitled to.

“You doubtless know that the act of April 2, 1906, increased the salary of the Governor from \$8,000 to \$10,000, placed the Secretary to the Governor upon a salary of \$5,000 and increased the salary of Executive Clerk to \$3,000.

“Your compliance with this request without unnecessary delay will be appreciated.”

The present term of governor began on the second Monday of January, 1906, and continues to the second Monday of January, 1908. This was the term for which a governor and lieutenant governor were last fall elected. At the beginning of this term the salary of the governor was fixed at \$8,000. Section 19 of Article III of the constitution provides as to the executive department of the state:

“The officers mentioned in this article shall, at stated times, receive for their services, a compensation to be established by law, which shall neither be increased nor diminished during the period for which they have been elected.”

On April 2nd, 1906, the general assembly changed the salary of the governor from \$8,000 to \$10,000. The constitutional provision quoted, however, prohibits

any officers from receiving the increased compensation "during the period for which they shall have been elected." This provision manifestly prohibited Governor Pattison from receiving the increased compensation during the term for which he was elected, and the lieutenant-governor succeeding him occupies the same position. As lieutenant governor, upon the death of Governor Pattison, the duties and powers of the office for the residue of the term devolved upon the lieutenant-governor, who, as acting governor, assumed all such duties and powers, including the right to draw the compensation attached to the office and subject to all the constitutional limitations as to compensation affecting the particular term.

At the time of the inauguration of the governor and lieutenant-governor on the second Monday of January, 1906, the latter became vested with a contingent right to act as governor at the compensation then provided by law, without decrease, and the state became entitled to his services at the existing salary, without increase. The salary of any incumbent of the office of governor is, therefore, \$8,000 per annum until the second Monday in January, 1908, and \$10,000 per annum thereafter.

The secretary to the governor and the executive clerk are provided for by Section 80 of the Revised Statutes. No term is fixed for either office. They therefore hold during the pleasure of the governor. The present secretary to the governor and executive clerk were appointed after the passage of the act of April 2, 1906 (98 O. L., 365) and their salaries are consequently controlled by that act. The secretary's salary is \$5,000; the executive clerk's is \$3,000.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### STOCKADE OF LABORERS—DUTIES OF VARIOUS STATE DEPARTMENTS.

Powers and duties of commissioner of labor, inspector of workshops and factories and state board of health as to alleged stockade of laborers.

August 3, 1906.

*Hon. Andrew L. Harris, Governor of Ohio, Columbus.*

DEAR SIR:—By reference from you I am in receipt of newspaper clippings concerning an alleged stockade of certain laborers at Dayton, Ohio.

If the facts stated therein are true, the subject is one requiring the attention of possibly three state departments.

1st. The commissioner of labor has the power (Sec. 308) to *investigate, collect, arrange and systematize statistics* relating to the *industrial, social, educational and sanitary* condition of the laboring classes and for this purpose has the right (Sec. 309) to send for persons and papers, to examine witnesses under oath, to take depositions or cause them to be taken by others authorized by law to take depositions, limited only by the provision that persons shall not be obliged to leave the vicinity of their residence or place of business.

By no statute is authority given the commissioner to require any improvements or alterations in the conditions as he finds them, but he shall (Sec. 310) make an annual report of same to the general assembly, but said report shall be so arranged as not to expose without the written consent, the name or private affairs of any person, firm or corporation that has furnished such information as the bureau requires.

2nd. The inspector of workshops and factories is given certain powers enu-



merated in Sec. 4238c which look to the sanitary conditions and safety appliances installed and maintained in *buildings where persons are employed at daily labor* also to require *safety regulations* with respect to the construction of such building, including also *tenement houses*. This department also has authority to compel obedience on the part of employers to the child labor laws and others upon kindred subjects. In the execution of his duties the inspector may serve notice upon the proprietors, owners or agents of such places to correct the abuse if any is found, and a refusal to obey such notice is a misdemeanor.

3rd. The state board of health (Sec. 409-25) shall have supervision of all matters relating to the preservation of the life and health of the people of the state, and may enforce its regulations in respect thereto.

I return herewith the clippings and suggest the submission of same by you to the various heads of the departments named, believing that the facts indicate with sufficient exactness a condition warranting an investigation with a view to **ascertaining whether or not any of the laws enforceable by the respective departments are violated and the subsequent correction of any abuses that may be found to exist.**

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### IN RE SULTANA MONUMENT COMMISSION.

The act providing for the erection of a monument to the victims of the Sultana disaster does not authorize the erection of such monument within the state house grounds.

December 19th, 1906.

*Hon. Andrew L. Harris, Governor of Ohio, Columbus.*

SIR:— Pursuant to your request I have made an investigation of the charges and counter-charges of unlawful and improper conduct on the part of the Commission, the granite companies and others connected with the proposed erection of a monument to the soldiers who lost their lives by the sinking of the steamship Sultana at the close of the civil war.

An act was passed by the last General Assembly of Ohio on April 2nd, 1906, to authorize the appointment of a Commission for this purpose and making an appropriation therefor of \$15,000 (93 O. L., 308). There were appointed upon the commission Dr. W. P. Madden of Xenia, Captain L. J. Cutter of Marietta and John J. Zaiser of Canton.

From time to time during the summer and fall there were reports, either in the form of protests to the Governor or of suspicious rumors in the newspapers, that improper influences of some kind were at work in connection with the letting of the contract for the monument. These culminated on November 8th and 9th in certain specific charges filed in the executive office. The most important of these charges were as follows:

First: By the Hughes Granite Company, of Clyde, Ohio, through Mr. W. E. Hughes, to the effect that the Sultana Commission had awarded the work of preparing the model and designs for the proposed monument to a New York sculptor, contrary to law; were about to make a contract with the Leland & Hall Company, a favored granite firm of New York, for the construction of the monument without competitive bidding, and the whole work of the Commission was tainted "with the disgrace of the charge of graft and boodle."

Second: By the three members of the Commission to the effect that at various

times and places Mr. Hughes, President of the Hughes Granite Company, had attempted to secure the contract for the erection of the monument by offering stock in his company at a nominal price to the three members of the Commission, and had offered employment to one of the members for this purpose.

In addition to these written charges filed with the Governor there were several others of a more or less definite character in the newspapers, the most direct of these being that Mr. R. A. Pollock, State Senator from the Canton, Ohio, district, had offered to Mr. P. E. Bunnell, agent of the Leland & Hall Company, to secure the favorable vote of Mr. Zaiser, a member of the Commission, through the use of money.

All these charges were investigated at public hearings held in the office of the Attorney General on Saturday, December 8th, 1906. There were present at said hearing Messrs. Madden, Cutter and Zaiser, members of the Sultana Commission; Mr. W. E. Hughes, of the Hughes Granite Company; Mr. P. E. Bunnell, of the Leland & Hall Company; Major E. F. Taggart, Past Commander of the Department of Ohio of the Grand Army of the Republic, who had protested to the Governor and certain members of the commission against the manner in which the contract was about to be awarded; Senator Pollock, Mr. J. Edward Sims, a newspaper correspondent; Messrs. David F. Pugh and Frank S. Monnett, attorneys representing the Hughes Granite Company, and Mr. J. E. Todd, attorney representing the Leland & Hall Company.

Although the investigation was a voluntary proceeding, the Attorney General having no authority to compel the attendance of witnesses or to have oaths administered, yet each person requested to appear was present and consented to be, and was sworn by a notary public. Shorthand notes of all the testimony was taken and a complete transcript of the same is herewith transmitted.

The testimony upon the subject of bribery or attempted bribery developed so many contradictions and flat denials that it cannot be said that any of the charges in this respect were sustained.

As to the charge that the Commission had, or was about to enter into a contract with the Leland & Hall Company for the construction of the monument, without competitive bidding, I find that this was not supported by any evidence: but that the only contract they had entered into was one with Mr. Landi, a New York sculptor, for the construction of a working model to be cast in bronze, for which they had agreed to pay, when approved by the Commission, the sum of \$4,000, and that while this contract may have been unnecessary and might have been submitted to competition or included in the entire contract for the construction of the monument, it was not required by law to be so awarded, and was awarded in good faith.

As to the general charge that the Commission was actuated by corrupt or improper motives, this was not sustained in any particular. It may have been unnecessary and unwise for the Commission to make a trip to New York and Boston to look at monuments, and to Barre, Vermont, to look at quarries, and to spend public moneys for such a purpose in view of the fact that designs and specifications could have been procured by invitation and sculptors and monument builders without such means. It may have been, and doubtless was, injudicious for the members of the Commission to permit the Leland & Hall Company to entertain them and pay some of their hotel bills and other expenses while in the east. It was clearly improper for one of the members of the Commission, Mr. Zaiser, to borrow money from the representative of the Leland & Hall Company, and particularly not to repay the loan until after the conduct of all the parties promised to be made public. But all these things, when carefully scrutinized, in the present instance, show only inexperience and indiscretion without any corrupt intent.

As to the charges that W. E. Hughes of the Hughes Granite Company, attempted to procure the contract by offering stock in his company at a nominal price to all the members of the Commission and employment to one of the members, the testimony showed that while the three Commissioners signed such a charge, Mr. Zaiser, although the same was read to him twice, did not comprehend the accusation and subsequently denied any intentional part in it. Messrs. Madden and Cutter testified that Mr. Hughes had made this offer to them and Mr. Hughes denied it. Whatever the truth may be, it is clear, on the one hand, that no member of the Commission entertained or accepted such a proposition, and equally clear not only from the testimony of the members of the Commission, but from the admissions of Mr. Hughes that, notwithstanding his protest against the letting of the contract without competitive bidding, he was himself attempting to secure the same without the formality thus required by law.

My conclusions therefore are as follows:

*First:* That no charges of the corrupt use of money or other inducements were sustained on either side.

*Second:* That the members of the Commission, while not always discreet, were proceeding in good faith to perform the trust committed to them and were not at any time actuated by dishonorable motives.

*Third:* That the whole controversy arose from the over-zealousness of the agents of the two rival granite companies, who were a little too anxious to defeat each other and a little too willing to take advantage of less experienced men.

In conducting this investigation it has been necessary to examine the law providing for the erection of the Sultana monument, and the discovery has been made that, while the preamble of the act expresses a legislative intent that the monument shall be erected on the State House grounds, the act itself does not grant any power to the Commission to use such grounds or any part of the same for this purpose. The statute seems, therefore, inoperative for the object sought to be accomplished, and I recommend that no further action be taken by the Commission until this doubt as to its power be removed by such amendment as the next General Assembly may think proper to make.

Respectfully submitted,

WADE H. ELLIS,  
*Attorney General.*

(To the Secretary of State.)

PROPOSED AMENDMENT TO ARTICLES OF INCORPORATION OF  
BANKERS IDENTIFICATION COMPANY.

Articles of incorporation of Bankers Identification Company may not be so amended as to provide for payment of money upon injury to members; such amounts to insurance business.

January 9th, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your communication enclosing for the consideration of this department, a copy of an amendment to the Articles of Incorporation of The Bankers Identification Company, which amendment is in words as follows:

“Said corporation is formed for the purpose of furnishing its members, in case of injury by accident a ready and sure means of identification, and to pay a certain class of persons employed by such members to render certain assistance and service on account of injury by accident, certain sums to be agreed upon between the company and members, and in no case to pay any amount to members.”

The foregoing amendment amends the purpose, as provided in the original articles of incorporation, which purpose as recited in such original articles, was as follows:

“Said corporation is formed for the purpose of furnishing its certificate holders a ready and sure means of identification, and such other information, as may be required, concerning the standing and character of the certificate holder within the liability of the company to furnish.”

There is accompanying the articles of incorporation of such company and the amendment thereto above set forth, a form of contract which is proposed to be written by this company, and upon consideration thereof I express the opinion that the contract sought to be written is one substantially amounting to insurance.

Under date of July 6th, 1901, Hon. A. I. Vorys, Superintendent of Insurance, gave to the counsel for this company an opinion that the association in question was an insurance association, that it was not exempted from the laws regulating such companies, and that before operating in this state it would be compelled to qualify as an insurance company. In the opinion then expressed by such department I fully concur.

The amendment attempted to be made by it to its articles of incorporation does not change the character of business sought to be done by it, and it is still subject to the same criticism as was then made against it by the Superintendent of Insurance.

Second. I further am of the opinion that the purpose of the corporation as recited in the amendment of its articles is indefinite in this, that it does not say what is the assistance and service that is to be performed, the furnishing of which is guaranteed by the company; and for the further reason that the literature of the company discloses that it is formed for professional business, and therefore should not be sanctioned or approved by your department.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

MAYOR—TENURE OF OFFICE OF.  
Mayor serves until successor qualifies.

January 20th, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:— In response to your inquiry as to whether the president pro tem. of council should perform the duties of the mayor of the village when the person elected to that office fails to qualify, or whether the mayor in office continues in office, I beg to say that Section 200 of the municipal code provides that the mayor shall continue to serve until his successor is elected and *qualified*. The president pro tem. of council shall become the mayor only in case of the death, resignation or removal of the mayor. Unless the successor was not only elected but qualified the incumbent holds over.

The supreme court of this state in construing a similar provision in *State ex rel v. Howe*, 25 O. S. 588, held that:

"In such case, there is no interregnum or vacancy in the office. It passes in succession. The end of one tenure, and the beginning of the next, occur at the same instant. But if no successor be qualified, the old incumbent continues in office, not as a mere de facto officer or locum tenens, but as its rightful and lawful possessor until such successor is duly appointed and qualified."

Throop on Public Officers, Section 329, says:

"If the people fail to elect an officer's successor or the person elected by them fails to qualify, there is no vacancy, and the incumbent holds over."

The holding over by the incumbent until the election and qualification of his successor continues until a successor can be elected in the manner provided by law. As it was said in *State ex rel v. Wright*, 56 O. S. 540,

"By a successor is not meant a more temporary appointee, but one regularly chosen in succession to the office to take the place of the predecessor on account of the cessation of his right of occupancy."

The first paragraph of the syllabus in this case was as follows:

"A mayor of a municipal corporation who has been regularly elected to the office, is entitled to serve until his successor is qualified; and while he continues to so serve on account of a failure to elect his successor, there is no vacancy in the office, nor is the council authorized to make any appointment thereto."

It appears therefore that at the termination of the regular term of the incumbent there is no vacancy in the office and that the incumbent will continue to hold the office until the next ensuing regular election for municipal officers.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

ARTICLES OF INCORPORATION OF UNITED STATES COFFEE COMPANY — "ANNUITY CONTRACT."

Articles of incorporation of United States Coffee Company providing for "annuity contract" attempt to authorize insurance business, and may not be filed.

January 25th, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have received the articles submitted to you by the United States Coffee Company for the purpose of obtaining a certificate evidencing its compliance with Sections 148c and 148d of the Revised Statutes authorizing it to do business in the state of Ohio.

This company seems to be incorporated under the laws of the state of West Virginia for the purpose of dealing in tea, coffee and spices and in the language of its charter, "in the transaction of such business may and is hereby authorized to issue a contract of annuity to its customers."

Accompanying the articles, I find a copy of the contract of annuity which the corporation proposes to issue to its customers. By the terms of this contract, in consideration of the weekly payment of a specified sum to the company, the company sells to the purchaser a certain amount of tea or coffee, and for the same consideration further agrees, in the event of the death of some person theretofore agreed upon, to annually pay such purchaser the sum of \$100.00 during the time that such weekly payments continue at the same rate.

This plan of business is nothing more nor less than life insurance and you are not empowered, in my opinion, to issue to the company a certificate authorizing it to do business in this state.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

CORPORATION — PRIVATE — CONTRACT OF — WITH MUNICIPAL CORPORATION.

Private corporation may be formed to contract with municipal corporation for use of streets, etc., for heating plant.

March 7th, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the request that you have made for an opinion on the power of corporations to contract with municipal corporations as to the use of their streets, public ways, etc., for heating plants, I beg to say that under Section 7, paragraph 15 of the municipal code as originally enacted in 1902, no power was conferred upon municipalities to contract with or grant franchises to such character of corporations, but by that section the power to use the streets and public ways for such purposes was limited to strictly municipal heating plants, or plants organized and controlled by the municipal authorities.

By an amendment to paragraph 18 of Section 7 of the municipal code, which was approved April 27th, 1904 (97 O. L., 507; Ellis's Code, pp. 56, 56), power was granted to such companies and corporations as were organized for the purpose of supplying municipalities and the citizens thereof with heat. by steam or other-

wise, to use the streets, public ways, etc., upon such terms as might be conferred upon them by the municipal authorities for a period not to exceed twenty-five years, and this amendment gave to the municipalities power to contract with such companies, as well as to provide the terms for the use of such public ways.

It also contains a clause, curative in its nature, conferring upon existing companies the powers as to existing contracts made before the enactment of such law. It therefore follows that corporations may be organized in Ohio for the purposes herein referred to.

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

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#### WILLIS LAW—WHEN NATURAL GAS COMPANY SUBJECT TO.

March 9th, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have had under consideration the question presented by the Homer Natural Gas Company and the Centerburg Gas & Oil Company. It appears that both of these companies are natural gas companies and the inquiry is, whether they are subject to the provisions of Section (2780-24) of the Revised Statutes commonly known as the Willis law. Under Section 7 of this act (2780-30) a natural gas company required by law to file an annual report with the auditor of state is not subject to the provisions of that act. Under Section (2780-17) natural gas companies when engaged in the business of supplying natural gas to consumers within this state are required to make reports to the auditor of state. The exemption from the operation of the Willis law is, therefore, dependent upon two things: first, that the person claiming the exemption is a natural gas company, and secondly, that it is engaged in the business of supplying natural gas to consumers within this state. In other words, in order to escape from the franchise tax under the Willis law the corporation so escaping must have become subject to the excise tax law and liable for taxes thereon. The only question to be determined, therefore, is whether or not at the time covered by these reports, that is, May 1905, the companies were actually supplying natural gas to consumers, if so, they are exempt from the operation of the Willis law, otherwise they are not.

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

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#### ARTICLES OF INCORPORATION OF FUNERAL BENEFIT ASSOCIATION OF KNIGHTS OF THE GOLDEN EAGLE OF SPRINGFIELD, OHIO.

Incorporation of funeral benefit association, separate from local lodge, unauthorized by act regulating fraternal beneficiary associations.

March 28th, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I transmit to you herewith the proposed articles of incorporation of the Funeral Benefit Association of the Knights of the Golden Eagle, of

Springfield, Ohio. This proposed corporation is sought to be incorporated under the provisions of the act regulating fraternal beneficiary associations, Sections (3631-11 to 3631-33) inclusive and pursuant to the provisions of Section (29) thereof.

I am of the opinion that the provisions of that act will not permit separate corporations to be formed for the purpose of providing for the payment of death benefits as therein named, because if incorporated the government of the so-called funeral benefit association would not be vested in the local lodge or in the fraternal beneficiary association of that name, but would be vested in the board of directors of the corporation and, if so, it would not be brought within the exemption mentioned in Section (29) of the act above cited.

My conclusion thereon is fortified by the uniform practice adopted by other fraternal orders operating in this state, engaged in the payment of death benefits paid by the local lodge or association without the intervention of a separate corporation to manage and control the same, and the insurance department of the state has uniformly construed this law to apply only to such associations as assume the payment of death benefits by the lodge or association as defined by the act regulating fraternal beneficiary associations as amended May 12th, 1902.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### DIRECTORS—STATUTORY REQUIREMENTS AS TO.

Majority of directors of Ohio corporations must be citizens of Ohio; secretary of state may not waive this requirement.

April 16th, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your communication accompanied by a letter of Mr. C. R. James to you under date of April 13th, 1906. In answer thereto, I beg to say that Section 3248 of the Revised Statutes of Ohio requires that a majority of the directors of a corporation organized under the laws of Ohio must be citizens of the state of Ohio. Of course no officer of the state has power to waive this provision and a corporation offending against it would undoubtedly be subject to proceedings in quo warranto, and it would be the duty of this department to institute such proceedings in case its attention was directed to a condition violating this section.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### ARTICLES OF INCORPORATION OF TITLE GUARANTEE AND TRUST COMPANY.

Question of similarity of name must be determined by secretary of state.

April 19th, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I transmit herewith articles of incorporation of The Title Guarantee and Trust Company and the letter of The Lenderson & Barch Abstract & Title Co., of Toledo, Ohio, together with their draft for the sum of \$150.00.



I have approved these articles, as I am of the opinion that they comply with the requirements of Section 3821ggg of the Revised Statutes, as amended by House Bill No. 393 of the 77th General Assembly.

I call your attention to the similarity in the name to that of "The Guarantee Title & Trust Company;" but as the question of similarity of name is to be determined by you pursuant to the authority conferred by Section 3238. R. S., I express no opinion thereon as to whether the same is so similar as to have a tendency to mislead the public or not.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

#### WILLIS LAW — APPLICATION OF, TO CONSOLIDATED BRIDGE CORPORATION.

Bridge company, consolidated under laws of Ohio, is a domestic corporation and subject to Willis law.

April 21st, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:— From the facts submitted by you, it appears that a bridge corporation formed under the laws of this state for the purpose "of acquiring and maintaining a bridge across the Ohio river between the city of Cincinnati, in the state of Ohio, and the city of Newport, in the state of Kentucky," consolidated with a corporation having like powers and the same purposes formed under the laws of the state of Kentucky.

The question presented is whether under the statutes of this state imposing franchise taxes this consolidated corporation should pay franchise taxes to this state, and, if so, on what basis.

The consolidated corporation owes its existence in this state to Section 3547 of the Revised Statutes, which reads as follows:

"Such bridge company shall have the right to consolidate its capital stock with the capital stock of any bridge company in an adjoining state authorized to construct a bridge across the Ohio river, in the manner prescribed for the consolidation of railroad companies, and the two companies shall thereupon be merged into one corporation, possessing within this state all the rights, privileges, and franchises, and subject to all the restrictions, disabilities, and duties of such corporation of this state so consolidated."

Among the duties imposed upon domestic incorporations by the laws of this state is that of making an annual report to the secretary of state during the month of May, and "upon the filing of such report, the secretary of state shall charge and collect from such corporation a fee of one tenth of one per cent, upon the subscribed or issued and outstanding capital stock of said corporation."

See Sec. (2780-24) Bates Revised Statutes.

If the consolidated company is required to file a report in May the amount of fees or tax required of it is fixed.

Thompson on Corporations, Section 320, in a discussion of the consolidation of corporations formed under the laws of different states, says:

"From the foregoing observations, we are justified in the conclusion that a corporation created by the concurrent legislation of two or more states, exists in each of such states as a domestic corporation of that state."

"A corporation formed by a consolidation of a domestic and a foreign corporation, pursuant to Laws 1881 C. 94, must be deemed a "domestic corporation."

In re St. Paul Ry. Co., 36 Minn. 36.

The same conclusion is reached by the highest courts of other jurisdictions and the Supreme Court of this state seems to have indirectly passed upon the question in *Ashley v. Ryan*, 49 O. S., 504. The court there had under consideration the consolidation of two railroad companies. A consolidated railroad company bears the same relations to the state as a corporation formed from domestic and foreign bridge corporations. Compare Sections 3382 and 3547. Of the consolidated railroad company the court said:

"But it seems pretty well settled, upon principle at least, that where formed under co-operative legislation of the different states, it becomes a corporation in each state where its road is located. It is a legal entity residing in and doing business in different states, with a status in each, derived from and determined by the laws of that state."

And the court shows that under the then double liability clause of the Constitution of Ohio, stockholders of the consolidated corporation would have been subject to such double liability.

It may be argued that if each of the states concerned should levy a franchise tax based upon the entire capital of the company, double and excessive taxation will result. It must be remembered, however, that the consolidated company has all the corporate power that can be conferred by two sovereignties, and that it is entirely within the power of each state to impose upon the corporation all the duties and obligations imposed upon other corporations of its creation. Domestic corporations are taxed by this state upon the power granted by the state to them to do business as a corporation regardless of where they do business, or whether they do any business at all.

I am aware of the decision in *State v. Metz*, 32 N. J. L., 199, in which it was held that a bridge corporation formed by the consolidation of two corporations, one under the laws of New Jersey and one under the laws of Pennsylvania, was liable for taxation in New Jersey upon one-half only of its capital and surplus; but that was a case of property tax, while the question now to be considered is that of a franchise tax.

In my opinion, therefore, the consolidated corporation is for all purposes a domestic corporation and should be required to file reports as such during the month of May, and pay annual taxes equal to one-tenth of one per cent. upon its subscribed or issued and outstanding capital stock.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

WILLIS LAW — APPLICATION OF TO, WATER TRANSPORTATION  
COMPANY.

Water transportation company not engaged in business, subject to Willis law, not Cole law.

April 25th, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — You present the report for 1906, under the provisions of the Willis law, of The Miami Transportation Company, and inquire whether this company is liable for report to you or to the Auditor of State, in accordance with the Cole law.

The company was organized for the purpose of

“building, owning, selling, operating and sailing boats, ships and vessels and doing a general transportation, freight and passenger business upon Lake Superior, Michigan, Huron, Erie and Ontario, and the waters connecting the same, and tributary thereto.”

The report submitted contains the statement in answer to question 7, “Sold out three years ago. Not engaged in any business.”

Section 7, of the Willis law, (2780-30) R. S., exempts from its operation *inter alia*,

“Public service corporations required by law to file annual reports with the Auditor of State.”

Section (2780-17), et seq. R. S., as amended April 25, 1904, defines certain corporations which shall file annual reports with the Auditor of State, among which are water transportation companies, defined as follows:

“When engaged as a common carrier in the transportation of passengers or property by boat, or other water craft, over any water way, whether natural or artificial, from one point within this state to another point within this state.”

It appears that the company is closing up its business and is not engaged in the transportation of passengers or property and would not, therefore, be liable for report and fee to the Auditor of State. It also appears that the company's franchise is still in existence and the powers conferred by same subject to its use. In such event I deem the company liable, under the provisions of the Willis law, for report and tax, and herewith return their report and the check for \$20.00 accompanying the same.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

PROPOSED AMENDMENT TO ARTICLES OF INCORPORATION OF  
GUARANTEE, TITLE AND TRUST COMPANY.

May 2nd, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of the articles of incorporation of The Title Insurance and Loan Company, which name had by subsequent pro-

ceedings been changed to The Guarantee, Title and Trust Company, and which it is now proposed to amend in its purposes and objects as shown by the certificate of amendment signed by the president and secretary of such corporation under date of April 27th, 1906, and which amendment, together with the original articles of incorporation you have submitted to this department for a written opinion as to whether the same violates that provision of Section 3238a R. S., forbidding that any amendment to the articles of incorporation of an Ohio corporation should "change substantially the original purposes of its organization."

I have compared the purposes, as contained in the original articles, with the amendment, and note that the original articles did not alone create the corporation "an agency company" to act as agent of title, guarantee and trust companies, but conferred upon it the same powers in kind as are sought by the amendment submitted.

Upon such examination, I am satisfied that the change made by the amendment is one of the degree of the powers, and not any change in the character of the same. It might be questioned as to whether the proposed amendment was really necessary, although the object seems to have been to confer upon such corporation the powers provided by the recent act of the General Assembly, taking effect April 14th, 1906.

I therefore return the same to you, expressing the view that the amendment does not substantially change the original purpose of the organization of the corporation, and that it does not violate Section 3238a of the Revised Statutes.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### REDUCTION OF OUTSTANDING STOCK — CERTIFICATE OF, MUST BE FILED.

Preferred stock of private corporation may be redeemed and retired without filing certificate of reduction of capital stock; outstanding common stock may not be reduced without filing certificate of reduction. Annual report of American Foundry Co.

May 3rd, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:— In connection with the enclosed letter of the American Foundry Company, you present two questions upon which you desire the opinion of this department.

First: A corporation organized for manufacturing purposes had \$25,000 preferred stock and \$25,000 common stock and now seeks to file an annual report under the Willis law showing all of the preferred stock except \$1,200.00 to have been redeemed. You ask whether this may be done without requiring the corporation to file a certificate of reduction of its capital stock.

Section 3235a provides:

"If the organization is for profit, it must have a capital stock. Such stock may consist of common and preferred or of common only \* \* \* and every corporation issuing both common and preferred stock may create such designations, preferences and voting powers, or restrictions or qualifications thereof, as shall be stated and expressed in the certificate of incorporation, and such preferred stock, may, if desired, be made subject to redemption at not less than par, at a fixed time and price to be expressed in stock certificate thereof."

The articles of incorporation of the American Foundry Company expressly provide for such redemption, and the same is therefore legal. Section 3264 does not apply, and there is no provision in the statute requiring a certificate to be filed in such cases.

Second: The second question is not raised in the case before us, but presented as a general proposition under facts substantially as follows:

A corporation filing its annual report in 1906, having only one class of stock, shows a less amount of "subscribed or issued and outstanding capital stock" than is shown in its report for 1905. No certificate of reduction under Section 3264 has in the mean time been filed, and you ask whether such report should be received.

Section 3264 provides the only means under the statute for a reduction of capital stock and no reduction may be made of issued and outstanding capital stock unless by a reduction of authorized capital stock as therein provided.

As to whether a corporation may purchase shares of its own stock from its stockholders and thereby reduce its outstanding capital stock, the decisions in this country are conflicting, and in general each case turns upon its own peculiar facts and the circumstances surrounding the particular transaction. In this state the leading case is that of *Coppin v. Greenlees & Ransom Co.*, 38 O. S., 275, which holds an agreement on the part of a corporation to purchase its own stock from a stockholder to be *ultra vires*, and on pages 279 and 280 the court say:

"Now, it is just as plain, that a business or trading corporation cannot exist without stock and stockholders, as it is that the creditors of such corporations are entitled to the security named in the constitution. *State ex rel Att'y General v. Sherman*, 22 Ohio St., 411. The corporation itself cannot be a stockholder of its own stock within the meaning of this provision of the constitution. Nobody will deny this proposition. And if a corporation can buy one share of its stock at pleasure, why may it not buy every share? If the right of a corporation to purchase its own stock at pleasure, exists and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of corporations. I am aware, that the amount of stock required to be issued is not fixed by the constitution or by statute, and also that provision is made by statute for the reduction of the capital stock of corporations; but of these matters, creditors are bound to take notice. They have a right, however, to assume that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it, becomes extinct, or is held subject to be re-issued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors the security intended."

The later case of *Morgan v. Lewis*, 46 O. S., 1, does not overrule the previous case, although it decides the question differently under a different set of circumstances, and on page 6 the court say:

"We have no disposition to call in question the general and well recognized principle that a corporation cannot buy its own stock. It is conceded that this principle proceeds upon a want of power rather than upon any express prohibition in its charter. With this general principle conceded, however, the right of a corporation to take its own stock in satisfaction of a debt due it has long been recognized in this state."

And on page 8:

"It is apparent from the foregoing that no inflexible rule has been recognized by this court, that a corporation may not in any case nor for any purpose receive its own stock. On the contrary, the way is left open for the application of exceptions to the general rule in proper cases."

To further emphasize this rule in Ohio, the legislature by a recent act has authorized the purchase by corporations of stocks in *other* companies under certain conditions, thereby implying by negation at least, the lack of authority to deal in its own stock.

It is therefore settled in this state, for the present at least, that a corporation cannot, except in exceptional cases, where authority is granted either expressly or impliedly in its charter, or where the reason is plain and the transactions inure to the benefit of the corporation, become the owner of its own capital stock.

It is my opinion that for the purposes of collection of Willis taxes no retirement or reduction of "outstanding" stock should be permitted except by the reduction of *authorized* capital stock as provided in section 3264 R. S.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### AUTOMOBILE LICENSE LAW INVALID.

May 5th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:—In answer to your recent inquiry relating to the act entitled "An Act to compel owners and operators of motor vehicles to register with the Secretary of State," passed April 2nd, 1906, I beg to advise you as follows:

This act is substantially a copy of the New York law of 1904, with some changes that add to the ambiguity of the law from which it is copied. These added ambiguities arise from a change in the sectional numberings. Sections 3 and 9, and all inclusive, were in the New York law part of the same section as Section 2 in the Ohio law. For instance, Section 9 of the Ohio law is subdivision 8 of Section 2 of the New York law, but while the sectional number is changed the language remains the same. When, therefore, what is Section 9 in the Ohio law, makes illegal a certain violation of "this section" it does not make anything illegal because there is nothing required by "this section," while in the New York law "this section" included *inter alia*, the provisions of Section 2 of the Ohio law.

Section 2 of the Ohio law provides that a license shall be taken out by certain owners of motor vehicles, but there seems to be no prohibition of the use of such vehicles when unlicensed. It seems to have been the intention of the General Assembly to prohibit the use and operation of unlicensed vehicles, but the failure of Section 9 of the law to accomplish that end leaves the state with no penalty against those who do not take out such license. It might be argued, however, that in as much as Section 2 imposes a duty, one not performing the same might be punished under Section 28 reading, "the violation of any other provisions of this act shall be punished," etc. If such construction should be sustained, it would be because the purpose of the act were to impose a tax upon the ownership of the vehicle and not to regulate the use of public highways, and

such a tax could not be sustained under our constitution. The act has many other similar defects of form that need not be noticed here in view of more fundamental difficulties.

Whatever the act might have meant, had the New York law been followed in sectional numbering, the practical elimination of Section 9 removes all doubt as to the construction of Section 2. By this section licenses are required to be issued only to persons "hereafter acquiring" a motor vehicle. By its express terms, one owning a vehicle prior to the passage of the law is not bound to secure a license unless he thereafter acquires another such vehicle, in which case he must take a license for both vehicles by him owned. It seems to me that this too clearly violates the constitutional requirements of uniform operation of the statute and the guaranty of the equal protection of the laws to require citation of authorities.

The Secretary of State is charged with the duty of issuing licenses, keeping records, furnishing tags, etc., but no means are furnished him for securing the required equipment. He can pay for the necessary facilities out of the proceeds of the licenses, but he cannot collect the licenses until he has the facilities and he is prohibited from buying same without the necessary funds under section (17-1) Bates' Revised Statutes.

The various sections of the act are interdependent, and it cannot be presumed that any of them would have been passed without the passage of the other, and the failure of one of them means the failure of all.

Further than this, it is quite doubtful whether the state has a right to require municipal corporations to maintain streets and regulate the use thereof as to all other classes of transportation, and as to one class, grant exclusive rights and privileges, removed from municipal control or regulation.

I, therefore, advise that you neither incur any further liability nor take any other official action under this statute until a construction of it is secured or the question of its validity determined by some court of competent jurisdiction.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### TRUST COMPANY—FOREIGN—WHAT IS "DOING BUSINESS" IN OHIO.

Trust company of another state, accepting trust in said state involving real estate situated in Ohio, need not obtain authority to do business in Ohio.

May 4th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:—In answer to the inquiry made by Messrs. White & Case of New York in their letter addressed to you under date of the 1st inst., which you have submitted to me for my views thereon, I beg to say that if a trust company in the state of New York accepts in that state a trust which embraces real estate in the state of Ohio, I do not deem it to be necessary that such trust company take out authority to transact business within this state, because the acceptance of such trust would not be, in my opinion, doing business within this state.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

PHYSICIANS' DEFENSE COMPANY MAY NOT BE ADMITTED TO DO  
BUSINESS IN OHIO UNDER MODIFIED CONTRACT.

May 11th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:—The proposed form of contract of the Physicians' Defense Company of Ft. Wayne, Indiana, together with its application for authority to carry on business in the state of Ohio, and a copy of its charter as issued to it by the state of Indiana, have received my consideration. You desire a written opinion thereon relative to the right of this company to do and engage in its business within this state in view of the opinion of the Supreme Court of Ohio in the case of State ex rel. Physicians' Defense Company v. Laylin, 73 O. S., 90.

This same company on the 20th day of June, 1904, brought suit in mandamus in the court of common pleas of Franklin county, Ohio, against yourself as Secretary of State, to compel you to issue and deliver to it, agreeable to the provisions of Section 148d of the Revised Statutes, a certificate authorizing it to transact business in the State of Ohio as a foreign corporation. After trial had in the court of common pleas and the circuit court of this county, the case reached the supreme court on error and the writ prayed for by the relator, the Physicians' Defense Company, was refused by that court, the court holding that a foreign corporation created for the purpose of engaging in and carrying on the business of defending physicians and surgeons against civil prosecutions for malpractice in the manner and by the means which obtained with the relator company is not entitled to have or receive from the Secretary of State a certificate authorizing it to transact such business in this state for the reason that the business proposed is professional business, and as such is prohibited to corporations by section 3235 of the Revised Statutes of Ohio.

This would seem to fully answer the application now made by this same company, but it is contended that the contract proposed to be written and the powers sought to be exercised within the state of Ohio have been altered so as to remove the objectionable features criticised by the Supreme Court in the case cited, and further the company urges that the Circuit Court, in the case of the State of Ohio ex rel. Bankers' Identification Company v. Laylin, Secretary of State, in the form of contract proposed to be entered into by the Bankers' Identification Company, obviated the criticism of "engaging in professional business," and that the Physicians' Defense Company in the application now made has followed the methods adopted by the Bankers' Identification Company and therefore is not subject to the criticism made by the Supreme Court, and for which reason the Supreme Court denied the prayer of such company for a certificate authorizing it to transact its business within this state. These claims of the company necessitate an examination of the opinion rendered by the Circuit Court in the case referred to, and also the change of purposes of the corporation which it is proposed to carry out within this state.

The opinion expressed by the Circuit Court was upon an application of the Bankers' Identification Company to file an amendment to its articles of incorporation as provided by section 3238a R. S., and did not arise in any action challenging the right of such company to do or carry on its business within the state. In that case it was conceded by the Attorney General that in an action in mandamus to require the Secretary of State to file amendments to its articles of incorporation, duly adopted as provided in the procedure contained in Section 3238a R. S., the right of the company could not be challenged to do business under its original charter, and the company could require such amendments to its ar-



ticles to be filed in the office of the Secretary of State, and that in case of that officer's refusal so to do, mandamus was the proper remedy to compel him so to do.

The questions presented by this application of the Physicians' Defense Company were not involved in that action, and therefore it should not be considered as a precedent to in any way modify what has been said by the Supreme Court relative to this company. That court said (73 O. S., 99-100):

"The services necessary to be rendered by the company in the carrying out and performance of its said contract, being such, as in this state, may only be performed by a member of the legal profession, an attorney at law, who shall have been first duly authorized and licensed to perform the same, are *professional services*, and a business which in its conduct or transaction requires and permits only that character of service, is essentially and certainly, a professional business. \* \* \*

"The agents to be employed, ~~are~~ and must be, attorneys at law, and by the express terms of its contract they are to be employed and paid by the corporation. While, therefore, the services rendered by the persons thus employed are rendered to, and in defense of, the contract holder, they nevertheless are rendered for, and in legal contemplation are performed by, the corporation itself. If this be not the engaging in or carrying on of professional business, then it would be difficult to conceive how professional business could be engaged in or carried on by a corporation. We are of the opinion that the business proposed is professional business, and may not therefore be transacted or carried on by a corporation in the state of Ohio because of the prohibitive provisions of Section 3235, Revised Statutes."

Now, do the provisions contained in the company's charter remain subject to the criticism that its business is professional? I quote from Article II of its charter:

"The proposed plan of doing business is as follows: The association will issue to physicians and surgeons for stated and agreed compensation contracts by which *it* will undertake and agree to defend the holder of the contract at its own expense against any action brought against him for damages for alleged malpractice in relation to, or connection with services performed, or which should have been performed within the time covered by the contract. But the association will not in any defense contract issued by it assume, or agree to assume or pay any judgment for damages for malpractice rendered against the holder of such contract."

The purpose of the corporation, as recited in the application blank, made to you as secretary of state, are as follows:

"The business or objects of the corporation which *it* is engaged in carrying on or which *it* proposes to engage in or carry on in the state of Ohio, is to aid the medical profession in the practice of medicine and surgery by compensating attorneys and other persons employed by and rendering services to physicians and surgeons in the defense of civil prosecutions for malpractice."

The counsel for the company claim that because the attorneys are not to be employed by the association, but that the employment thereof is to be left to the physician or surgeon holding a contract with the company, hence such

provision has removed the criticism made by the court. The corporate articles provide that "it," the company, will undertake and agree to defend the holder of the contract, and the purposes, as recited in the objects of the corporation, contain the provision that the company shall pay the attorney so employed.

The Supreme Court on page 100 *supra* seems to have as severely criticised the payment by the corporation, as the employment. In other words, the scheme of the business of assuming to defend malpractice cases and to be responsible for the compensation of the attorneys engaged, is condemned by the court as being a professional business and inhibited by Section 3235, R. S.

I am of the opinion that the objections entered by the Supreme Court to this scheme have not been removed by the proposed change of plan now presented by this company, and that the scheme is still obnoxious to the criticisms then made, and that in view of that authority you should not issue to such company a certificate of authority to carry on such business within the state of Ohio.

I herewith return to you the papers transmitted to me.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### CORPORATIONS — PRIVATE — AMOUNT OF CAPITAL STOCK REQUIRED TO BE SUBSCRIBED BEFORE ENGAGING IN BUSINESS.

Corporation cannot avoid requirement of Section 3244 R. S., that ten per cent. of its capital stock must be subscribed before engaging in business, by "increasing" its authorized capital stock: ten per cent. of the total authorized capital stock after such increase must be subscribed.

May 14th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:— With the report for 1906, and check for \$10.00 of the Central Elevator Company, of Cleveland, you submit the following statement of facts upon which you desire the opinion of this department:

The Central Elevator Company was organized with an authorized capital stock of \$5,000. On September 7th, 1905, the company filed a certificate of increase to \$500,000. The report submitted shows that no part of the increase has been subscribed and the company has not now ten per cent. of its authorized capital stock subscribed.

Query: Should the company be obliged to have subscribed a sufficient additional amount to make ten per cent. of its present authorized capital and file a certificate to that effect in your office?

The certificate of September 7th, 1905, was by authority of Section 3263, R. S.

"A corporation for profit, after its original stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid in, \* \* \* may increase its capital stock \* \* \* and a certificate of such action by the corporation shall be filed with the escretary of state."

Section 3242 of title II, chapter 2, providing for the creation and regulation of corporations, provides that the persons named in the articles of in-

corporation shall order books to be opened for subscriptions to the capital stock, and Section 3244 stipulates that "*as soon as ten per cent. of the capital stock is subscribed*" the subscribers of the articles of incorporation shall so certify in writing to the secretary of state and *thereupon* shall give notice to the stockholders to meet for the purpose of choosing directors.

Read together, these sections make it imperative that persons desiring to become a body corporate shall certify to the secretary of state that ten per cent. of the authorized capital stock *has been subscribed* before a legal board of directors may be chosen.

A statute must be understood to contain by implication, if not by express terms, all such provisions as may be necessary to effectuate its objects and purposes, or to make effective the rights, powers, privileges or jurisdiction which it grants, and also all such collateral and subsidiary consequences as may be fairly and logically inferred from its terms. (Black's Interpretation of Law, p. 62.)

To say that this corporation, through the means provided for an increase of capital stock, might carry on its business under a charter and an amendment thereto authorizing a total capital stock of \$500,000, only one per cent. of which is subscribed, would be to nullify the provisions of sections 3242 and 3244. It is a principle of law that whatever may not be done directly, may not be done indirectly, and consideration of the foregoing sections plainly indicates that the intent of the legislature was to provide that all corporations organized in Ohio must have ten per cent. of their capital stock subscribed and a certificate to that effect filed with the secretary of state, before exercising the powers granted by its charters.

Our courts held in *State ex rel. v. Insurance Co.*, 49 O. S., 440:

"The making and filing for the purpose of profit, of articles of incorporation in the office of the secretary of state, do not make an incorporated company; such articles are simply authority to do so. No company exists within the meaning of the statute *until the requisite stock has been subscribed* and paid in and the directors chosen."

It is my opinion that where the original authorized capital is less than ten per cent. of the total authorized capital after the increase is made, a certificate should be required that ten per cent. of the total authorized capital has been subscribed, before the corporation can assume to act under the authority of the increase.

In the case before us I advise the submission to The Central Elevator Company of the gist of this opinion and the requirement from it of the proper certificates. The Company then would be obliged to show in their 1906 report at least \$50,000 subscribed capital stock.

I return herewith the report and check submitted by you.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### BOND — OF EMPLOYE OF ADMINISTRATIVE BOARD.

Two bonds filed by superintendent of Ohio state reformatory cumulative.

May 15th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:— Pursuant to your request I have examined the two bonds heretofore filed with you by J. A. Leonard as superintendent of the Ohio State Reformatory.

It appears that Mr. Leonard was elected superintendent of that institution under Section (7388-20) Bates' R. S., to "hold his office during the pleasure of the board." Upon qualification he filed a bond required by the succeeding section with personal sureties. Later on he filed another bond, also complying with the governing section with a surety company as surety thereon. Each of these bonds recognizes that the term of Mr. Leonard is indefinite and each bond runs for an indefinite period. I beg to advise you that under these circumstances the second bond is cumulative to the first and they are both valid and subsisting obligations. No method is provided by statute for a surety to be released from this bond and no such release can be had during the official term for which such bond is given.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

### REGISTRATION — QUADRENNIAL.

Amendment of Sections 2926a and 2926h, R. S., relating to registration in presidential years, and changing minimum population of cities in which such registration required from 14,000 to 11,800, does not make it necessary that such registration should be had in cities having population of between 11,800 and 14,000, until date of next succeeding presidential election.

May 17th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:— Pursuant to your request I have examined the recent act of the General Assembly, 98 O. L., 212, amending Sections 2629a and 2629h of the Revised Statutes of Ohio, relating to registration of electors.

Section 2629a, as amended in 1904, required registration in cities of fourteen thousand population and over and *inter alia*, provided:

"No person shall be deemed or held to have acquired a legal residence in any ward or election precinct in any such city, for the purpose of voting therein at any election, general or special, nor shall he be admitted to vote at any election therein unless he shall have caused himself to be registered as an elector in such ward or precinct in the manner and at the time hereinafter required."

This language remains in the section as amended in 1906.

Does this language require registration this year in a city having a population sufficient to bring it within the act of 1906, but not within the act of 1904? The language quoted might seem to limit the right of suffrage to those who comply therewith. The right of suffrage, however, is given and defined by the Constitution, and registration laws are sustained only so far as they reasonably and impartially regulate the exercise thereof.

Daggett v. Hudson, 43 O. S., 548.

The manner and time of the registration referred to by Section 2926a is found in Section 2926h and so far as pertinent is as follows:

"In all cities which now or hereafter may have a population of eleven thousand eight hundred and less than one hundred thousand, a general registration for all the electors therein shall only be had at each and every presidential election, at the times and upon the days hereinbefore specified."

When by the amendment of 1904 the General Assembly made all cities of fourteen thousand population subject to the provisions of the registration laws and limited the exercise of the right of suffrage to registered electors the language quoted from Section 2926a was reasonable because the statute provided for a general registration during that year, that being a presidential year. The same language in the same section, as re-enacted in 1906, however, would seem to deprive an elector of a vote unless he had registered "in such ward or precinct in the manner and at the time hereinafter required," that is, unless he had registered in a presidential year. So literal a construction of this language is therefore out of the question. It would not be a regulation but a prevention of the exercise of the right of suffrage.

I am of the opinion, therefore, that no registration is required of the electors in the cities affected until 1908.

While no machinery is provided in the several cities for registration until the next presidential year, the cities are nevertheless, registration cities for all other purposes provided for by law. The deputy state supervisors of elections have power to locate voting places in new precincts and where the council of one of the cities has provided for a special election for the submission of a proposition to authorize the issuance of bonds "at the regular voting places" the election should be held at such places as have been designated by the deputy state supervisors.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### BOND — OF EMPLOYE OF ADMINISTRATIVE BOARD.

Officer chosen for indefinite term by administrative board must file new bond upon re-election; supplementary to opinion of May 15.

May 18th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:— Since rendering you an opinion on May 15th, 1906, in the matter of the bonds of J. A. Leonard, superintendent of the Ohio State Reformatory, I am advised that since the filing of these bonds Dr. Leonard has been re-elected by the board of managers of that institution and that he has accepted such re-election and qualified thereunder. This, in my opinion, releases the sureties upon the old bond and requires Dr. Leonard to file a new bond.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### CORPORATION — PRIVATE — INCREASE OF PREFERRED STOCK.

Method by which preferred stock of private corporation may be increased.

May 23, 1906.

*HON. LEWIS C. LAYLIN, Secretary of State, Columbus, Ohio.*

DEAR SIR:— With the enclosed communication from Hon. Rufus B. Smith you inquire whether a corporation which has an issue of preferred stock, all of which has been taken and paid for, can in any way provide for an additional

issue of preferred stock without securing the consent of all of the present preferred stockholders, the charter providing that the preferred stockholders shall not have the right to vote?

Section 3235a provides *inter alia*:

“At no time shall the amount of preferred stock exceed two thirds of the actual capital paid in in cash or property.”

Subject to this limitation a corporation may, under authority of Section 3263 “upon the assent in writing of three fourths in number of the *stockholders* of any corporation representing at least three-fourths of its capital stock”, increase its capital by issuing and disposing of preferred stock. A certificate of such action shall be filed with the Secretary of State as provided in Section 3262.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### FUNERAL BENEFIT ASSOCIATIONS — FOREIGN.

Burial League of the United States, a foreign funeral benefit association, must comply with insurance laws of Ohio before admission to do business within state.

June 1, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of your letter of the 23d inst., with documents accompanying the same presented to you by the Burial League of the United States, which company has applied to your department for permission to qualify as a foreign corporation to do and carry on its business within the State of Ohio, pursuant to Sections 148c and 148d of the Revised Statutes.

In answer to your request for an opinion as to whether such association or corporation may be authorized to transact business in this state, by favor of the sections of the Revised Statutes cited, I refer you to the opinion of this department, given you under date of July 1st, 1904, relating to this same corporation in which I then expressed the opinion that the contract proposed to be written within the State of Ohio by such corporation, substantially amounted to insurance, and is forbidden by Section 289 of the Revised Statutes, unless such company qualifies to engage in such business as required by the statutes governing insurance companies.

This corporation is evidently of the opinion that the provisions of the act of March 31st, 1904 (97 O. L. 61) exempt it from the operation of the insurance laws of the state. The amendment referred to, so far as it is pertinent to this question, is as follows:

“Nor shall such sections, nor any other laws relating to insurance companies apply to any association formed for the exclusive purpose of providing for the payment of the funeral expenses of the members of such associations by assessments upon such members, when the amount of such payments on account of any one member does not exceed the sum of \$100, and when the membership of such association is limited to the county in which such association is organized.”

That amendment, as is evident, only applies to domestic associations, and not to foreign associations or corporations.

There is no reason apparent to me why the opinion of July 1st, 1904, should not be adhered to.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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ARTICLES OF INCORPORATION OF METROPOLITAN FUNERAL AND BURIAL ASSOCIATION.

Articles of incorporation of domestic funeral benefit association must indicate that payments of any one member shall not exceed \$100, and that membership thereof is confined to county.

June 6, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter enclosing articles of incorporation of The Metropolitan Funeral and Burial Association Company to be located at Cincinnati, Ohio, concerning which you desire an opinion of this department as to whether the same should be filed by you in your department as required by the statutes governing your duties as to the filing of articles of domestic corporations.

I have compared the purpose of this department as set forth in its articles with the requirements of the act of March 31st, 1904 (97 O. L. 61), which, so far as it is pertinent to the question here presented, is as follows:

“Nor shall such sections, nor any other laws relating to insurance companies apply to any association formed for the exclusive purpose of providing for the payment of the funeral expenses of the members of such association by assessments upon such members, when the amount of such payments on account of any one member does not exceed the sum of \$100.00, and when the membership of such association is limited to the county in which such association is organized.”

The purpose as defined in the articles of incorporation submitted is as follows:

“Said corporation is formed for the purpose of providing a suitable burial for persons desiring to procure the advantages thereof; said company furnishing everything incident thereto, under a contract with some undertaker, pursuant to a contract made with said persons in their lifetimes, who agree to comply with all the terms and conditions of the constitution and by-laws of said company.”

It will be observed by comparing the purpose of this association with the provisions of the act referred to that it does not incorporate therein the requirements of such act, to-wit: the limitation upon the amount of the payment, also limiting the membership thereof to the county in which the association is organized. For the reason that it does not so provide, I return these articles of incorporation not approved and advise that the same be not filed by you.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

ARTICLES OF INCORPORATION OF CLYDE SAVINGS BANK AND  
TRUST COMPANY.

June 6, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:— Acknowledging the receipt of articles of incorporation of The Clyde Savings Bank and Trust Company that you have transmitted to this department for approval I beg to say I cannot approve the same as the corporation hereby sought to be created seeks, by its articles, to assume the powers of a savings and loan association, together with certain powers of safe deposit and trust companies. This cannot be done by a corporation with a capital stock of but \$60,000.

Section 3831gg R. S. provides that such powers cannot be exercised by a corporation unless it has a minimum capital of \$200,000.

I refer you to the opinion of this department under date of October 30th, 1905.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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UNITED INVESTORS COMPANY OF NEW YORK MAY NOT ENGAGE  
IN BUSINESS IN OHIO.

June 11, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:— Acknowledging the receipt of yours of the 7th inst., enclosing inquiry from the Loomis-Woodward Company as to the legality of the business proposed to be engaged in within the State of Ohio by the United Investors Company of New York, I beg to say in answer thereto that the business done by this company, as shown on pages 7 to 13 of the circular matter which accompanies your letter, is in violation of the act of the General Assembly of the State of Ohio found in 93 O. L., 146, and otherwise designated as Sections (4427-1) to (4427-12) R. S. It therefore follows that the same cannot legally qualify to carry on such business within this state.

I return to you the circular matter referred to, together with the letter of the Loomis-Woodward Company addressed to you under date of June 5th, 1906.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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CORPORATIONS— BANKING POWERS OF.

Banking corporation has no power to purchase its own stock save for debt.

June 18, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:— By your request the American Savings Bank Company of Toledo, Ohio, submitted to this department its report for 1906 and check for \$50.00, with the following statement of facts:



"Originally \$100,000.00 capital stock was subscribed, issued and outstanding with one-half (\$50.00 per share) paid in, being \$50,000.00 paid in; and we have always paid \$100.00 annual fees, but now it is different. Jan. 10, 1905, at our annual meeting of stockholders a resolution was passed to put our stock on a par basis and to give each stockholder the right and option to either pay in \$50.00 per share or surrender his or her certificate with 50% paid in and receive therefor, a certificate for half the number of shares with 100% paid in and as it now stands we have 500 shares issued and outstanding of \$100 each, making \$50,000.00 paid in capital. The old certificates have all been surrendered to, and accepted by, the company and in their place have been issued certificates in the amount of \$50,000.00, which is now the issued and outstanding capital stock of this company and is the only stock subscribed for."

The question of the purchase of its own stock by a manufacturing company was discussed in my opinion of May 3d, 1906, and it was there held that a corporation organized under our laws for manufacturing purposes could not purchase shares of its own stock and thereby reduce its outstanding capital. The only difference existing between the question there submitted and the one arising under the above statement of facts is that the American Savings Bank Company is a banking company doing a general banking business.

Section (3821-71) provides among other things:

"No banking company shall be the holder or purchaser of any portion of its capital stock \* \* \* unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, etc."

This is the legislative expression of the general law on this subject and it only remains to be determined whether the above facts constitute, in effect, a purchase of outstanding stock. When the above corporation showed \$100,000.00 of subscribed and issued capital stock each one of its subscribers was personally liable for \$50.00 more per share than he had paid in. The full amount of \$100,000.00 was not only subscribed for but was issued, the transaction in reality being a sale of shares of stock for one-half their face value.

In my opinion any means which this company may have adopted to relieve its subscribers from their additional liability, thereby effecting a redemption of a portion of its capital stock, was without authority or law and void as to creditors or other interested parties.

The law of Ohio prescribes but one way (Sec. 3264) for the reduction of capital stock, and the opinion of May 3d that no reduction of issued and outstanding capital may be made unless by a reduction of authorized capital may be followed in this case.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### WILLIS LAW — APPLICATION OF, TO BANKRUPT CORPORATION.

Corporation not liable for Willis law tax becoming due after filing of petition in bankruptcy.

June 18, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Your letter of June 14th enclosing communication of Ross W. Funck, trustee in bankruptcy of the Wooster Shale Brick Clay Company makes

inquiry as to whether said corporation having been declared a bankrupt February 20th, 1906, should pay the taxes due under the Willis law in May, 1906.

In the case of the First National Bank v. Aultman, Miller & Co., (opinion by Doyle, Referee) 12 A. B. R., 12, it was held:

“Where a state franchise tax does not become a charge against a corporation until after a petition in bankruptcy is filed against it, the trustee should not be ordered to pay the same as a tax.”

This opinion has been followed by this department whenever the question has been submitted. The only duty resting upon the trustees in bankruptcy, in such case, is that imposed by Section 8 of the Willis law, requiring that a certificate of the clerk of the court should be filed with the Secretary of State to the effect that said corporation has been declared a bankrupt and that its affairs are in process of liquidation. For the filing of this certificate the Secretary of State should collect from said trustee the sum of \$5.00 which should be taxed as costs in the proceeding and which shall have the same priority as other costs.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### CORPORATIONS — BANKING — CAPITAL STOCK OF.

State bank may not do business with less than \$15,000 subscribed capital stock.

June 20, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:— You have submitted the report for 1906 of The Ohio State Bank Company of Liberty Center, Ohio, with the information that the same is a state bank organized under the laws of Ohio. It appears from answer to question 6 of said report that the company has only \$10,000 of subscribed capital.

Section (3821-66) R. S., prohibits the organization of a state bank with an authorized capital of less than \$25,000; Section (3821-67) provides that at least 60% of the entire capital stock must be subscribed before said banking company may be engaged in business and Section (3821-68) that upon satisfactory evidence furnished to the Auditor, Governor and Secretary of State, that the previous sections have been complied with, a certificate shall be issued by your department to that effect.

I suggest the return of the report and the requirement from said company of of the evidence indicated.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### ELECTIONS — BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF — POWER OF DEPUTY CLERK.

Deputy clerk of board of deputy state supervisors and inspectors of elections has power to administer oaths to election officers.

June 20, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

In response to yours of June 16th, 1906, I beg to advise you that where the law provides for a deputy officer such deputy may perform all and singular the

duties of his principal. Section 10, R. S. The law provides for a Deputy Clerk of the Board of Supervisors and Inspectors of Elections, and, in my opinion, such deputy has power to administer oaths to election officers as provided by Sections (2966-6), (2966-7) and 2926e of the Revised Statutes.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### FUNERAL BENEFIT ASSOCIATION — DOMESTIC.

Articles of incorporation of domestic funeral benefit association must indicate membership thereof is confined to county.

June 26, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith articles of incorporation of The National Gold Bond Burial Company, advising you that the same does not comply with the provisions of the act of May 21st, 1904, (97 O. L., 61), which act was an amendment to the existing law governing such associations and exempting them from the operation of the laws governing insurance companies within the state.

The provisions to which I especially refer are as follows:

“Nor shall such section, nor any other laws relating to insurance companies apply to any association formed for the exclusive purpose of providing for the payment of the funeral expenses of the members of such associations by assessments upon such members, when the amount of such payments on account of any one member does not exceed the sum of \$100, and *when the membership of such association is limited to the county in which such association is organized.*”

The third paragraph of the articles of incorporation of this company should recite that the membership of the association is proposed to be limited to the county (Hamilton) in which the association is organized.

For these reasons I herewith return the same without my approval.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### RAILROAD COMMISSION — OFFICE SUPPLIES OF.

Office supplies of railroad commission must be furnished by secretary of state.

August 3, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — In response to your request of the 2d inst., I have examined the act creating the Railroad Commission, (98 Ohio Laws, 342), and observe that it apparently contemplates the Adjutant General shall furnish it with such office supplies as may be needed. Comparison of the act with the Wisconsin law, from which the Ohio statute was almost literally taken, shows that the Adjutant General is substituted only for an officer who has no place in the Ohio laws, and who appears, under the laws of Wisconsin, to have control not only of the State House

but of supplies. The conclusion I have reached is that the Adjutant General has only such powers, under this particular act, as are generally conferred upon him by law and has, therefore, nothing to do with stationery and similar supplies needed by the Commission. Sections 137 and 138 of the Revised Statutes of Ohio give the Secretary of State authority to provide stationery "and other articles as may be necessary" to state officers. The Railroad Commission and its officers are, in my opinion, such state officers and entitled to all the privileges of this section.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### TOWNSHIP TRUSTEES — VACANCY IN OFFICE OF.

Vacancy in office of township trustee must be filled by appointment by justice of the peace whose last commission bears the earliest date; Section 1452 R. S. construed.

August 8, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for an opinion of the proper construction of Section 1452 of the Revised Statutes. It appears from your inquiry that a vacancy exists in the office of township trustee; that both justices of the peace were elected at different times prior to 1904, and both elected for the terms now being served in the fall of 1904. The section mentioned authorizes a vacancy in the office of township trustee to be filled by appointment by that justice "holding the oldest commission." In my opinion this does not refer to a commission earlier than the one under which the justice is now holding and it is entirely immaterial as to what the terms were served or commissions held by either justice prior to the current term. Both of them seem to have been last elected in 1904. They may have been commissioned at different times, however. If so the township clerk should ascertain which commission bears the earlier date and notify the holder thereof to make the appointment. If both commissions bear the same date the justice "oldest in years" should make the appointment.

Yours very truly,

W. H. MILLER,  
*Ass't Attorney General.*

#### ELECTIONS — PRIMARY — APPLICATION FOR, BY COUNTY EXECUTIVE COMMITTEE OF POLITICAL PARTY.

It is the duty of state supervisor of elections and board of deputy state supervisors of elections to recognize in all matters in which it is authorized to act the county executive committee of a political party designated by state central committee of such party as the rightful committee; board of deputy state supervisors of elections has no authority to conduct county primary election at expense of county upon application of county executive committee other than that designated as the rightful committee by the state central committee of such party.

August 27, 1906.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication in which you submit the following inquiries is received:

*First:* "When the State Central Committee of a political party has determined which of two rival county committees is the 'rightful executive committee' of such party under the provisions of Section (2966-3) of the supervisory election law, is it the duty of the State Supervisor of Elections and the County Board of Deputy State Supervisors of such county to recognize such county executive committee in all matters where the county executive committee of such political party is authorized by law to act?"

Section (2966-3), providing for the appointment and qualification of Deputy State Supervisors, contains a provision whereby the State Central Committee of the political party entitled to the appointment, in cases where recommendations are made by more than one county executive committee, shall determine which of the county executive committees making the recommendations is the rightful executive committee, and shall certify such determination to the State Supervisor of Elections. When the State Central Committee, acting under this provision, determines which committee is the rightful committee, it is the duty of the State Supervisor of Elections and the County Board of Deputy State Supervisors of the county, in my opinion, to recognize such executive committee as the rightful executive committee in all matters where the county executive committee of such political party is authorized by law to act.

*Second:* "Is there any authority of law given a County Board of Deputy State Supervisors to conduct a county primary under Sections 2916 and 2917 of the Revised Statutes and charge the expense thereof to the county, where application thereof is made by a county executive committee of a party other than the 'rightful county executive committee' of such party as determined by the State Central Committee of such party under Section (2966-3) of the supervisory election law?"

Sections 2916 and 2917 contemplate but one county executive committee for each political party, therefore where the State Central Committee, under the provisions of Section (2966-3) have determined between rival county executive committees in a county which is the rightful county executive committee, said county executive committee so determined to be the rightful county executive committee, is in my opinion, the only committee authorized to act under Sections 2916 and 2917 of the Revised Statutes.

Very truly yours,  
 W. H. MILLER,  
*Ass't Attorney General.*

#### SAFE DEPOSIT AND TRUST COMPANY—QUALIFICATION OF, FOR DOING BUSINESS.

Safe deposit and trust company may not engage in business without complying with provisions of Section 3821a, 3821b and 3821c, R. S.

September 19th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:—Replying to yours of the 18th inst., enclosing a letter from Mr. Walter G. Kirkbride, attorney at law, Toledo, for my consideration, I desire to

say in answer thereto, that the powers conferred upon safe deposit and trust companies, as contained in Sections 3821a, 3821b and 3821c of the Revised Statutes, are exclusive of other forms of corporations, and such should not be permitted to be organized to execute such powers, unless subject to the restrictions and limitations obtained in the sections referred to.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

WILLIS LAW—APPLICATION OF, TO GREAT LAKES TOWING CO.

September 26th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to me the report of The Great Lakes Towing Company with check for \$158.50, and inquire whether this company is liable under the Willis law?

It appears from the report of this corporation that it is organized under the laws of New Jersey and I assume that it has complied with Section 148c and 148d and is regularly admitted to transact business in this state.

In answer to question 7 of the report, they claim to be engaged in a "general towing and wrecking business on the Great Lakes and their harbors." In a former opinion from this department it was held that all corporations doing business in this state were liable for franchise taxes, either under the Cole law or the Willis law, and that if such company did not come within the definition of public service corporations as provided under the Cole law then such corporation was liable and should make report under the Willis law.

In this case it does not appear that this company is engaged "as a common carrier in the transportation of passengers or property by boat" and does not, therefore, come under the head of water transportation companies.

I am of the opinion that The Great Lakes Towing Company is a foreign corporation doing business in Ohio and should report under the Willis law. In the report enclosed it occurs to me that this company does not set out the particular location and value of its property either in or out of Ohio, with sufficient definiteness for you to determine whether the proportion claimed by it is a just one. I would recommend in this case that the report be returned and a detailed statement secured before fixing the amount of the fee.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

SAFE DEPOSIT AND TRUST COMPANY—CAPITAL STOCK OF—ARTICLES OF INCORPORATION OF AMERICAN BANKING AND TRUST COMPANY.

October 6th, 1906.

*Hon. Lewis C. Laylin, Secretary of State.*

DEAR SIR:—Replying to yours of the 2nd inst. containing the communication addressed to you by The American Banking Company of Sandusky, I would say that if the proposed articles of incorporation of the new company, to-wit. The American Banking and Trust Company, contains in its purpose clause the language

as quoted in its letter of the 2d inst., to-wit, "The business of a safe deposit and trust company as described in Sections 3821a and 3821b of the Revised Statutes of the State of Ohio, and to enjoy all the privileges granted to such companies by said Sections 3821a and 3821b," the same could be done with a capital stock of less than \$200,000, but amounting to at least \$50,000, without violating the provisions of the Revised Statutes governing safe deposit and trust companies. This is perfectly consonant with the opinion expressed by this department to you under date of June 5th, 1905. (Op. Atty. Gen., 1905, p. 41.)

I do not here pass upon the question as to whether such change of corporate powers can be effected pursuant to the provisions of Section 3238a R. S., by amending its articles, or whether the change would have to be made by a re-incorporation.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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### CORPORATIONS — BANKING — BRANCH BANKS.

Branch banks may not be established in Ohio.

October 9th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR — Acknowledging the receipt of the inquiry presented by you accompanying the letter of Mr. E. O. Murray of New Paris, Ohio, I beg to say that in my opinion there is no authority for establishing branch banks within this state.

Section 3236, R. S., makes it incumbent upon each corporation to establish a situs for every corporation organized under the laws of the State of Ohio, and this does not authorize the location of branch corporations (banks) in any other situs than that named in the certificate issued by your department.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

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### ELECTIONS.

County commissioners may not submit to electors question whether or not county library shall be constructed.

October 12th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR: — Your letter of October 12th requests my opinion as to the authority of county commissioners to submit to the voters of the county the question whether or not a county library shall be constructed in the county.

I am unable to find any authority for the submission of this question to the voters of the county.

Section 891a, R. S., vests in the county commissioners themselves the authority to decide whether a gift for library purposes shall be accepted and a tax levied for a library fund. The question must, therefore, be decided by the commissioners and may not be referred to the voters.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

CORPORATIONS — BUILDING COMPANY — PURPOSE — AMENDMENT  
OF ARTICLES OF INCORPORATION.

Corporation organized under Section 3884a, R. S., for the purpose of acquiring real estate for construction of certain buildings may not by amendment to articles of incorporation so modify such purpose as to acquire power of dealing generally in real estate, as defined and limited by Section 3235, R. S.

December 8th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of yours of the 7th inst. enclosing the letter of Mr. Powell Crosley, attorney-at-law of Cincinnati, for my consideration and answer. It presents the inquiry whether, by amendment, a corporation organized as a building company pursuant to the provisions of Section 3884a, R. S., can change its purpose by a proceeding under Section 3238a R. S., to that of a corporation to deal in real estate and limited to twenty-five years' existence, as provided by Section 3235, R. S.

Section 3884a, R. S., provides for the organization of a corporation for the single purpose of constructing and maintaining buildings to be used for certain specific purposes, and limits such corporation, in its authority to acquire real estate by purchase or lease, to the purpose above set forth. Such corporation is also limited in the terms of its leases and methods of dealing in relation thereto, to those contained in the above section.

It is proposed to engraft upon such corporation, as supplemental powers, those powers contained in Section 3235, R. S., relating to corporations created for the purpose of buying or selling real estate and giving to such corporations the right of existence for a term of twenty-five years from the date of their articles of incorporation. This change is proposed to be effected under the procedure mentioned in section 3238a, R. S. The obstacles presented by this proposed plan are: (1) those of method; (2) those of powers.

The method provided in Section 3238a by which it is proposed to effect this object, is not applicable to such change, alteration, or enlargement of the original purpose of a corporation organized pursuant to Section 3884a. Section 3238a, R. S., provides, inter alia, that

“Nothing in this supplemental section contained shall authorize a corporation, by amendment, to increase or diminish the amount of its capital stock; nor shall any corporation, by amendment, change, substantially the original purpose of its organization.”

In my opinion the particular corporation under consideration, The Queen City Realty Company, is limited by the act under which it was created to the single, definite purpose therein recited. It was not empowered thereby to buy or sell real estate generally, but for the single purpose of constructing and maintaining buildings to be used for hotels, storerooms, offices, warehouses and factories, and its power to purchase or lease real estate was for such purpose alone. A general authority to acquire, hold, and dispose of real estate for all manner of purposes, is not a mere enlargement of the purpose to acquire real estate for the definite purpose before mentioned, and subject to the restraints contained in Section 3884a, but is a substantial change from the original purpose for which the corporation was organized, therefore it would follow that the procedure out-



lined in Section 3238a of amending the articles of a corporation is not applicable to such change as has been proposed by the above named company.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

TOWNSHIP TRUSTEE—VACANCY IN OFFICE OF—METHOD OF FILLING AS AFFECTED BY EXTENSION OF EXISTING TERMS OF JUSTICES OF THE PEACE.

In determining which justice of the peace within a township holds "oldest commission," so as to authorize him to appoint to fill vacancy in office of township trustee, under Section 1452, R. S., justice holding office by virtue of extension of term by constitutional amendment (article XVII, Section 3) deemed to hold under commission for term thus extended, regardless of reappointment to fill supposed vacancy, and issuance of new commission.

December 17th, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:—It appears from your letter of December 13th that a dispute has arisen between two justices of the peace as to which one was entitled, under Section 1452, R. S., to make an appointment to fill a vacancy in the office of township trustee.

Mr. McFadden was elected in November, 1905, and was commissioned in December of that year. The three-year term for which Mr. Brophy was elected and for which he received a commission, expired in April, 1906. Since he was in office at the time of the adoption of Article XVII, Section 3, his term was thereby extended until his successor should be "elected and qualified." There was, therefore, no vacancy in his office at the expiration of his three-year term, and the appointment to fill a supposed vacancy and the new commission issued pursuant thereto, were of no effect. Mr. Brophy did not hold after April, 1906, by virtue of any new election or appointment requiring a new commission to be issued as evidence thereof under Section 83, R. S. His title to the office was sufficiently evidenced by the commission of 1903, and the constitutional amendment of 1905.

Section 1452, R. S., requires the justice of the peace "holding the oldest commission" to make appointments to fill vacancies in the office of township trustee. The words quoted refer to the oldest active commission, the oldest commission which, taken by itself or read in connection with the statutes and the constitution, evidences a right to hold office at the time of the occurrence of the vacancy in the office of trustees.

I am therefore of the opinion that Mr. Brophy held the oldest commission and was entitled to make the appointment in question.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

ELECTRICITY—AMENDMENT OF ARTICLES OF INCORPORATION OF STEAM RAILROAD COMPANY SO AS TO AUTHORIZE USE AND SALE OF.

Steam railroad company may so amend its articles of incorporation as to authorize use of electricity as motive power; may not so amend as to authorize sale of electric light, heat and power.

December 21st, 1906.

*Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.*

DEAR SIR:—Replying to yours of the 18th inst. accompanying the letter of D. H. James, President of the Toledo and Columbus Railway Company, I beg to say the inquiry you have submitted to this department, which is presented by Mr. James, with relation to the Toledo and Columbus Railway Company as to the right of that company to amend its articles of incorporation pursuant to the provisions of Section 3238a, R. S., so as to authorize such corporation to operate a railroad by electricity or other motive power whose purpose clause now provides that such corporation is formed for the purpose of operating a railroad “by steam or other motive power.” The proposed change also is sought to include:

“Manufacturing, selling and furnishing electric light, heat and power for the use of said corporation or to any persons, firm or corporation.”

As to the right of the railroad company to operate its road by electricity as a motive power in addition to that of steam, it is seemingly authorized by Section (3310-1), R. S., which is as follows:

“Upon any railroad heretofore or hereafter constructed in this state, electricity may be used as a motive power in the propulsion of cars; provided, however, that before any line of poles and wires shall be constructed through or along the streets, alleys or public grounds of any municipal corporation, plans of such construction shall be submitted to or approved by the council of such municipal corporation.”

This act of the General Assembly was passed May 21st, 1894, and indicates the policy of the General Assembly to authorize railroad companies, meaning thereby companies organized for the purpose of owning and operating steam railroads, to acquire the right to use electricity as a motive power in the propulsion of its cars. If this power is not conferred upon such corporation at the time of its organization it could be assumed by it following the procedure outlined in Section 3238a, for it does not change substantially the original purpose of its organization, when that purpose has been enlarged by the General Assembly as provided in the statute above cited.

As to the second inquiry presented by the letter of the railway company, the power to manufacture, sell and furnish electricity, light, heat and power to other persons, firms or corporation, is plainly a substantial variance from the original purpose contained in the articles of the railroad company. The case of *State ex. rel. v. Taylor*, Secretary of State (55 O. S., 61) seems to deny this right. There a company was incorporated for the purpose of engaging in the business of manufacturing gas and electricity, and furnishing gas for light, heat and power and for such other purposes as may be used by the citizens and corporations in Steubenville and its vicinity. It was sought by the procedure contained in Section 3238a, R. S., to enlarge this purpose to that of a gas, electric and traction company, with power to acquire, own, operate, lease and maintain a street railway in the city of Steubenville, to be operated by electricity or other motive power. Such change in its purpose clause, by amendment, was denied because it “would change, substantially, the original purpose for which the company was organized.”

Since the decision above cited, an act of the General Assembly was passed (93 v. 139; 95 v. 391) authorizing corporations or companies maintaining and operating a street railroad or a railroad operated by electricity, to acquire the

franchise of a company organized to supply electricity, natural or artificial gas, or both electricity and natural and artificial gas, for power, light, heat or fuel purposes; but having given consideration to the intention of the General Assembly expressed in this act, I am of the opinion that it does not extend to authorizing a corporation organized for the purpose of operating a steam railroad to employ the additional power conferred upon street railroads, or railroads operated by electricity, by the act above cited.

I therefore express the opinion that the latter power is denied to such corporation.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## (To the Auditor of State.)

## AUDITOR — COUNTY — FEES OF.

Whether county auditor making settlement with auditor of state after amendment of Section 1069, R. S., effective February 13, 1906, entitled to fee of one per cent. of collections for school fund, as allowed by said section in its original form.

February 16th, 1906.

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

DEAR SIR:—Under date of February 15th, 1906, you inquire whether the Auditor of State should be governed by Section 1069 as amended February 13th, 1906, or by the provisions of that section prior to its amendment, in making settlement with county auditors.

In the absence of the Attorney General your inquiry has been referred to me, and I beg to advise you that in as much as Section 1069 in its original form only provided that the county auditor "shall be allowed \* \* \* on moneys collected on levies made by school boards, one per cent., etc.," on settlement with both the County Treasurer and the Auditor of State, a settlement with the county treasurer only would not be within the letter of the law and in case any settlement had not been made with the State Auditor until after the amendment of this section, there is no authority for the State Auditor to allow the one per cent. therefore allowed County Auditors for school collections.

The question whether the immediate application of the amended statute violates any of the constitutional rights of any officer is a judicial one to be determined by the courts if occasion arises.

Very respectfully,

R. J. MAUCK,  
*Special Counsel.*

## INHERITANCE TAX — DIRECT — REPEAL OF.

Effect of act repealing direct inheritance tax law as to estates in which inventory not filed prior to April 16, 1906.

April 18th, 1906.

*Hon. E. M. Fullington, Deputy Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have yours of April 17th, 1906, requesting my opinion of the application of the act repealing the Direct Inheritance Tax Law to pending claims of the state. The repealing act is as follows:

"The act entitled 'An act to impose a tax upon the right to succeed to, or inherit property,' passed April 25th, 1904, 97 O. L., 398, 400, be and the same are hereby repealed, except as to estates in which the inventory has already been filed at the date of the passage of this act."

The legislature in framing this repealing act seemed to go upon the theory that unless some saving clause were attached, no right would remain in the state to collect any taxes upon estates in process of settlement at the time of the repeal. It would seem then that it was sought by this act to do something less than unqualifiedly to repeal the Direct Inheritance Tax Law. If, however, unqualified repeal of the law would leave

the state with the right to collect taxes theretofore accrued, certainly anything less than unqualified repeal could not have greater effect in destroying or abandoning the right of the state.

The question that, accordingly, arises, is: What would have been the effect of unqualified repeal? The answer is found in Section 79 of the Revised Statutes:

“Whenever a statute is repealed or amended, such repeal or amendment shall in no manner effect (affect) pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not effect (affect), pending actions, prosecutions, or proceedings, unless so expressed; nor shall any repeal or amendment effect (affect) causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

Such unqualified repeal could not affect the state's cause of action, then, according to this section, unless the repealing statute “otherwise expressly provided.” In my opinion the repealing statute does not otherwise expressly provide. It may be true that the general assembly intended to reward negligent trustees who had failed to file inventories and abandon the state's claim against such and to preserve the claim against those who had promptly complied with the statutory requirement for filing inventories, but, if so, it should have expressly so provided. Its attempted saving of one class of rights not requiring saving can not be construed into a relinquishment of another class of rights.

Until, therefore, some competent court determines that the general assembly has by this act relinquished the state's claim for taxes, I advise that you proceed with the collection of such taxes as accrued under the repealed law prior to April 16th, 1906, the day when the passage of the repealing act was perfected.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### DOW TAX — APPLICATION OF.

Application of Dow tax to following cases:

1. Office selling by order from warehouse located outside state.
2. Dealer residing in state and selling exclusively to customers outside state.
3. Same, when goods are purchased and business transacted on premises owned by another person subject to the tax.
4. Same, when such extra-state business is carried on as a “department” of a general business.

April 25th, 1906.

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

DEAR SIR:— You have requested my opinion upon several questions as to the application of the Dow law to wholesale liquor dealers in certain specified cases.

The first question presented is substantially as follows:

A company owning a distillery in Pennsylvania has an office in Cincinnati, where orders are taken and payment received for sales of whiskey, but all whiskey sold at the Cincinnati office is shipped from the Pennsylvania warehouse to the customer direct. Is such company liable to the Dow tax?

The sale at the office within this state of intoxicating liquors stored in a warehouse situated in another state, and shipped from said warehouse direct to the purchaser in this state, does not make such office subject to the Dow tax.

Brooks v. Van Ness, 38 B. 262. Affirmed without report, 57 O. S., 642.

"The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce."

Robbins v. Shelby Co., 120 U. S., 497.

Emert v. Mo., 156 U. S., 319.

Toledo Commercial Co. v. Glenn Mfg. Co., 50 O. S., 221.

Vance v. Vandercook, 170 U. S., 444.

"Equally well established is the right to send liquors from one state to another, and the act of sending the same is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a state law which denies such a right, or substantially interferes with or hampers the same is in conflict with the Constitution of the United States."

451. "The interstate commerce clause of the constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress which allows state authority to attach to the original package before sale but only after delivery."

445. But "by virtue of the act of congress the receiver of intoxicating liquors in one state sent from another, can no longer assert a right to sell in defiance of the state law in the original package, because Congress has recognized to the contrary."

Scott v. Donald, 165 U. S., 96, 98.

Emert v. Mo., 156 U. S., 311.

Second—"B is a wholesale liquor dealer residing and doing business in Ohio, and paying the U. S. government tax. He sells nothing to customers who reside within Ohio. Is he liable for the Dow law tax?"

In my opinion, B. is engaged exclusively in interstate commerce and is not subject to the tax.

Third—"B. is a wholesale liquor dealer residing in Ohio and paying the U. S. government tax. He purchases all his supplies of A., another wholesale dealer, and has his office upon the premises used by A. and described in A's statement to the auditor. A. has paid and will continue to pay the Dow law tax. B. sells no goods to customers who live in Ohio. He bills in his own name the purchases from A. direct to his customers (who are all outside of Ohio.) Is B. liable for the Dow law tax, or is he exempt because covered by the clause 'Class 4' in the blank 'Liquor Traffic Tax Form 9' or otherwise?"

B. is not liable, since he makes no sales to customers within this state.

Fourth—"A. is a wholesale liquor dealer doing business in Ohio and has paid the Dow tax. He does a portion of his business as a separate department, using a different name for this portion, calling it 'B. & Co. Department.' He has paid the U. S. government tax to secure stamps in this name, 'A., B. & Co

Department.' He carries on all his business, including (B. & Co. Department) in the same premises which are described in his Dow law tax return. Has A the right to bill the goods as from himself and payable to himself, but adding the words 'B. & Co. Department' without paying an additional Dow law tax provided he makes no sales of goods so stamped in Ohio?"

The question assumes that A. is the sole owner of the entire business transacted on the premises, for which he has paid the Dow tax. The fact that he carries on certain departments of his business in another name does not make him liable to an additional tax. This also disposes of your fifth question.

Very truly yours,

C. P. HINE,  
*Assistant Attorney General.*

#### CLERK OF COUNCIL.

Duties of clerk of council — "corporation clerk."

May 15th, 1906.

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

DEAR SIR:— Referring to the letter of Edwin Henderson, city clerk of the city of Cincinnati, addressed to you under date of the 9th inst., and transmitted to me for an opinion upon the questions therein presented, I beg to say, the new municipal code imposes upon the clerk of council, otherwise known as "corporation clerk," the custody of the assessment roll and records of assessments and documents pertaining thereto in order that he may perform the duties directed by sections 68, 69, 94 of the municipal code and related statutes.

I herewith return to you the letter of Mr. Henderson.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### DEPARTMENT STORE.

Whether department store can receive deposits without being subject to Sections 3817, et seq., requiring reports to auditor of state.

May 29th, 1906.

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

DEAR SIR:— I am in receipt of your inquiry as to the opinion of this department upon the question raised in the letter of Mr. John C. Hutchins, attorney-at-law of Cleveland, which briefly stated, is as follows:

Can a department store organized for the purpose of conducting a commercial business, as part of such business receive money on deposit from customers and others on which it agrees to pay interest, without subjecting such company to the requirements of Sections 3817 and 3818, R. S., and other related sections?

Section 2758, R. S., defines banking as follows:

"Every company, association or person not incorporated under any law of this state or the United States for banking purposes, who

shall keep an office or other place of business and engage in the business of lending money, *receiving money on deposit*, buying and selling bullion, bills of exchange, notes, bonds, stocks or other evidences of indebtedness with a view to profit shall be deemed a bank, banker or bankers within the meaning of this chapter."

The power to receive deposits is one of the chief functions of banking, as is evidenced by the special statutory authorization contained in Sections 3799, 3804 and other related sections of the Revised Statutes.

While sections 2762, 3817 and 3818, R. S., requiring certain forms of reports to be made to your department, seek to include institutions of all descriptions engaged in banking, it is not free from doubt that such institutions as are mentioned in the foregoing question, are included therein.

In my opinion, these sections should be construed by you to include all associations receiving deposits, evidenced by pass books, and paying interest thereon, until some court, in an action instituted to test the question, has decided otherwise.

Whether the "department store" is a person, partnership or corporation is not stated.

Whether, if it is a corporation, organized for the purpose of conducting a commercial business, it may lawfully receive deposits and agree to pay interest thereon is a question which has not been presented, and is, of course, not answered by this opinion.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### DOW LAW — APPLICATION OF — LOCAL OPTION.

Brewery located in "dry" township may not sell beer at brewery or in neighboring "dry" city; may sell at distributing place in "wet" territory, subject to tax.

June 8, 1906.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—In reply to further inquiries from your office as to the interpretation of the Dow Law and the local option laws, I beg leave to submit the following opinion:

First: *A brewing company, located in a township which has voted dry under the township local option law, cannot lawfully make sales of beer as a beverage at the brewery.*

It has been held by the Supreme Court of this state in the case of *Stevens v. State*, 61 O. S., 597 that:

"The sale of beer as a beverage in any quantity, whether by the manufacturers or not, is prohibited in a township where the people have availed themselves of the provisions of the local option law, passed March 3, 1888. 85 v. 55."

Second: *A brewing company, whose plant is located outside the limits of a municipality which has voted dry under the Beal Law, cannot lawfully make sales of beer as a beverage within the limits of such municipality.*

Such brewing company is clearly prohibited by Section (4364-20b) from



making sales of intoxicating liquors as a beverage within the limits of such municipality.

Although the executory contract of sale, i. e., the order for the goods, and the agreement by the brewer to furnish them, is made at a brewery, in wet territory, yet, if the brewing company retains the title to the goods until they are delivered to the purchaser in a dry township, or in a municipality which has voted dry under the Beal Law, the executed sale takes place at the point of delivery and the law is violated.

Commonwealth v. Greenfield, 121 Mass., 40;  
 Village of Bellefontaine v. Vassaux, 55 O. S., 321, 330, 331;  
 Doster v. State, 93 Ga., 43.

If, however, the sale is completed so that the title passes outside the limits of the dry municipality or township, the delivery to the purchaser, within the dry township or municipality, of his own property, although the delivery may be by the brewer's wagon, does not constitute a sale in violation of the local option laws.

Dunn v. State, 82 Ga., 27;  
 Herron v. State, 10 S. W., 25;  
 State v. Hughes, 22 W. Va., 743;  
 Commonwealth v. Hess, (Pa.), 17 L. R. A., 176;  
 Village of Bellefontaine v. Vassaux, 55 O. S., 330-33;  
 Harding v. State, 97 N. W., 194.

Third: *A brewing company must pay the Dow Tax for a warehouse located elsewhere than at the manufactory if sales are made from such warehouse.*

If intoxicating liquor is shipped to the warehouse and kept on hand for sale by local agents, the manufacturer is liable to the tax. As stated in *Brewing Co. v. Talbot*, 59 O. S., 516:

"If the customers had made their purchases or received their property at the building, it would undoubtedly have been a place of traffic. Instead of conducting the business in that way the agents who had charge of the building and contents obtained orders from the customers which they filled by hauling the beer from the building to the customers. This was merely a matter of convenience to the purchaser, or inducement to buy. The building where the property sold was situated, and from which it was delivered, was, for every practical purpose the place where the business was carried on."

Although the executory contract of sale is made at the manufactory, if the sale is executed by the setting aside of the specific goods, which are the subject of the sale, at the warehouse, the sale takes place at the warehouse and the manufacturer is liable to the tax for the business so carried on. The sale is not completed while any act remains to be done on the part of the seller, such as setting apart and identifying the specific goods which are the subject of the sale from other goods belonging to the seller.

Bonham v. Hamilton, 66 O. S., 82;  
 Village of Bellefontaine v. Vassaux, 55 O. S., 323.

The questions which you have presented do not involve a construction of the Brannock Law or the Jones Law, in any particular. Nothing in this opinion

has, therefore, any reference to sales of intoxicating liquors in residence districts of municipalities which have voted dry under either of said laws.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### INHERITANCE TAX — DIRECT — REPEAL OF.

When act repealing direct inheritance tax law became effective.

July 31, 1906.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your inquiry relating to the claim of the state for inheritance taxes against the estate of Henry C. Herbig, late of Coshocton County, Ohio, who died April 15th, 1906. It appears that the only question raised in this case is as to whether or not the law had been repealed at the time of the death of the decedent. The claim made, as I understand it, is that the repeal of the law became effective on the 14th of April. The veto amendment to the constitution provides that in case any bill has passed both houses and been presented to the Governor and

“is not signed and is not returned to the house wherein it originated and within ten days after being so presented exclusive of Sunday and the day said bill was presented, said bill shall be law as in like manner as if signed, unless final adjournment of the General Assembly prevents such return, in which case shall be law, unless objected to by the Governor and filed, together with his objection thereto in writing, by him in the office of the Secretary of State within the prescribed ten days.”

Inasmuch as the act repealing the direct inheritance tax law was not presented to the Governor until April 3d, bearing in mind that Sundays are not counted as part of the ten days, it seems clear that the repealing act did not take effect until April 16th, 1906.

As you are aware, however, the question of collection of taxes unpaid at the time of the repeal is involved in a case now pending in the Supreme Court, a determination of which will be had shortly after the beginning of the fall session of the court.

As far as the single question involved in this case is concerned, however, my opinion is that you may safely proceed upon the assumption that the repeal was not effective until April 16th, 1906.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### INHERITANCE TAX — COLLATERAL.

Application of collateral inheritance tax to children of nephews and nieces of decedent.

August 1, 1906.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have had under consideration your inquiry as to whether legacies to sons and daughters of nephews and nieces were subject to the pro-

visions of the collateral inheritance tax law. The excepted classes under this statute are described as follows:

"Father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child and made a legal heir under the provisions of Section 4182 of the Revised Statutes of Ohio, or the lineal descendants thereof, or the lineal descendants of any adopted child, the wife or widow of a son, the husband of the daughter of a decedent."

The statute in the main follows the statute of the State of New York, the principal difference being in the number of legatees exempt. The phrase "lineal descendant" in the New York law has been frequently interpreted to apply to the direct descendants of the decedent only.

Matter of Jones, 5 Dem. 30;  
 Matter of Smith, 5 Dem. 90;  
 Matter of Miller, 5 Dem. 132;  
 Ibid, affirmed, 45 Hun 244.

The only question then is whether the phrase "or the lineal descendant thereof" modifies all of the preceding words describing the exempted classes or only the class immediately preceding described as "a person recognized as an adopted child and made a legal heir under the provisions of Section 4182 of the Revised Statutes of Ohio." In my opinion the phrase quoted relates only to the class last described. Exceptions are strictly construed. If the phrase mentioned is not given the restricted meaning herein suggested, the words "lineal descendant" in the earlier part of the section have no vitality at all and must be entirely ignored. The statute seems to clearly exempt the lineal descendants of three classes only: (1) of the decedent; (2) of a child made an heir under Section 4182; (3) of an adopted child. In other words the lineal descendants of only those to whom the decedent stood *in loco parentis* are exempt.

This, too, is in entire harmony with the second section of the statute which recognizes every one not specifically exempt and not lineal descendants of any of the three classes mentioned as either a collateral heir or a stranger to the blood, and as such subject to the tax.

The only reported case in Ohio is *In re. Estate of William Hooper*, 6 O. D., 560; 4 N. P., 186. In this case the stepsons of the decedent were held not exempt. If the phrase "or the lineal descendant thereof" had modified all of those exempted it would have exempted the lineal descendants of the wife as well as the lineal descendant of the nephew and niece.

I am of the opinion that legacies to grand nieces and grand nephews are not exempt from the operation of the law.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### AUDITOR — COUNTY — FEES OF.

County auditor making settlement with auditor of state after amendment of Section 1069 R. S., effective February 13, 1906, entitled to fee of one per cent. of collections for school fund, as allowed by said section in its original form.

August 18, 1906.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:— Under date of February 15th, 1906, you inquired of this department whether the Auditor of State should be governed by Section 1069 as amended February 15th, 1906, or by the provisions of that section prior to its amendment in making settlement with county auditors for fees due them for preparing and placing upon the tax duplicate the school levies of 1905.

You were advised at that time by Mr. Mauck, Special Counsel to this department, that the question whether the immediate application of the amended statute violated any of the constitutional rights of any officer was a judicial one to be determined by the courts, and that until such determination was had you should refuse to allow the 1% provided under Section 1069 before the same was amended.

The right of the county auditor to receive the 1% as provided in original Section 1069, has recently been determined by a suit in the Court of Common Pleas of Clinton County, in which it was held that the services of the county auditor having already been performed under the statute fixing his compensation for the same, the General Assembly was without power to take away that compensation so as to defeat claims previously accrued. In that case a final judgment has been entered authorizing the county auditor to draw his warrants on the Treasurer of Clinton County for 1% on all moneys collected on the tax duplicate for school purposes at the December, 1905, and June, 1906, collections.

I therefore advise you that the judgment in said case should be followed by you in making your settlement with county auditors for the moneys collected in the December, 1905, and June, 1906, collections.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### TREASURER — COUNTY — FEES OF.

County treasurer not entitled to fee of 8/10 of 1% of collections for school fund as part of grand duplicate, in addition to 1% provided by Section 3960 R. S.

August 29, 1906.

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

DEAR SIR:— I have yours of August 27th accompanied by an opinion of the Prosecuting Attorney of Pickaway County rendered to the treasurer of that county, advising the treasurer that under Section 1117 he is entitled to his percentage upon moneys collected on the grand duplicate of the county, and that in addition he is entitled, under Section 3960 to 1% upon the amount collected under school levies.

The prosecuting attorney appears to base his opinion that the county treasurer is entitled to double compensation for the collection of school funds upon *State v. Lewis*, 73 O. S., 201. I do not consider the case cited as controlling the treasurer's compensation or in any way pertinent to the case.

Section 3960 provides that the treasurer shall, upon the collection of school funds, receive one per centum and no more. The words "and no more" are not to be found in any of the sections under consideration in the *Lewis* case. It is difficult to imagine any way in which the General Assembly could have more clearly provided against the treasurer receiving double compensation for the collec-

tion made under school levies, than to use the words that it has employed in this case. I advise that upon settlement you allow the treasurer one per centum on all moneys collected under school levies "and no more."

Very truly yours,

W. H. MILLER,

*Ass't Attorney General.*

#### DOW TAX—REFUNDER OF.

Authority of county auditor to replace upon duplicate Dow tax penalty refunded by mistake denied; authority of prosecuting attorney to bring suit for recovery of such refunder.

October 16, 1906.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You request an opinion as to the right of the county auditor to replace upon the duplicate a penalty assessed for non-payment of a Dow tax, once paid in full and receipted for, but refunded by the auditor acting under a mistaken idea of the law.

I am unable to find any authority for such procedure. The penalty became a lien on the property when it was first entered upon the duplicate, and this lien was discharged when the tax and penalty was paid. It cannot be revived by the unauthorized act of the auditor in refunding the penalty.

The prosecuting attorney may bring suit under Section 1277 R. S., against the person to whom the refunder was made for the recovery of the public funds so misappropriated. *Vindicator Printing Co. v. State*, 68 O. S., 362-372.

Very truly yours,

CHARLES P. HINE,

*Ass't Attorney General.*

#### TAXATION.

Moneys and credits invested in non-taxable securities at date of return subject to be listed for taxation for portion of tax year preceding such investment.

November 23, 1906.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for an opinion upon the question presented by the Auditor of Clark County as follows:

"Are monies which have been invested in non-taxable securities to-wit: county or municipal bonds, subject to be listed for taxation during any portion of the tax year preceding such investment."

Section 2736 R. S. provides that the tax payer shall return his various forms of taxable personal property, monies, etc., which are in his possession, or under his control, on the day preceding the second Monday of April of each year.

Section 2737 provides what the statement of the tax payer shall set forth, and among other items is the following:

"Sixteenth, the monthly average amount or value, for the time he held or controlled the same within the preceding year, of all monies, credits, or other effects within that time invested in, or converted into bonds or other securities of the United States or of this state not taxed, to the extent he may hold or control such bonds or securities on such day preceding the second Monday in April."

The General Assembly has thus established a particular day upon which the taxability of property is determined. Section 2737 distinctly provides what shall be contained within the statement made by the tax payer, but it is not made the guide by which to determine the property that is subject to taxation. That is determined by Section 2731 R. S., and by Section 2, Article XII of the Constitution.

The state in making the ownership or holding and controlling of property subject to taxation to relate to the second Monday of April in any year, was not precluded from making such property subject to taxation at all periods of the year. This is evidenced by Section 2737 R. S., which provides, among other things, for ascertaining the average value of a merchant's stock, the average value of a manufacturer's materials and manufactured articles, during the tax year, and likewise the monthly average amount or value of monies, credits, etc., thereafter invested in non-taxable bonds or other securities of the United States or of this state.

In construing the paragraph quoted from Section 2737 R. S., the bonds of the several subdivisions of the state, such as cities, villages, hamlets, counties and townships, should be included among the non-taxable "bonds or securities" of the State of Ohio.

Such divisions are "public agencies in the system of the state government," and their bonds, since the first day of January, 1906, are exempted from taxation. (97 O. L., 652.)

Some question may arise as to such bonds being included in the operation of Section 2737 R. S., but as any other construction would create an unconstitutional exemption and discrimination in favor of certain non-taxable investments, and against other forms thereof, it should not be adopted unless the language employed necessarily excludes such view, which in my opinion it does not.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

(To the Bureau of Inspection and Supervision of Public Offices,  
Department of Auditor of State.)

MUNICIPAL CORPORATIONS — APPORTIONMENT OF FUNDS LOST IN  
BANK FAILURE.

Apportionment of loss of city funds caused by failure of bank a mere matter of book-keeping.

January 23, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN: — I beg to acknowledge the receipt through you of a letter from Hon. Wm. L. Day, City Solicitor of Canton, Ohio, containing certain inquiries which you have submitted to this department for a written opinion thereon. It appears from the statement contained in the city solicitor's letter that the time of the failure of the Canton State Bank of Canton, certain funds of the city, including the sinking fund and also funds of the city school district and the firemen's pension fund, were represented to be somewhat complicated by reason of the failure of that bank, and the question is presented as to how the loss caused thereby to the various funds should be apportioned so that no one or more funds should bear all, but a uniform proportion of the loss.

The solicitor further makes the statement that P. A. McKenzie, the examiner appointed by your department to investigate the financial condition of the municipal offices of the City of Canton, has suggested in his report that he prorate the loss by reason of the bank failure "among the general city funds, the sinking fund, the firemen's pension fund and the school fund." The solicitor reports that the firemen's pension fund was deposited in an entirely separate bank from the one which failed, and under separate bond, as was also the school fund, for each of which funds the city treasurer executed a separate bond.

Having no information as to the facts involved herein other than that contained in the letter of the city solicitor, and basing the opinion expressed upon his recital of the facts, I beg to say that as to the general funds of the city in charge of the city treasurer by virtue of Section 135 of the Municipal Code, as amended in 97 O. L. 270, there need be no partition or division of the loss between the various divisions of such funds because the bond given by the treasurer covers the same *in toto*, and the attempt to prorate the loss among the various divisions of the city funds, would be a mere question of bookkeeping, not decreasing nor increasing the liability, if any, upon the treasurer's bond, nor including the funds of the city with those of the school or the firemen's pension fund, for which separate bonds and accounts are required. This is evidenced by Section 1, of the act found in 95 O. L. 223, amended in 97 O. L. 248; and also with regard to the duties of the city treasurer when acting as treasurer of the school funds by virtue of Section 136, Municipal Code, and 4042 R. S. Therefore, if the firemen's pension fund and the school funds were in other and separate banks from that which failed I cannot see upon what principle such funds should be charged with any portion of the loss.

As I have said, as between the various divisions of the municipal funds the question of partitioning the loss so sustained is but one of bookkeeping there arises therefrom no question of law upon the facts presented to be solved by this department.

I return herewith to you the letter of the city solicitor under date of January 17th, 1906.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

SPECIAL SALARY LAW — EFFECT OF DECISION DECLARING SAME UNCONSTITUTIONAL UPON COMPENSATION OF OFFICERS AFFECTED.

Officer drawing salary under invalid special salary act for Hamilton County estopped from claiming fees for services rendered during period for which salary drawn; fees computed according to general statutes, after special act declared unconstitutional; clerk of courts entitled to fees for records made after salary system abandoned; county auditor entitled to one per cent. of increased valuation for improvements for entries made upon the duplicate at time when no salary was drawn.

January 26, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN: — Acknowledging the receipt of yours of the 18th inst., relative to the question presented by you concerning the fees of certain officers in Hamilton County, I submit herewith the questions presented and the answers thereto:

1. Since the salary law applying to Hamilton County was declared unconstitutional by the Supreme Court, at what time should the officers stop drawing a salary and begin receiving fees?

The Supreme Court held in the case of the City of Findlay v. Pendleton, et al., 62 O. S. 80, and also in the case of State of Ohio ex rel. Guilbert, Auditor v. Yates, Auditor, 66 O. S. 546, in substance, that an unconstitutional act is void, not only from the time it was declared unconstitutional but it never had any validity and could not be invoked as a foundation of right to be enforced in a court of justice. It would therefore follow that the invalidity of the act providing for a fixed salary to be paid the officers of Hamilton county existed from the inception thereof and no specific time can be asserted when the officers should stop drawing salaries therein provided for, and begin receiving the fees provided for services mentioned in the statutes. The true rule is that the officer is estopped by the drawing and acceptance of the salary provided by an unconstitutional law, from claiming fees or additional compensation for the same period during which he received a salary, and if at any particular period the officer or officers refused to, and did not, accept their salaries for any given period they were then entitled to receive fees for the services performed during such period. The application of this rule depends upon the facts as shown to your examiner and the compensation should be computed accordingly.

2. Are the county officials entitled to collect fees earned during the salary period and retain the same for their own use, or must such fees be collected and paid into the county treasury to the credit of the fee fund?

The answer to this question is suggested in the answer to the preceding one, for if any county official receives his salary during the salary period he is estopped from retaining fees for services performed during such period and all such fees, when collected, must be paid into the country treasury to the credit of the fee fund.

3. Should the allowance made to the county officials and fees taxed be checked in accordance with the provisions of special acts applying to Hamilton County only, or in accordance with the general laws applying to all counties?



Under the authority of State ex rel. Guilbert v. Yates, *supra*, holding the act of April 22, 1896, (92 O. L., 597), unconstitutional, the method of computing fees should be pursuant to the general statutes governing items of service and not by special acts, applicable to one or more counties. This rule should be followed where the act under which the computation is sought to be made has been declared to be void, but should not be applied where the act is in force and not questioned in any court.

4. Where the clerk of court is recording a large number of old cases where the cost of the records has been collected in former years from litigants and the money so collected paid into the county treasury to the credit of the fee fund, should the clerk be allowed as a credit against the amount due the county treasury from him on account of fees collected by him which had been earned during the salary period, the amount taxed for such records?

Pursuant to the requirements of Sections 1341, 1342, 1343, etc., R. S., the salaries of the deputies and assistants were fixed by the judges of the court of common pleas. These were to be paid from the county fee fund, and the county would have been liable for the services performed in making such records, whether the clerk had remained upon a salary basis or on a fee basis. If the records were not actually made until after the clerk's office went upon a fee basis, and the fees had been collected for such records, and paid into the fee fund, the amounts thereof would be a charge against the fees in the hands of the clerk, and upon settlement the clerk is entitled to a credit for such amount.

5. You quote Section 1071 of the Revised Statutes, regarding the compensation of the county auditor, wherein it is provided "that in Hamilton County, whenever any assessor or taxpayer who is required by law to list for taxation any improvements to real estate shall fail to do so, and such improvements are placed by the county auditor upon the tax duplicate for any year, an amount equal to one per centum of the tax value of such improvements shall be allowed by (to) the county auditor by the county commissioners as compensation therefor, and which amount the county auditor shall deposit in the county treasury to the credit of the fee fund as earnings of the county auditor's office." The question presented regarding such act is, since the change from the salary to the fee basis may the auditor be legally allowed this percentage for his own use?

He will be entitled to the amount computed by the above statutory rule for services in that regard performed during such period when he was not receiving a salary, and where such improvements are placed by the county auditor upon the tax duplicate for any year or years wherein he has received no salary, the allowance of one per centum should be made by the county commissioners as compensation for his entire services in connection therewith, computed upon the valuation of the improvement for a single year, and not upon the aggregate valuation.

In arriving at these conclusions it has been by the consideration of the very well known principles applicable to such cases. A law though questionable as to its constitutionality, if followed by any executive officer pursuant to which he has been paid a given compensation or salary, is sufficient to estop him from claiming any other compensation or salary for services performed during the same period, and until it is declared to be unconstitutional, it furnishes a rule for his guidance

and direction in connection with the duties of his office. When it is declared unconstitutional by a court of competent jurisdiction it is the same as if the law had never existed, but will estop him who has received and accepted his compensation thereunder.

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

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#### AUDITOR—COUNTY—FEES OF, FOR INDEXING DITCH PROCEEDING.

County auditor entitled to fee of 10c for indexing each entry in the commissioners' journal of ditch proceedings; not required to index each name separately.

March 21st, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:—Your communication of recent date relative to the fee to be allowed the County Auditor for indexing the proceedings of the County Commissioners as to the apportionment made by the County Surveyor in cases for the location and construction of ditches, is received. You say that the apportionment made by the County Surveyor contains the name of each land owner affected, together with the amount of his assessment, and you particularly inquire if the Auditor is required to index each name.

In reply I beg leave to say that Section 850 of the Revised Statutes of Ohio provides:

“That the clerk shall keep a full and complete record of the proceedings of the board, and a general index thereof, in a suitable book provided for that purpose, \* \* \* \* and in counties where no index has been made of any such record, the commissioners thereof are hereby authorized to cause an index to be made of such past records for such period of time subsequent to the first day of January, A. D. 1880, as the judgment of the county commissioners may determine; and the clerk shall receive for indexing provided for in this section, such compensation as is provided for like services in other cases.”

The fee commission, composed of the Attorney General, Auditor of State and Secretary of State, rendered an opinion December 7th, 1902, holding that the Auditor is entitled to receive 10 cents for indexing *each subject or separate journal entry*, in the commissioners' journal under Section 850, R. S. I believe the construction placed upon Sec. 850 by the fee commission to be correct. Therefore the Auditor is not required to index each name in said apportionment, but is only required to index the journal entry containing the finding the County Commissioners upon said apportionment.

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

## PUBLICATION OF REPORT OF COUNTY COMMISSIONERS.

Manner in which report of county commissioners shall be published fixed by Section 917, R. S.

March 23rd, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:—I have been requested to give you an opinion as to whether the report of County Commissioners may be published under the authority of Section 4367 in two newspapers at the county seat and two newspapers at each city in the county having a population of more than 8,000.

Section 917 was enacted on April 16th, 1900, and is of later date than Section 4367. This section requires the publication of the Commissioners' report and specifies the number of times it should be published, i. e.:

“One time in two newspapers of different political parties, printed in the county, and of general circulation in said county, if there are two such papers published; if not, then a publication in one paper only is required; and in addition to the publication therein required, be published in one newspaper printed in the German language and having a bona fide circulation of not less than six hundred, if there be such a paper printed, and in general circulation among the inhabitants speaking that language in the county, and in the same manner.”

Since the legislature has itself prescribed the time and manner of publication of this report, the county officials have no discretion to change the number of times of publication. Section 917 governs the publication of this report.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## STREETS — FUNCTIONS OF COUNCIL AND BOARD OF PUBLIC SERVICE AS TO.

Function of council with regard to supervision of streets legislative only; administrative functions, including the expenditure of money appropriated by council for street purposes, vested in board of public service.

March 30th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

DEAR SIR:—Yours of this date has been received, together with the letter of the City Solicitor of Springfield, containing certain inquiries which you submit to this department for reply.

The five questions presented by the communication of the City Solicitor present but different phases of the same proposition, namely, What are the respective duties of the council and the board of public service in the supervision and control of public streets and ways of a city?

By Section 28 of the Municipal Code the following provision is made:

"In all municipal corporations council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the corporation and shall cause the same to be kept open and in repair and free from nuisance."

By Section 139, defining the powers of the board of public service the following provision is made:

"The directors of public service shall be the chief administrative authority of the city, and shall manage and supervise all public works and all public institutions, except where otherwise provided in this act."

Section 140:

"The directors of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market-houses, bridges, viaducts aqueducts, sidewalks, sewers, drains, ditches, culverts, ship-channels, streams and water-courses; the lighting, sprinkling and cleaning of all public places, and the construction of all public improvements and public works, except as otherwise provided in this act."

Section 141 extends this power of the board of public service to the management of all municipal industries and all public buildings and other property of the corporation.

It would be contended upon a superficial examination of these two provisions of the Municipal Code, that there was an irreconcilable conflict between the authority of the council and the board of public service with regard to the supervision and control of the streets and public ways. But fundamentally this difference must be found in the organization of the bodies with regard to the different branches of the state government to which they are related, and not in the language employed in the foregoing sections.

This is emphasized by Section 123 of the Municipal Code which provides as follows:

"The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as may be otherwise provided in this act. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon."

In each department the respective bodies referred to, are supreme, to wit, the council as a legislative body and the department of public service as the chief administrative authority of the city. The observance of this fundamental distinction, the difference between the legislative and the administrative, will solve all the difficulties presented by the communication of the City Solicitor; and the determination of the particular proposition as to whether an act cited is either legislative or administrative should be determined by the City Solicitor, who is the legal counsel of the municipality.

In Abbott on Municipal Corporations, the following language is used with regard to legislative bodies:

Section 513. "A municipal council possessing, however, the power to legislate for those within its jurisdiction must necessarily act in the same manner under the same conditions and controlled by the same general principles of law and the special restrictions that may exist for its prototype, the legislative body of the state or nation. Its enactments are laws in all their essential characteristics but limited in operation only with respect to territory."

With regard to the care of the streets and public ways the administrative bodies classed under the head of executive, is thus commented upon by the same author:

Section 572. "The care of public highways includes not only the making of repairs as ordinarily understood but also the employment of those means, financial or otherwise as may be found necessary to maintain them in a safe condition and protect them from injury. The employment of the necessary materials and men to accomplish this, it has been held, *is a proper exercise of these duties*. The effecting of such a result will not justify, however, the use of agencies not authorized by law or the incurring of unauthorized indebtedness, or the expenditures of public funds in excess of those legally appropriated for a particular purpose."

With this light cast upon the construction of powers of council as distinguished from powers of administrative bodies, the language employed in Section 123 becomes clear that when the contract for any given improvement is authorized by council and the moneys appropriated for the purposes contemplated by the contract, the full power of the council has been exercised in connection therewith and the conducting of such contract to performance must be left to the judgment of the administrative officer, or with the board of public service.

Applying this principle to the questions proposed by the City Solicitor, it would be a legislative power to authorize a contract to be made for the improvement and lighting and otherwise caring for the public streets of the city, and appropriating the money therefor; but it would be administrative to determine the method of the improvement, what it should consist of, the character of the lights to be employed, where the same are to be suspended or otherwise fixed and established. The limitation upon the power to contract as imposed upon the board of public service should be borne in mind as contained in Section 143. For any contract or purchase involving \$500.00 or less, the directors of public service are supreme. They do not need the concurrence of council thereon. When any expenditure within that department other than the compensation of persons employed therein exceeds \$500.00 such expenditure shall first be authorized and directed by ordinance of council, and when so authorized and directed, the directors of public service shall make the contract with the lowest and best bidder after advertisement as require by such section.

The authority of council herein spoken of is the same as that mentioned in Section 123, and is limited to the exercise of legislative powers in both of such provisions.

When the appropriation has been made for general purposes of repair or otherwise, the expenditure of the same and the method of its performance are, by these sections, vested exclusively in the board of public service.

As I have said, the application of this distinction between the powers of the

two bodies, giving to each the right to exercise the proper powers conferred upon it, will solve all the questions presented by the City Solicitor, with regard to which no serious disagreement can arise as to their proper construction and application.

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

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#### DEPOSITORY — CITY.

Funds of city must be awarded to bank offering highest rate of interest.

April 2nd, 1906.

*Bureau of Inspection and Supervision of Public Officers, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:—I beg to acknowledge the receipt of your communication of even date herewith enclosing the letter of the City Auditor of Newark, Ohio, under date of the 31st ult., also copies of certain ordinances and resolutions adopted by the city council of the city of Newark.

I note your request for a written opinion upon the questions submitted in the City Auditor's letter, and in answer thereto would say, when the city council of the city of Newark, pursuant to Section 135 of the Municipal Code advertised for bids for the deposit of the city moneys and received therefor, pursuant to such advertisement, two bids, one from the Licking County Bank & Trust Company, in which that bank agreed to pay 2%, and the other from the Newark Trust Company, in which that bank agreed to pay 1½% interest for the use of such money as might be awarded to it pursuant to such bids, it became and was the duty of the city council to award to the Licking County Bank & Trust Company, if their bid was in all respects legal, any portion of the public moneys of the city of Newark but not to exceed the amount of the paid in capital stock and surplus of such bank, upon such bank tendering good and sufficient surety as provided by the section of the Municipal Code above referred to. The council had no authority without again re-advertising for bids to award to the Newark Trust Company any portion of the public moneys upon its bid of 1½%. Such bid would be the lowest rate of interest offered for the use of the public moneys and would not be in compliance with Section 135 of the Municipal Code.

The direction of the council to the City Auditor after awarding the amount of money provided by the resolution to the Licking County Bank & Trust Company, to proceed to readvertise for the remaining funds was perfectly lawful and was as required by the section quoted. I cannot agree with the City Solicitor in his opinion that any portion of the funds under the original advertisement and bid of the Newark Trust Company should be awarded to that company. I deem such attempt to award any portion of the public monys to the Newark Trust Company upon its bid of 1½% a plain violation of that section of the code.

Your letter informs me that after the passage of the resolution to readvertise for the remaining funds the City Solicitor enjoined the Auditor from publishing the legal notice and enjoined the council from awarding any contract. Also that upon the passage of an ordinance or resolution providing for the employment of counsel, other than the Solicitor, to represent the city officers, such employment was enjoined upon the petition of the city solicitor. Both of these cases are now pending in the courts.

You request that as the propositions here presented involve the ruling of your department and of this department thereon, that counsel may be employed by this department to assist in the presentation of such cases and thus seek to sustain the rulings and instructions of your department. With this in view I will make arrangements immediately to have counsel represent your department at the hearing of those cases.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

#### PUBLICATION.

What notices, etc., must be published in two newspapers of opposite politics in cities of 8,000 inhabitants outside county seat.

April 5th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:—Your letter of March 31st requests my opinion as to what notices, proclamations or advertisements shall be published in two newspapers of opposite politics in cities of 8,000 inhabitants or more outside of the county seat under Section 4367, R. S.

The only advertisements which are required to be published in two newspapers of opposite politics at the county seat and also in two newspapers of opposite politics published in other cities within the county having more than 8,000 inhabitants, are proclamations for elections, orders, fixing times for holding court, bridge notices, pike notices and notices to contractors. There are some statutes prescribing notices of the classes enumerated in Section 4367, but of more recent enactment, which provide specifically for a different time and place of publication. Such statutes supersede Section 4367 in so far as they are inconsistent therewith.

Section 4367 as originally enacted (73 O. L. 75) provided that,

“Such other advertisements or notices as the auditor, probate judge, treasurer and commissioners may deem proper shall be published.”

As amended (86 O. L. 258) the words “or notices” are omitted and the word “or” is substituted for “and.” Each of the enumerated officers may therefore publish such “advertisements of general interest to the taxpayers” as he deems proper in two newspapers of opposite politics at the county seat only or he may, in his discretion, publish them also in two newspapers of other cities within the county having more than 8,000 inhabitants.

It is impracticable to attempt to define what advertisements properly come within the scope of the words “such other advertisements of general interest to the taxpayers as the auditor, probate judge or commissioners may deem proper.” The statute vested a large discretion in the officers enumerated, the only limitations being that the publication must be an advertisement within the common meaning of the word, and must be a matter of general interest to the taxpayers. It is not within my province to attempt to mark the bounds of the discretion vested in these officers more definitely than does the statute itself.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

## RECORDER — COUNTY — FEES OF.

County recorder entitled to fee of six cents per hundred words for transcribing index to records in his office; entitled to fee for keeping alphabetical index and general index authorized by Section 1154 R. S., only; county commissioners have no authority to authorize any other form of index.

April 6th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

DEAR SIRS — Your communication dated March 28th, is received. You submit the following inquiries:

1. If the alphabetical indexes kept in a County Recorder's office, become so worn and defaced as to require transcribing in order to preserve them, may the Commissioners authorize the making of a different form of general alphabetical index and pay the Recorder any fee other than the 6 cents per 100 words provided for transcribing records or books in his office, for making such new indexes?

The general alphabetical indexes to which you refer I assume to be those provided for by Section 1153 R. S., this form of index being the only known in the Revised Statutes as an "alphabetical index."

Section 1153 of the Revised Statutes provides that the Recorder "shall make and keep up" the alphabetical index. Section 1157 of the Revised Statutes provides the fee the County Recorder shall receive for the same. The only statute under which a County Recorder could receive compensation for transacting the alphabetical index is Section 906 of the Revised Statutes, which is as follows:

"The county commissioners shall, when they deem the same necessary, have any of the records or *books* in the office of the county auditor, county *recorder*, or county surveyor, transcribed into other books, by the officers having charge thereof, and pay them therefor six cents per hundred words;" etc.

This section authorizes the County Commissioners to contract with the County Recorder to transcribe any of the records or books in the office of the County Recorder. The alphabetical index being a separate book from the records the County Commissioners would, in my opinion, be authorized to employ the County Recorder to transcribe the same and pay him therefor 6 cents per hundred words, and no more.

2. Are the County Commissioners now or have they heretofore been authorized to prescribe any form of general index to be kept in the Recorder's office other than the form specifically provided for in Sec. 1154, R. S., commonly known as an abstract index, or one in substantial compliance with this section?

This inquiry, as I understand it, involves the construction of Section 1155 of the Revised Statutes, which provides that:

"When general indexes, such as are prescribed in the next preceding section, or any other indexes *authorized* by the county commis-



sioners, are brought up and completed, the recorder shall keep up the same; and he shall receive for indexing any lot or parcel of land 10 cents, to be paid out of the county treasury."

The general index referred to in this section is the index provided for in Section 1154. The language used in Section 1155 "or any other indexes authorized by the county commissioners" I understand to be any indexes authorized by the County Commissioners other than the alphabetical index provided for in Section 1153, and the general indexes provided for in Section 1154. However, I know of no statutory provision which authorizes County commissioners to provide for any other index save the two enumerated.

3. May the County Commissioners legally pay out of the county treasury for the keeping up of general indexes in the Recorder's office, other than the indexes provided in Sec. 1154 or some other index in substantial compliance with that section?

Section 1155 is the only statute that provides payment for indexes out of the county treasury and, in my opinion, refers to the general index provided for in Section 1154.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

#### AUDITOR — CITY — INCREASE OF SALARY.

City council may increase compensation of city auditor, but such increase cannot be effective during his term of office.

April 12th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have an inquiry presented through your department signed by Mr. F. D. King, as President of the City Auditors' Association in which is presented the question of the power of city councils to increase the pay of the Auditors. I cite you to Section 126, M. C., which provides:

"The salary of any officer, clerk or employe so fixed shall not be increased or diminished during the term for which he may have been elected or appointed."

Under this provision the power is conferred upon city councils to increase or diminish the salaries of the Auditors, as well as any other officer, but such increase or decrease cannot take effect during the term for which such officer is elected.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

## MUNICIPAL CORPORATION—EXPENDITURES OF.

No expenditures may be made by city departments other than as provided for by the semi-annual appropriation ordinances of council.

April 20th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:—I beg to acknowledge the receipt through your department of the letter of Hon. George S. Marshall, City Solicitor, Columbus, Ohio, presenting five separate inquiries upon which the written opinion of this department is requested.

I do not consider it necessary to separately state the questions presented because they can all be considered under one head, viz: Can there be any expenditures made by any of the departments of the city other than as provided for by the appropriation ordinances?

The answer to the foregoing question would include the question of the power of the city to grant to the board of public service the additional amount asked for, also the power to provide for the purchase of land for opening and widening certain streets, also the payment of the claim of the electrical expert mentioned in the fourth question of the City Solicitor. These and all similar expenditures are governed by the provisions of Section 43 of the Municipal Code, viz:

“In all municipal corporations, council shall make at the beginning of each fiscal half year, appropriations for each of the several objects for which the corporation has to provide, out of the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and of other sources of revenue. All expenditures within the following six months shall be made with and within said appropriations and balances thereof. All unexpended appropriations or balances of appropriations remaining over at the end of the year and all balances remaining over at any time after a fixed charge shall have been terminated by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the funds from which they were taken and they shall then be subject to such other authorized uses as council may determine.”

It is mandatory by the foregoing section of the Municipal Code to provide for all expenditures semi-annually, by semi-annual appropriation ordinances. Provision is made that the expenditures for the six months following the appropriation shall be made out of the amounts so appropriated. It was presumed by the general assembly that the municipal council and the officers of the city would be cognizant at the time of the making up of the budget of the expenditures which should be made within the following six months. There is no provision providing for such expenditures as are included in the queries of the Solicitor other than by recourse to the general appropriation scheme thus set forth in Section 43 of the Municipal Code, save by the creation of a contingent fund which is provided for by the same section, but as the questions submitted do not ask as to the power to pay the same or any of them from any such contingent fund, consideration of its provisions is not given.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

ASSESSMENT — FOR MUNICIPAL STREET IMPROVEMENTS — COMPENSATION OF CIVIL ENGINEER NOT PAYABLE OUT OF PROCEEDS.

Compensation of civil engineer, regularly employed for work on street improvement may not be made payable out of proceeds of special assessment; compensation once paid out of proceeds of such assessment cannot be recovered from such engineer; such compensation should be provided for by appropriation of council.

May 14th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN: — I beg to acknowledge receipt of your communication enclosing a letter from G. P. Gillmer, City Solicitor of Niles, O., presenting the question as to the right to pay the compensation of a civil engineer out of the funds raised by assessment for street improvement purposes.

The statement is made by the City Solicitor that the engineer is employed by the board of public service per diem. It has been repeatedly held in Ohio that the compensation for the services of salaried officers could not be included in the amount of the assessment, but if an engineer was employed especially for that particular improvement the amount paid by the city for his services may properly be included in the assessment. The distinction adopted by the Supreme Court of this state in construing the following language from Section 2284, R. S., "the expense of the preliminary and other surveys," is, that such language has reference only to cases in which the engineer doing the work was employed for that special purpose and does not apply to work done by engineers appointed for a definite period of time, at fixed salaries. The court further says:

"It is sufficient to say that when the salaries of these engineers were paid from the general funds of the city, as required by law, that was the end of it, unless there was some law expressly authorizing the charge and assessment that was made \* \* \* for the purpose of reimbursing the city for the amount so paid; and in as much as there is no such law the court did not err in holding that the charge was improperly included in the assessment."

The same language is now employed in Section 2284 and I believe the same ruling should apply, and in the absence of specific authority therefor the expense incident to the work of the city engineer should not be added in the assessment.

The solicitor further asks, "If it should appear from the report of the inspector from your office that during a former administration the engineer drew directly from the fund providing for the improvement of a particular street" what would be advisable to be done regarding the same? If an inspection of the municipal offices would disclose such fact, it would seem that the engineer had been paid from a fund not created for that purpose and thereby the assessment for the improvement would be *pro tanto* excessive, and the right of action, if at all, would only lie in favor of the individuals affected thereby. The compensation had been earned by the city engineer and the payment from an improper fund would not form a basis for the recovery of the same from the engineer.

Answering the further question suggested by the city solicitor: If the board of public service is empowered to employ an engineer, as it is pursuant to Section 145, M. C., the compensation of such engineer should be fixed by the board

pursuant to the foregoing section and sufficient appropriations should be made by council pursuant to section 43, M. C., for the payment of the same, as it would be one "of the several objects for which the corporation has to provide."

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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TREASURER—CITY—COMPENSATION FOR ACTING AS TREASURER  
OF SCHOOL FUNDS.

City treasurer may receive compensation from city board of education for acting as treasurer of school funds.

May 18th, 1906.

*Hon. Sam A. Hudson, Bureau of Inspection and Supervision Public Offices,  
Department of Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your communication dated May 4th, inquiring whether or not a city treasurer who serves as treasurer of the city school district by virtue of Section 4042 of the Revised Statutes of Ohio, may legally receive compensation from the Board of Education for his services as treasurer of such school district, is received.

In reply I beg leave to say that Section 4056 of the Revised Statutes provides that,

"The board of education of *each school district shall fix* the compensation of its clerk and treasurer, which shall be paid from the contingent fund of the district."

Under this provision it is the duty of the school board of a city district to fix the compensation of the school treasurer, and the fact that the school treasurer is also the city treasurer will not preclude such treasurer from receiving the compensation so fixed.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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AUDITOR—COUNTY—COMPENSATION OF DEPUTY: COMPENSA-  
TION OF AUDITOR AS SECRETARY OF MUNICIPAL  
BOARD OF REVIEW.

Compensation of deputy auditor not dependent upon record of his appointment; county auditor as ex-officio secretary of boards of review of municipal corporations within the county may perform services by deputy, and receive more than one per diem for the same day's work.

County board of equalization may determine length of time for which clerks employed thereby shall receive compensation.

May 29th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of  
State, Columbus, Ohio.*

GENTLEMEN:—The questions submitted by Mr. Peckinpaugh of your department have received consideration, and in answer thereto I beg to say:

1. The legal appointment of a deputy to the county auditor should be evidenced by a record of the same, as provided by Section 1018, Revised Statutes. But the acts of the deputy cannot be impugned simply because the record of his appointment is not complete or that the same has been omitted. The record is evidential but not conclusive as to the appointment or non-appointment. If the appointment had been made, the auditor may be legally represented by the deputy without any record having been made thereof, and the compensation could be properly allowed, for the allowance of the compensation is not conditioned upon the completion of the record of the appointment of the deputy. The whole question turns upon the fact of the appointment and not upon the record thereof.

2. By Section 4 of the act of May 10th, 1902 (Sec. (2819-4) R. S.) creating boards of review for municipal corporations, it is provided as follows:

"The county auditor of any county in which any of such municipal corporations are located, shall be secretary to such board and shall, in addition to his other duties provided by law, be present at each meeting of the board in person or by deputy; he shall keep a correct record of the proceedings of the board in a book to be kept for that purpose, and perform such other duties as the board may order, or as may be incident to his position. For his services as secretary to such board he shall receive out of the county treasury, upon the order of the board, \$5.00 per day for each and every day the board shall be in session."

The query presented with regard to this act is whether one person can earn more than one per diem in twenty-four consecutive hours, payable out of the county treasury.

The provisions of the act, it will be noted, are that he, the county auditor, shall "be present at each meeting of the board in person or by deputy."

The facts presented show that in several of the counties of the state there are several boards operating under the provisions of this act, and of each of these boards the county auditor is the secretary and has been receiving the compensation provided by the act. It may be possible that the sessions of the board can be so arranged that he could be personally present at each session of each of the boards and thus *personally* comply with the requirements of the act. If this cannot be done he must then be present "by deputy." If this requires more than one deputy, he would be authorized to appear by such deputy. The compensation provided by the act is for the performance of the duties prescribed by the act and such other duties as the board may order. If these duties are performed, either by himself or lawful deputy, there would appear to be no good reason why he should not receive out of the county treasury, upon the order of the board, the compensation therein named.

3. The question further presented is as to the power of the County Board of Equalization, organized pursuant to section 2804, R. S., to employ a clerk or clerks and as to the length of time for which the clerk should receive compensation. The compensation provided by the act should not be limited to the days during which the board is in session, but should be as prescribed by the act, "not to exceed \$3.00 per day for their services for the time actually employed." It may be that the clerk of the board has duties to perform in connection with his employment, such as the issuing of notices or the inspection of county or other records, which might be at times other than the times during which the board was actually in session. The board is to be the judge of the time actually employed, and there could be no hard and fast rule adopted disqualifying the board from paying its clerk for services performed under its direction on days other than when the board was in session.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## JUVENILE COURT.

Act in 98 O. L. 314, valid; compensation of probation officers; jurisdiction of court to try misdemeanors of parents, etc.

June 12th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:— Yours of June 6th has received my consideration. The questions which it presents relate to the act of the 77th General Assembly found in 98 O. L., 314, 319, entitled an act "To amend Sections 1, 6, 7, and 10 of an act entitled 'An Act to regulate the treatment and control of dependent, neglected and delinquent children,' passed April 25th, 1904, and to supplement said act with supplemental sections 23, 24, 25, 26, 27, 28, 29 and 30."

1. The first question relating thereto is: "The enacting clause amends sections 1, 6, 7 and 10, of the act of April 25, 1904, while in fact, sections 1, 3, 6, 7 and 10 are amended. The original sections 1, 3, 6, 7 and 10, of the act of April 25, 1904, are not specifically repealed by this act. What, if any, effect does this have upon the validity of the law?"

Section 29 of the act provides that the act shall be liberally construed to the end that its purpose may be carried out. As there is no repealing clause contained in the body of the act (98 O. L., 314) the intent of the General Assembly should be construed to amend the act of April 25th, 1904 (97 O. L., 561) only to the extent that the two acts are inconsistent and cannot be construed together and, in such event, the latter act prevails. The failure on the part of the General Assembly to specifically repeal the enumerated sections of the act in question does not render the act invalid.

2. The question is presented: "How many probation officers may be appointed and what are the salaries provided for them in counties having a population of over 130,000; how many may be appointed and what are their salaries in counties having a population of less than 130,000?"

Section 6 of the act (98 O. L., 316) provides that:

"The juvenile courts of the several counties in this state shall have authority to appoint or designate one or more discreet persons of good moral character to serve as probation officers during the pleasure of the court; one of whom shall be a woman: *said probation officers to receive no compensation from the county treasury except as herein provided.* \* \* \* The number of probation officers named and designated by the juvenile court shall be as follows: in counties having a population of over 130,000, not to exceed three probation officers, one probation officer to be known as the chief probation officer, who shall receive not more than \$1,500 per annum payable monthly, and when in the discretion of the court it is found necessary, a first assistant, who shall receive \$1,000 per annum, payable monthly, to serve as probation officer during the pleasure of the court, to be paid by the county treasury out of any funds appropriated for the use of the judges of the common pleas, insolvency or probate courts, etc. \* \* \* Provided that said

judge, if in his opinion the circumstances demand it, may appoint a third or fourth discreet person to serve as probation officer, who shall receive \$1,000 each per annum, payable monthly, *and still other fit and willing persons who shall serve without compensation from the court* and said probation officers shall be and are hereby vested with all the powers and authority of sheriffs to make arrests, serve the process of said court and perform all other duties incident to their office."

A consideration of this section leads to the conclusion that the only probation officers who may receive compensation are those who are appointed by the juvenile courts in counties having a population of over 130,000. In such counties, if, in the opinion of the judge of the juvenile court, the circumstances demand it, he may appoint as many as four persons to serve as probation officers. The officer designated as the "chief probation officer" shall receive not more than \$1,500 per annum; a first assistant who shall receive \$1,000 per annum, and the third and fourth persons appointed as such officers shall receive \$1,000 each per annum, each payable monthly.

In the counties containing a population of 130,000 or less the number of probation officers would appear to be limited to such number as, in the opinion of the judges of the juvenile courts of such counties, the circumstances might demand; and in such counties there seems to be no other provision regarding such officers than that they shall be "fit and willing persons who shall serve without compensation from the court."

It is not within the province of this department to ascribe a reason for this apparent omission on the part of the General Assembly to fix the salaries of probation officers in counties containing a population of 130,000 or less, but we may properly state as part of the history contemporary with the enactment of this law that the counties within which juvenile courts were to be created by Section 3 of the act did not originally include any other than those wherein three or more judges of the Court of Common Pleas regularly held court concurrently, but by amendment the following provision was inserted in that section, to-wit, "provided that in all other counties the probate judge shall act as judge of the juvenile court," without enlarging the language used in Section 6, of the act in designating what probation officers shall receive compensation.

The language of Section 6, of the act, "said probation officers to receive no compensation from the county treasury except as herein provided," excludes from the operation of the provisions for compensation those probation officers appointed in counties having a population of 130,000 or less, as it has been repeatedly held by the Supreme Court of this state that when the statute creating an office does not provide for compensation the services are gratuitous.

3. "Section 23 defines what shall constitute a misdemeanor on the part of a parent or other person and provides fine and imprisonment upon conviction. Has the juvenile court jurisdiction to try such a case?"

Section 21 of the original act provides certain fines for the offenses therein defined and confers jurisdiction upon the juvenile court to hear the same and enforce its orders. In that class of cases such court has jurisdiction. In the class of cases mentioned in Section 23 (98 O. L., 317), I am inclined to believe that such court also has jurisdiction to hear and determine as to the guilt or innocence of the persons accused of the offenses defined therein, and the fees and costs in all such cases coming within the province of the act may be taxed as for similar services, and be paid out of the county treasury upon itemized vouchers

certified to by the judge of said court, as provided in Section 29 of the act in question.

4. "What records are required to be kept by the clerk of this court?"

Section 3 of the act (98 O. L., 315), provides:

"The orders, judgments and findings of such court shall be entered in a separate book or books known as a 'juvenile record,' which shall be kept by the clerk of said Common Pleas or other court whose judge may be so designated who shall be clerk of such juvenile court."

I am of the opinion that the language thus employed authorizes the judges of such courts to use such books for the entering of the orders, judgments and findings of such court similar in character to those which are ordinarily kept by Courts of Common Pleas for the entry of its orders, judgments and findings but to be separately designated as pertaining to the juvenile court.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### TRANSFER OF MUNICIPAL FUNDS.

Council may transfer from one fund to another; formalities of transfer; transfer not necessary in application of contingent fund to unforeseen deficiencies in appropriations.

June 29, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:— I am in receipt of your favor of the 25th inst. containing the following questions referred to this department for answer:

1. Has council the authority to make transfers from one appropriation account to another, within the same fund?
2. Has council authority to make transfers from an appropriation account of one fund to an appropriation account in a separate fund?
3. Has council the authority to make transfers from the contingent fund for the use of an appropriation account in another fund?

These separate questions can be treated together, as they each call for a construction of Section 43 of the municipal code, supplemented by 97 O. L., 520.

By consideration of that section it is apparent that the limitation upon the power of the municipal councils to transfer moneys from one appropriation to another or from one fund to another, is contained in the following language:

"Provided that councils of cities or villages may at any time by the votes of three-fourths of all the members elected thereto, and the approval of the mayor, transfer all or a portion of one fund or a balance remaining therein, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property within the corporation, and no such transfer shall be made until the object of the fund from which the transfer is to be effected has been accomplished or abandoned."



The provision with regard to the contingent fund is as follows:

"In making the semi-annual appropriations and apportionments herein required council shall have authority to deduct and set apart out of any moneys not otherwise appropriated such sums as it shall deem proper as a contingent fund to provide for any deficiency in any of the detailed appropriations so to be made, which deficiency may lawfully and by any unforeseen emergency happen, and such contingent fund, or any part thereof, may be extended for any such emergency only by an ordinance passed by two-thirds of all the members elected to council and approved by the mayor, and any balance remaining in such contingent fund at the end of the fiscal year shall thereupon become a part of the general fund, to be again appropriated as other monies belonging to the corporation."

I assume that your several questions anticipate that the requisite steps shall be taken by the municipal council before attempting to make any such transfer contemplated thereby, and that in the absence of such action being taken there could be no transfers either between appropriation accounts, or between funds or between appropriations and funds.

Section 43 seems to plainly make a distinction between an "appropriation" and a "fund." These terms are not used interchangeably. A "fund" is the source from which an appropriation is made while an "appropriation" is the source from which the expenditures are made. By authority conferred upon your bureau, it has sub-divided municipal revenues into separate and distinct funds; and by authority of the same act and also of Section 43, M. C., appropriations are made from such funds, "for each of the several objects for which the corporation is to provide." By provision of the municipal code (Section 35) estimates are to be made by every officer, board and department in the municipal corporation of the amount of money needed for their respective wants for the incoming year, and for each month thereof. It would seem from the provisions of that, and kindred sections, that the appropriations made, as required by Section 43, M. C., should be classified, at least, in as many classes as there are departments of the municipal government.

To observe the distinction more clearly between "appropriations" and "funds," illustration might be employed from the creation of certain "funds," designated by statute, in addition to those which the bureau has classified and designated, pursuant to the powers conferred upon it, such as an "assessment fund," and a "sinking fund." A "fund" has been defined to be "an amount set apart for some particular purpose of government." It is a pledge of the public or corporate revenue for one or several objects for which the corporation is to provide. When the word "sinking fund" is used it contemplates the revenue set apart as a fund to keep down the interest and extinguish the principal of the debt, and is so designated by Section 101 of the municipal code.

By the language of the section cited, a liberal provision was made by the General Assembly for the transfer of revenues from one fund to another, provided that the procedure therein set forth is adhered to. The only limitation upon the right of council to so provide is, that the transfer can only be made among funds raised by taxation, upon all the real and personal property in the corporation. This would prohibit a transfer of moneys from an "assessment fund" to any other fund, for that fund is raised by special assessment upon a certain specific portion of the property situated within a municipality, and is not raised by general taxation.

Subject to this limitation the authority would seem to be conferred upon

council to transfer from one fund to another, provided that such transfer be between funds raised by general levy, and after the object of the fund in which the transfer is to be effected has been accomplished or abandoned.

By the same authority by which the transfer has been made from one fund to another, which may be done at any time by the required vote and the consent of the mayor, the council may make appropriations therefrom, and may transfer from one appropriation account to another, whether within or without the same fund; but expenditures can only be authorized from the contingent fund in case of deficiencies in any appropriations, which may lawfully and by any unforeseen emergency happen; and, in such instances, such expenditures are made direct from such fund, and not by transferring any part of the same to the fund in which the deficiency so occurs. Such expenditures can only be authorized by an ordinance of council, passed by two-thirds of all the members elected thereto and approved by the mayor.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### DE FACTO OFFICER—COMPENSATION OF.

Duty of city auditor as to payment of salary pending judicial determination of title to office; liability of city to *de facto* and *de jure* officers.

July 6th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:—Acknowledging the receipt of your recent letter containing the inquiry of William L. Davies, city auditor of Youngstown, Ohio, which you have submitted to this department, I beg to say that the rule is well settled that a *de facto* officer cannot maintain an action to recover the salary, fees or other compensation attached to an office; that an officer to be entitled to the salary of an office must have qualified thereto in the manner provided by law.

In the case put by the city auditor, Mr. George B. Moyer was dismissed from the position of city detective. The mayor then appointed his successor, Mr. Watkins, and following this the city council passed an ordinance reorganizing the police department and Watkins was again appointed detective. Mr. Moyer then made a demand upon the mayor for his reinstatement, which was refused, and he started proceedings in the Court of Common Pleas against the mayor to compel him to reinstate him as detective, and upon the trial of that case the court held that Moyer had been illegally dismissed. The mayor still refuses to reinstate Moyer and has appealed the case to the Circuit Court.

It is not in the province of this department to determine, under the circumstances, which is or which is not entitled to the office. It is clear that under the authorities, before an officer is entitled to the compensation attached to an office he must not only be a *de facto* but a *de jure* officer. But if the city has paid the salary attached to the office to a *de facto* officer it will not be required to pay the salary of a second time to a *de jure* officer, who has been excluded therefrom pending litigation as to the title to the office.

You might cite Mr. Davies to the decision of the State of Ohio on the relation of Cronin v. Eshelby, Comptroller of the City of Cincinnati, 2nd Ohio Circuit Court Report, 468; and under the authorities therein cited, if the auditor pays:

the salary to either one of the claimants to the office he need have no fears that he will be compelled to pay it to the other claimant. The better position for him to assume would be to stand indifferent as to the claims of each and refuse to pay either until the matter has been finally adjudicated by the courts or other settlement made of the question.

Very truly yours,

WADE H. ELLIS,  
Attorney General.

### COUNCIL — DISQUALIFICATION OF MEMBER OF.

Election or appointment of member of council to other public office or employment *ipso facto* vacates office of councilman; council may immediately, mayor after thirty days, fill vacancy; member resigning incompatible office or employment may retain office of councilman; disqualification for office of councilman on account of interest in expenditure of money of the municipal corporation must be established by proceedings in the probate court.

July 17th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department Auditor of State, Columbus, Ohio.*

GENTLEMEN:—Replying to the inquiries presented by you contained in the letter of Morton Webster, mayor of Pomeroy, Ohio, I beg to say the letter of the mayor and the report of your examiner inform me that at the time of the election of two of the councilmen they were also elected members of the school board, the election being held November 8th, 1904. And I gain the further information that another member of council has been furnishing supplies for the village, contrary to the provisions of sections 45 and 120 of the municipal code. The questions presented thereby are as follows:

1. Are the offices of the three councilmen named now vacant, *ipso facto*?
2. Was the election of the two councilmen who were at the same time elected as members of the school board, void?
3. On what date does the thirty days mentioned in Section 120, M. C., begin to run?
4. Does the mayor have the power to declare the offices vacant and proclaim the appointment of successors to the disqualified members?
5. Would the members who are also members of the school board be disqualified for appointment to fill their unexpired term as councilmen, even though they should resign from the school board?

All these questions relating to the same subject matter can be treated together. It is clear that Section 120 of the municipal code forbids any member of council holding any other public office or employment except that of notary public and member of the state militia; and further, that he shall not be interested in any contract with the city. That section contains the further language:

“Any member who shall cease to possess any of the qualifications herein required, or shall remove from his ward, if elected from his ward, or from the city, if elected from the city at large, shall forthwith forfeit his office.”

Upon the election or appointment of a member of council to any other office than those expressly excepted in Section 120, M. C., he ceases to be qualified to hold the position of councilman. The procedure to oust such disqualified person from the office of councilman is clearly set forth in the reported cases of our courts. In the case of State of Ohio ex rel. Attorney General v. Craig, reported in 69 O. S., 236, the Supreme Court reviewed the power of the city council of the city of Mansfield to elect certain members of the council as members of the board of health of that city, and further considered the legality of the appointment of the defendant, Dr. Craig, by such board of health so organized, as health officer of said city. On pages 244 and 245 the court used the following language:

“The appointment of members of council to positions on the board of health being a nullity and void, no proceeding in quo warranto was necessary to oust them from such nullity, but the council under the old statute or the mayor under the new municipal code, might treat the office (of the board of health) as vacant, and make a valid appointment to fill such vacancy as was done by the mayor in this case. True, the members of the old board might have been ousted by proceedings in quo warranto as intruding themselves into a public office without warrant of law, but while that might have been done, it was not necessary to do so before appointing a new board, because their appointment was a nullity, and they had no color of title to the office, and could not invoke a nullity to keep duly appointed officers out of the office. When there is some color of title, resort must first be had to quo warranto, but where there is no such color, but a mere nullity, a legal appointment may be made to fill the office, and then if the party in the wrong still persists in holding the office, he may be ousted by proceedings for that purpose.”

I think the foregoing case is directly in point on the question of the eligibility of the two councilmen who were elected as members of the board of education. But it appears that one of the two members of the board of education has tendered his resignation as such member and retained the office of councilman. In that instance the disqualification having ceased the right to oust him for that reason would also cease; but in the case of the councilman who insists upon retaining both offices the following procedure can be adopted:

From the time he assumed the position of member of the board of education his qualification as a member of council ceased and from that time the grounds existed for the council to elect a successor for his unexpired term, and the council having failed to act for more than thirty days and to fill such vacancy the mayor can treat the position of such councilman as vacant, such vacancy arising from the disability of the person to serve as a councilman. The mayor can fill such vacancy by appointment pursuant to the provisions of Section 228 M. C., as was done in the case of State v. Craig, and should the member refuse to vacate his office as councilman he might be ousted by proceedings in quo warranto as pointed out in that case. In the meantime he should receive no compensation for his services as councilman because he is not qualified to act as such.

In the case of the councilman who has been interested in any contract with the municipality, as set forth in the letter of the mayor, he cannot be removed in the same summary way as is provided for the removal of the member who has ceased to possess the qualifications of a councilman. Section 120 M. C. forbids a member of council being interested in any contract with the municipality. Section 45 M. C. provides that:

"Nor shall any member of the council \* \* \* have any interest in the expenditure of money on the part of the corporation other than his fixed compensation; and a violation shall disqualify the member violating it from holding any office of trust or profit in the corporation, and render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of this section, and if in office he shall be dismissed therefrom."

The guilt of such member must be established by some tribunal and in some authorized form of proceeding. The authority is not conferred upon the mayor to try him for such offense, but as such action on the part of the councilman would constitute a misfeasance or malfeasance in office, complaints should be filed in the probate court by any elector of the municipality and a trial thereon be had in that court, and if the complaint be sustained a judgment of removal would be entered by the court. See Sections 1732 and 1736 (old numbers, R. S., Ellis's Municipal Code, Second Ed., pp. 557 to 559.) In such case the vacancy is required to be filled pursuant to the provisions of Section 228 above referred to. This view of the procedure against such councilmen is fully sustained by the Supreme Court of Ohio in the case of *State ex rel. Attorney General v. Ganson*, 58 O. S., 313, 324.

I cite you further to the 7th paragraph of the syllabus in the case of *Commissioners of Guernsey County v. Cambridge*, 7 C. C. 72; *State ex rel. Attorney General v. McMillen*, 15 C. C., 163.

The foregoing having answered all the questions presented I herewith return to you the report of the examiner, which you have submitted, also the letter of Mr. Webster addressed to you under date of July 14th.

Very truly yours,

SMITH W. BENNETT,

*Special Counsel.*

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#### AUDITOR — COUNTY — FEES OF.

County auditor placing omitted taxes on duplicate entitled to fee of four per cent. of amount thereof.

July 24, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:— The question presented in your letter of the 23d inst. has received my consideration. It involves the inquiry presented by N. C. Bohnert, Auditor of Pickaway County, as to whether he, the present auditor, is entitled to the 4 per cent. fee allowed by Section 1071 R. S., on taxes omitted and placed by a former auditor upon the tax duplicate, or whether the fee mentioned should be allowed to his predecessor, who performed such service?

In the case of *Probasco v. Raine*, Auditor, (50 O. S., 378) the Supreme Court of Ohio in construing Section 1071 R. S. said (p. 391):

"To have equality in taxation, all property must be brought upon the duplicate. Some officer must be authorized and empowered to cause all property to be listed for taxation. Such officer must be paid for his services, either by fees or salary."

The language of the act and the expression thus used by the court evidences that the General Assembly meant the auditor who performed the service, that is, discovered and placed the property upon the tax duplicate, is entitled to the statutory percentage.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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#### MUNICIPAL CORPORATION — CONTRACT OF.

Proper execution on behalf of city of contract with water company.

September 1, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:— Returning herewith the letter addressed to you under date of the 27th ult., by J. U. Douglass, City Auditor of Massillon, Ohio, I beg to advise that the contract made and entered into by the City of Massillon with the Massillon Water Supply Company, should be executed on behalf of the city by the directors of public service pursuant to the requirements of Sections 143, 143a and 144 of the Municipal Code.

Very truly yours,  
SMITH W. BENNETT,  
*Special Counsel.*

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#### COUNTY COMMISSIONERS — COMPENSATION OF, FOR DITCH WORK.

Compensation of county commissioners for ditch work under Section 4506 R. S., as amended 98 O. L. 296, limited to \$300 in any one year, as provided by Section 897 R. S.

October 6, 1906.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:— Your communication of recent date inquiring whether or not Section 4506 R. S., as amended by the last legislature abrogates the limitation of \$300 for ditch work performed by county commissioners, as provided in Section 897 R. S., is received. In reply I beg leave to say the only change effected by the amendment to Section 4506 is in fixing the surveyors' per diem at \$5.00 per day instead of \$4.00. Therefore the law remains the same as far as compensation to county commissioners for ditch work is concerned, as before the amendment, and county commissioners are limited to \$300 in any one year for ditch work as provided in Section 897 R. S.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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#### TRUSTEES OF SINKING FUND — SALE OF SECURITIES BY.

Sale of securities by trustees of sinking fund of municipal corporation must be advertised, and competitive bids solicited.

November 8, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:—Your letter of October 30th requests an opinion on the following question:

May the sinking fund trustees of cities, under the powers conferred in Section 110 M. C., sell at private sale, without advertisement and competitive bids, securities held by them, for the satisfaction of any obligations under their control?

The power to sell securities for the satisfaction of certain obligations is conferred upon the sinking fund trustees by Section 110 of the Municipal Code.

“Section 110. The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the city or village, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and money collected for said purposes and invest and and disburse them in the manner provided by law. *For the satisfaction of any obligation under their supervision the trustees of the sinking fund may sell or use any of the securities or money in their possession.*”

This statute contains no direction as to the manner in which the sale shall be conducted, but Section 97 and Section 115 of the Municipal Code being *pari materia*, may properly be looked to for aid in the construction of the section above quoted.

Section 97 M. C., in substance provides, that whenever a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the sinking fund trustees in their official capacity, and only after their refusal to take any or all of them at par and interest, *bona fide* for and to be held for the benefit of such corporation, sinking fund or debt, shall such bonds or as many of them as remain, be advertised for public sale. “*All sales of bonds, other than the sinking fund trustees by any municipal corporation shall be to the highest and best bidder after thirty days notice, etc. \* \* \** Provided, however, when any such bonds have been once so advertised and offered for sale, and the same or any part thereof remain unsold, then said bonds, or as many as remain unsold, may be sold at private sale at not less than their par value, etc.”

Section 113 M. C., authorizes the trustees to issue coupon or registered bonds of the corporation for certain purposes, and Section 115 provides that such bonds “shall be sold as provided in Section 97 of this act.”

No reason suggests itself why the sale of bonds purchased by the trustees from the city should not be conducted with the same formalities and safe guards required in the sale of bonds issued by the trustees for the purpose of refunding other bonded indebtedness.

The Supreme Court of this state has held, in the case of *Cincinnati v. Guckenberger*, 60 O. S., 353, that the provisions of the code with reference to the sale of bonds by municipal corporations and by sinking fund trustees should be construed together. While the sale considered in that opinion was under authority of the statutes re-enacted with some changes, as Sections 113-115 M. C., and not under Section 110 M. C., the remarks of the court may fairly be applied to the construction of the present Sections 97 and 110 M. C.

“True, it is not uncommon to find in legislation special provisions intended to supplant or supersede, for the special subject matter, some

general provision on the same general subject, but such instances are expected to be so marked, either by force of the language itself, or by necessary implication as to the purpose to be accomplished, as that the meaning shall be plain. \* \* \*

"The sale being required and no method of conducting it having been provided, it follows that we look to other sections for that detail, and it is given in Section 2709, by the requirement of a sale to the highest and best bidder after thirty days' notice by advertisement in newspapers. And as the language of Section 2729g (2) indicates no intent to waive or change this direction as to publicity, but rather emphasizes that purpose, we must conclude that the requirement to advertise is obligatory on the sinking fund trustees, whenever sales are to be made."

I am, therefore, of the opinion that sales of the bonds of a city by the trustees of its sinking fund are governed by the provisions of Section 97 above quoted. They are sales by the municipal corporation within the meaning of this section, although made through the agency of the trustees. The only sale of its bonds by a municipal corporation which may be made without the prescribed formalities is the sale to the sinking fund trustees.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### MUNICIPAL CORPORATION — EXPENDITURES OF — AUTHORITY OF BOARD OF PUBLIC SERVICE.

Board of public service may order expenditure of proceeds of municipal bond issue without consent of council.

November 15, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN:— Your communication of recent date requests an opinion as to the effect of the following provision in a municipal ordinance in so far as it attempts to make the consent of council a prerequisite in every case to the power of the board of public service to order any expenditure of the proceeds of the bond issue authorized by said ordinance.

The proceeds of the bond issue "shall be paid out by the treasurer upon warrants issued by the auditor, on the order of the board of public service and shall be expended by said board for the purposes specified in Section 1 of this ordinance, *after authority therefor has been duly obtained from council.*"

I assume that all the necessary preliminary steps have been taken for the issue of bonds for a specific definite municipal purpose.

Section 123 M. C. provides as follows:

"The powers of council shall be legislative only and it shall perform no administrative duties whatever, and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as may be otherwise provided in this act. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon."



The purpose of this restriction was said, in *Lillard v. Ampt*, 4 N. P., 305, to be "to emphasize that the respective executive, legislative and administrative functions of the city government should be distinct and independent of one another." And it has further been held that the proper officers of the municipality must execute the municipal contracts and conduct them to performance. (*Knauss v. Columbus*, 13 Dec. 200.) The statute cited and the many opinions bearing upon the subject by the courts, all recognize the limitation thus imposed upon council to be, that where its authority is required, as preliminary to entering into any contract, it confers the authority by appropriate legislation and provides for the appropriation, and thereafter the executive and administrative functions are carried out by the proper officer or department of the city having jurisdiction thereof.

It has been repeatedly held by this department that the sale of bonds, duly provided for, for any specific purpose, constitutes in law an appropriation for that purpose, and the proceeds of such bond issues need not be embraced within the semi-annual appropriation ordinance to be acted upon by the council.

The limitation contained in Section 143 and Section 154 should be observed. They provide in substance that when any expenditure within such departments, other than the compensation of persons employed therein, exceeds \$500, the expenditure shall first be authorized and directed by ordinance of council. But when the authority is conferred by council the expenditure of the fund or funds is made under the direction of the appropriate officer or department.

It therefore follows that when the necessary municipal legislation has been enacted by council providing for the issue and sale of bonds for any municipal purpose, and the authority of council has been obtained for the execution of the contract upon which the proceeds of the bonds are to be expended, the expenditure may be made by the proper officer or department, subject to the limitations hereinbefore referred to, and the auditor may honor vouchers upon such funds without specific authority from the council, notwithstanding the provision in the ordinance above quoted.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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TRANSFER OF MUNICIPAL FUNDS — POWER MAY NOT BE USED TO  
MAKE EXPENDITURE FROM ANY FUND OF AMOUNT IN EXCESS  
OF THAT FIXED BY APPROPRIATION.

Authority of council to transfer from one fund to another does not carry with it authority to make expenditures from such transferee fund in excess of amount appropriated by semi-annual "budget" appropriation ordinance, nor for objects other than therein authorized.

To whom annual report of auditor of city to be made.

November 15, 1906.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN: — I have your inquiry of the 8th inst., enclosing the letter of the city auditor of Cincinnati, Ohio, for my consideration and answer. Replying thereto I beg to say that in my opinion the authority contained in Section 43 M. C., to transfer all or a portion of one fund, or a balance remaining therein, to the credit of one or more other funds does not include authority to expend the same. The power to transfer funds, as therein contained, in one power and the power to expend is still another.

The right to transfer funds does not authorize the expenditure of such funds transferred. The limitations upon expenditures of municipal officers are contained in part in the same section in the following language:

"In all municipal corporations council shall make, at the beginning of each fiscal year, appropriations for each of the several objects for which the corporations has to provide, out of the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made with and within said appropriations and balances thereof."

This language, in my opinion, does not permit the enlargement of the subjects contained in the budget of appropriations but merely permits, under the circumstances set forth in Section 43 M. C., the redistribution of the moneys within the several funds. The question presented by the city auditor involves the power of council to transfer \$20,000, the proceeds in part of the Dow Tax, from the general fund to the light fund, in order to enable the board of public service to contract for street lamps for equipping certain districts of the city. Such an expenditure must have been authorized by the semi-annual appropriations before the authority could be exercised. It must have been one "of the several objects for which the corporation had to provide," and as such included in the appropriations made. If duly authorized, as above suggested, and there had been for any reason a shortage in the appropriation necessary for that purpose it could have been provided for by the transfer made under the authority of Section 43 M. C., also the expenditure therefrom could not be of any greater amount than that included in the appropriation ordinance for that purpose.

The officer or department to which the city auditor is required to make his annual report is mooted in the letter of the city auditor. Pursuant to Section 44 M. C. the auditor is required to make up monthly a statement of the balance of all funds and accounts in his office as the same exists at the close of business on the last day of the month, a copy of which he is required to forward to the mayor who shall keep it for public inspection. This monthly report, so provided for, is entirely distinct from the annual statement as provided for in Section 36 M. C. That section requires that the auditor of every city "shall furnish to the mayor and council and to each member thereof the following statements which council may require to be printed." (Then follow four different forms of statements.) There is further a detailed statement of all receipts and expenditures to be made by the auditor on or before the third Monday in March of each year concerning which it is not specifically provided to whom the same shall be made, but as the mayor is required to communicate to council a statement of the finances of the municipality it could be safely assumed that there would be a sufficient compliance with Section 1756 R. S., if a copy of such statement, made thereunder, is transmitted to the mayor.

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

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#### PARK POLICE — STATUS OF.

Park police of city of Cleveland properly under supervision of board of public service of that city.

November 19, 1906.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—I have your recent inquiry regarding the so-called "park police" of the City of Cleveland, asking this department for an opinion as to whether such police are under the jurisdiction of the board of public safety or of the board of public service of the city. I have communicated with the city solicitor of Cleveland who has furnished me the ordinances under which such policemen are appointed, in which they have been designated as "care takers" of the parks and the history of the appointment of such employes shows that for more than fifteen years in that city the parks have been protected by such "care takers" under the jurisdiction of the public department having the management of the parks and boulevards; that since the enactment of the municipal code these "care takers" have been continued by the city law department under the jurisdiction of the department of public service pursuant to the powers conferred upon such department by Sections 141 and 145 M. C.

In my opinion such "care takers" are not and should not be considered as part of the police department as defined in Sections 148 and 149 M. C., and under the peculiar service rendered by them in connection with the park system of that city they are properly placed under the jurisdiction of the board of public service.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*


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#### ELECTIONS—EXPENSE OF—DISTRIBUTION BETWEEN COUNTY AND MUNICIPAL CORPORATION OR TOWNSHIP.

General rule—election expenses are chargeable to county; expense of place of holding elections chargeable to municipal corporation or township; expense of publication of mayor's proclamation of election chargeable to municipal corporation; that of police officers at polls chargeable to municipal corporation; that of registration chargeable to municipal corporation.

November 27, 1906.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—In response to your request for an opinion upon the several questions presented by you in regard to the distribution of election expenses as between municipal corporations and townships upon the one side and the counties in which they are situate upon the other, I beg to point out as the primary rule for determining such distribution that our present system of supervising elections is one of county boards and not of city boards. The so-called Hypes Law, 97 O. L. 185, was enacted for the purpose of establishing a constitutional and uniform system of conducting elections throughout the state and the county was adopted as the unit of that system. Accordingly, whenever any expense arises in the conduct of elections, such expense is to be borne by the county except in so far as a different intention appears by statute. This appears from that part of Section 2926t reading as follows:

"But for all November elections the county in which such city is located shall pay the general expenses of such election other than the expenses of registration."

The expenses incident to registration are provided for by Section 2926*t*. It is to be observed that Section 2926*t* especially exempts the county from the expenses of registration and imposes upon the county all the other "general expenses of such election." Other sections of the statutes seem to exempt certain expenses which apparently are not among the "general expenses" covered by Section 2926*t*.

By the provisions of Section 1443 the township trustees are authorized to fix the place of holding elections within their township, including all the precincts thereof, and may purchase or lease suitable property to that end.

Under the provisions of Section (1536-982) Bates, original Section 1725 R. S., the council of all municipal corporations shall designate the place or places for holding the regular elections; and in all corporations divided into wards, there shall be a place or places in each ward designated for holding elections.

By Section 2923 it is provided:

"Elections shall be held for every township precinct at such place within the township as the trustees thereof shall determine to be most convenient of access for the voters of such precinct, and for each municipal or ward precinct, at such place as the council of the corporation shall designate.

"Provided, that in registration cities, the deputy state supervisors of elections shall designate such place of holding elections in each precinct."

Section 2926*c* authorizes the board of elections to fix the place of registration and election in registration cities and directs such boards to "provide suitable booths or hire suitable rooms for such purpose and for their own office, at such rents as they deem just."

By Section 2926*d* it is provided that "the cost of the rents, furnishing and supplies of all rooms hired by the said board for their offices and for places of registration of electors and holding of elections in such cities shall be borne and paid, by any such city out of its general fund."

Taking up your several inquiries in detail I beg to express my opinion as follows:

First. All expenses incidental to registration must be paid by the city.

Second. The *place* of holding elections in municipalities must be provided by the municipal corporation and in precincts outside municipalities by the township in which such precinct is located.

Third. The expense of publishing the mayor's proclamation of election, being a duty imposed exclusively upon a municipal officer and not upon the election board, should be borne by the municipality and for the same reason the expense of police officers at the polls should be borne by the municipal corporation.

Fourth. All the other expenses are to be borne by the county.

Fifth. It is within the express power of the city auditor to require evidence that a voucher is properly and legally drawn upon him, and he may, for this purpose, even subpoena witnesses upon the facts warranting the issue of such voucher.

I return to you herewith the several letters submitted by you.

Very respectfully,

WADE H. ELLIS,

*Attorney General.*

ELECTIONS—EXPENSE OF—DISTRIBUTION BETWEEN COUNTY  
AND MUNICIPAL CORPORATION OR TOWNSHIP.

In registration cities, expense of board of deputy state supervisors of elections divided between county and city proportionally as total expense compares with expense of registration.

December 6, 1906.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—In answer to your further inquiry relating to the expenses of holding elections I beg to say that in registration cities the city is liable for so much of the rent of the offices of the Board of Supervisors and the furnishings and supplies thereof as represents the proportion of the whole business of the offices devoted exclusively to registration; the balance shall be paid by the county. The furnishings and supplies above mentioned include the heating and lighting of the offices of the board.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

ASSESSMENTS—SPECIAL MUNICIPAL—ALTERATIONS IN.

Council may make alterations in special municipal assessments, upon objection thereto, before certification to county auditor; proper procedure for making objection; neither city engineer nor city solicitor may make such alterations; clerical mistakes may be corrected by council before certification to county auditor.

December 17, 1906.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Your letter of the 13th inst. contains several inquiries which it is not necessary to consider separately as they are incident to the main proposition of whether any city officials and, if so, which one, can reduce the amount of any special assessment against any particular piece of property and what procedure is involved therein.

After the several steps have been taken preparatory to levying an assessment upon property benefited by an improvement, as required by the Municipal Code and related sections of the Revised Statutes, the parties assessed have the privilege of filing their objections in writing with the clerk within two weeks after the expiration of the publication of the notice of assessment. When such objections are filed it becomes the duty of the city council to appoint an equalizing board composed of three disinterested freeholders of the corporation. Pursuant to Section 69, such board shall hear and determine *all objections* to the assessment and shall equalize the same, as they think proper, and shall report the equalized assessment made by them to the council, which has the power to confirm the same or set it aside and cause a new assessment to be made and appoint a new equalizing board.

When the assessment is confirmed by the council *it shall be complete and final*, and shall be recorded in the office of the clerk of the council. By this provision an opportunity is given to every one interested to present any objection to the assessment and if the opportunity thus presented is not taken advantage of, the right to object thereto, or to secure any reduction, alteration or change in

the same *before any municipal officer or the city council, is lost.* Until the assessment is confirmed by the council the interested party may secure his relief, contemplated in your first question, by proceeding before the equalizing board.

No power is given to the city engineer and city solicitor or to either of them to make any alteration in the assessment, but if there is a clerical mistake occurring therein the council has the authority to correct the same before final approval of the assessment, upon being satisfied of such error.

After the assessment has been certified to the county auditor, as contemplated in your fourth question, there is no power conferred upon the city council, or any other city board or official, to make any alteration or change in the assessment so certified.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### INSOLVENCY COURT OF HAMILTON COUNTY — COMPENSATION OF JUDGE AND DEPUTIES.

Under Hamilton county salary law as originally enacted, compensation of judge of insolvency court of Hamilton county equal in amount to that of probate judge of said county, payable out of fee fund; under said act as amended April 21, 1896, such compensation equal in amount to that of probate judge of said county, payable out of general fund; after said act declared unconstitutional, such compensation equal in amount to that of probate judge of said county, payable out of general fund, while compensation of deputies and assistants of said judge payable out of fee fund; county salary act of 1906 governs compensation of judge of said court and of his deputies and assistants, after January 1, 1907.

December 18, 1906.

*Bureau of Inspection and Supervision of Public Offices, Department of Auditor of State, Columbus, Ohio.*

GENTLEMEN: — Your letter of recent date requests an opinion as to the compensation fixed by law for the Judge of the Court of Insolvency in Hamilton County, and for the clerks employed by him. The questions presented are intricate and I have taken time to discuss them fully with some of the officials interested in their proper solution before rendering a formal opinion to you.

A full discussion of these questions necessarily covers a period of time extending from May 21st, 1894, the date of the establishment of the court, to January 1st, 1907, when the new salary law goes into effect. This period may, for the purpose of this opinion, be divided into four shorter periods as follows: First, from the establishment of the court, May 21st, 1894, to the date of the amendment of the original act, April 21st, 1896; Second, from April 21st, 1896, to November 17th, 1903, the date of the decision in *State v. Lewis*, (69 O. S., 202); Third, from November 17th, 1903, to January 1st, 1907, the date when the new salary law goes into effect; Fourth, after January 1st, 1907.

*First: What was the compensation fixed by law for the Judge of the Court of Insolvency in Hamilton County, and for the clerks employed by him for the period commencing May 21st, 1894, and ending April 21st, 1896?*

The original act establishing the insolvency court provided that the judge should "receive the same compensation and be paid in like manner as the judge of the probate court of said county wherein said courts of insolvency are established." (91 O. L., 844, Section 3.)

At this time the Probate Judge of Hamilton County received a salary of \$5,000 (Section 1345 and Section 1347 R. S.). All fees collected were paid into the county treasury into the county officers' fee fund from which the salaries of employes of the court were paid monthly, on warrant of the county auditor. The constitutionality of the Hamilton County Salary Law was not questioned at this time, and the legislature must have intended that the provisions of this law, as to salary and fees of the probate judge, should, for the time being, regulate the salary and fees of the insolvency judge.

No express provision was made in the insolvency act for the compensation of deputy clerks, but the appointment of such clerks was authorized (Section (548-7)), and the provisions of Section (548-9) and Section (548-16) quoted *infra* are broad enough to make applicable to the insolvency judge the provisions of the special salary law as to the compensation of deputies of the probate court. (See Sections 1342, 1343, 1346, 1348 and 1350 R. S.) During the first period, then, both the salary of the insolvency judge and the manner of compensation of his employes were fixed by the special act governing the probate court of Hamilton County.

It will aid in the determination of the important question whether the change in the salary of the Probate Judge, by the recent salary law, operates to change the salary of the Judge of the Insolvency Court, to consider what effect such change in the salary of the Probate Judge would have had if made during the earlier periods in the history of the insolvency court.

The act establishing the insolvency court evidences throughout an intention to make the general body of laws governing the probate court apply also to the insolvency court. Not only are existing laws governing the probate court made applicable to the insolvency court, but the act expressly and repeatedly refers to such laws now in force, or that may hereafter be enacted, and declares that they shall be held to extend to the insolvency court "unless the same be inconsistent with this act or plainly inapplicable."

Section 9 provides that the court of insolvency shall

"discharge the same duties and incur the same penalties as are now or may hereafter be enforced or enjoined by the constitution and laws of the state upon the judge of the probate court."

Section 16 provides:

"All laws now in force or hereafter enacted, regulating the fees of the probate court and the mode and manner of making out, filing and recording an itemized account of all fees received by the probate court, shall be held and deemed to be applicable to said court of insolvency." See also Sections (548-10), (548-12), (548-13).

The rule of construction in such cases is stated in Lewis's Sutherland' Statutory Construction, Section 405, as follows:

"There is another form of adoption wherein the reference is not to any particular statute or part of a statute, but to the law generally which governs a particular subject. The reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied. \* \* \* ."

See also Section 406.

It may be conceded that if the act establishing the insolvency court had specifically referred to the provisions of the Hamilton county salary act, a repeal or amendment of the sections expressly referred to would have had no effect so far as the insolvency court is concerned. (Lewis's Sutherland Statutory Construction, Section 405.) But no such specific reference was made, and the original act taken as a whole indicates no intention to fix a compensation for the judge of the insolvency court differing either in amount or manner of payment from the compensation which, then was, or might thereafter be fixed for the Probate Judge. On the contrary the whole plan seems to have been to keep the courts, as near as might be, on an equal footing in every respect.

If, then, a change in the salary of the Probate Judge had been made by legislation, during this first period, it would have resulted in a corresponding change in the salary of the Insolvency Judge.

*Second: What was the compensation fixed by law for the judge of the court of insolvency in Hamilton county and for the clerks employed by him for the period commencing April 21st, 1896, and ending November 17th, 1903?*

On April 21st, 1896, Section 3 of the insolvency court act was amended to read as follows:

"That said judge when elected shall give a like bond and be qualified and shall receive the same compensation as the judge of the probate court of said county wherein such courts of insolvency are established, and shall be paid out of the county treasury on the warrant of the county auditor, in quarterly installments."

The only change effected by this amendment was in the fund from which the salary of the insolvency judge was to be paid. This change appears to have been made because the fees collected in the insolvency court were insufficient to pay its running expenses and also to pay the judge a salary equal to that received by the Probate Judge. If this was the purpose of the amendment it emphasized the intention of the legislature to keep the compensation of the Insolvency Judge equal to that of the Probate Judge. It is as though the legislature had declared that even though the fees collected by the Insolvency Judge are not sufficient for the purpose, he shall be paid the same salary as the Probate Judge.

If the purpose of the amendment was to prevent future changes in the salary of the Probate Judge from applying to the Insolvency Judge, it is hard to explain the retention of the very clause which referred to the salary of the Probate Judge as the measure of the compensation of the Insolvency Judge. I am therefore of the opinion that after the amendment, as before, any change in the amount of the salary of the Probate Judge, and any change in the schedule of fees of that court, would equally affect the salary and fees of the Insolvency Judge.

*Third: What was the compensation fixed by law for the Judge of the Court of Insolvency in Hamilton county and for the clerks employed by him for the period commencing November 17th, 1903, and ending January 1st, 1907?*

On November 17th, 1903, the Supreme Court held the Hamilton county salary law unconstitutional, but the execution of the judgment was suspended until June 24th, 1904, (State v. Lewis, 69 O. S., 202.). The Probate Court of Hamilton County thereupon became subject to the general laws governing probate courts



throughout the state. This change in the compensation of the Probate Judge from fees to salary was manifestly not foreseen, nor provided for, by the legislature. Whatever the purpose of the 1896 amendment may have been, the effect of the express provision that the compensation of the judge should be paid out of the county treasury on warrant of the County Auditor, in quarterly installments, was to prevent future changes in the compensation of the Probate Judge, from salary to fees, from being applicable to the Insolvency Judge.

After the decision in *State v. Lewis*, the Probate Judge was no longer obliged to pay his fees into the county treasury. His net compensation thereafter was the difference between the amount of fees collected and the expense of maintaining the court. It is unreasonable to suppose that the legislature intended this sum to be the measure of compensation of the Insolvency Judge, to be paid to him out of the county treasury. It is unreasonable to suppose that the legislature intended the Insolvency Judge should collect fees, which, under the general law governing Probate Judges, he would not be compelled to pay into the county treasury, and should also be paid an amount equal to the sum of said fees out of the county treasury. It is unreasonable to imply a requirement that the Insolvency Judge should pay his fees into the county treasury only to receive back, in quarterly installments, the exact amount of the fees paid in.

The provision for the compensation of the judge for salary is so intimately related to the provisions for the disposition of his fees and the payment of his employes that if the section of the special salary act as to salary is left in force the other related sections must also be held to be in force unless necessarily abrogated by the decision in *State v. Lewis*.

It does not follow from the fact that the provisions of the special salary act were unconstitutional, as applied to the probate court, that such provisions would be held unconstitutional as applied to the insolvency court. The decision was based upon the ground that any law fixing the compensation of the *officers therein referred to* must be of general application throughout the state. (*State v. Lewis*; *State v. Yates*, 66 O. S., 546.)

The insolvency court was created by a special act of the legislature, for a single county (*State v. Bloch*, 65 O. S. 370), while the probate court is expressly provided for by the Constitution and exists in every county in the state (Article 4, Section VII).

I am therefore of the opinion that the decision of *State v. Lewis* did not affect the duty of the Insolvency Judge to pay into the county treasury the fees, penalties, etc., collected through said court, nor the manner of payment of the clerks of the court out of the county treasury from the fee fund.

If the Judge of the Court of Insolvency has hitherto paid his clerks out of the fees collected through his office before turning the same over to the county treasury, such payments should be allowed as credits against the amount with which he would be charged as the proceeds of his office. The question whether deputies should be paid out of the county treasury as provided by the Hamilton county salary law, or out of the fees in the hands of the Insolvency Judge is not, therefore, of much moment. It will be of no importance after January 1st, 1907, if the new salary act is applicable to the court of insolvency.

The decision in *State v. Lewis* clearly could not operate to change the construction of the language of the insolvency act. No part of this act was construed in that case. If, prior to *State v. Lewis*, the true construction of the insolvency act was that legislative changes in the salary of the Probate Judge should equally affect the salary of the Insolvency Judge, then that remained the true construction after this decision.

*“Fourth: What law will govern the compensation of the Judge of the Court of Insolvency in Hamilton county and the compensation of the clerks employed by him, after January 1st, 1907?”*

The provisions of the new salary act (98 O. L. 89) are quite similar to those of the old special act except as to the substitution of special fee funds for the general one provided for by the former act and as to the manner in which the amount of the salary of the Probate Judge is fixed. If the recent act had been passed in 1896, prior to the amendment to section 3 of the insolvency act, and prior to the decision in *State v. Lewis*, it would scarcely have occurred to any one to question its applicability to the insolvency court. But I have endeavored to show that the amendment and decision referred to did not change the plan of the original law.

I am therefore of the opinion that after January 1st, 1907, the salary of the Judge of the Insolvency Court, and the manner in which the clerks could be compensated, will be governed by the provisions of the new salary law (98 O. L. 89). The salary of the judge will, however, be paid out of the county treasury as hitherto, in accordance with the provisions of Section (548-3), R. S., instead of from the fee fund as provided by 98 O. L., 89, Section 11. Future changes in the salary of the Probate Judge will equally affect the salary of the Insolvency Judge, unless the law making such change expresses a contrary intention.

The estimate of expenses for 1907, provided for by section 3 of the salary law, should be made at the earliest possible moment. The requirement that it be filed before November 20th, 1906, is directory.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### SHERIFF — EXPENSE OF, UNDER COUNTY SALARY LAW.

Under county salary law, 98 O. L., 89-96, horses and vehicles for use of sheriff may be furnished as well as maintained at county expense; expense incurred in service of process and subpoenas by sheriff may not be paid by county; meals and lodging paid for by the sheriff or deputies when engaged in work, the expense of which is authorized by said act to be paid, may be included in such expense; expense of handcuffs, revolvers and postage may not be paid by county; telephones in sheriff's office may be paid for by county.

December 20th, 1906.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN: — Your communication of recent date submitting the following inquiries relating to the sheriff's office under the new county salary law, is received.

1. Is the county or the sheriff required to furnish the necessary horses and vehicles for the proper conduct of the duties of the office? (Sec. 19.)

2. May the sheriff be reimbursed for actual expenses incurred for railroad fare, livery hire or other expenses of transportation in serving civil processes, subpoenas in criminal cases, summoning juries, etc., etc., or can he be reimbursed only for the expenses incurred in pursuing or transporting persons accused or convicted of crimes and offenses and in conveying persons to the various state institutions? (Sec. 19.)

3. Does "necessary expenses incurred" as used in Sec. 19, cover personal expenses of the sheriff or his deputies, such as meals and lodging?

4. Is the county required to furnish hand-cuffs, revolvers, badges, etc., for the sheriff's office?

5. Is the county required to pay for postage and telephone service, used in the discharge of his official duties?

In reply I beg leave to say the determination of all of the above questions, except the last two, involves a construction of Section 19 of the county salary law (98 O. L., page 89-96), which fixes sheriff's additional compensation.

Section 19 of the county salary law is as follows:

"The county commissioners shall in addition to the compensation and salary herein provided, make allowances quarterly to every sheriff for keeping and feeding prisoners under section 1235 of the Revised Statutes, and shall allow his actual and necessary expenses incurred or expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state asylum for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expense of maintaining horses and vehicles necessary to the proper administration of the duties of his office. Every sheriff shall file under oath with the quarterly report herein provided for, a full, accurate and itemized account of all his actual and necessary expenses, mentioned in this section before the same shall be allowed by the county commissioners."

The first question involves the construction of the following language contained in the above section:

"The county commissioners \* \* \* shall allow \* \* \* all expense of maintaining horses and vehicles necessary to the proper administration of the duties of his office."

In my opinion the word "maintaining" as used in this section should be so construed as to authorize the county commissioners to furnish at the county expense the necessary horses and vehicles for the use of the sheriff in the discharge of his duties, or, if the sheriff owns a sufficient number of horses and vehicles to allow the expense of maintaining them.

*Second.* Section 19 in fixing sheriff's additional compensation specifically enumerates the additional compensation sheriffs are to receive in the allowance of actual and necessary expenses incurred or expended. That is, county commissioners shall allow the sheriffs actual and necessary expenses

" \* \* in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state asylum for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates." \* \* \*

Section 19 makes no provision authorizing the county commissioners to allow "actual and necessary expenses" incurred for railroad fare, or other means of transportation in serving civil processes, subpoenas in criminal cases, summoning juries, etc., other than the expenses to be allowed for the maintenance of necessary horses and vehicles. I cannot understand how the legislature would fail to make provision for necessary expenses incurred by the sheriff in paying railroad and traction car fare in serving civil processes and subpoenaing witnesses in civil and criminal cases. It will certainly work an inconvenience if not a miscarriage of justice in many cases if the sheriff is compelled to use horses and vehicles as his only means of transportation. Cases will arise where the immediate attendance of witnesses is required in the trial of both civil and criminal cases and the sheriff ought to have the right in serving subpoenas in such cases to use the most convenient and expeditious mode of transportation. But the legislature has failed to authorize such expenses; and in my opinion, sheriffs will be compelled to rely entirely upon horses and vehicles in the services of all processes both civil and criminal, unless they pay their own expenses.

*Third.* "Necessary expenses incurred," as used in Section 19 does, in my opinion, include necessary meals and lodging for the sheriff or his deputies when actually paid for.

*Fourth and Fifth.* In answer to these two questions Section 19 of the county salary law makes no provision for the payment of any such expenses as here enumerated and I am of the opinion that the county commissioners cannot be required to furnish hand-cuffs, revolvers, badges or postage for the use of the sheriff in the discharge of his official duties. I believe, however, that the county commissioners may, under Section 859 which provides that the county commissioners shall provide "offices for the county officers," furnish such offices with telephones and such other equipment as they deem necessary for the proper discharge of official duties.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## (To the Treasurer of State.)

## DEPOSITORY — STATE — NATURE OF SECURITY REQUIRED TO BE OFFERED BY.

Bonds given by state depositories continuing guaranties.

January 31st, 1906.

HON. W. S. MCKINNON, *Treasurer of State, Columbus, Ohio.*

DEAR SIR: — You have submitted to this department the following inquiry:

“Whether or not the bonds given by the depositories designated as state depositories are continuing guaranties and whether or not new bonds should be required from such state depositories, annually, or at the close of the term of the Treasurer of State who has made a deposit with such depository?”

Section 5 of the act entitled “An act to provide a depository for state funds,” approved May 3rd, 1904, (97 O. L. p. 536, Sec. (200-7) R. S.) provides among other things that the bonds given by state depositories shall be conditioned for the receipt and safe keeping and payment over to the Treasurer of State or upon his written order of all money which may come into the custody of such depository under and by virtue of this act, and said bond shall include a special obligation to settle, etc.

In the form of bond submitted by you is the condition that if the designated depository shall pay over to the Treasurer of State for the use of the State of Ohio, upon demand made therefor or upon his written order, any and all moneys which from time to time hereafter may come into the custody of such designated depository, under and by virtue of the act referred to, free from any discount or deduction of any kind therefrom, and shall further pay to the Treasurer of State for the use of the State of Ohio interest upon the daily balances on such deposit or deposits at the rate of — per centum per annum, payable at the time mentioned in said act without demand, and shall do each and every act as required of such depository by the terms of said act and shall save the State of Ohio free from any loss whatsoever upon such deposit or deposits made with the said designated depository, then this obligation shall be void, otherwise it shall be and remain in full force and effect.

These bonds are executed by the depositories and sureties to the State of Ohio, and not to the Treasurer of State.

A surety on a bond is liable for the defaults of the principal from the time the bond is given.

*Bantell v. Wheeler, 195 Ill. 455.*

The liability of such surety company continues during the time mentioned in the bond (*Coleman v. People, 78 Ill. App. 215*) and during the term of the agency, for the faithful performance of which the bond is given.

*Rockford Ins. Co., v. Rogers, 15 Colo. App. 27.*

When a bond recites that the principal will discharge the duties of the office (during the time he holds the appointment and until he is relieved therefrom) the liability of a surety does not cease before the revocation of the appointment.

*Mobile, etc. R. Co. v. Brewer, 76 Ala. 141.*

The rule of limitation as to the duration of the liability of a surety is this:

“When the words of the condition of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond specifying the time during which the prescribed duty is to be performed by the principal the general words will be limited by the recital and the surety will only be liable the time therein specified.”

Brandt on Suretyship, Section 138.

It logically follows that where the words in the condition of the bond are general and indefinite as to the time during which the surety shall remain liable, and there is no recital specifying any particular time for the continuing of such liability, such bond is a continuing guaranty and the surety remains liable.

Where the guarantors of a bank selected as state depository executed a bond to the state that the bank shall

“well and faithfully account for and pay over all moneys deposited with it or for which it shall in any way become liable”

and also

“account for and pay over all moneys now on deposit in said bank or due or to become due therefrom to the people”

it was held in an action on such guaranty that the guarantors were bound as a continuing security for the deposit existing at the time of the execution of the bond, as well as for subsequent deposits.

People v. Lee et al., 104 N. Y. 441.

The condition of the bond submitted being as herein recited, such form of bond furnishes a continuing security for all demands existing against the depository as well as for all that may arise under the terms of the contract with the depositories.

I am of the opinion, therefore, that bonds given by state depositories, if they conform to the form submitted by you, are continuing guaranties and that it is not necessary that new bonds be executed annually or upon the expiration of the term of the Treasurer of State.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### OHIO UNIVERSITY—DISPOSITION OF BEQUEST TO.

Fund bequeathed to trustees of Ohio University for specified purpose cannot be accepted as part of the irreducible debt.

August 8th, 1906.

HON. W. S. MCKINNON, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have yours accompanied by a letter from Dr. Alston Ellis, President of the Ohio University, inquiring whether a fund of \$1,000 bequeathed to the trustees of the Ohio University for a certain specified educational purpose, can be accepted as part of the irreducible debt of the state?

The irreducible debt of the state consists only of those funds arising under Section 1, of Article VI of the Constitution, and inasmuch as this bequest was to the trustees of the Ohio University and by them accepted and not directly to the State of Ohio and accepted as such by the general assembly of the State of Ohio, it is not such a fund as that mentioned in the section of the Constitution referred to and cannot, therefore, be accepted by you and made a part of the irreducible debt.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

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SAFE DEPOSIT AND TRUST COMPANY—DEPOSIT OF.

Duty of treasurer of state, upon dissolution of safe deposit and trust company, as to surrender of deposit made under Section 3821d, R. S.

October 9th, 1906.

HON. W. S. MCKINNON, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:— Acknowledging the receipt of yours of the 3rd inst., enclosing a communication from George D. Copeland of Marion, Ohio, regarding the surrender of the deposit made by the Central Ohio Loan and Trust Company with your department, I beg to say that these deposits are made pursuant to Section 3821d of the Revised Statutes. If the Central Ohio Loan and Trust Company has dissolved and retired from the business contemplated by its charter, you should, before surrendering the deposit made by it, satisfy yourself by a proper certificate that the dissolution has been effected, and that the company has surrendered its corporate powers. You should further protect yourself as Treasurer by a good and sufficient bond, executed by the parties in interest, covering any outstanding liabilities of such company. I think you would be justified, on the execution of such bond as is satisfactory to you, in delivering over to the parties entitled thereto the deposit in question.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

**(To the State Commissioner of Common Schools.)**

## TEXT BOOKS — SUBSTITUTION OF.

Substitution of text books under Section (4020-14) R. S., effective during remainder of five year period after original adoption.

April 27th, 1906.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your letter dated April 25th inquiring whether or not when text books are substituted under Section (4020-14), Revised Statutes of Ohio, they shall be used for a period of five years from the date of such substitution or for the remainder of the five year period for which text books were originally adopted, is received.

The portion of section (4020-14) R. S., involved is as follows:

“But no text books so adopted shall be changed, nor any part thereof altered or revised, nor shall any other text books be substituted therefor, for five years after the date of the selection and adoption thereof without the consent of three-fourths of all the members elected, given at a regular meeting.”

Under this provision it is my opinion that after text books have been adopted, any substitution will be for the remainder of the five year period after said substitution.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

## SCHOOL EXAMINERS—ELIGIBILITY OF WOMEN TO APPOINTMENT AS.

Women eligible to appointment as members of county and city boards of school examiners.

July 11th, 1906.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of July 9th in which you request my opinion upon the following question:

“Are women eligible to appointment on county and city boards of school examiners, and can they legally serve as members of such boards in the State of Ohio?”

Section 4069, R. S., which prescribes the qualifications of county examiners, provides:

“There shall be a county board of school examiners for each county, which shall consist of three competent persons to be appointed by the probate judge. Two of such persons shall have had at least two years' experience as teachers or superintendents, and shall have been within five



years, actual teachers in the public schools. Each person so appointed shall be a legal resident of the county for which he is appointed, and, should he remove from the county during his term, his office shall be thereby vacated and his successor be appointed. No examiner shall teach in, be connected with, or be financially interested in any school which is not supported wholly or in part by the state, or be employed as an instructor in any teachers' institute in his own county; nor shall any person be appointed to the position, or exercise the office of examiner who is agent of or is financially interested in any book publishing or bookselling firm, company or business, or in any educational journal or magazine. \* \* \*

Section 4077, R. S., which prescribes the qualifications of city examiners, provides:

"There shall be a city board of school examiners for each city school district, to be appointed by the board of education of the district: such board shall consist of three persons, and the majority of the persons appointed shall have at least two years' practical experience in teaching in the public schools and all persons appointed shall be otherwise competent for the position and residents of the district for which they are appointed. \* \* \*

The remainder of these statutes and other sections relating to the duties of examiners do not afford any assistance in the determination of the question submitted.

It is within the constitutional power of the legislature to authorize the appointment or election of women to positions of an official character under the school laws.

State v. Cincinnati, 19 O., 178;

State v. Board of Education, 9 O. C. C., 134;

State v. Adams, 58 O. S., 612, 616.

Section (3970-12) R. S., authorizes women "to vote and to be voted for, for member of the board of education and upon no other question."

Members of the board of examiners are not elected but are appointed by the Probate Judge or by the board of education.

The word "persons" used in the statutes describing the qualifications of school examiners includes women unless the context or the subject matter shows that this could not have been the intention of the legislature. In re Hall, 50 Conn. 31.

The pronouns "he" and "his" used to refer to the appointee are the sole indication that the legislature intended the appointment to be conferred on male persons only. Section 23 R. S., provides, however, that,

"Unless the context shows that another sense was intended \* \* \* words in the masculine include the feminine and neuter gender."

The context does not show that another sense was intended and since the office of school examiner is one which may properly be filled by a woman, I am of the opinion that women may be appointed members of the city and county boards of school examiners.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## FENCES — DUTY OF BOARD OF EDUCATION AS TO.

July 16, 1906.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—In reply to your request for an opinion from this office as to the duties and liabilities of boards of education of township and village school districts with reference to fences enclosing school-houses, I beg to advise you as follows: Section 3987 R. S. provides:

“The board of education of any district is empowered to build, repair and furnish the necessary school-houses, purchase or lease sites therefor, or rights of way thereto, or rent suitable school-rooms, provide all the necessary apparatus and make all other necessary provisions for the schools under its control; also, the board shall provide fuel for schools, build and keep in good repair all fences inclosing such school-houses, plant when deemed desirable shade and ornamental trees on the school-grounds, and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts.”

The duty of enclosing school lots with fences and of keeping the same in repair was probably imposed upon the boards of education because of the unusual burden which would otherwise fall upon the adjoining land owners. Such fences are usually subjected to hard usage and frequent repairs are likely to be necessary through no fault of the adjoining owner. The duty is enjoined for the protection of private rights and may be enforced by any person having special interest in its enforcement.

I do not believe that the boards could be compelled to build a fence between the school-house and the public highway since I am not able to see what special interest of any individual would be affected by the existence or non-existence of such a fence.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## COUNTY COMMISSIONERS — AUTHORITY OF, TO MAKE SCHOOL LEVY.

County commissioners may make additional levy for school purposes when board of education of any school district fails to certify sufficient levy before first Monday in June.

July 21, 1906.

HON. EDMUND A. JONES, *Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—When the board of education of any school district fails to certify a levy for a sufficient amount to the county auditor on or before the first Monday in June, I am of the opinion that the county commissioners may make and certify such additional levy as may be necessary for school purposes at any time before the first Monday in August. Section 3960 R. S.; Section 3969, 98 O. L. 249.

If the authority of the county commissioners is limited to levying a contingent fund for incidental expenses only, and not for use as a building fund, tuition fund or interest fund, the whole purpose of Section 3969 is apt to be defeated. In case the board of education makes no levy the county commissioners must have power to make levies of every sort in order to "provide sufficient school privileges for all youth of school age, to provide suitable school houses for all the schools under its control, etc." The words "contingent fund" first appear in Section 3969 R. S., in the revision of 1880. The word "contingent" is not used in the original law but at the time of the revision of 1880, Section 3958 provided for a "contingent fund for the continuance of the school or schools of the district after the state funds are exhausted, to purchase sites for school houses, to erect, purchase, lease, repair, and furnish school houses, and build additions thereto, and for other school expenses." While Section 3958 now provides for separate levies for different funds, I do not believe this statute was intended to limit the general power of county commissioners to make such levies as may be necessary to carry out the general purpose expressed in Section 3969.

Very truly yours,

C. P. HINE,

*Asst. Attorney General.*

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#### SEWER ASSESSMENT—LIABILITY OF SCHOOL PROPERTY FOR.

School property not chargeable for sewer assessment; proportion should be certified to county auditor for entry on general tax list of municipality.

July 31, 1906.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I am of the opinion that school property is not chargeable for a sewer assessment nor can judgment be rendered against the board of education for the payment of such assessment out of its contingent fund. *City of Toledo v. Board of Education*, 48 O. S. 83, *Board v. Auditor*, 35 W. L. R. 29.

When a city improvement passes by a school building the council may authorize the proper proportion of the estimated cost of the improvement to be certified to the county auditor and entered on the tax list of all taxable property in the corporation. Section 63, Municipal Code.

Very truly yours,

C. P. HINE,

*Asst. Attorney General.*

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#### CONSTRUCTION OF SECTION 4073 REVISED STATUTES.

The words "school districts" and "such districts," in Section 4073 R. S., refer to "village, township and special districts."

July 25, 1906.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—You have requested a written opinion from this department as to the construction of the following provision of Section 4073 R. S.

"And said certificates shall be valid in all village, township, and special school districts of the county wherein they are issued, but in all school districts situated in two or more counties teachers' certificates obtained in either county shall be valid in such districts."

The words "school districts" and "such districts" in the last clause in the above quotation both refer to village, township and special-school districts.

While sub-districts are still recognized and still exist for certain purposes there is nothing in the language of Section 4073 which permits of the construction that the words "such districts" refers to sub-districts. The statute must be construed as if the words "village, township and special school districts" were substituted for the words "school districts" and "such districts."

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### TEACHER — COMPENSATION OF.

Contract between board of education and teacher providing for janitor services without extra compensation and for forfeiture of compensation for holidays invalid.

July 27, 1906.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I have received your communication asking: "What is the effect of a contract between the board of education and a school teacher which provides that a teacher shall work at \$2.00 per day but shall receive no extra pay for janitor work and no pay on holidays?"

In reply thereto I will say that in my opinion the above contract has two illegal provisions. One provision violates Section 4018, which provides that:

"No teacher shall be required by any board to do the janitor work of any school-room except as mutually agreed by special contract and for compensation in addition to that received by him for his services as teacher."

The other provision violates Section 4015, which permits teachers to dismiss their schools on holidays without forfeiture of pay. The teacher is not bound by these provisions which are in contravention of law and is entitled to receive \$2.00 per day for each and every day of the school month, or the sum of \$40.00 per month. He may dismiss his school on holidays without forfeiture of pay, notwithstanding the clause in the contract. He may decline to perform the janitor services until the board makes a special contract with him for such services for compensation in addition to his salary of \$40.00 per month.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

**(To the State Board of Public Works.)**

## CANCELLATION OF CERTAIN LEASE OF CANAL LANDS.

May 4, 1906.

*State Board of Public Works of the State of Ohio, Columbus, Ohio.*

GENTLEMEN:— Acknowledging the receipt of yours of May 4th containing a copy of a lease made and entered into between the Board of Public Works and Thomas Brown under date of July 11, 1868, and your request for an opinion as to whether your board can cancel the lease, I beg to say that the lease in question does not contain any waiver of notice to be served upon Thomas Brown or his assigns, nor does it contain a waiver of the demand for the rent due as preliminary to the forfeiture of the lease.

The law governing such form of leases is that the exact rent due or exact balance in order to forfeit a lease for non-payment of rent must be demanded at a convenient time before the close of the day it is due and upon the premises included in the lease.

I am informed that Thomas Brown is dead, and if this lease has been assigned by him during his life time there is no notice given to you of the name of the assignee nor who the legal heirs of Thomas Brown are.

As the Supreme Court in the recent case of the State of Ohio ex rel. Attorney General v. The C. H. & D. Ry. Co., et al. has determined the title of the State of Ohio to certain parts of the premises in question and certain other parts thereof to be in the city of Dayton, and as the State of Ohio is in possession of its portion of said premises, under the judgment of said court, and as the Board of Public Works exceeded its authority in attempting to lease said premises for a term of 99 years, renewable forever, the lease cannot in any way affect the title thus vested in the State of Ohio, and it would seem to be useless to anticipate any right in any lessee of said lease until such right was asserted by any such lessee, I therefore would advise that no notice or demand be made and no attempted forfeiture be entered upon said lease as contemplated in your department letter of May 4.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## BIDS—CONFORMANCE TO SPECIFICATIONS.

Bid for construction of public works must conform to specifications.

June 23, 1906.

*The State Board of Public Works, Columbus, Ohio.*

GENTLEMEN:— You request my opinion on the following state of facts:

The State Board of Public Works has advertised for bids for the construction of two aqueducts on the Miami and Erie canal. All bidders were notified by the advertisement that particulars as to the plans and specifications of this work could be obtained from the chief engineer of public works at Columbus, Ohio, or from the canal engineer at Middleport, Ohio. All prospective bidders applying to the chief engineer at Columbus or the canal engineer at Middleport were furnished with printed instructions to bidders and specifications

which clearly showed that the trunk of the aqueducts were required to be constructed of wood. The provisions of the specifications are very clear on this point.

A bid has been submitted to the State Board of Public Works for the construction of aqueducts in accordance with the plans attached to said bid, which plans provide for an iron or steel trunk. You desire to know whether this bid can be considered.

The bid is not in accordance with the specifications fixed by the board in an important particular and cannot, therefore, be considered.

As stated by Shauck, J., in *Pease v. Ryan*, 7 O. C. C., page 50:

"It is familiar in the law governing contracts by public officers that proposals must respond to the advertisement by which they are invited, for otherwise there would be no competition."

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### BIDS—ACCEPTANCE OF—DISCRETION OF BOARD OF PUBLIC WORKS.

Bid received after advertised time for closing may not be accepted by board of public works; board has discretionary power to determine "lowest responsible bidder"; board has discretionary power to award contract in sections to different bidders.

July 20, 1906.

*State Board of Public Works, Columbus, Ohio.*

GENTLEMEN:—Referring to the inquiry contained in yours of the 17th inst. in reference to the letting of certain contracts for material and labor in the construction of certain locks on the Ohio canal in and near the city of Akron, I beg to say that I assume that in the advertisement and other requirements preparatory to the letting of contracts of this character you have complied with the provisions of Section (218-9) R. S. being the statute that governs your board in such matters. There is no limitation imposed by the statute upon your right to reject all bids and re-advertising if you find that some bids, otherwise acceptable, must be rejected on account of some technicality in the manner of submitting it; and further, if you have specified a certain hour of the day within which all bids must be received and the bid mentioned by you of the Atlas Portland Cement Co. was not submitted within the particular time mentioned in the advertisement it could not afterwards be received; but if your advertisement called for bids to be submitted July 12, 1906, as I assume from your letter, all parties would have the right to submit bids during that entire day, and the bid of the cement company, referred to, having been received at the office of the board at 1:10 P. M., July 12, it would be, under such circumstances proper to receive it and to consider it as a valid bid.

2. The question is further presented as to the power of your board to exercise a proper discretion in determining who is the lowest *responsible* bidder, or the "lowest and best" bidder, or whether the board is compelled to award the contract to that bidder who, in fact, is the lowest upon the entire job.

In answering this inquiry I cite you to the case of the State of Ohio *ex rel* Walton v. Hermann, et al, commissioners of the water works of the city of

Cincinnati (63 O. S. 440). In that case the relators filed a proposal to do the work specified for the sum of \$655,950, and the defendant W. J. Gawne Co. bid \$659,230. The petition in mandamus alleged that the commissioners of the water works rejected the lower bid and awarded the contract to the W. J. Gawne Company, which, it will be observed, was more than \$4,000 higher. The court in deciding the case said:

"A statute which confers upon a board of public officers authority to make a contract 'with the lowest and best bidder,' confers upon the board a discretion with respect to awarding the contract which cannot be controlled by mandamus."

This decision cites with approval the case of the State ex rel v. Commissioners (36 O. S. 326) as bearing upon the question. As to what constitutes proper discretion in awarding such contracts I refer you to the State of Ohio ex rel. v. the Village of St. Bernard, et al., reported in 10 C. C. (Ohio) 74. In this case the circuit court for the first circuit held:

"Where the trustees of the water works of a city, acting under the provisions of Sections 2415 and 2419 R. S. have taken proper and reasonable care to advise themselves whether one of the bidders for the pumping engines for the village could be depended upon to do the work bid for, with ability, promptitude and fidelity, and on the knowledge thus obtained, in good faith came to the conclusion that he was not, the court, even if satisfied that such opinion was incorrect, ought not to interfere with their subsequent action in awarding the contract to the next lowest bidder, if his bid was in proper form and complied with the advertisement for bids. The duty and discretion of deciding this question is imposed upon the board of trustees and not upon the courts."

As supporting the same view with regard to this board, I cite you to the case of Carmichael v. McCourt et al, 27 C. C. (Ohio) 775.

It will probably be unnecessary to cite other authorities than those from our own state courts, but the question has been presented in many other states, from which I quote the following:

"The determination of who is the lowest responsible bidder rests not in the exercise of an arbitrary, unlimited discretion of the officers or board awarding the contract but on the exercise of a bona fide judgment based upon facts tending reasonably to the support of such determination.

In the absence of fraud or gross abuse, the courts will not interfere with the exercise of discretion by administrative boards in their determination of who is the lowest responsible bidder."

Inge v. Board of Public Works of Mobile, 135 Ala. p. 187;  
State v. Richards, 50 Am. St. Rep. 489.

In the case of the People v. Kent, (160 Ill. 665) which was a proceeding to require the officers having the matter in charge to award a contract to one who claimed to be the lowest responsible bidder, the court said:

"It appears that the defendant, after investigating the records made by the relator in doing similar work before, and the other matters re-

ferred to in his answer, determined that the relator was not the lowest responsible bidder. He was vested with the exercise of official judgment and discretion with which, in the absence of fraud the courts have no right to interfere. To the same effect is the case of *Kelly v. City of Chicago*, etc. 62 Ill. 279.

"In Smith's modern law of municipal corporations, Section 746, this law is announced; where an officer in the letting of a contract to a bidder is vested with the exercise of official judgment and discretion, as where the contract is to be let to the lowest responsible bidder, the courts have no right, in the absence of fraud, to interfere with the exercise of that judgment and discretion. The officer's duty is not merely ministerial and cannot be controlled by mandamus."

To the same effect is the case of the *State ex rel v. McGrath*, 91 Mo. 386

The precedent announced by this department in the year 1899 in the case brought by The Laning Printing Co. against Charles Kinney and others, commissioners of public printing, would seem to be in point as defining the powers of this board. There The Laning Printing Company of Norwalk, Ohio, being actually the lowest bidder for certain public printing, was not awarded the contract by the commissioners, and it sought to compel the award of the contract by proceedings in mandamus. This department advised the commissioners that in construing the language used in Section 321, R. S., to wit: the "lowest responsible bidder," they could take into consideration the experience of the relator, in such work, the facilities which it had to perform the same within the statutory time, etc., etc., and that its discretion of such award, when honestly exercised, could not be controlled by mandamus.

In view of the foregoing authorities, you are permitted, in determining who is the "lowest and best bidder," to exercise honest discretion, taking into consideration every element which would affect your judgment as to the capability or responsibility of each bidder.

3. A paragraph in the specifications and notice to contractors, upon which all bids were predicated, is as follows:

"Contractors may bid on one or more sections making one price for each class of work on each separate section, and contractors must bid with the condition that they will accept, award and enter into contract to construct the work on such sections, whether one or more, as may be awarded to them by the board of public works, irrespective of the number of sections upon which the contractors may be the lowest bidder."

Under this provision you would be authorized to award to any contractor a portion or section of the work if your judgment is that a certain section or sections should be awarded to such contractor, and thus be enabled to divide the awards, to various contractors, provided it be found by you that upon such section or sections, the contractor to whom such award be made, be the lowest and best bidder on such portion thereof.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*



## APPROPRIATION — ANTICIPATION OF.

Board of public works may enter into contract providing for payments out of appropriation made, to be available in future.

July 26, 1906.

*Board of Public Works of the State of Ohio, Columbus, Ohio.*

GENTLEMEN:—The inquiry presented in yours of this date is as follows: Can an appropriation for the board of public works for the last three-fourths of the fiscal year ending November 15, 1907, and for the first quarter of the fiscal year ending February 15, 1908, as provided by the appropriation act passed April 2nd, 1906 (98 O. L. 372), be anticipated, by making contracts in reference thereto for the work contemplated by such appropriations, provided, that no payment of any portion of said contract be made until the appropriation is available as contemplated in such act? In other words, can a valid contract be entered into by the board, with reference thereto, if the contractor agrees to the delay in payment thereof until after the money is available under the appropriation?

Section 22 of Article II of the constitution of Ohio provides:

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

In this instance a specific appropriation has been made (98 O. L. 372, 373) for maintenance and repairs, and for rebuilding certain portions of the public works of this state. The limitation contained in this section is not upon the power or authority of the board, or any other officer, in whom is vested the power to make a contract, to enter into a contract with reference to the appropriations lawfully made, but the limitation is upon the authority to draw any moneys from the treasury without a specific appropriation having been made.

This is not the creation of a debt as forbidden by Sections 1, 2 and 3 of Article VIII of the constitution, nor does the intended contract contemplate the creation of a liability beyond the amounts specified in the appropriation act. The judgment of the general assembly has thus been exercised and the expenditures of the certain sums named in the appropriation act has been authorized, all of which contemplates that the same can be applied to the payment of valid contracts made with reference thereto, and the question is, whether those contracts can now be made provided the contractor agrees to have the payments thereon deferred until the amounts specified in the act can be legally applied thereto.

In my opinion this may be done. This view is supported by the case of the State v. Medbery (7 O. S. 522) and that of the State of Ohio on the relation of Charles Parrott, et al. v. The Board of Public Works (36 O. S. 409, 412).

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## CANALS.—ENFORCEMENT OF LAWS FOR PROTECTION OF.

Penalty for violation of Section (218-215) R. S. recoverable in civil action only; payment of judgment rendered in such civil action may not be enforced by imprisonment under Section (218-219) R. S.

October 6, 1906.

*Board of Public Works, Columbus, Ohio.*

GENTLEMEN:— In compliance with the request for an opinion as to whether a criminal prosecution or a civil action is the proper procedure under Section (218-215) R. S. I beg to advise you as follows: The statute referred to provides that each person who violates its provisions shall "forfeit and pay the sum of \$10.00 for each violation and moreover be liable for all expenses incurred by agents of the state," etc.

The statute in question is part of an act passed June 17, 1879 (76 O. L. 185). This act contains in itself no express direction as to the manner in which the penalties imposed by its various sections should be collected, but it was entitled "An Act supplementary to 'an act to provide for the protection of the canals of the state of Ohio, the regulation and navigation thereof,' passed March 28, 1840." The act of March 28, 1840, contained many provisions for penalties in language similar to that used in the latter act and both acts clearly define certain offenses as misdemeanors punishable by fine or imprisonment (Sections (218-77) and (218-218) R. S.) One section of the act of 1840 specifically provided that the penalty imposed should be sued for and recovered in an action of debt in the name of the State of Ohio before any justice of the peace in this state. (Section (218-91) R. S.)

The following sections now designated as (218-198) and (218-199) were also a part of the act of 1840:

Sec. (218-198). In all prosecutions and proceedings under this act, it shall be lawful for either party to appeal to the court of common pleas of the proper county, upon the same conditions and in the same manner as appeals are allowed by law in civil cases, cognizable by justices of the peace.

Sec. (218-199). Either of the acting members of the board of public works, resident engineers, superintendents, lock-tenders, or collectors, shall be authorized to commence suit against any person charged with the commission of any offense, or made liable under the provisions of this act, or the orders of the board, before any justice of the peace in any county in the state where the person so charged or made liable may be found, or in the county where the offense was committed; and if any person so charged or made liable shall, when before the justice for trial, ask for an adjournment of the trial, or a continuance of the case, and the justice shall deem it expedient to grant such adjournment or continuance, it shall thereupon be his duty to reduce to writing the testimony of each witness in attendance, on the part of the state, and to cause the same to be subscribed and sworn to; the defendant shall have a right to cross-examine witnesses, and the depositions so taken shall be competent evidence on the trial of the case, before said justice; and should the case be appealed, they shall be competent evidence upon the trial in the appellat court.

The language of these sections "prosecutions and proceedings" "charged with the commission of an offense or made liable" indicates that both civil and criminal proceedings were contemplated by the framers of the act. *White v. State* (14 Ohio, 469) was an early case arising out of a violation of Section 5 of the act of 1840. (Section (218-70) R. S.) which provided that the offender should "forfeit and pay for every such offense the sum of \$5.00." The statement of facts shows that the defendant was "arrested upon a complaint, tried, convicted and fined" before a justice of the peace; on appeal to the common pleas court:

a declaration in debt upon the statute was filed and judgment rendered for \$5.00 and costs. This is the only case I have found in this state in which a criminal prosecution was brought under a statute merely imposing a penalty and not defining the offense as a misdemeanor nor directing the mode of collecting the penalty. In such cases the general rule is that the penalty should be collected by a civil suit.

16 Enc. of Plead. & Pract. 284, 235, 238;  
Stockwell v. U. S. 13 Wall. 531.

There is no doubt that a civil action is a proper means for recovery of the penalty imposed by Section (218-215) R. S. The statute referred to in the case of Rockwell v. State, (11 Ohio, 131), provided that "the offender shall forfeit and pay a fine of not less than \$5.00 nor more than \$50.00" but the court held "debt is the proper remedy and it is within the knowledge of the court that debt has been frequently brought in analogous cases and it is given by express provision in some other cases precisely similar." (See also Smith v. State, 18 O. 89; Markle v. Akron, 14 Ohio, 586).

It is to be presumed that the legislature intended some distinction between offenses for which it directs that the offender is merely to "forfeit and pay" a certain amount and other offenses which it clearly defines as misdemeanors punishable by fine, but if persons subject to the penalty may be arrested and fined as for criminal offenses every material distinction between the two classes of offenses is obliterated. I am therefore of the opinion that the only proper procedure for the collection of the penalty imposed by Section (218-215) R. S. is by civil suit before a justice of the peace. A bill of particulars should be filed setting forth all the facts necessary to show a violation of the statute and asking judgment for the amount of the penalty and the amount of expenses, if any incurred by the agents of the state in removing encroachments. The action should be brought in the name of the state on the relation of one of the officials designated by Section (218-199.) The case may be tried by a justice if a jury is not demanded. Either party may appeal to the common pleas court.

You also ask whether the defendant against whom judgment has been rendered for a penalty in a civil action may be imprisoned under authority of Section (218-219), which reads as follows:

"In addition to the penalties already prescribed for violations of the provisions of this act, and the act to which this is supplementary, the court before whom any case for such violation is tried, shall have power to sentence the party or parties convicted to be confined in the jail of the proper county until the fines and costs are paid or secured."

The words "parties convicted" defining the persons subject to the terms of the statute and the words "until the fines and costs are paid" defining the period of imprisonment, are properly applicable to criminal prosecutions alone. The authority to imprison conferred by this statute is, therefore, in my judgment limited to cases where a fine has been imposed after criminal prosecution and cannot be exercised to enforce payment of a judgment for a penalty rendered in a civil action.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## CANAL LANDS — TITLE TO.

Title of state to certain islands appropriated for canal reservoir purposes, as against adverse claimants under patentees of United States.

September 22, 1906.

HON. GEORGE H. WATKINS, *President Board of Public Works, Columbus, Ohio.*

DEAR SIR:— Your letter of September 8th requests my opinion as to the title of the state to certain lands therein described. Your statement of the facts upon which the state's title to these lands depends is substantially as follows:

Between the years 1828 and 1832, the State of Ohio, through its duly authorized agents, constructed what was known for many years as the Licking Reservoir, now Buckeye Lake. In constructing this reservoir the canal commissioners and their engineers, acting under the provisions of the act of the General Assembly passed February 4th, 1825, entered upon and constructed the necessary embankments needed to impound the waters required to supply the Ohio Canal, both north and south of the Licking summit. There were, however, a number of tracts of land, the title to which was in the United States at the time of such occupation. The land particularly described in your letter, and taken as representative of the class of lands about which disputes as to titles have arisen, was such a tract. It contains 35.06 acres including an island, and was patented February 22nd, 1850, by the United States to the individual through whom title adverse to the state is now claimed. The entire tract with the exception of about seven acres was covered by the waters of the reservoir at the time the patent was issued.

The first two questions, based upon the facts as outlined above, are as follows:

"1. Did the state appropriate or acquire the fee to the land below the wasteweir (high water) line of the reservoir, including islands, by reason of the construction and flooding of the reservoir, as a part of the public water works of the state, patents to such lands having been issued by the United States to individuals after such appropriation, but prior to the adoption of the constitution of 1851?

"2. If so, did it appropriate a minimum berme embankment, whether natural or artificial, adjacent to the top water line of said reservoir?"

The facts assumed as the basis of the above question are in every material particular, identical with the facts before the court in the recent case of *State v. Stoker*, 72 O. S., 638, unreported. The supreme court in that case decided that the state had acquired title in fee simple to the lands which were the subject of the action. On the authority of this case I have no hesitation in answering in the affirmative so much of your first two questions as relates to lands permanently submerged or constituting a part of the berme embankment. See also: *Hatch v. Railway Co.*, 18 O. S., 92 *Smith v. State*, 59 O. S., 278-284.

If at the time of the construction of the reservoir it was reasonably necessary for the state to own the islands within the reservoir for canal or reservoir purposes, the title to such islands also vested in the state. The flooding of the surrounding lands, shutting off access to the islands, operated, in my opinion, as a sufficient occupation under the act of February 4th, 1825.

The rule as to what constitutes occupation by the state, is stated in *Miller v. Wisenberger*, 61 O. S. 584, as follows:

"If the entry, use and possession by the state were open and notorious so as to inform the land owner that his land had been taken by the state for canal purposes, a fee vested in the state. But if the entry, possession or use was merely incidental, constructive or indirect, and not of such character as to apprise the canal commissioners that they were making the state liable, nor the land owner that his lands were so appropriated as to give him a claim against the state for taking and using the same for canal purposes, no title or fee-vested in the state."

Both the agents of the state and the land owners must have considered the land included within the limits of the banks of the reservoir, and entirely surrounded by lands and waters of the state, as having been appropriated by the state. Assuming that a particular island was not necessary for canal purposes, yet it was necessary for canal purposes to flood the surrounding land, and by such flooding to appropriate the island. Such appropriation was for canal purposes, although the island itself was not used as a part of the canal system.

But was it not in fact reasonably necessary for the state to acquire title to all lands within the limits of the reservoir? The future enlargement of the canals might make it necessary to raise the waters of the reservoir, and it was therefore proper to appropriate all lands within the reservoir, whether submerged or not, in order to avoid the necessity of future appropriations of small pieces of land which were almost of no value at the time of the original appropriation.

You also ask:

"3. Did the state appropriate or acquire the fee to lands thus flooded, including islands, below the wasteweir line of the reservoir, where the land was patented by the United States after the adoption of the present constitution of Ohio?"

"4. If so, did it appropriate a minimum berme embankment, whether natural or artificial, adjacent to the wasteweir (high water) line of said reservoir, when the lands were thus patented?"

The chief contention on the part of the state in the case of *State v. Stoker*, *supra*, was that the state had obtained title from the federal government to the government land occupied for canal purposes, the intention of the federal government to confer title and the intention of the state to accept it, being evidenced by legislation. If the *Stoker* case was decided upon that ground, it is immaterial whether patents subsequent in date to the acquisition of title by the state, were issued before or after the adoption of the present constitution. In either case, title having previously passed from the United States to the State of Ohio, the issuance of the patent was a nullity.

*Webster v. Clear*, 49 O. S., 392-400;

*Doolan v. Carr*, 125 U. S., 618;

*Van Wyck v. Knevals*, 106 U. S., 360.

The contention of the state in the *Stoker* case is supported by the opinion of the Supreme Court of the United States in the case of *Werling v. Ingersoll*, 181 U. S., 131-141.

"The congressional act of 1827, nevertheless, implies by its language and subject-matter the consent of Congress to a right of way through the public lands, and the subsequent state act of 1829, in the eleventh section, showed the width of the canal contemplated, which was the same as the prior and repealed act of 1825 provides for. Of course, a towpath

would be added. These two facts show the intention of the parties to proceed thereafter with reference to the act of 1827 and not under that of 1822. Work was not in fact commenced until 1837.

"When Congress under the act of 1827 granted the alternate sections to the state throughout the whole length of the public domain, in aid of the construction of the canal, it also granted by a plain implication the right of way through the reserved sections, for it cannot be presumed the government was granting all these alternate sections to the state for the purpose avowed, and yet meant to withhold the right to pass through the sections reserved to the United States along the route of the proposed canal. But the implication would not extend to the ninety feet on each side. It would extend to the land necessary to be used for the canal of the width contemplated, and that had been asserted in an act of the General Assembly in 1825 and was subsequently reiterated in another act of that body (1829)."

The act of 1827 referred to in the above opinion is one granting land for canal purposes to the state of Indiana. This act is not only practically contemporaneous with the act granting lands to the State of Ohio for canal purposes, but its language is almost word for word that used in the first three sections of the latter act. The Ohio act in addition to granting alternate sections along the route of the Miami and Erie Canal, contained an additional grant of 500,000 acres of government land to be selected by the governor. The inference that Congress intended that the state should have title to lands actually appropriated for canal purposes is therefore stronger from the terms of the Ohio act than from the terms of the act referred to in the above quotation.

If, however, the Stoker case was decided upon the theory that title passed from the *patentee* to the state by virtue of occupation by the state under the act of 1825, the question of the date when the patent was issued becomes material.

The act of 1825, which provides in substance that the canal commissioners might enter upon and take possession of any lands and waters necessary for the prosecution of the improvements intended by the act, and that all applications for compensation for lands, etc., so appropriated, must be made within one year, are, in my opinion, inconsistent with Article I, Section 19 of the Constitution of 1851.

*Levee Commissioners v. Dancy*, 65 Miss., 335.

But even if title to lands obtained after 1851 was not acquired by the state under the act of 1825, it will probably be found that in most instances the state has acquired title by adverse possession. The Constitution of 1851 does not deny to the state the right which every individual possesses, to acquire title by adverse possession.

Lewis on Eminent Domain, Sec. 665b:

*Eldridge v. Binghampton*, 120 N. Y. 309, 24 N. E. 462:

*Baxter v. State*, 10 Wis., 454;

*Rhode Island v. Mass.*, 4 How. U. S., 591: .

*Levee Commissioners v. Dancy*, 65 Miss., 335.

The fact that some of the lands in question are now held by tax titles is immaterial. A tax sale of lands belonging to the state is void. *State v. Griftner*, 61 O. S., 201.

I am, therefore, of the opinion that the state has title to all the lands referred to in your letter.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## (To the Superintendent of Insurance.)

## PHYSICIAN'S LIABILITY POLICY MAY NOT BE WRITTEN IN OHIO.

Writing physician's liability policy amounts to transaction of professional business within the meaning of Section 3235 R. S., and foreign insurance company may not be admitted to write such contract within state of Ohio.

January 22, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have given consideration to the inquiry contained in yours of the 15th inst., regarding the right of the Fidelity and Casualty Co. of New York to do the business set out in the letter of their counsel and to write the form of contract submitted with such letter, within this state.

The form of physician's liability policy as defined by the supreme court of this state in the case of State of Ohio ex rel. The Physicians' Defense Co. v. Laylin, Secretary of State, comes within the prohibition contained in Section 3235 R. S., providing that a corporation cannot be created for the purpose of carrying on professional business.

The counsel for the company in his communication to you urges that the business engaged in by that company is writing a form of insurance provided for by Section 3641. In answer to this contention I beg to say that without being compelled to definitely decide whether that section includes insurance of this character, yet if it be an insurance contract it is nevertheless an attempt to do within this state that which has been denied to domestic corporations. The supreme court in the above cited case decided November 28th, 1905, Syl. 2, says:

"But a foreign corporation created for the purpose of engaging in and carrying on such business, is not entitled to have or receive from the Secretary of State of the State of Ohio, a certificate authorizing it to transact such business in this state, for the reason that the business proposed is professional business, and as such is expressly prohibited to corporations under Section 3235 of the Revised Statutes of Ohio."

I think the paragraph of the syllabus of the learned court above quoted amounts to a prohibition upon the right of the Fidelity and Casualty Company of New York to write the form of contract which you have submitted with your letter. I therefore return to you the communication addressed to you by Charles C. Nadal, counsel for the company, together with the form of policy issued by such company.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## PHYSICIAN'S LIABILITY POLICY MAY NOT BE WRITTEN IN OHIO.

Contract of insurance against loss for damages in consequence of error or mistake of assured in the practice of medical profession is not a contract of indemnity insurance against damage for accident to other persons, such as is authorized by Section 3641 R. S.; such contract may not be written in Ohio by foreign insurance company: opinion of January 22nd reaffirmed.

February 2, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:— Acknowledging the receipt of your letter of the 30th ult., enclosing a further communication from Charles C. Nadal, counsel for The Fidelity and Casualty Company relative to the physician's liability policy proposed to be issued by said company, I beg to say in answer thereto that I do not deem it necessary to further explain the position of this department with regard to the form of policy in question proposed to be issued by this company other than to say that the opinion heretofore expressed classes the policy as among those prohibited by the opinion expressed by the supreme court in the case of the State of Ohio ex rel. The Physicians' Defense Co. v. Laylin, Secretary of State (73 O. S. p.—, decided November 28th, 1905).

I have given consideration to all that Mr. Nadal has said in his letter and it is probably due to him, through your department, that I should answer the same. In my former letter I mooted the question as to whether Section 3641 R. S. included insurance of this character, not expressing any opinion thereon because in my view of the application of the decision in the above entitled case to the question at issue, the contention of the counsel for The Fidelity and Casualty Company was resolved against the company on the ground that the business sought to be carried on under such form of policy was "a professional business." His letter of the 29th inst. addressed to you and by you transmitted to this department, criticises the suggestion that this form of insurance is not authorized by Section 3641 R. S. because, as he suggests, he "never urged anything of the kind." The suggestion was made irrespective of whether it was in response to any inquiry from him, as necessarily arising in the determination of the question as to whether such form of contract can be authorized within this state because the statute governing such companies has not provided therefor. I assumed that the power to do any form of insurance business within this state had to be authorized by the statutes of the state in view of the prohibition contained in Section 289 of the Revised Statutes, which is as follows:

"It is unlawful for any company, corporation or association, whether organized in this state or elsewhere either directly or indirectly to engage in the business of insurance or to enter into any contracts substantially amounting to insurance or in any manner to aid therein in this state, or to engage in the business of *guaranteeing against liability, loss or damage*, unless the same is expressly authorized by the statutes of this state, and such statutes and all laws regulating the same and applicable thereto have been complied with."

In view of this it became necessary, in my opinion, to inquire whether Section 3641 R. S. or any other section of the Revised Statutes of Ohio conferred upon either domestic or foreign companies the right to enter into any contract of the form submitted to you by this department as having been proposed by The Fidelity and Casualty Company.

When it is conceded by the counsel for that company that the contract in question is a contract of insurance we are not left to conjecture as to what section of the statutes governing insurance within this state is made the basis of the authority for entering into this form of contract. It is claimed to be by virtue of the following language employed in Section 3641 R. S.:

"A company may be organized or admitted under this Chapter to  
\* \* \* make insurance to indemnify employers against loss or damage



for personal injury or death resulting from accidents to employes or persons other than employes, and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations."

It is probably under the latter clause of the above quoted section that the authority is inferred and that the character of the policy is one

"to indemnify persons and corporations other than employers against loss or damage or personal injury or death resulting from accidents to other persons or corporations."

The reasoning of the learned court in the State of Ohio *ex rel. The Physicians' Defense Co. v. Laylin, Secretary of State*, is cited by the counsel for the company as authorizing this form of contract to be made and entered into within this state in that the contract is distinguished from the one under consideration by the court in that case, in this, that it is claimed to be "a contract of indemnity." It might be admitted that the contract in question is one of indemnity and still not be an answer to the suggestion that it must be such a character of indemnity insurance as is authorized to be done within this state, and if not "expressly authorized" as provided by Section 289, *supra*, then it follows that the authority cannot emanate from your department nor from that of the Secretary of State to do that which, although not expressly prohibited is, nevertheless, not authorized. As to whether the same is authorized depends upon the construction to be given the language quoted from Section 3641 R. S., and also from a consideration of the character, terms and provisions of the contract that the company thus seeks to issue and sell.

Leaving for a moment the consideration of the question as to this being a professional business thus sought to be done we quote from the policy itself the language employed therein as to the character of the contract the company offers:

"The Fidelity and Casualty Company in consideration of the premium \* \* \* does not insure the person described \* \* \* against loss from common law or statutory liability for damages on account of bodily injuries fatal or non-fatal, suffered by any person or persons in consequence of any alleged error or mistake made within the period of this policy by the assured in the *practice of his profession as described in the schedule.*

"If \* \* \* any suit is brought against the assured to enforce a claim for damages covered by this policy the assured shall immediately forward to the home office of the company every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend against any such proceeding in the name and on behalf of the assured unless it shall elect to pay to the assured the indemnity provided for \* \* \*

"The assured shall not settle any claim except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceedings, without the consent of the company, previously given in writing \* \* \*"

The above is all that is material, for the purpose of this question, to quote from the policy before me. This, it will be claimed, brings the contract within the language quoted from Section 3641, *viz:* insurance "against loss or damage for personal injury or death resulting from accidents to other persons."

The policy insures the party against:

"loss from common law or statutory liability for damages on account of bodily injuries fatal or non-fatal, suffered by any person or persons in consequence of any alleged error or mistake made \* \* \* by the assured in the practice of his profession."

There is, in my opinion, a very wide distinction between "*loss or damage* for personal injury or death resulting from accidents" and that provided for in the policy, which is, "loss for damages in consequence of any alleged error or mistake." To hold that the words employed in this policy of "error or mistake" are equivalent to "accident" is destructive or subversive of the definition usually employed in connection with such terms. "Error or mistake" is equivalent to malpractice or professional ignorance, but the statute in question does not provide for insurance against error or mistake but only against loss or damage resulting from accidents and, in my opinion, there being no express authority to do or engage in the character of business thus sought to be done and to write the form of contract provided for herein, this form of insurance is not authorized within the State of Ohio.

I am led to this conclusion by the adjudicated cases and definitions as given by standard authorities of the terms here under consideration. The Century Dictionary in defining the word "accident" uses the following language:

"In legal use an accident is an event happening without the concurrence of the will of the person by whose agency it was caused; *it differs from a mistake* in that the latter always supposes the operation of the will of the agent in producing the event, although that will is caused by erroneous impressions on the mind."

"Specifically in equity practice an event which is *not* the result of personal negligence or misconduct."

In Bouvier's Law Dictionary "accident" is defined:

"The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of the event without any human agency."

In Anderson's Law Dictionary the following definitions of "accident" are given with citations of authority:

"An event or occurrence which happens unexpectedly from uncontrollable operations of nature alone and without human agency; or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both. An event from an unknown cause or an unusual or unexpected event from a known cause."

These definitions are sufficient to widely distinguish "accidents" as included in Section 3641 R. S. from "errors and mistakes" occurring "in the practice of a profession" as included in the form of policy of this company.

This does not involve the question of the construction of a contract or policy between a promisor and promisee, or between the insured and the insurer, for in such cases a different rule of construction prevails, but it presents a question of statutory power to do or engage in a certain line of insurance business where the state's officers deny the existence of the power. In such a case the power must be "expressly authorized" (Section 289 R. S.).

As applicable to this, Lewis' Sutherland on Statutory Construction says, p. 700:

"We are not at liberty to imagine an intent and bind the letter of the act to that intent; much less can we indulge in the license of striking out and inserting, and remodeling, with a view of making the letter express an intent which the statute in its native form does not evidence. Every construction, therefore, is vicious which requires great changes in the letter of the statute, and, of the several constructions, that is to be preferred which introduces the most general and uniform remedy."

The same word "accidents" is employed in a former clause above quoted on page 3, as in the latter clause being construed. The word "accidents" in each clause should receive the same construction. In paragraph 2 of Section 3641 R. S. the word "accidents" is employed four times and it should receive the same construction throughout the entire paragraph.

"A word repeatedly used in a statute will bear the same meaning throughout the statute, unless a different intention appears."

Rhodes v. Weldy, 46 O. S., 234.

The word "accident" has received the construction contended for here as employed in the other portions of the paragraph under consideration and to distinguish it and give it a different meaning in the portion of the statute providing for this character of indemnity insurance without an intention appearing upon the face of the statute so to do would be violative of this canon of construction and should not be adopted. All parts of the statute are in *pari materia* and are to be construed together. They form a part of the same statute and are co-related, (Cincinnati v. Conner, 55 O. S. 82; Cincinnati v. Guckenberger, 60 O. S. 353) so that I contend we should give to the term "accidents" the same meaning throughout the same statute. This is more apparent when we see that the evident reason for the introduction of the second clause (p. 3) as distinguished from the first was that the first clause limited the contract or policy so as to indemnify employers only, the second clause enlarged the power to contract with regard to persons "other than employers" but did not thereby change the kind of contract, viz: a contract to indemnify "against loss or damage resulting from accidents."

That which is aimed at in the policy to provide against is the malpractice of the physician or surgeon. His "errors and mistakes" constitute malpractice. The basis of a claim for damages against a physician for malpractice is the failure to exercise the average degree of skill, care and diligence in the particular case of accidents, and arises from his contract of employment.

Gillett v. Tucker, 67 O. S. 106.

Fundamentally "mistakes and errors" in the practice of the profession of medicine cannot be considered as "accidents." In this view of the question I am brought into opposition to the opinion of Attorney General Knowlton of Massachusetts in construing a statute of the State of Massachusetts known as the act of 1894, Chap. 522, Section 6, Paragraph 5 thereof. That statute is not identical with the one under consideration but the reasoning adopted by the attorney general is not satisfactory to me as an authority in construing our own statute. I have carefully considered his opinion and opinion of the Insurance Commissioner of the State of Minnesota, and I do not deem them of controlling effect on this question. I therefore give it as my opinion that Section 3641 of the Revised Statutes of Ohio does not authorize a physician's liability policy, of the character submitted to your department, to be written within this state.

I am further of the opinion as expressed in my previous letter to you that the business thus sought to be engaged in by this company is a professional business and forbidden by Section 3235 of the Revised Statutes of Ohio.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### BONDS—VALIDITY OF, ISSUED IN PURSUANCE OF SPECIAL ACT.

Bonds issued pursuant to act in 90 O. L. 322, a special act similar to acts recently declared unconstitutional, authorizing creation of indebtedness for erection of court house may be regarded as valid.

March 5, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:— Acknowledging the receipt of yours of the 24th ult. presenting the inquiry as to the validity of the bonds issued pursuant to the act found in 90 O. L. p. 322, I beg to say that while the act in question is, *in form*, such as may not have been sanctioned by any of the more recent utterances of the Supreme Court of this state, and is obnoxious to the later rulings of that court condemnatory of special legislation, yet similar acts of the General Assembly have been abundantly sustained prior to the enactment of such law, and such decisions may have induced the passage of the law under consideration.

The mere fact that *the form* of such laws has been condemned does not conclude the inquiry, unless we are also compelled to decide that the *subject matter* thereof is *ultra vires*. This we do not concede. On the contrary the erection and equipment of county buildings is, by general laws, made the duty of the county commissioners, who are by general laws, authorized and directed to levy a tax for such purposes and in anticipation of the payment thereof to issue and sell the bonds of the county.

It would therefore seem to be sufficient to say that the powers sought to be exercised in the issuance and disposition of county bonds for the purpose of furnishing the funds wherewith to erect, equip and furnish a court-house, is plainly within the constitutional powers of the county authorities; and because such power has been executed in a different manner than that provided for by general law, the bonds issued pursuant thereto should not be condemned, especially since the county has used the proceeds thereof in the erection and equipment of such building, and for the further reason that no court has ever questioned the constitutionality of the particular act under which such power was exercised.

I herewith return to you the file which you transmitted to me.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### FRATERNAL BENEFICIARY ASSOCIATIONS—RENEWAL OF LICENSE, AFTER SURRENDER OF CHARTER FROM ANOTHER STATE AND REINCORPORATION.

Benefit of provision of Section (3631-27) Revised Statutes, exempting fraternal beneficiary associations doing business in Ohio at the date of passage of the act of April 26, 1904, from the provisions of said act, is lost by surrender of corporate

charter of foreign association and reincorporation in another state; such association not entitled to renewal of license.

April 4th, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—The questions presented in yours of the 31st ult. invite an examination of the fraternal beneficiary association law of this state, passed and approved April 26th 1904 (97 O. L. 421, 433, R. S. (3631-11) et seq.)

The first of the series of questions refers to the rights of the Woodmen of the World, a fraternal organization, and inquires if it would be entitled to a renewal of its license to do business in Ohio should it surrender its present charter granted by the State of Nebraska and reincorporate in another state?

I assume that the scope of the question is meant to include the further inquiry, whether it is to be treated, after reincorporation, as a new corporation making its initial application for authority to do business herein, and subject to the laws as they now exist, or should it be treated after reincorporation as having been admitted to Ohio as a corporation of Nebraska, pursuant to the laws of this state as they existed at the time of its admission and qualification to do business herein, and without the necessity of further authority to do business in Ohio as a foreign corporation.

Section 16 of the fraternal beneficiary act above referred to is as follows:

“Associations which are now authorized to transact business in this state may continue such business until the first day of April next succeeding the passage of this act, and the authority of such association may thereafter be renewed annually, but in all cases to terminate on the first day of April,” etc., etc.

Section 17 of the same act is in part as follows:

“No foreign association now transacting business, organized prior to the passage of this act, *which is not now authorized to transact business in this state*, shall transact any business therein without a license from the superintendent of insurance. Any such association shall be entitled to a license to transact business within this state upon filing with the superintendent of insurance a duly certified copy of its charter or articles of association; a copy of its constitution or laws, certified by its secretary or corresponding officer, a power of attorney to the superintendent as hereinafter provided; a statement under oath of its president and secretary or corresponding officer, in the form required by the superintendent, duly verified by an examination made by the supervising insurance official *of its home state* of its business for the preceding year; a certificate from the proper official in its home state, province or country that the association is legally organized; etc. \* \* \*

“Nothing contained in this act shall in any manner be so construed as to require any such foreign association, not now authorized to transact business in this state, to conform its rates of assessment to those prescribed by the national fraternal congress mortality table as a condition precedent to the securing of such license or any renewal thereof.

“Any foreign association hereafter organized, desiring admission to this state shall in addition to the foregoing requirements of this section show that it collects from all its members for death benefits, assessments not lower than those required by the national fraternal congress mortality table, with interest at 4%, and shall have the further qualifications required of domestic associations organized under this act and

have its assets invested as required by the laws of the state, territory, district, county or province where it is organized. \* \* \*

"Provided, however, that nothing contained in this or the preceding section shall be taken or considered as preventing any such association from continuing in good faith all contracts made in this state during the time such association was legally authorized to transact business therein."

The question involves the consideration of these paragraphs from the laws of Ohio, and further, the changes effected in the organization by its reincorporation under the laws of a state other than that issuing its present charter.

The quotations from the Ohio laws above cited do not in any respect abridge the right of comity existing toward other states in the admission of the corporations of those states to do business herein save that they require certain different and other requisites to be observed by such corporations organized under the laws of other states, than were required of such corporations prior to the enactment of the fraternal beneficiary law referred to.

The privileges contained in Section 16 above cited are limited to associations "which are now authorized to transact business in this state." The time therein referred to would be the time of the enactment of that law, to-wit, April 26th, 1904.

Section 17 of the foregoing act applies to foreign associations and provides that such association "which is not now authorized to transact business in this state, shall transact any business therein without a license from the superintendent of insurance," and the further provision that certain requirements are exacted of foreign associations "*hereafter organized*" emphasizes the distinction between corporations authorized to do business at the time of the enactment of the law in question and those which might thereafter be organized.

When the Woodmen of the World surrenders the charter granted to it by the legislature of the State of Nebraska and incorporates under the laws of another state it cannot be said to be the same corporation for its existence under the charter of the State of Nebraska has ended and it has been created as a new corporation under the laws of some other state. Its situs is changed, and it is the subject of a different jurisdiction and to the laws of a different commonwealth. It becomes in law a new creature as essentially different from what it was under its former charter as is the existence of two separate natural persons. Therefore if such corporation after the surrender of the Nebraska charter and the incorporation under the laws of some other state should apply to the State of Ohio for admission to do business herein, it must come shorn of its past privileges conferred upon it by the laws of Ohio at the time of its admission thereto, and obtain its right to enter the State of Ohio and to do business herein under the laws as they exist and subject to all other limitations at the time of such admission. It would follow that it, the new corporation, would not be entitled to a "renewal of its license to do business in Ohio," because it would not be "continuing business" as an association "authorized to transact business in this state," as prescribed in Sections 16 and 17 of the act in question.

The second question presented needs no further answer than to again say that should the corporation seek to do business in Ohio as a new corporation it will be required to show, in addition to the requirements otherwise set forth, that "it collects from all of its members for death benefits, assessments not lower than those required by the national fraternal congress mortality table, and performs the other conditions required of such foreign corporations."

The further questions presented can be solved upon the principles herein announced.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

PUBLICATION OF CERTIFICATE OF SUPERINTENDENT OF INSURANCE.

Section 4955, R. S., does not affect requirement as to publication by insurance company of certificate of superintendent of insurance under Section 284, R. S.

April 25th, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:— I am in receipt of yours of April 23rd requesting my opinion upon the application of the provisions of Section 4955 of the Revised Statutes, to the publication required by Section 284.

Section 4955 would, standing by itself, seem to relate to the publication of all notices provided by statute. It appears, however, that this section was never a part of the law of this state until the codification of 1878, at which time it was enacted as a part of the act entitled "An Act to revise and consolidate the laws relating to civil procedure," etc. At the time this section was enacted it seems to me that its purpose was clearly expressed by the context and by the title of the consolidated act of which it was a part, and that it related exclusively to such publications as were provided for by the code of procedure. If this is true the subsequent enactment of Section 284 cannot give it a more comprehensive meaning.

*Ebersole v. Schiller*, 50 O. S. 701.

I am of the opinion, therefore, that Section 4955 has no application to such publications as are required by Section 284.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

LEGAL RESERVE COMPANY—WHETHER COMPANY HAVING ASSESSMENT POLICIES OUTSTANDING MAY BE ADMITTED AS.

Insurance company (Minnesota Mutual Life) having a few outstanding assessment policies, the writing of which has been discontinued, may be admitted to do business in Ohio as a legal reserve company.

May 23rd, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:— I am in receipt of the application of the Minnesota Mutual Life Insurance Company filed with you for a license to transact business in this state, together with the accompanying briefs of the counsel for the company. You desire an opinion from this department as to whether such company has the right to receive a license from your department to do a legal reserve business when its statement shows that it has a certain number of assessment policies outstanding on risks outside of the State of Ohio.

If this company has outstanding, as stated in the documents submitted to me, but 138 policies representing insurance to the amount of \$276,000, this should not be considered as sufficient to characterize it as an assessment company nor as one engaged in the business of insurance on the assessment plan; and if this company should comply with the requirements of the laws of Ohio and the rules of your department, it should not be excluded from doing business in Ohio as a legal

reserve company because carrying the number of assessment policies referred to and which character of business it has discontinued since 1901.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### WRITING POLICIES BY MAIL UPON INSURANCE WITHIN OHIO NOT "DOING BUSINESS" IN OHIO.

Insurance company receiving applications by mail outside state and issuing policies outside state upon insurance within state need not secure license to do business in Ohio.

July 9, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—In answer to your inquiry in re the application of a foreign insurance company for license to do business in the State of Ohio, I beg to say that in my opinion the amended Section 2745c of the Revised Statutes, as amended in 98 O. L. 242, does not apply to any company receiving applications mailed in Ohio to a point outside the state and issuing policies outside the state upon such applications though the insurance is within the State of Ohio.

I do not attempt by this to pass upon any instance where any agent for a money consideration or otherwise acts as an inspector of property within this state.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### PERSONAL LIABILITY OF DIRECTORS AND OFFICERS OF INSURANCE COMPANY FOR FRAUDULENTLY PROCURING CERTIFICATE OF SUPERINTENDENT OF INSURANCE.

Directors and officers of mutual fire insurance company procuring certificate of superintendent of insurance upon false representation that cash premiums aggregating ten thousand dollars have been paid personally liable to creditors.

September 17th, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—It appears from your inquiry that the Home Mutual Fire Insurance Company was organized as a mutual fire insurance company under Section 3634 of the Revised Statutes of Ohio. This section provides *inter alia*, that such company shall not issue policies of insurance until it has procured the certificate of the superintendent of insurance and that such certificate shall not be issued until cash premiums have been paid aggregating not less than \$10,000 in cash. If the superintendent of insurance has been induced to issue such certificate upon the representation that \$10,000 in cash has been received when, in fact, only \$6,000 has been received, it is my opinion that the directors and officers making such false representations are liable to loss claimants or other creditors for the difference between the amount actually received and the \$10,000 required by law.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*



## FRATERNAL BENEFICIARY ASSOCIATION — INVESTMENT BY.

Power of American Insurance Union, a fraternal beneficiary association, to enter into certain contract of investment in real estate.

September 19th, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:— You have referred to this office a certain contract and lease executed by and between The American Insurance Union and Mr. Lincoln Fritter, dated March 13th, 1905, and you inquire whether the investment therein evidenced is within the powers of this association.

The American Insurance Union is a fraternal beneficiary association and its powers are controlled by the act of April 26th, 1904, (97 O. L. 421). Section 10 of this act, (3631-20) R. S., provides that in investing its funds a fraternal beneficiary association shall be governed by paragraphs 1, 2 and 3 of Section 3598 and Sections 3599 and 3600 of the Revised Statutes of Ohio. These sections and parts of sections authorize investments of three kinds, viz:

First, in certain classes of public bonds;

Second, in mortgages upon real estate or upon the pledge of such mortgages; and

Third, in real estate for its own accommodation in the transaction of its business, or which may have been conveyed to it in satisfaction of debts due the association.

I have carefully examined the whole transaction between The American Insurance Union and Mr. Lincoln Fritter, evidenced by all the instruments of writing submitted. The sum and substance of the contract between the parties and the legal effect thereof are about as follows:

Fritter owns a perpetual leasehold upon certain property in West Broad Street, Columbus. The A. I. U. agrees to advance the money to Fritter to erect a building on a portion of said premises, and to occupy a certain part of the building when completed, for which it is to pay rent to Fritter. The entire management and control of the property is in Fritter. He collects all the rents and out of these rents, after paying all fixed charges and expenses, such as taxes, insurance, assessments, repairs, etc., he is to pay the A. I. U. 5 per cent. per annum upon the money it advances and provide a sinking fund of 4 per cent. per annum on such money advanced. At the end of twenty-five years it is expected that the sinking fund will have paid the entire cost of the building to the A. I. U., the arrangement between the parties will be terminated and the property will belong to Fritter unencumbered by any obligation, expressed or implied, to the association.

For the purpose of this inquiry it is unnecessary to consider the transaction in minute detail, nor those provisions which contemplate a sharing of the rents and profits between the contracting parties in the event that they exceed a certain fixed sum. The whole arrangement is simply a loan from the American Insurance Union to Mr. Fritter. The total amount so far advanced for the construction of the building is about \$66,000.

In my judgment the American Insurance Union is without power to enter into or maintain this contract. It does not come within either of the three classes of investments which fraternal beneficiary associations are authorized to make.

First, it is not an investment in public bonds.

Second, it is not a mortgage, for no security whatever is given for the loan. The interest is only payable out of the rent of the building constructed and the

sinking fund, which is designed to repay the loan, depends for its accumulation upon the same source.

Third, it is not an investment in real estate for the accommodation of the association in its transaction of its business. It is doubtless true that the association can either buy or lease real estate for this purpose, both under Section 3599 of the Revised Statutes and under the general corporation laws of the state; but the contract here made is neither a lease nor a purchase. It is true that the ground upon which the building is erected is in form leased to the association for twenty-five years, but under the contract, which is made a part of the lease, the association has no control over any of the property except that portion which it is to occupy and for which it pays rent. The purpose and effect of the whole transaction seem to be to vest the title and management of the property in Fritter even during the twenty-five year period, during which the contract between the parties is in existence.

Before any action is taken by your department I suggest that The American Insurance Union and Mr. Fritter be given an opportunity to so adjust their relations as to conform to the laws of this state which limit the powers of fraternal beneficiary societies, and which do not authorize the several agreements herein considered.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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#### REMITTER OF EXCESSIVE TAXES BY SUPERINTENDENT OF INSURANCE.

Superintendent of insurance has no power to reduce amount of taxes due from insurance company for current year as remitter of excessive amount paid for preceding year.

December 7th, 1906.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Replying to yours of the 6th instant presenting the question as to your power to reduce the amount of taxes due from an insurance company for the current year when the amount of taxes paid during any preceding year by such company is excessive, I beg to say that I know of no authority giving the Superintendent of Insurance the right to make a remitter of taxes under the circumstances contained in your letter.

Irrespective of whatever remedy the company may have to recover the excess if any, which it has paid to the state, the Superintendent of Insurance has no jurisdiction to refund such excess or to deduct the same from the taxes for which the company stands charged in your department.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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#### BUILDING AND LOAN ASSOCIATION—INCOMPATIBILITY OF OFFICES IN.

Offices of president and financial secretary of building and loan association organized under laws of Ohio may not be held by the same person; offices of finan-

cial secretary and treasurer of such association may not be held by the same person; third member of committee of such association to sign checks disqualified from acting as president or financial secretary thereof; regulations of such association determine additional principles upon which incompatibility may be determined.

December 15th, 1906.

HON. A. I. VORYS, *Inspector of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:— The question presented in yours of the 12th instant, upon which you desire an opinion of this department, is as follows:

Can the same individual hold the positions of president, financial secretary and treasurer; or president and financial secretary; or president and treasurer; or financial secretary and treasurer, of a domestic building and loan association?

Replying to such inquiry I beg to say that recognized legal authorities on the subject of building and loan associations say, that the principles of the law of agency govern the rules between the association and its directors and other officers, acting as its agents, as well as between it and agents employed for special purposes; (Endlich on Building Associations, 2nd edition, sec. 227).

This rule governs in the absence of special statutory directions, but where otherwise provided in the statutes of the state governing such associations, the directions therein contained must be adhered to. If there is an incompatibility in the duties imposed upon the respective officers above named, either by statute or by the code of regulations of such associations, then in so far as such duties are incompatible, they cannot be vested in the same individual.

It will thus be observed that such duties may be defined in the statutes or may be defined with more definiteness in the constitution and by-laws enacted pursuant to the provisions of Section (3836-3), R. S.

The questions not having been presented with reference to any particular code of regulations, the answers herein expressed have been deduced from a consideration of the powers conferred upon such officers by the statutes and the laws pertaining to corporations generally.

(1) As the statute (Section (3836-4), R. S.) requires, before any fund can be withdrawn from the depository named by the board of directors, the check therefor must be signed by both the "president and financial secretary," or such other officers as the board of directors may designate. The conclusion is that if the board of directors has not otherwise designated different officers than the ones named in the statute to sign checks for the withdrawal of funds of the association, it becomes the duty of the president and financial secretary to each subscribe his name to such checks. This presupposes that there must be two individuals to act under such direction, and thus afford greater precaution against improper withdrawal of funds, and it would follow that in such instances, the positions of president and financial secretary should not be held by the same individual.

(2) By the same section the treasurer is required to deposit funds in the name of the corporation, in the bank which has been designated as the depository by the board of directors. It is ordinarily made the duty of the secretary to pay over the money received by him to the treasurer, and the treasurer makes the deposit of the same. Manifestly these powers should not be concentrated in the same individual but should be separately conferred, so that the plain intention of the law may be complied with, and such officers, namely secretary and treasurer, made to serve as checks upon each other.

(3) Many associations have provided that the president, financial secretary and some other officer in addition thereto, shall be required to sign all checks. In such event the other officer, whoever it may be, would be likewise disqualified from serving as either president or financial secretary, and vice versa.

(4) Section (3836-1), R. S., provides that building and loan associations may be organized and conducted under the general laws of this state relating to corporations, so far as they do not conflict with the special provisions made for their regulation. The officers of such associations are not specifically named in the special chapter pertaining to such associations, but those which are recognized therein are a president, financial secretary, treasurer, and the board of directors. Others may be provided for by the constitution and code of regulations, and by analogy they could be similar to those provided in Chapter 1, Title 2, Division 2, Part Second, of the Revised Statutes, governing corporations generally. If they are provided for, and their duties defined, the definition thereof would determine whether the powers of such additional officers should be united with those of any other officer, for if such powers are incompatible their union would be forbidden by the law of agency.

By reference to the principles thus announced, it will be easy in any given instance to determine whether any two offices should be united in the same individual.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## (To Various State Boards.)

## AGRICULTURE—STATE BOARD OF—MEMBERSHIP IN.

Right of Carthage Hamilton County Agricultural Society to membership in state board of agriculture to be determined by said board.

February 5, 1906.

HON. W. W. MILLER, *Secretary State Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—Your inquiry of recent date relative to the right of the Carthage Hamilton County Agricultural Society to membership in the State Board of Agriculture, is received. You say that Hamilton County has a regularly organized agricultural society known as the Hamilton County Agricultural Society, which holds its annual fairs at Oakley and has a membership in the State Board of Agriculture, receiving the per capita fund out of the county treasury authorized by Section 3697.

That the Carthage Hamilton County Agricultural Society holds its annual fairs at Carthage and has been organized since the Hamilton County Agricultural Society has ceased holding its fairs at Carthage. You inquire whether, under Sections (3916-25) and following, the said Carthage Hamilton County Agricultural Society is entitled to membership in the State Board of Agriculture and to receive the per capita fund provided by Section 3697?

In reply I beg leave to say that in my judgment Sections 3692 and 3697 provide for only one agricultural society in the county and the question as to which of these two societies is to be recognized and participate in the per capita fund will be determined by the State Board of Agriculture.

Very truly yours,

W. H. MILLER,

*Ass't Attorney General.*

## BOARD—ADMINISTRATIVE—MEMBER OF, MAY NOT HOLD SALARIED POSITION THEREUNDER.

Member of state board of agriculture ineligible to appointment to salaried position thereunder.

June 18, 1906.

HON. T. L. CALVERT, *Secretary State Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—Your letter of June 14th requests a written opinion upon the following question:

“May a member of the State Board of Agriculture be appointed to a salaried position under such board and draw public money?”

There is no express statutory or constitutional prohibition rendering members of the State Board of Agriculture ineligible to appointment by the board to hold positions under said board. It is, however, against public policy for members of any board of public officers to appoint one of its own members to any office or employment within the control of said board. Where the vote of the member

appointed is necessary to the appointment, such appointments have universally been held void.

Throop on Pub. Officers, Sections 610, 611;  
Ohio v. Taylor, 12 O. S., 130;  
State v. City of Newark, 6 Nisi Prius, 523.

And where the salary of the appointee or the duration of his appointment and the extent of his duties are fixed by the board, and it is the duty of the board to exercise general supervision and control over said appointee, to inspect his accounts or approve his expenditures, it is manifest that the same person should not be at the same time appointee and member of the board. It is the entire board to which the state has intrusted supervision and control of the various officials and employes appointed by it. If one member of the board is employed in one capacity, another may be employed in some other capacity, and the effectiveness of supervision by the board as a safe guard against misconduct by its appointees would be seriously impaired.

The incompatibility between the positions of member of an appointing board and appointee of such board is founded on the old rule that an agent cannot contract with himself. As stated in Throop on Public Officers, Section 610:

“This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force and sound policy requires that there be no relaxation of its stringency in any case which comes within its reason.”

I am therefore of the opinion that the board of agriculture may not appoint one of its members to any salaried position under said board.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### BOARD OF STATE CHARITIES—APPOINTMENT OF MEMBERS OF.

Appointment of members of board of state charities need not be confirmed by senate.

February 14, 1906.

HON. H. H. SHIRER, *Secretary Ohio Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Your communication dated February 13th is received. You say that Governor Herrick, in his message to the Senate, includes the names of the three persons who were appointed as members of the Board of State Charities; that neither the Constitution nor the Revised Statutes of Ohio require a confirmation by the Senate of these appointments and you inquire whether or not these names should be withdrawn from the Senate.

In reply I beg leave to say that on investigation, I find no law requiring these appointments to be confirmed, and I see no objection to your requesting the Governor to withdraw the names from the consideration of the Senate.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## STATE HOSPITAL FOR THE INSANE — ADMISSION TO.

Actual residence within the state of Ohio required by Section 700 R. S., for admission to state hospital for the insane; technical domicile not sufficient.

March 3d, 1906.

HON. H. H. SHIRER, *Secretary Ohio Board of State Charities, Columbus, Ohio.*

DEAR SIR: — Your letter of March 1st with reference to commitment of a minor son of Mrs. Wells to the State Hospital for the Insane, is at hand.

You state that while he resided at Oregon, Illinois, he was committed to the Illinois Western Hospital for the Insane; that Mrs. Wells has resided in this state for several years; has been divorced from her husband and has been given the custody of her son.

In my opinion she is not entitled to have her son committed to the Hospital for the Insane in this state. Section 700 of the Revised Statutes provides:

“No person shall be admitted to either of the hospitals belonging to the state, except an inhabitant of the state, unless by joint resolution of the General Assembly, which joint resolution shall specifically name the person to be admitted, and no person shall be considered an inhabitant within the meaning of this chapter who has not resided within the state one year next preceding the date of his or her application, and no person is entitled to the benefits of the provisions except those whose insanity has occurred during the time such persons have resided in the state.”

The words “resided within” mean having an actual dwelling place within this state. The boy in question does not reside in this state, even though his technical legal domicile may be in this state.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## BOARD OF COUNTY VISITORS — EXPENSE OF.

Payment of expense of board of county visitors contingent upon certificate of probate judge as to satisfactory performance of duties: should be paid as soon as such certificate issued.

July 25, 1906.

*The Ohio Board of State Charities, Columbus, Ohio.*

GENTLEMEN: — Replying to the questions presented in yours of the 24th inst. I beg to say that the purpose of the act of the General Assembly of the State of Ohio approved March 3d, 1906, amending Sections (633-15), (633-16) and (633-17) R. S. (98 O. L. 28), is apparent when the amendatory act is compared with the law existing at the time of the amendment. The new matter contained in Section (633-15) providing for the payment of the actual and necessary expenses incurred by the Board of County Visitors or by any member or members selected by said board for the performance of the duties defined in that section, requires as a condition precedent to the payment of such expenses, not exceeding \$100 per annum, that the probate judge of the county shall have issued his certificate that the members of the board have satisfactorily performed their duties as provided in Section (633-16) and (633-17) R. S.

No compensation is allowed to any member of the Board of County Visitors, nor to such person as may be selected by said board, but only their necessary expenses. The act should receive such construction as would authorize the payment to the members entitled to the same of the expenses incurred in the performance of their duties, and such payment should be made without unreasonable delay, after the service has been performed and the amount thereof presented to the county commissioners for allowance. As the creation of the expense could only properly be in the performance of the duty, it is incumbent upon the board to make it appear to the probate judge that labor has been performed, and this can be done quarterly. The certificate to the probate judge could then be made, quarterly, after the expense of the quarterly visitation had been incurred, as contemplated by Section (633-16) R. S.

When the expense of the board for the last quarter of the year is presented, there should also be prepared and presented a full report of its proceedings for the entire year, in the form suggested in Section (633-17) R. S. The probate judge can then issue his certificate for the last quarter and the expense for that quarter should then be allowed. In this manner after quarterly certification to the performance of the duties of the board, the members of the board can receive early payment of the expenses incurred by them, and the requirements of the act will be complied with.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### OHIO STATE BOARD OF DENTAL EXAMINERS—POWER OF.

Power of board to require new application and to exact additional fee from applicant who fails to present himself for examination at the first meeting of the board after filing application.

November 5, 1906.

DR. H. C. BROWN, *Secretary Ohio State Board of Dental Examiners, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 25th in which you request an opinion as to whether a person who has filed an application and paid the required fee for examination, and who fails to present himself at the first meeting of the board after filing his application, as specified in Section 4404 R. S., is entitled to an examination at any subsequent meeting of the board without making a new application and paying another fee.

The answer to this question is involved in some doubt. The provision that the "applicant shall present himself before said board at its first meeting after filing his application" is susceptible, in my opinion, of two possible constructions. Statutory requirements of this nature are held mandatory or directory accordingly as courts are satisfied that some reason does or does not exist, because of which the strict language of the statute should be given effect. Thus, if this question were presented to a court, and the court were satisfied that the legislature contemplated the possibility of such change of status on the part of the applicant after the first meeting of the board as to render his admission to a subsequent examination without new qualification inadvisable, the statute would be held to be mandatory. Under such a decision the board would be obliged to exact a new application accompanied by a new fee, in every case where the applicant might fail to present himself at the first meeting of the board after filing his application.



If, on the other hand, the court were satisfied that there could be no impropriety in allowing an applicant who has failed to present himself at such first meeting to be examined at a subsequent meeting, having regard to the purpose of the whole registration act, the statute would be held to be directory. This holding would be in accord with the prevailing rule where a designation of time, unsupported by any special reason for denying legal effect to acts under the statute not done within the time designated, is in question. (Sutherland on Statutory Construction, Section 612.)

Such decision would carry with it the implication that the board is vested with such discretion as is properly exercised by administrative boards in general. Under such a decision the board would be authorized to give an examination to an applicant who had failed to present himself at such first meeting, when satisfied that no change in the status of the applicant had taken place since the first application had been filed. A court taking this view of the question would probably regard the provision of Section 4404, that the board shall have power to "make reasonable rules and regulations for the purpose of carrying out and enforcing the provisions of this act" as conferring express authority for the exercise of such discretion. Whichever one of these views might be taken, should the authority of the board be called in question judicially, it seems clear that in the specific case mentioned in your letter, the board may properly require a new application and exact the payment of an additional fee.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### EMERGENCY—CREATION OF.

An emergency, within the intendment of Section (17-1) et seq., R. S., was created by the appointment to the offices of secretary to the governor and executive clerk of new incumbents after the enactment of the law found in 98 O. L. 365, providing a fixed annual salary for such officers.

July 26, 1906.

*To the Honorable, The Emergency Board of the State of Ohio, Columbus, Ohio.*

GENTLEMEN:—I have had under consideration the question of whether an emergency has arisen within the intendment of Section (17-1) et seq. Bates' Annotated Statutes, in the matter of the salary of the Secretary to the Governor, and the Executive Clerk in that office. The last General Assembly on April 2, 1906, (98 O. L. 365) provided that a fixed annual salary of five thousand dollars should be paid the former and three thousand dollars the latter, and that all fees collected by the office should be turned into the state treasury.

The incumbents of these two offices have been appointed since the passage of the act mentioned. The act provided that it

"should not operate to affect the compensation of any officer or employe named herein during his existing term"

and as it would not, therefore, affect those who were then occupying the offices mentioned no provision was made for the increased salaries although the law takes from one of the incumbents the fee which the fixed salary replaced. The change in the personnel of the offices could not have been reasonably anticipated and, in my opinion, the resulting insufficiency in the appropriations made for these

officers should be taken up by the emergency board and the expenditure should be authorized of such additional amount as may be necessary to cover the difference between the amounts appropriated and that necessary to pay the straight salaries provided for by the amended statute.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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EMERGENCY—PRESENT UNAVAILABILITY OF APPROPRIATIONS  
MADE BY GENERAL ASSEMBLY IS NOT SUCH, AS AUTHORIZES  
CREATION OF DEFICIENCY.

Fact that appropriations made for railroad commission unavailable until expiration of eighteen months from appointment of commission does not authorize said commission to create deficiency such as may invoke the powers of the emergency board.

August 15, 1906.

*To the Emergency Board of the State of Ohio, Columbus, Ohio.*

GENTLEMEN:—I have had under consideration the application of the Railroad Commission of Ohio for authority to create deficiencies and your request for an opinion as to the power of the board to grant the several requests made by the commission. The power to appropriate money or bind the state to the expenditure of money is exclusively a legislative power. The only theory upon which the exercise of any power by your board can be sustained is that the General Assembly may delegate to certain of its officers the power to pledge the good faith of the state. Assuming that the General Assembly has this authority, an examination of the act creating your board shows that it has conferred the least possible power consistent with the state's necessities. It has not given the board power to substitute its judgment for that of the General Assembly or to correct any supposed failure of that body to perform its duty.

The act creating the Emergency Board, Sec. (17-3), Bates' Annotated Ohio Statutes, authorizes "deficiencies to be made" only "in case of an emergency." An emergency is defined by the Century Dictionary as "a sudden or unexpected happening; an unforeseen occurrence or condition." It must follow, therefore, that "emergency" and "unforeseen emergency" mean the same thing. In *Ampt. v. City of Cincinnati*, 1 N. P. 379, a case was under consideration involving a very similar question, the exercise of certain powers there depending upon the construction of Section 2690*h* of the Revised Statutes which authorized the proposed action only in case "any unforeseen emergency happen." In enjoining the action proposed Judge Saylor said:

"In order that an appropriation may be made from the contingent fund under Section 2690*h* to provide for a deficiency in any specific appropriation made under this section for a fiscal half year, it is necessary that a deficiency shall lawfully and by an unforeseen emergency happen; something unforeseen shall happen affecting the object for which the specific appropriation is made, and which, by requiring an unexpected expenditure of the money appropriated to that particular object, has caused, or will cause a deficiency in the appropriation."

From this it must be concluded that the board is strictly limited in its actions to actual causes of new conditions arising since the adjournment of the General

Assembly, such as create an actual emergency in the business of the state, and one which was not foreseen or contemplated by the legislature when considering the subject involved.

Now the General Assembly contemplated the needs of the Railroad Commission of Ohio, and made for it appropriations as follows:

Salary of three commissioners for one year and six months..	\$22,500.00
Salary of clerks for one year and six months.....	8,550.00
Contingent expenses .....	4,500.00
Traveling expenses .....	3,000.00

In addition to this the General Assembly appropriated for the Commissioner of Railroads and Telegraphs for the year beginning February 15, 1906, as follows:

Balances and receipts.	
Salary of commissioner.....	\$3,000.00
Salary of chief clerk.....	2,400.00
Salary of statistical clerk.....	1,200.00
Salary of chief inspector.....	1,200.00
Salary of deputy inspector.....	1,200.00
Salary of stenographer.....	1,200.00

It also made similar appropriations for the Commissioner of Railroads and Telegraphs for the year beginning February 15, 1906. The "balances and receipts" above mentioned are those arising under Section (250-2) of the Revised Statutes.

The General Assembly in Section 36 of the act creating the Railroad Commission, 98 O. L. 358, provided:

"All powers, duties and privileges imposed and conferred upon the Commissioner of Railroads and Telegraphs of this state under existing laws are hereby imposed and conferred upon the commission created under the provisions of this act; provided, that the powers and duties conferred and imposed upon the Railroad Commissioner by laws in force at the passage of this act shall continue to be exercised by him until the commission provided for in Section 1 of this act has been appointed and qualified, whereupon the office of Commissioner of Railroads and Telegraphs is hereby abolished."

Among other powers and duties that the Commissioner of Railroads and Telegraphs had was that of disbursing the funds derived from the railroads of the state under Section (250-2) when the money was properly appropriated, as it was appropriated by the last General Assembly, and of disbursing all the other funds appropriated so far as such disbursement is necessary and this power now belongs to the Railroad Commission and the funds so arising and so appropriated are liable for its needs.

The fact that some of the appropriations are not available and will not be until February 15, 1907, does not affect the question. A similar exigency arose in the case of the Commissioner of Highways in 1904, but the Emergency Board concluded, and in my opinion properly so, that no emergency thereby arose and that it had no power to amend the law making the appropriation. These appropriations having been made, contracts may be lawfully entered into as against them. The General Assembly has only prohibited the disbursement of such funds from the treasury until February 15, 1907.

The Railroad Commission has now all the direct appropriations made for

the Commissioner of Railroads and Telegraphs for the current year; all the direct appropriations made for that officer for the succeeding year; all the appropriations made directly to the Commission, sufficient in the judgment of the General Assembly, for eighteen months; and all the proceeds of the special tax under Section (250-2) available generally for the needs of the Commission as it may determine such needs.

My conclusion, therefore, is that the Railroad Commission may use any and all of these funds for the purposes for which they were appropriated, and may use for any lawful needs, not otherwise provided for, the monies arising under the special tax above referred to; but that the Emergency Board is without authority to allow the creation of deficiencies for any of the purposes proposed by the Commission.

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

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#### HEALTH OFFICER — PUBLICATION OF RULES OF.

Rules and regulations of health officer intended for guidance of general public should be published in the same manner as municipal ordinances, etc.

January 3, 1906.

DR C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of yours of the 26th ultimo I have given consideration to the question therein presented, and beg to advise you that Section 124 of the Municipal Code must be construed in connection with Sections 1694, 1695, 1696 and 1697 R. S., which sections are still in full force and effect.

From the consideration of these acts it is apparent that it is the policy of the General Assembly to provide for the publication of all ordinances, resolutions and other matters requiring legal publication to be made in one or more papers, either daily or weekly, as provided by the statutes, published within the limits of the municipality and of general circulation therein. But if there is no paper published therein it is sufficient to cause the same to be published in a newspaper having circulation in such village though not published therein.

The rules of a health officer or of a board of health should be published with the same care as the ordinances of cities and villages when the same are intended for the general public and not as mere orders and regulations for the government of the board. This is required by Section 2118 R. S. (95 O. L. 424).

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

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#### EXPECTORATING ON FLOOR OF STEAM CARS, ETC.

State board of health has power to adopt rules prohibiting expectorating on floor of steam cars, etc.; enforcement of such rules is properly within the province of local boards and health officers, but in case of failure of local authorities to act, state board may cause prosecutions to be brought.

January 6th, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I am in receipt of yours of the 3d inst., requesting an opinion from this department upon the powers of the State Board of Health to adopt and enforce orders prohibiting the spitting on the floor of steam cars, interurban electric cars, or other public conveyances not operated within the limits of any municipality.

I call your attention to Section (409-25) R. S., in which the General Assembly has limited the authority of the State Board of Health in making and enforcing *orders in local matters* only in such cases "when emergency exists, and the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established."

It is by the same act made the duty of the local boards of health, and other health authorities to enforce all sanitary rules and regulations adopted by the State Board of Health and in the event of failure or refusal on the part of any member of such boards or other officials and persons mentioned in that act to do so, he or they shall be subject to a fine of not less than \$50.00 upon a first conviction and upon conviction for a second offense of not less than \$100.00.

It is apparent that the power is given to the State Board of Health in such matters to adopt a rule with relation thereto, and to cause the same to be executed by the local boards of health and health authorities and officials, and it is only when they fail to act or in case of an emergency, that the State Board of Health is authorized to act. In the latter event prosecutions for violation of such order may be brought by any officer, member of the state or local boards of health or any official or private person.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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EXPECTORATING ON FLOOR OF STEAM CARS, ETC.

When arrest for expectorating on floor of steam cars, etc., may be made without warrant.

March 1st, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Replying to yours of the 24th ult., I beg to say that if a police officer sees an individual violating the order recently adopted by the State Board of Health to prevent expectorating in railway cars, he can arrest the offender without a warrant, or he can make an arrest upon complaint of an employe or other person who witnessed the violation of such order, without a warrant having been first issued therefor. Such officer has authority to arrest a person when he has reason to believe that such person has committed any crime or offense against the laws of the state or ordinance of a municipality or orders of the board of health lawfully made.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

PUBLICATION OF ORDERS, RULES AND REGULATIONS ADOPTED BY  
STATE BOARD OF HEALTH.

What is due publication of the various orders, rules and regulations adopted by the state board of health under the authority of Sec. (409-25) R. S.

April 19th, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:— Acknowledging the receipt of your recent letter requesting a written opinion of this department upon the question of the due publication of rules and regulations adopted by the State Board of Health, pursuant to the requirements of Section (409-25) R. S., I beg to say that the powers conferred upon the State Board of Health by that section of the Revised Statutes include the following:

“The board may make special or standing orders or regulations for the prevention of the spread of contagious or infectious diseases, and for governing the receipt and conveyance of remains of deceased persons, and such other sanitary matters as admit of and may best be controlled by a universal rule. It may also make and enforce orders in local matters, when emergency exists, and the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided in this chapter, and all necessary expenses so incurred shall be paid by the city, village, or township for which services are rendered. It shall be the duty of all local boards of health, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and all other officers and employes of the state, or any county, city or township thereof, to enforce such quarantine and sanitary rules and regulations as may be adopted by the state board of health, and in the event of failure or refusal on the part of any member of said boards or other officials, or persons in this section mentioned to so act, he or they shall be subject to a fine of not less than fifty dollars, upon first conviction, and upon a conviction of second offense of not less than one hundred dollars,” etc.

No express provision is made by the statutes of this state, with regard to the publication of special or standing orders or regulations of the State Board of Health, but by Section 2118 R. S., the provision is made with regard to the boards of health of any *city, village, hamlet or township*, that the orders and regulations made by them not for their government, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of cities and villages. If the state board of health is proceeding pursuant to the latter power contained in the above quoted matter from Section (409-25) R. S., to make and enforce orders in local matters when emergency exists, etc., such orders and rules in such matters should be published as required by the provisions of Section 2118 R. S.; but when the board is proceeding under the first quoted power to “make special or standing orders or regulations for the prevention of the spread of contagious or infectious diseases” etc., and has pursuant to such powers adopted an order or regulation relative to spitting in interurban and steam railway cars and stations, the board may, pursuant to such power therein contained, make a reasonable rule for the publication of all such latter described orders, and the same should include a notice to each person, firm, partnership, association or corporation owning or operating interurban or steam railways, cars and stations, and a requirement that the same

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be posted in a public and open manner in such cars or stations. It would be reasonable also to order that copies of such rules and regulations be published in the local newspapers and to send them to the boards of health, health authorities and officials and other officers to be affected thereby, or whose duty it is made to enforce the same.

Your department will be assisted, pursuant to the requirements of Section 202 of the Revised Statutes, by counsel furnished by this department, as the interests of the board and of the state may demand.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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HEALTH OFFICER — VILLAGE — CREATION OF OFFICE BY COUNCIL — APPOINTMENT TO SAME BY STATE BOARD OF HEALTH.

Council of village having village board of health may create office of village health officer by ordinance abolishing board and creating office; upon failure of council to provide for filling such office so created, state board of health may appoint to same.

May 10, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:— Replying to yours of the 8th inst. I beg to advise you that where an ordinance of a village has established a board of health if the village desires to abolish the board of health and appoint a health officer, it should be done by repealing the ordinance which created the board and appointing a health officer; and in villages the appointment of such health officer abides in the village council.

In the event that council passes an ordinance abolishing the board of health and also passes an ordinance creating a health officer in lieu of such board of health, the board of health thus abolished would not continue to serve until a health officer was named by the village council, because, upon their failure to create such position and name such officer it would devolve upon the State Board of Health pursuant to powers contained in Section 187 of the Municipal Code, to appoint a health officer for such village.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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HEALTH OFFICER — VILLAGE — CREATION OF OFFICE BY COUNCIL — FORMALITIES.

Ordinance of village council creating office of health officer must be enacted with same formalities required for creation of village board of health.

May 14, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:— Replying to yours of the 11th inst. and as supplemental to my letter to you on the 10th inst. I would say that in the case mentioned by you it is necessary for the village council to pass an ordinance creating the office of

health officer with the same formality as would be required for establishing a board of health.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### LIVE STOCK—POWER OF MUNICIPAL BOARD OF HEALTH TO REGULATE KEEPING OF.

Municipal board of health may provide reasonable regulations prohibiting the keeping of live stock in thickly populated portions of cities or villages.

May 28, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—The keeping of live stock of any character within a thickly populated portion of a city or village can be provided against by a local board of health, if it produces such conditions that are noxious and offensive and such as might properly be defined to be a nuisance. Such conditions are valid subjects of regulation and prohibition to be enforced by local boards of health.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### GARBAGE DISPOSAL PLANT—APPROPRIATION OF LAND FOR.

Municipal corporation may appropriate land for garbage disposal plant.

June 11, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Replying to yours of the 8th inst., I beg to advise that it is within the power of municipal corporations to appropriate, enter upon and hold real estate inside or outside the municipal limits of a city or village for the purpose of a garbage disposal plant or farm, pursuant to the provisions of Sections 10 and 11, and related sections, of the Municipal Code.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### ANTITOXIN—GRATUITOUS DISTRIBUTION OF.

Municipal board of health may furnish antitoxin gratuitously to indigent persons, at expense of municipality.

June 19, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your inquiry of the 14th inst., and your request for an opinion upon the following question:



Have local boards of health authority to furnish antitoxin gratuitously to indigent persons, both for the treatment of those afflicted with diphtheria as well as for the prevention of the disease in persons exposed thereto?

The General Assembly of the State of Ohio has conferred upon each municipal corporation and township organization of the state, the power to create a board of health or health officer, and has vested authority in such boards or officers to make orders and regulations of certain general characters hereinafter specifically noted.

The necessity of the creation of such boards or officers, is evidenced by the mandatory character of the legislation relating thereto. (State ex rel. Miller v. Massillon, 2 O. C. C. (N. S.) 167). The power of such boards to enact or make orders and regulations is not specifically limited to certain definite subjects, but the grant of power is made to the boards in the most general language, leaving to the boards the adoption of such rules as they "may deem necessary" for the accomplishment of the purpose of their creation.

It is in the following language:

"Section 2118 R. S. The board of health of any city, village, hamlet or township may make such orders and regulations as it may deem necessary for its own government, for the public health, the prevention or restriction of disease and the prevention, abatement or suppression of nuisances. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of cities and villages; and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances; and in townships the posting of such orders and regulations in five conspicuous places within the township shall be deemed a sufficient notice thereof."

This power of ordaining, enacting or making rules or regulations is limited by the rule that the orders and regulations it adopts must be of such general character as will bring them within the subject conferred, viz: the preservation of the public health, and the restriction of disease. They must in some degree tend to secure, maintain and preserve the public health.

The Hamilton common pleas court in the case of Cincinnati v. Allison, 12 O. D. 376, 379, said upon this subject:

"It may be considered a legal axiom that the preservation of the public health is a proper and necessary exercise of the police power of the state; that boards of health are appointed as subordinate departments of the state, charged with the general supervision of the interests of the health of the community, and vested with power to make regulations for preventing the spread of disease, and in other ways care for the public health. These powers are usually expressly granted by the General Assembly but irrespective of any express provision, the preservation of the health and safety of the inhabitants being one of the chief ends of local government, the power to pass reasonable regulations to effect this, must be allowed an implied power. In our state, this power is granted expressly in Section 2118 R. S. as follows:" (Thereupon the court quotes the foregoing section of the Revised Statutes.)

In the case of Walton v. City of Toledo, 3 O. C. C. R. (N. S.) pp. 295, 300, that court said:

"It is needless to say that the powers of the board of health are very large. If you read the whole statutes of the State of Ohio on the subject you will find that the powers that are given to the various boards of health and the laws enacted for the purpose of protecting the people of the state from contagious diseases and from the sale of diseased or impure articles, are about as broad as language can make them; they extend into every relation of life and the protection of health is one of the most important departments that the legislature has to deal with, or that the city council has to deal with under the powers conferred upon it by the legislature of the state in carrying out the general police powers of the state."

The board of health is made the judge of the proposed agency, and of the probability of its tendency to prevent or restrict disease. In view of the data submitted by you with your letters there can be no doubt of the efficiency of the agency proposed, and that its general use would tend to the prevention and restriction of diphtheria. We might here employ the language of the Supreme Court of the United States used in the case of *Jacobson v. Mass.*, 179 U. S., p. 11, in which was considered a resolution of the Board of Health of the City of Cambridge, which provided for the enforcement of compulsory vaccination. (Page 31.)

"In view of the methods employed to stamp out the disease of smallpox can any one confidently assert that the means provided by the state to that end has no real or substantial relation to the protection of the public health and the public safety? Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox."

Again the code for the government of health boards recognizes the contagious and infectious character of diphtheria and in the enactments for the exercise of their powers in connection therewith expressly provides:

" \* \* \* and when any contagious or infectious disease shall become or threaten to become epidemic in any city, village, hamlet or township, and the local authorities shall neglect or refuse to enforce *efficient measures for its prevention*, the State Board of Health, or the secretary as its executive officer, on the order of the president of said board, may appoint a medical or sanitary officer and such assistants as he may require, and authorize him to enforce *such orders or regulations* as said board or its executive officer may deem necessary."

The Supreme Court of Minnesota on the 6th day of June, 1902, in the case of *State v. Zimmerman*, 90 N. W. Rep. 783, in construing health legislation, said:

"The legislative grants of power to municipalities, intended to secure the preservation of the public health, and to provide for the enforcement of proper and necessary sanitary regulations to prevent the spread of contagious diseases, are, notwithstanding the individual liberty of the citizen, is, in a measure, involved, entitled to the broad and liberal construction by the courts, in aid of the beneficial purpose of their enactment. *A general grant of power in broad and comprehensive terms, to do all acts and make all rules and regulations deemed necessary and expedient for the preservation of the public health*, vests in the authorities to whom is granted power to enforce in cases of emergency, rendering

it reasonably necessary in the interests of the public health and for the prevention of the spread of smallpox, a regulation requiring children to be vaccinated as a condition to their admission to the public schools."

And in the case of *Jacobson v. Massachusetts, supra*, the Supreme Court of the United States held, that reasonable regulations are within the police power of the state, and authority to make the same may be delegated to local bodies.

If the contemplated order or regulation is within the spirit of Section 2118 R. S., can the expense thereof be provided for as legitimate expenditures of the board of health?

I am of the opinion that the expense thereby created is included within the language of Section 2138 R. S., and that the following language, there employed, is not limited to periods of epidemic, viz:

"And when expenses are incurred by the board of health, under the provisions of this chapter, it shall be the duty of council, upon application and certificate from the board of health, to pass the necessary appropriation ordinances to pay the expenses so incurred, etc."

I therefore conclude, that, in the event of the prevalence of diphtheria in a given community, if the local board of health duly adopt an order or regulation to furnish antitoxin for the treatment of indigent persons afflicted with such disease or exposed thereto, the indebtedness thereby created would be a valid indebtedness of the municipality or the taxing district, in which the same was thus authorized.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### SEWERAGE SYSTEM—CHANGE IN OUTLET OF—APPROVAL OF STATE BOARD OF HEALTH.

Approval of state board of health necessary to proposed change or extension of outlet of municipal sewerage system.

July 6, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Your letter dated June 29th inquiring whether or not municipal authorities may make any change or extension in the outlet of any sewerage system now in use, without first obtaining the approval of the State Board of Health, is received.

The several inquiries you submit may be answered together. The latter part of Section (409-25) R. S., provides as follows:

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

The evident intent of the legislature in requiring the approval of the State Board of Health before any change or extension may be made in any system

of sewerage now in use is to give to the State Board of Health absolute control over the outlet of sewerage systems.

I am, therefore, of the opinion that whatever may be the nature of the change in the outlet sought to be made in a sewerage system now in use by any municipality, such change may not be made without first obtaining the approval of the State Board of Health as required in the portion of Section (409-25) R. S., as quoted above.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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BONDS — LIMITATION UPON AUTHORITY OF MUNICIPAL CORPORATION TO ISSUE, FOR CONSTRUCTION OF PUBLIC WATER SUPPLY.

Amount of bonded indebtedness incurred by municipal corporation may not, under "Longworth Bond Act," at any time exceed eight per cent. of the total tax valuation of all property within such corporation; such limitation applies to indebtedness incurred in construction of public water supply and systems of sanitation.

July 7, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:— Yours of the 29th ult., addressed to this department contains the inquiry as to what amount of bonded indebtedness a municipal corporation may incur for the introduction of a public water supply, sewerage system or for purification plants for either water or sewage.

The authority to issue the bonds of a municipality for such purposes, is found in Sections 2835, 2835b, 2836 and 2837 Revised Statutes.

Consideration of the same evinces the intention of the General Assembly to limit the authority of all municipalities in the creation of bonded indebtedness for any and all purposes, including those above specified, in any one year to not exceed 1% of the total value of all the property of the municipality as listed and assessed for taxation. If the city council deem it necessary in any one fiscal year to issue bonds in any amount greater than 1% of the valuation of the property as contained on the tax duplicate they shall submit the question of issuing such bonds in excess of 1% to a vote of the electors of the municipal corporation, and when the vote is taken upon such proposition and is favorable thereto, the aggregate amount of all outstanding and unpaid bonds issued under the authority of the act referred to (95 O. L. 318, April 23, 1904), shall not exceed 8% of the total value of all the property as listed and assessed for taxation, within such municipality.

Municipalities in this state have, therefore, the authority to create or assume an aggregate indebtedness, after a vote thereon by the electors thereof, of 8% of such total valuation.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

NUISANCE—ORDER OF HEALTH OFFICER NO EXCUSE FOR.

Order of village health officer does not excuse from liability for creation of nuisance.

July 9, 1906.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Replying to yours of the 6th inst. I beg to say that the fact that the owner of a creamery is complying with the orders of the health officer of a village by discharging the waste from a creamery into a stream, which discharge is creating a nuisance, does not relieve such owner from liability for the damages thereby occasioned; nor does it constitute a defense to an appropriate action to abate such nuisance.

The health officer has no more power to authorize the creation of a nuisance than any other officer. (Dillon on Municipal Corporations, Vol. 1, p. 448.)

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

STATE LIBRARIAN—SALARY OF.

Salary of officer appointed for indefinite term may be changed at any time—effect of failure of legislature to make sufficient appropriation for salary of state librarian, same being fixed by law; only amount appropriated may be paid out without new appropriation, but claim against state for balance exists in favor of officer.

September 18, 1906.

HON. C. B. GALBREATH, *Sec'y Board of Library Commissioners, Columbus, Ohio*

DEAR SIR:—Your letter of August 16th states that an act passed by the last General Assembly fixed the salary of the state librarian at \$3,000.00, but that only \$2,500 was appropriated for its payment. The present librarian was in office at the time the law changing the salary attached to the office, was enacted. You desire my opinion as to what salary may, under the circumstances, be paid.

No law prescribes the term of office of the state librarian, and I assume that the present incumbent was not appointed for any definite term. The salary of an officer appointed for an indefinite term, and subject to removal, may be changed at any time.

State v. Massillon, 24 C. C., 249;  
Lexington v. Renick, 105 Ky., 779.

The present state librarian is therefore entitled to be paid the increased salary, if there is any fund out of which such payment may lawfully be made. Article II, Section 22 of the constitution provides:

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

In the case of State v. Medbery, 7 O. S., 522, this constitutional provision was the subject of careful consideration. The court said, page 529:

"No claim against the state can be paid, no matter how just or how long it may remain due, unless there has been a specific appropriation made by law to meet it."

And again on page 530:

"But if the general assembly should authorize liabilities to be incurred and make no appropriation to meet them, but let each citizen who performed services or furnished materials to carry on the government, hold his claim against the state unpaid, debts to the amount of these claims against the state would at once be created, and remain debts at the end of the two years and until an appropriation was made to meet them, whatever public revenue might be on hand, inasmuch as every executive officer is forbidden by the constitution to pay any claim unless there has been a specific appropriation for that purpose made by law."

The fact that an appropriation is less than the salary fixed by law does not affect the right of an official to the full salary; (*John M. Langston v. United States*, 21 Court of Claims, 10; *Texas v. Steel*, 57 Texas, 200) but the difference between the amount of the salary and the amount of the appropriation cannot be paid until a new appropriation shall have been made.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### RECESS APPOINTMENTS — CONFIRMATION BY SENATE.

Effect of failure of senate to confirm appointment by governor during recess of general assembly to fill vacancy in board of medical registration and examination; appointee holds until successor qualified: no vacancy in office because of such failure to confirm.

March 23, 1906.

JOHN K. SCUDDER, M. D., *Ohio State Board of Medical Registration and Examination, Cincinnati, Ohio.*

DEAR SIR: — In your letter of March 21st you state that you were appointed a member of the Ohio State Board of Medical Registration and Examination by Governor Herrick in the interim between the present session of the senate and the one next preceding it: that your appointment was reported to the present session of the senate, which has failed to advise and consent to the appointment. You inquire whether you continue as a member of the board until Governor Pattison appoints your successor.

Section 12 of the Revised Statutes is as follows:

"In case of a vacancy in any office filled by appointment of the governor, by and with the advice of the senate, occurring by expiration of term, or otherwise, when the senate is in session, the governor shall appoint a person to fill such vacancy, and forthwith report such appointment to the senate; and when the senate is not in session, and no appointment has been made and confirmed, in anticipation of such vacancy the governor shall fill the vacancy and report the appointment to the next session of the senate; and if the senate advise and consent to the same, the person so appointed shall hold the office for the full term; and if the senate do not so advise and consent, a new appointment shall be made."

Governor Herrick was authorized, under this section, to appoint you. The term for which you should hold office was uncertain at the time of your appointment, being dependent, to some extent, upon the subsequent action of the senate. If they should confirm the appointment you were to hold office for the full term, but upon their failure to advise and consent the statute provides that a new appointment shall be made. When such appointment has been made and confirmed by the senate the appointee takes office and your term is at an end.

The wording of the statute is not clear but it seems to indicate that the condition subsequent which determines your office, is the appointment of a successor rather than the failure of the senate to consent to your appointment. The failure to consent is a negative act which makes it the duty of the governor to perform the positive act of appointing your successor. The senate is nowhere given the summary power of removal. Section 12a governing the removal of appointive officers for inefficiency etc., makes such removal in every case dependent upon the initiative of the governor. Any doubt as to the proper construction of Section 12 is removed by Section 8 of the statutes which is as follows:

"Any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the constitution or laws."

Section 12 contains no provision excepting officers appointed by the governor from the operation of the general rule prescribed by Section 8.

You will therefore continue to discharge the duties of your office until the appointment of your successor has been made by the governor and confirmed by the senate, unless you are removed in the meantime under the authority of Section 12a.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

#### MEDICAL REGISTRATION ACT.

Persons not having obtained certificate prior to July 1, 1900, must comply with Section 1403c R. S.

July 21, 1906.

DR. GEORGE H. MATSON, *State Board of Medical Registration and Examination, Columbus, Ohio.*

DEAR SIR:—I have your favor of July 16, regarding the application of Dr. Mara Wingate of the Ohio State Board of Medical Registration and Examination for a certificate permitting her to practice medicine in the state of Ohio. I note that you say that Dr. Wingate mailed an application for registration to a member of the Board in June 1900, and that, because of the absence of the member from his usual place of residence the letter failed to reach him, and was not presented to the Board for consideration until after July 1, 1900. I note also that the application is based upon a diploma from the Cleveland University of Medicine and Surgery, conferred March 23, 1896, and that the application is in all respects regular, and if properly presented to the Board would entitle the applicant to registration under the act of 1896.

The registration act, R. S., Section 4403c provides :

"All persons *authorized* and *entitled* prior to July 1, 1900, to practice medicine, surgery or midwifery in the state of Ohio, under and by virtue of the provisions of an act entitled, 'An act to regulate the practice of medicine in the state of Ohio,' passed February 27, 1896, to which this act is amendatory may engage in such practice, and shall be subject to the law regulating the same; and all other persons desiring to engage in such practice in this state, shall \* \* \* submit to the examination hereinafter provided."

A subsequent provision of the same section is as follows :

"Provided that nothing contained in this section shall be construed to compel any person *holding* or *obtaining*, prior to July 1, 1900, a *certificate* of the board, under the act to which this act is amendatory, entitling such person to practice medicine or surgery in this state."

It is clear that the last proviso above quoted cannot apply in this case, because Dr. Wingate neither *held* nor *obtained* a certificate prior to July 1, 1900. The question which then arises is: Was Dr. Wingate authorized and entitled to practice medicine in this state prior to July 1, 1900?

The pertinent provisions of the act of 1896 are as follows:

"No person shall practice medicine, surgery or midwifery, in any of its branches, in this state, without first complying with the requirements of this act. If a graduate in medicine or surgery, he shall \* \* \* present his diploma to the state board of medical registration and examination for verification. \* \* \* If the board shall find the diploma to be genuine, etc. \* \* \* the board shall issue its certificate to that effect \* \* \* which, when left with the probate judge for record as hereinafter required, shall be conclusive evidence that its owner is entitled to practice medicine or surgery in this state."

It seems clear that, to be "authorized and entitled to practice medicine," the applicant must not only have filed his application, but he must have received his certificate. It is the decision of the Board, and its action in the matter which authorizes the applicant to practice, not the act of the applicant in presenting his credentials; for if that were the case, the issuance of the certificate would be of no moment whatever. Accordingly, since Dr. Wingate, not having obtained a certificate of registration from the Board prior to July 1, 1900, was not, prior to that time, "authorized and entitled to practice medicine" under the act of 1896, she is amenable to the provisions of the act of 1900, and the Board is without authority to issue a certificate to her, under the act of 1896.

The fact that Dr. Wingate's application, if it had reached the Board in time, would have entitled her to a certificate, and that its failure to reach the Board was due to no fault of hers, does not affect the legal aspect of the case.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*



STATE BOARD OF PHARMACY—EXAMINATION OF APPLICANTS  
REGISTERED IN OTHER STATES.

State board of pharmacy may require examination from applicant seeking registration on certificate obtained in another state.

May 8, 1906.

HON. WM. R. OGIER, *Secretary State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Your letter of May 4th asks the following questions as to the authority of the State Board of Pharmacy under paragraph 2, section 4409, R. S., as amended April 2, 1906:

1st. Is it mandatory or optional with the board to register pharmacists without examination who are registered in other states?

2nd. What authority is to determine the standard of qualification and requirement as to competency in another state?

3rd. May this board make the following ruling: "No application for registration as pharmacist in this state will be considered from any person seeking registration on a certificate obtained in any other state, when such person has failed in his examination before this board, within the period of one year preceding the date of his application for registration from another state."

Whether pharmacists who are regularly registered as such under the laws of other states, as set forth in Section 4409, shall be registered without examination by the board of pharmacy of this state, is left to the discretion of the board. The statute is permissive, not mandatory.

The board, itself, should determine by an examination of the statutes of other states whether the standards of qualification and requirements as to competency of such states are as thorough as those established by the board of pharmacy of this state.

In my opinion the board may make the ruling set forth in your third question.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

BINDING OF PUBLIC DOCUMENTS—RE-LETTING OF UNCOMPLETED CONTRACT FOR.

Contract for binding public documents first let to the Ohio Institution for the Deaf and Dumb, and by it uncompleted may be re-let without advertisement or competitive bidding.

October 1, 1906.

*To the Honorable, the Commissioners of Public Printing, Columbus, Ohio.*

GENTLEMEN:—You have submitted to me the question whether the binding of certain executive reports delivered for that purpose to the printing department of the institution for the deaf and dumb, and not completed within a proper and reasonable time because of the pressure of other work and lack of necessary facilities, can be let by contract, without advertisement and without competitive bidding, to private firms or individuals.

Section 2 of Article XV of the constitution of Ohio provides that all printing for the general assembly or for any executive or other department of the state shall be let on contract to the lowest responsible bidder in a manner to be provided by law. Sections 319, 320 and 321 R. S. and other related sections, provide that all printing contracts shall be let by the commissioners of public printing after advertisement and to the lowest responsible bidder. Section 330 declares that the necessary binding for the state shall be provided for by the commissioners of public printing in such manner as they deem best and upon such terms as would be most advantageous to the state for periods not exceeding one year; but that before any award of contract is made the contractors must execute a bond in the sum of \$5,000 for the faithful performance of the contract. Section 328 provides that if for any cause the successful bidder on a printing contract fails to execute his contract with reasonable promptness the commissioner of public printing may enter into a contract with some other person, having regard to the lowest price; and further that if there is unfairness or fraud in the bids they may re-advertise and re-let the contract, and in the meantime they may provide for the printing upon such terms and in such manner as they deem most advantageous for the state. This section expressly declares that these provisions are in all respects applicable to the letting and re-letting of contracts for binding.

Section 340 R. S. declares that any printing or binding required to be done by the state not expressly embraced in the chapter on this subject shall nevertheless be controlled by the provisions of this chapter and the commissioners of public printing *may advertise for proposals thereon.*

Section 663 of the Revised Statutes provides that the book binding of the state shall be done *as far as practicable at the Institution for the Deaf and Dumb.*

Reading all these constitutional and statutory provisions together I am of the opinion that the word "printing" includes binding in so far as competitive bidding is necessary to the letting of contracts; and that the policy of the state is to require both binding and printing contracts to be so let after advertisement and to the lowest responsible bidder.

It seems clear, however, that while original contracts either for printing or binding ought, under our constitution and statutes, to be let to the lowest responsible bidder after public advertising, yet since upon failure or default of the contractor upon a printing contract the commissioners of public printing are authorized to get the work done in such emergency without competitive bidding, so where reports or pamphlets have been delivered to the bindery of the State Institution for the Deaf and Dumb with the expectation in good faith that the work would be done there, and for any cause it is not possible or practicable to complete the work at that institution, the balance of such binding so uncompleted may be by the commissioners of public printing let by contract upon the best terms procurable but without competitive bidding, if the time within which such work ought reasonably to be done shall not justify the delay required by advertising for proposals.

In any event I am of the opinion that such bids should be invited as can be procured without advertisement and the work should be let to the firm or individual offering to do it in the most acceptable manner for the lowest price.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## RAILROADS—HOURS OF REST OF EMPLOYEES.

Provision of section (3365-14) R. S., as to hours of rest of railroad employes, constitutional.

September 17, 1906.

*The Railroad Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—I have your inquiry requesting an opinion upon Section (3365-14) of the Revised Statutes. This section reads as follows:

“Any company operating a railroad over thirty miles in length, in whole or in part within the state, shall not permit or require any conductor, engineer, fireman, brakeman or any trainman on any train, or any telegraph operator who has worked in his respective capacity for fifteen consecutive hours, to again be required to go on duty or perform any work until he has had at least eight hours’ rest, except in cases of detention caused by accident, unavoidable or otherwise. Ten hours shall constitute a day’s work, and for every hour that any conductor, engineer, fireman, brakeman or any trainman, or any telegraph operator of any company who works under the direction of a superior, or at the request of the company, (works, he) shall be paid for such extra services in addition to his per diem.”

In the case of the Wheeling Bridge and Terminal Railway Co. v. Gilmore (8 C. C., 658), this section was under consideration, and so much of it as is embodied in the last sentence of the section was held to be unconstitutional. An examination of the section discloses its purpose to be two-fold.

First, it seeks to regulate the number of hours’ rest which certain railroad employes must have after fifteen consecutive hours of service. This is manifestly the proper and reasonable regulation for the protection of the lives and property of those dependant upon the physical ability of railroad employes to perform their duties. The remaining sentence of the section sought to regulate the contractual relations existing between the employe and the company and to provide for his compensation regardless of his contract. This last part of the section, and only this part, was held unconstitutional in the case cited. While the court did not have under consideration the first part of the section it must have recognized that that part of the section was within the provisions of the constitution. I quote from the body of the opinion:

“While corporations, like the plaintiff in error, have public duties to perform that the state may regulate by proper laws, and over whose business it may exercise such control as lies within the police power of the state, such, for instance, as is contained in the first sentence of Section 1 of the act in question, yet beyond this the state cannot interfere with the dealing and contracts of such companies with their employes who are *sui juris*, any farther than it lawfully can with those of other employers of labor.”

I advise you therefore that the first provision of this section has not been held unconstitutional and that your commission should proceed upon the theory that the first sentence of this section is a valid and subsisting law.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## CAR SERVICE — CHARGE FOR LESS THAN TEN DAYS.

Railroad company may charge for use of entire car for less period than ten days, provided such charge is not unreasonable; remedy of shipper for unjust and unreasonable charge.

September 18, 1906.

*Railroad Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—I have your inquiry as to whether Section 3227 of the Revised Statutes prohibits railroad companies from charging car service until after the expiration of ten days.

This section is in *pari materia* with Section 3221, and relates only to such consignments of freight as are covered by Section 3221. This latter section only relates to "the receipt of any property in their ware-house, depot, station, store or other place of deposit or doing business," and in my opinion, relates only to freight in less than car load lots.

In my opinion, therefore, Section 3227 does not prevent the railroad company from charging for the use of an entire car even though for a less period than ten days. I suggest, however, that in a proper case relief might be secured for a shipper having just complaint under the provisions of Section 14 of the railroad commission act, 98 O. L., 350.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## CASH FARE — MAY NOT EXCEED LEGAL RATE.

Railroad company may not exact sum in addition to legal rate with privilege of refunder from passengers failing to purchase tickets.

September 24, 1906.

*The Railroad Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—It appears from your inquiry that one or more railroad companies in the state of Ohio have adopted and are enforcing the rule that where a passenger fails to provide himself with a ticket, the conductor of the train shall collect the regular fare prescribed by law, 98 O. L. 4, and an additional sum of ten cents and for said sum of ten cents issue a refunder for that sum redeemable at any ticket office of the company within thirty days. The propriety of reasonable regulations to induce the purchase of tickets by prospective passengers cannot be disputed, but the question raised by you is whether such rule is within the statute recited dimiting fares to two cents per mile.

An early case (1876) upon a similar question, is *Baltimore R. R. v. Boone*, 45 Md., 344. In this case a railroad was authorized to charge for certain transportation, the sum of eleven cents and no more. To induce the purchase of tickets, the railroad company required the passenger paying cash fare to pay twelve cents and to receive a "drawback" slip for one cent redeemable at the company's office. In considering this regulation, the court held:

"That the company has no right to claim from him more than eleven cents, that is to say six cents for the fraction of a mile beyond the city limits, and five cents for the route over its road in the city."

"That whilst the company might provide for any reasonable "draw-back" for its own security, it must be in the face of the law which gave it no authority to receive more than eleven cents. Below that limit, as a maximum, it could exercise its own discretion as to the amount of fare or any discount on the same."

Some years later (1890) a similar question arose in the supreme court of Pennsylvania. That court, apparently without examining the Maryland case, took an exactly contrary view. The syllabus is as follows:

"A railroad company has power to make reasonable regulations, not only as to the amount of passenger fares, but also as to the time, place and mode of their payment; this includes the right to refuse to carry without the previous procurement of a ticket, or to charge a higher rate of fare to passengers without tickets, provided a reasonable opportunity to procure them before entering the train has been afforded.

"A fortiori, a regulation requiring the payment of passengers neglecting to procure tickets of ten cents in addition to the regulation fare to be refunded on presentation at the ticket office of a check therefor, is valid, being neither unreasonable, oppressive, nor needlessly inconvenient to the traveler.

"Nor does a provision in such a regulation that it shall not be enforced as to passengers getting on trains at stations where no tickets are on sale, or when the presence of a large crowd upon a train renders it impossible for the conductor to collect the fares and tickets, if he takes time to issue such receipts to passengers without tickets, render the regulation unreasonable as not being general, fair and impartial.

"The additional sum so to be paid by the passenger and afterwards refunded to him, is not a charge for transportation, within the meaning of a provision in the company's charter limiting such charges to a certain rate per mile; wherefore, the fact that the fare and such additional sum may exceed the authorized maximum charge for transportation, does not constitute a violation of the charter."

Reese v. Pennsylvania Ry. Co., 131 Pa. St. 422.

The question again arose (1902) in *Weber v. Southern Ry. Co.*, 65 S. C., 356. The third paragraph of the syllabus by a majority of the court reads:

"Railroad companies have no right to charge a passenger who does not buy tickets when opportunity is given, excess fare and give rebate checks therefor, between points within this state."

In the following year a majority of the same court, in *Fullmer v. Southern Ry. Co.*, 67 S. C., 262, followed the last mentioned case, and expressed itself as follows:

"The railroad companies of this state have no right to demand and collect of passengers boarding trains without tickets an excess fare of twenty-five cents over maximum rate fixed by statute, where such passengers have an opportunity to purchase tickets at regular ticket offices before boarding trains."

While the syllabus quoted does not disclose the fact, the amount of "excess

fare" charged was to be repaid to the passengers within twenty days upon demand.

Our own supreme court said:

"A railroad company may charge a higher price for carrying passengers when the fare is paid on the train than it does at its ticket offices, provided the price thus charged is reasonable and the fare charged on the train does not exceed the maximum allowed by law."

Railroad Co. v. Skillman, 39 O. S., 444.

This rule as expressed by the supreme court of this state is not necessarily in conflict with any of the decisions cited from other states. The Pennsylvania case rests upon the proposition that the *temporary* collection of excess fare is not a charge, the language of the court defining "charge" being as follows:

"The essence of the meaning is that it is something required, exacted, or taken from the travelers as compensation for the service rendered, and, of course, something taken permanently,—not taken temporarily, and returned. The purpose of the restriction in the charter is the regulation of the amount of fares, not of the mode of collection; the protection of the traveler from excessive demands, not interference with the time, place, or mode of payment. These are mere administrative details, which depend on varying circumstances, and are therefore left to the ordinary course of business management. We fail to see anything in the present regulation which can properly be treated as an excessive charge, within the prohibition of the charter."

Commenting on this view of the Pennsylvania court, a majority of the supreme court of South Carolina well say:

"The reasoning of the court in the case last mentioned is fallacious in making the price, or something required, exacted or taken from the traveler, to depend upon the fact that it is taken permanently, not temporarily and returned. In order to show that this is not the correct test, it is only necessary to say that if the rebate check had provided that the excess fare should be refunded after a certain number of days, months or years, it would at once appear that the railroad company had received more than three cents per mile for every mile traveled, as the use of the money is a valuable consideration. If the railroad company had adopted a rule that a passenger should not be permitted to board its train or check his baggage until he exhibited a ticket, it might well be contended that this was a mere regulation; but not so, when the passenger is required to pay more money for his transportation than is permitted by the statute, even though under certain circumstances he may have the excess charges refunded to him."

Fullmer v. Railway Co., 67 S. C. 269.

This view of the law seems to me to be sound. The one consideration required of a railroad passenger in Ohio on distances of more than five miles, is that he pay two cents per mile. This consideration is appreciably increased when, in addition to such payment he is required to secure a receipt for an excess payment, preserve the same, take it to an agent of the company within a short time and secure the refunder, accomplishing after all this, only what the law gives him originally, to-wit, transportation for two cents per mile.

Both upon the weight of authority, therefore, and upon what I consider the sounder reasoning, I am of the opinion that a railroad company has not the power to enforce the regulation outlined in your communication.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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BILL OF LADING — AUTHORITY OF RAILROAD COMMISSION AS TO.

Railroad commission may determine proper conditions which may be imposed by bill of lading issued by railroad company for transportation of freight wholly within state; railroad company entitled to notice and hearing.

October 27, 1906.

*To the Railroad Commission of Ohio, Columbus, Ohio.*

GENTLEMEN: — I have yours of October 24, 1906, advising me that shippers on certain railroads in this State complain that bills of lading issued by these railroads "are unreasonable and unfair in that they seek to limit unduly the liability or responsibility of carriers." You inquire whether it is within the province of your commission to "determine and specify by order to the carriers of Ohio what conditions a bill of lading may bear, when issued, as a receipt for freight to be transported wholly within the State of Ohio, also whether or not such authority should be exercised by the making of a general rule to carriers within this State and whether or not a hearing should first be had so that the carriers might be given an opportunity to be heard.

Section 14 of the act creating your commission, 98 O. L. 350, provides that whenever upon an investigation made your commission shall find any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith unreasonable it shall determine and by order fix a reasonable regulation, practice or service to be observed and followed in the future.

In my opinion this section applies to a case where a railroad issues such bills of lading as those described in your communication. I advise you further that in consideration of such complaint the provisions of section 12 of the railroad commission act relating to the notice required to be given to the railroad company govern, it must follow, therefore, that each company complained of has a right to be heard after such due notice as the law contemplates and that the commission cannot *ex parte* issue a general order or rule governing all the railroad companies affected.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## (To Officers of the Various State Institutions.)

VEHICLE TAX — MUNICIPAL — PROPERTY OF STATE NOT  
SUBJECT TO.

Property of state of Ohio not subject to vehicle tax imposed by municipal corporation.

October 1st, 1906.

MR. CHARLES FLUMERFELT, *Ohio School for the Blind, Columbus, Ohio.*

DEAR SIR:— In my opinion the city of Columbus is without power to assess and collect a vehicle tax upon carriages owned by the state of Ohio. The ordinance imposing a vehicle tax is under authority of section 7, sub-section 9 of the municipal code, authorizing municipalities to license and regulate the use of the streets by persons who use vehicles or solicit or transact business thereon.

Of course the power of a municipal corporation to impose a vehicle tax proceeds from the state itself. There is no doubt of the power of the state to authorize its own officers or its municipal corporations or other instrumentalities of its creation to impose a tax upon its property or prescribe conditions upon which it may be used. In order to do this, however, express provisions to that end must be enacted.

"The state is not bound by the terms of a general statute, unless it be so expressly enacted." *State of Ohio v. Board of Public Works*, 36 O. S. 409.

In commenting upon this principle, the supreme court said in *State v. Railway Company*, 37 O. S. 176,

"This rule is of special force where any of the prerogatives, rights, or interests of the state are sought to be divested. \* \* \* The principle is well established, and is indispensable to the authority of the public right. The general business of the legislative power is to establish laws for individuals, not for the state."

"The state can, no doubt, through its legislature, subject itself to the provisions of a general law, but it must be by express enactment." *State v. Cappeller*, 39 O. S., 213.

That the state has not subjected itself to the provisions of any ordinance enacted pursuant to the authority conferred by the statute mentioned, it is only necessary to refer to the several appropriation bills passed by the general assembly. In none of these does it appear that any funds have been set apart for this purpose, and the trustees of your institution have no power to pay any license imposed upon the use of vehicles owned by the state. Inasmuch as the state has lawfully furnished vehicles and provided for their use and has not provided for the payment of any license for such use, it seems clear that the general assembly relied upon the general rule above stated, that is, that in the absence of an express provision, the state does not subject itself to a general law. Inasmuch as no funds have been appropriated out of which you can pay the license fee mentioned, you are without authority so to do; and inasmuch as the general assembly has not expressly provided that the state is bound by the terms of the statute mentioned, there is no obligation upon the part of the state to pay such license fees out of future appropriations.

I am of the opinion, therefore, that vehicles owned by the state are not subject to any ordinance passed pursuant to section 7 of the municipal code.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*



BOYS' INDUSTRIAL SCHOOL—COMPENSATION OF OFFICER FOR  
CONVEYING YOUTH TO.

Officer conveying youth to boys' industrial school entitled to actual expense and mileage of five cents per mile by way of compensation.

June 1st, 1906.

HON. C. B. ADAMS, *Supt. Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—Your letter of recent date relative to the compensation and expenses allowed officers for conveying a youth to the Boys' Industrial School, is received.

In reply I beg leave to say that section 759, as amended 97 O. L., 319, provides that:

"The expenses incurred in the transportation of a youth to the Boys' Industrial School, shall be paid by the county from which he is committed, to the officer delivering him, upon the presentation of his sworn statement of accounts of such expense, and such officer shall receive as compensation, five cents per mile each way from his home to the Boys' Industrial School by the nearest route."

This section, as amended, provides first, for the payment of the *expenses* incurred in the transportation of a youth to the Boys' Industrial School, and second, the *compensation* to the officer conveying him. The expenses are to be those actually incurred in the transportation, while the compensation is fixed at five cents per mile each way. The officer is therefore entitled to receive payment out of the county treasury for the actual expenses incurred in transporting the youth to the Boys' Industrial School, and also mileage at the rate of five cents a mile each way.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

OHIO INSTITUTION FOR THE EDUCATION OF THE DEAF AND  
DUMB—EXPENSE OF PUPIL.

Expense of oculist for treatment of pupil charged to pupil or to county from which he came.

January 22d, 1906.

HON. J. W. JONES, *Supt., Ohio Institution for the Education of Deaf, etc., Columbus, Ohio.*

DEAR SIR:—In answer to yours of January 9th, I beg to say that in my opinion the expense for the special work of an oculist for treatment of a pupil in the Ohio institution for the education of the deaf and dumb, is such an incidental expense as is provided for under Sections 631 and 632 of the Revised Statutes and should be charged to the pupil or to the county from which he comes.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## PUBLIC BUILDINGS—CONTRACTORS' BOND.

Bond submitted with bid for contract for construction of public building should cover obligation of contract when entered into, as well as obligation to enter into contract in accordance with bid; certified check may not be accepted in lieu of bond.

December 21, 1906.

*To the Board of Trustees of the Ohio Institution for the Education of the Deaf and Dumb, Columbus, Ohio.*

GENTLEMEN:—Under date of December 19th, I received a communication from Mr. C. E. Richards, of the firm of Richards, McCarty & Bulford, Architects, submitting the following inquiries:

1. In advertising for letting of a state building, what percentage of the proposal should the bond called for in this advertisement equal?
2. Is it legal to require a certified check to be submitted with the bid in lieu of the bond?
3. Should the bond submitted with the bid be a permanent bond or just temporary bond to be taken up and a new bond executed if contract is entered into?

Section 202 and succeeding sections of the Revised Statutes only authorize the Attorney General to advise State officers, heads of State departments, members of the General Assembly and prosecuting attorneys in matters in which the State is either a party or directly interested. I regret that by reason of this limitation I am unable to advise Mr. Richards in this matter. I presume, however, the information requested in Mr. Richards' letter is on your behalf and I therefore address this communication to you.

In answer to the first inquiry I beg leave to say Section 785 of the Revised Statutes which fixes the conditions for the awarding of contracts for public buildings, provides that

“ \* \* \* no proposals shall be considered unless accompanied by a bond of the proposer, with sufficient sureties, conditioned that if the proposal be accepted, the party proposing will enter into a proper contract, and faithfully perform his or their contract or contracts, in accordance with said proposal, and the plan or plans, specifications, and descriptions, which are made a part of such contract or contracts:”

Nothing is said in the above provision as to the amount of the bond. It is a general custom, however, in the letting of contracts for public buildings under this section to require the bond to be 50% of the bid submitted.

Second. Certified checks should neither be required nor accepted in lieu of the bond authorized in the provision above quoted.

Third. The bond required to accompany the bid or bids of the proposer under the provision of Section 785 as above quoted, must contain the condition.

“ \* \* \* that if the proposal be accepted, the party proposing will enter into proper contract, and faithfully perform his or their contract or contracts in accordance with said proposal, and the plan or plans, specifications, and descriptions, which are made a part of such contract or contracts:”

The bond is therefore a permanent bond and no other bond is required from the contractor should his bid or proposal be accepted.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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OHIO HOSPITAL FOR EPILEPTICS — RECORDS OF.

Records of the Ohio hospital for epileptics are open for inspection by citizens of the state.

April 26, 1906.

DR. W. H. PRITCHARD, *Superintendent, Ohio Hospital for Epileptics, Gallipolis, Ohio.*

DEAR SIR:— I have yours of April 23, 1906, requesting my opinion upon the right of a citizen of this state to a list of the patients committed to the institution of which you are superintendent.

I find no statute specifically requiring the keeping of such a record as the correspondence submitted to me would indicate is kept, but whatever records are kept for the institution are comprised within Section 6027 of the Revised Statutes which reads as follows:

“All books, papers, vouchers, and contracts, pertaining to any of the benevolent institutions of the state, are the property of the state, and shall be carefully preserved.”

There appears to be no provision requiring or authorizing the custodian of these papers to make copies thereof and, in my opinion, you have no such duty.

The right of any citizen, however, to inspect the records is a different proposition. The records belong to the state and there appears no reason sufficient in law for not treating these records for the purposes of inspection as other records are treated. It has been held in this state that:

“Public records are the people's records. The officials in whose custody they happen to be are mere trustees for the people, any one of whom may inspect such records at any time, subject only to the limitations that such inspection does not endanger the safety of the record, or reasonably interfere with the discharge of the duties of the officer having custody of the same.”

Wells v. Lewis, 12 O. D. 171.

The suggestion that improper motives may inspire one seeking to exercise this right does not affect the question. Where the right exists the motive cannot be inquired into. *Cincinnati Volksblatt Co., v. Hoffmeister*, 62 O. S., 189. I advise therefore that you permit any one desiring so to do to inspect any of the records of your institution under such regulations as you may find necessary to adopt to protect the same and at such times as will not unreasonably interfere with the official use thereof.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## RECESS APPOINTMENTS—CONFIRMATION BY SENATE.

Effect of failure of senate to confirm appointment by governor during recess of general assembly to fill vacancy in board of managers of Ohio Agricultural experiment station; appointee holds until successor qualified; no vacancy in office because of such failure to confirm.

March 31st, 1906.

HON. CHARLES E. THORNE, *Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—Your letter of March 29th, containing an inquiry as to the effect of the failure of the senate to confirm certain recess appointments by Governor Herrick, is before me. I assume that these appointments were made to fill vacancies in the offices.

Section 12 of the Revised Statutes is as follows:

“In case of a vacancy in any office filled by appointment of the governor, by and with the advice of the senate, occurring by expiration of term or otherwise, when the senate is in session, the governor shall appoint a person to fill such vacancy, and forthwith report such appointment to the senate; and when the senate is not in session, and no appointment has been made and confirmed, in anticipation of such vacancy the governor shall fill the vacancy and report the appointment to the next session of the senate; and if the senate advise and consent to the same, the person so appointed shall hold the office for the full term; and if the senate do not so advise and consent, a new appointment shall be made.”

Governor Herrick was authorized under this section to make appointments to fill vacancies. The term for which the appointees should hold office was uncertain at the time of appointment, being dependent, so some extent, upon the subsequent action of the senate. If they should confirm the appointment, the appointees would hold office for the full term, but upon their failure to advise and consent, the statute provides that a new appointment shall be made. When such appointment has been made and confirmed by the senate, the new appointee takes office and the term of the appointees who were not confirmed by the senate thereupon ends.

The wording of the statute is not clear but it seems to indicate that the condition subsequent which determines the office, is the appointment of a successor rather than the failure of the senate to consent to an appointment. The failure to consent is a negative act which makes it the duty of the governor to perform the positive act of appointing a successor. The senate is nowhere given the summary power of removal. Section 12a governing the removal of appointive officers for inefficiency, etc., makes such removal in every case dependent upon the initiative of the governor. Any doubt as to the proper construction of Section 12 is removed by Section 8 of the statutes which is as follows:

“Any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the constitution or laws.”

Section 12 contains no provision excepting officers appointed by the governor from the operation of the general rule prescribed by section 8.

Section 12 quoted above refers to vacancies *in any office* filled by appoint-

ment of the governor by and with the advice and consent of the senate. The constitution, Article VII, Section 3, expressly provides that the governor may fill vacancies that may occur in certain of such offices until a successor to his appointee shall be "confirmed and qualified." The legislature would therefore, be without power to provide that the term of appointees to the offices referred to in Section 3 should cease on failure of the senate to confirm. By construing Section 12 to mean that the term of the appointee ceases when a new appointment has been made and confirmed, the statute is brought into harmony with the constitutional provision and may operate equally on all appointive offices.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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OHIO AGRICULTURAL EXPERIMENT STATION—LOSS OF FUNDS  
OF, BY FAILURE OF BANK.

Powers and duties of board of managers of Ohio agricultural experiment station regarding liquidation of obligations created by failure of bank containing funds of board.

August 1st, 1906.

HON. C. E. THORNE, *Director of Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—In response to your letter of July 30th, 1906, I beg to answer your several inquiries as follows:

1. There can be no question that it is the duty of your board to pay to the holders of your checks the proportionate amount received on account thereof from the receiver of the bank.

2. Inasmuch as the payees of the checks received such checks on July 6th, 1904, and on August 31st, 1904, and inasmuch as the bank did not close its doors until November 23d, 1904, there is no legal or moral obligation upon the board to pay any further sum to the payees of such checks than that paid by the bank. An unreasonable time had elapsed between the receipt of the checks and the closing of the bank doors so that the money represented by checks on November 23d, 1904, should properly be considered as the deposit of the payees of the check rather than the deposit of the experiment station.

3. I know of no reason why the national law deposit, or so much thereof as may be lacking by virtue of the failure of the bank, cannot be made good by the proceeds of sale of farm products.

4. Without an opportunity to examine the bond of the surety company I am inclined to the opinion that the surety company has only bound itself to pay in case the bursar of the experiment station improperly pays out or converts to his own use the funds of the station. The bond of the surety company should not be accepted unless such bond expressly provides for the deposit of the funds of the station in certain specified banks.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

OHIO AGRICULTURAL EXPERIMENT STATION — LOSS OF FUNDS OF,  
BY FAILURE OF BANK — LIABILITIES OF SURETIES  
OF FINANCIAL OFFICER MAKING DEPOSIT.

Sureties on bond of financial officer for Ohio agricultural experiment station not liable for loss arising from failure of bank in which funds of board of managers deposited by said officer.

August 8th, 1906.

HON. CHARLES E. THORNE, *Director, Ohio Agricultural Experimental Station, Wooster, Ohio.*

DEAR SIR:—In response to yours of August 7th, I beg to say that I do not know that there is any custom or precedent governing the question asked by you. Unless the deposit of public money, however is absolutely prohibited by law I do not think the financial officer's sureties would be liable if he, in good faith, deposited the money with the consent or knowledge of his superior officer. I think, therefore, that the bond should distinctly provide a liability arising from the failure of the bank.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

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GIRLS' INDUSTRIAL HOME — TERM OF OFFICE OF TRUSTEE.

Trustees of girls' industrial home serve until their successors are appointed and confirmed.

April 4th, 1906.

HON. T. F. DYE, *Superintendent of Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—In your letter of April 2d you inquire whether a member of the board of trustees of The Girls' Industrial Home whose term expired April 1st, 1906, can serve until his successor is appointed. I am of the opinion that he continues in office until his successor is appointed and confirmed.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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OHIO SOLDIERS' AND SAILORS' HOME — INSANE INMATE — AUTHORITY TO COMMIT TO STATE HOSPITAL FOR INSANE.

Probate judge of Erie county has authority to commit to state hospital for insane inmates of the Ohio soldiers' and sailors' home.

March 22d, 1906.

HON. A. B. HOWARD, *Supt., The Cleveland State Hospital, Cleveland, Ohio.*

DEAR SIR:—Your communication relative to the authority of the probate judge of Erie county to commit inmates of the Ohio soldiers' and sailors' home to the state hospitals for insane, is received.

In reply I beg leave to say that Sections (674-8), (674-9), and (674-10), of the Revised Statutes of Ohio provide the procedure by which inmates of the Ohio soldiers' and sailors' home who become insane shall be committed to the state hospitals for insane persons.

Under the above sections the probate judge of the county in which the home is located, when a proper affidavit is filed, is empowered and authorized to hear and determine the insanity of such inmate, as is provided for in accordance with Title 5, Chapter 9 of the Revised Statutes of Ohio; and if the probate judge shall determine, upon such examination, that any inmate of the Ohio soldiers' and sailors' home is insane, said inmate shall be enumerated in the quota of persons entitled to admission into the asylum for the insane from the county in which said inmate was a resident at the time of entering said home.

These sections further provide that in order to carry out the above provisions the probate judge of the county in which said home is located *shall have the same authority to act* and receive, and order paid the same fees and costs as the probate judge would have in the county in which such inmate was a resident before entering said home.

These provisions would clearly indicate that it is proper for the probate judge of Erie county to determine the question of sanity or insanity, and that the inmates committed to your institution under such proceedings should be received by you, and said inmates should be enumerated in the quota of persons entitled to admission into your institution from the counties in which said inmates resided at the time of entering said home; that all claims for clothing, provided for by law, should be charged by you to the counties in which said inmates resided at the time of their admission into the Ohio soldiers' and sailors' home.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### LABOR OF INMATES AND EMPLOYEES OF STATE HOSPITAL.

Labor performed by employes and inmates of state hospital for the insane on contract with third party for improvement, such labor not being provided for in specifications, should be charged for at market price, not cost price.

July 25, 1906.

HON. W. P. MAGRUDER, *Mechanical Engineer for Trustees of Dayton State Hospital, Columbus, Ohio.*

DEAR SIR:—Your letter of July 21st presents substantially the following state of facts: A contract was let for a public improvement at the Dayton State Hospital. During the progress of the work the contractor requested the engineer of the hospital to do certain lathe and forge work which was a part of the work contracted for. This work was done by employes or inmates of the institution. You desire to know whether such work should be charged for at the market price for such labor, estimated at 60 cents, or whether the institution can only charge the amount which such labor actually cost the institution, estimated at 7 cents per hour?

Bidders for contracts for improvements at public institutions presumably base their bids on the cost of labor in the outside market, unless it is specified

that the labor of inmates may be used to some extent. If, by arrangement with the superintendent, the successful bidder is permitted to use the skilled labor of inmates at a nominal expense his profits will be greatly increased. There could be no fair competition for work at public institutions if such a practice were permitted, since it is plain that a contractor having an understanding with the superintendent that he could utilize the labor of inmates, would have an unconscionable advantage over other bidders.

If a public improvement at a state institution is such that the labor of inmates can be utilized to any material extent the advertisement for bids should specify just what work will be done in that way. Where it is not specified in advance that certain labor and material shall be furnished by the institution I am of the opinion that such labor and material should be charged for at the market price for labor of equal efficiency.

The same rule should apply in cases where a contractor neglects to fully perform his contract and the work is completed by the labor of inmates of the institution.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### ABSTRACT OF TITLE TO CERTAIN REAL PROPERTY.

December 6, 1906.

DR. A. F. SHEPHERD, *Dayton State Hospital, Dayton, Ohio.*

DEAR SIR:—In accordance with your request, I have examined the abstract of title to a tract of land, 33x200 feet, the property of George Behr, situated on the Dayton and Wilmington pike in Van Buren township, Montgomery County.

In my opinion, the suit shown at Section 17 could in no way affect the title of a purchaser from George Behr, unless pursued to judgment against Behr prior to his conveyance of the property. The action being personal in its nature, the court could in no way assume jurisdiction of the real property of the defendant.

Taxes for the year 1906, amounting to \$4.66, are unpaid and a lien.

No examination has been made in the circuit or district courts of the United States for pending suits or judgments.

Subject to the exceptions above noted, I am of the opinion that the abstract shows a good and perfect title in George Behr to the premises, as described in the deed shown at Section 7, and in the caption of the abstract.

I beg to advise your board that if in their opinion the purchase of this tract is advisable, there can be no legal objection thereto.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### PAROLE—CHANGE IN MINIMUM PENALTY.

Act changing minimum penalty for burglary from five years to one year renders prisoner sentenced under law in original form eligible to parole after having served one year.



March 7, 1906.

HON. FRANK COOK, *Secretary Board of Managers, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your question is, whether the recent act of the legislature which changes the minimum penalty for burglary in certain cases from five years to one, operates to make prisoners sentenced under a former law eligible to apply for a parole after having served one year of their sentence.

That the legislature has the power under the constitution to pass laws creating in the board of managers the power to parole prisoners under sentence at the time of the passage of the act is settled in *State v. Peters*, 43 O. S., 629, 650.

The law authorizing parole of prisoners is not an interference by the legislature with the function of the judiciary. The parole of a prisoner does not abrogate or interfere with the judgment of the court which sentenced him. The state possesses the power to provide regulations for the safe keeping, proper punishment and control of prisoners, and that power is properly exercised through the legislative department.

Neither is the exercise of the power of parole an interference with the power vested in the governor to grant reprieves, commutations and pardons. A parole is none of these. While on parole the convict remains in the legal custody and under the control of the board, subject at any time to be taken back within the enclosure of the prison.

Such a law is not unconstitutional as retroactive for it does not interfere with the vested rights of any individual. It is not *ex post facto* for it merely makes possible a mitigation of the punishment of the criminal.

In *Re Kline*, 70 O. S., 25, decided that the repeal of a statute defining a crime and prescribing the punishment does not in any respect vacate or modify judgments rendered while the statute was in force. A statute purporting to do this would clearly interfere with the judicial power. But as pointed out above, the exercise of the power to parole is not an interference with the judgment of the court and may therefore operate on prisoners sentenced before the passage of the act.

The *Kline* case affirms the prior holding in the *Peters* case, that the statute conferring the power of parole is a mere "disciplinary regulation," and decides that as such it is subject to modification or repeal without violation of any right of the prisoner.

The application of this decision to the statute changing the penalty for burglary in certain cases to one year is to decide that the term of imprisonment of prisoners sentenced to five years imprisonment under the old law is not changed by the present law.

That the legislature could by appropriate legislation give the board power to parole prisoners sentenced for burglary under the old law, who had served but a single year of their sentence, is in view of the above decisions not open to doubt. It only remains to be determined then whether the legislature has expressed an intention to give the board this power.

In the first place does Section (7388-9) R. S., express an intention to limit the class of those eligible to parole to those who had served, or who might thereafter serve the *minimum term provided by law at the time they were sentenced*, or does it express an intention to admit within this class those who might serve a term thereafter fixed by law as the minimum penalty for the offence of which they were convicted? In the latter case the passage of a law changing the minimum term for any crime would, in itself, be sufficient to affect the power of the board to parole prisoners convicted of that crime.

Which interpretation of Section (7388-9) is most consistent with its terms

and best adapted to effect the main purpose of the act? Clearly the purpose of the legislature in limiting the class eligible to parole was to prevent the board of managers from releasing criminals who had not served the term fixed by the legislature as the shortest commensurate with the crime. It was to prevent the absolute substitution of the discretion of the board for the judgment of the legislature. It is equally clear that the legislature intended that after a convict had served such minimum term his further imprisonment should depend upon and be subject to the action of the board.

The present legislature by changing the minimum term of imprisonment for burglary from five years to one has clearly manifested its belief that in many cases one year is a sufficient punishment for this crime. The judgment of the legislature as to the necessary minimum penalty has changed. Assuming that the liberal construction of Section (7388-9) is correct, the number of prisoners who may be paroled by the board may be increased, but there has been no enlargement of the discretion of the board. The class of convicts subject to the action of the board remains the same, i. e., those who have served a minimum term fixed by the legislature.

The evil which the recent act was intended to prevent—the too severe punishment of certain persons convicted of burglary—will be more completely remedied by extending to the board the same power as to convicts now in the penitentiary which it will undoubtedly have as to convicts sentenced hereafter. That it is in accordance with the intention of the legislature that the present act should have such operation is evident. The change in the law must have resulted from a belief that many prisoners now serving their sentences had been too severely punished, and if by its action the legislature could remedy existing wrongs as well as prevent such wrongs in the future, it must be presumed that they intended to do so.

The language of the statute not only permits such liberal construction but seems, in itself, to suggest it. The material portion of the act is as follows:

“That said board of managers shall have power to establish rules and regulations under which any prisoner who is now or hereafter may be imprisoned under a sentence other than for murder in the first or second degree, who may have served a minimum term provided by law for the crime for which he was convicted (and who has not previously been convicted) of felony, and served a term in a penal institution,  
\* \* \* may be allowed to go upon parole.”

If it had been intended to limit the class subject to parole to those who should thereafter serve the minimum term provided by laws in force at that time it seems almost certain that language clearly suggesting such intention would have been used. If the effect of future changes in terms of imprisonment was not in the mind of the legislature at all the natural language would have been “the minimum term.” There could not have been more than one minimum term for any one offence provided by law at the time of the passage of the act. The use of the indefinite article “a” indicates that the legislature had in mind different minimum terms, i. e., minimum terms under existing laws and minimum terms under laws to be passed in the future.

The prisoner convicted of burglary who has served one year of his sentence at the present time has “served a minimum term provided by law for the crime for which he was convicted.”

For the reasons above stated I am of the opinion that the recent act of the legislature, which changes the minimum penalty for burglary from five years to one year in certain cases, operates to make prisoners sentenced under the

former law for offenses for which the minimum term is now one year, eligible to apply for a parole after having served one year of their sentence.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### PAROLE—LIFE SENTENCE.

Prisoner serving life sentence under conviction of murder in first degree eligible to parole only upon proof of innocence established beyond a reasonable doubt.

November 26, 1906.

HON. O. B. GOULD, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your communication inquiring whether or not a prisoner serving a life sentence in the Ohio Penitentiary is eligible to parole, is received. In reply I beg leave to say that Section 6808, Revised Statutes, provides,

“no person convicted of murder in the first degree shall be recommended for pardon by the board of pardons, or for parole by the board of managers of the penitentiary, except upon proof of innocence established beyond a reasonable doubt.”

Under this provision all prisoners convicted of murder in the first degree and serving a life sentence are eligible to parole on condition that their innocence is established beyond a reasonable doubt.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### BREACH OF CONTRACT FOR INSTALLATION OF BOILER—RIGHTS AND DUTIES OF MANAGERS OF OHIO STATE REFORMATORY AS TO.

March 14, 1906.

HON. FRED S. MARQUIS, *Secretary Board of Managers, Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR:—Your letter of March 10th, in reference to a contract between the board of managers of the Ohio State Reformatory and the Atlas Engine Works, has been given careful consideration.

From the facts stated in your letter it appears that the contractor has not only failed to prosecute the work with reasonable promptness but also that the two boilers already completed fail to comply with the specifications as to efficiency; that tests have been made which demonstrate their inefficiency; that the contractor has failed to show that they complied with the specifications by another test although opportunity for such test has been afforded.

What action it will be best for you to take depends to some extent upon the practical question whether you can repair the old boilers so as to continue their use until new boilers can be installed by another company. If this can be done and the boilers already installed are so unsatisfactory that it will suit you



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... to have them replaced than to use them in connection with the two boilers yet to be constructed, written notice should be given by the mechanical engineer to the company to take down its work and remove the same as "unsound, improper and failing to conform to the specifications in that they do not, and upon test failed to develop 265 horse power each, etc." detailing their defects. (Article 4 of contract.)

The mechanical engineer should also file a written certificate with the board of managers stating that the neglect of the contractor to proceed with the work and the failure of the work as done to comply with the specifications (specifying defects) justify the board in terminating the employment of the contractor and employing others to complete the work. (Article 5.)

Written notice from the board should also be served upon the contractor referring to the receipt of the certificate of the mechanical engineer and stating that unless the boilers are tested and proved to comply with the specifications within five days, the board will make a requisition on the contractor to remove the boilers, or so much thereof as the board deems advisable, and to furnish such specified force and such specified material as the board deems necessary to the fulfillment of the contract; stating also that unless such requisition is complied with within 15 days the board will terminate the employment of the contractor, tear down such part of the work as the mechanical engineer decides must be removed in order to permit the construction of boilers which will comply with the specifications, and themselves furnish or employ another contractor or contractors to furnish this proposed labor and material; stating also that the present contractor will be held responsible for all loss sustained by reason of the default of such contractor and for all damages liquidated or unliquidated, to which the board is entitled under the terms of the contract. 792 R. S., Sec. 5 of contract. If test is not made within five days the requisition should be made as outlined above.

Before serving any notice upon the contractor it would be advisable for the board to lay the entire matter before the governor, auditor of state and secretary of state in order to make certain that they will approve whatever action the board decides to take. Section 792 R. S., prescribes the necessary procedure in cases like the one before us. By referring to this statute you will see that the written consent of the above officers is a prerequisite to the right of the board to remove improper materials and employ an additional force. After such written consent has been obtained and 15 days after the service of the requisition the board may proceed to make a new contract with another company for the completion of the work.

The board may, if it prefers, utilize the boilers already built, and upon notice as indicated above, may employ another contractor to put in the two additional boilers, holding the present contractor responsible for damages sustained by the board of managers by reason of the unexcused delay of the contractor and by reason of the difference in efficiency between the boilers actually constructed and those called for by the specifications. In each case the contract for completion of the work must be made in the manner prescribed by Section (782-5) R. S.

The board is entitled to recover \$10.00 for each day of delay not caused by the board's own neglect unless such delay was excused by reason of subsequent negotiations extending the time of completion. The board is also entitled to recover as damages the difference between the necessary cost of installing the boilers in accordance with the specifications and the contract price with the Atlas Engine Company. The amount of such damages cannot of course be ascertained until you have installed the new boilers. No action in the courts should be taken by you before that time.

If this letter does not give you all the information you desire, please advise me.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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RECESS APPOINTMENT—FAILURE OF SENATE TO CONFIRM.

Failure of senate to confirm appointment during recess of general assembly by governor to fill vacancy in board of managers of Ohio state reformatory does not terminate tenure of office of incumbent so appointed; such incumbent may hold until his successor is confirmed and qualified.

March 26, 1906.

HON. FRED S. MARQUIS, *Secretary Board of Managers, Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR:—Your letter of March 24th states that Messrs. H. F. Coates, Judson Vincent and J. W. Dover were appointed members of the board of managers of the Ohio State Reformatory by Governor Herrick during the interim between the present session of the legislature and the one last preceding it; that the senate has recently voted not to confirm their appointment. You ask whether or not there is a vacancy created by the act of the senate or whether these gentlemen are still entitled to serve until their successors have been duly confirmed and qualified?

Article, VII, Sections 2 and 3 of the constitution are as follows:

Sec. 2. "The directors of the penitentiary, shall be appointed or elected in such manner as the general assembly may direct; and the trustees of the benevolent, and other state institutions, now elected by the general assembly, and of such other state institutions, as may be hereafter created, shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by yeas and nays, and entered upon the journal of the senate."

Sec. 3. "The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the general assembly, and, until a successor to his appointee shall be confirmed and qualified."

The above appointees therefore are not displaced by reason of the failure of the senate to confirm them.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

RECESS APPOINTMENT — EFFECT OF RECONSIDERATION BY  
SENATE OF CONFIRMATION OF.

April 2, 1906.

HON. H. F. COATES, *Member Board of Managers, Ohio State Reformatory, Alliance, Ohio.*

DEAR SIR:—I have before me your letter of March 30th with reference to the action of the senate in reconsidering its confirmation of certain appointments. As I have already advised several members of your board, the failure of the senate to confirm does not of itself end the tenure of the present appointees.

The question of the right of the senate to reconsider within the time permitted by its rules, the confirmation once made, will only arise in case a new appointment to the office is hereafter made and confirmed by the senate. From the facts before me at this time I would not be warranted in expressing an opinion as to the effect of the reconsideration of its action by the senate.

Very truly your,

WADE H. ELLIS,  
*Attorney General.*

RECESS APPOINTMENT — EFFECT OF RECONSIDERATION BY  
SENATE OF CONFIRMATION OF.

April 2, 1906.

HON. J. W. DOVER, *Member Board of Managers, Ohio State Reformatory, McCon-  
nellsville, Ohio.*

DEAR SIR:—In your letter of March 28th you ask whether the senate has a right to reconsider the confirmation of your appointment as one of the board of managers of the Ohio State Reformatory. As I have already advised several members of your board, the failure of the senate to confirm does not of itself end the tenure of the present appointees.

The question of the right of the senate to reconsider, within the time permitted by its rules, a confirmation once made, will only arise in case a new appointment to your office is hereafter made and confirmed by the senate. From the facts before me at this time I would not be warranted in expressing an opinion as to the effect of the reconsideration of its action by the senate.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

OHIO STATE REFORMATORY — SALARY OF SUPERINTENDENT OF.

Whether or not provision of the state salary law, 98 O. L. 365, fixing salary of superintendent of Ohio state reformatory, affects compensation of the then incumbent of said office, depends upon whether said incumbent was employed for a fixed term or for an indefinite period.

April 13, 1906.

HON. FRED S. MARQUIS, *Secretary Board of Managers, Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR:—Your letter of April 4th requests my opinion as to the effect of the Ervin law upon the salary of the superintendent of the Ohio State Reformatory.

Section (7388-20) R. S., provides for the appointment by the board of managers of the reformatory of a superintendent "who shall hold his office during the pleasure of the board, subject to removal for cause after opportunity shall have been given him to be heard upon written charges."

Section (7388-22) provides that,

"The superintendent shall receive an annual salary to be fixed by the board of managers, payable by the treasurer of state, on the warrant of the auditor, in equal monthly installments; and shall be furnished the necessary fuel and provisions for himself and family under the direction of the board."

The Ervin law fixes the salary of the superintendent at \$2400.00 per annum, but it is provided in Section 4 that,

"This act shall take effect from and after its constitutional enactment, provided that it shall not operate to affect the compensation of any officer or employe named herein during his existing term, but shall operate during any lawful extension of such existing term."

The constitutional provision prohibiting changes in the salary of an officer during an existing term probably does not apply to officers appointed for an indefinite time subject to removal by the appointing power. (*State v. Massillon*, 24 O. C. C., 249; 2 C. C. N. S., 167; *Lexington v. Renick*, 105 Ky., 779.) But the policy of the legislature has been to extend to other officers and employes the protection afforded by the constitution to salaried officers having a definite term.

Section 126 of the municipal code, referring to "officers, clerks and employes," and Section 4 of the Ervin law, are examples of this policy.

An employe subject to removal by his employer has, strictly speaking, no "term of office"; but since the legislature expressly mentions employes, and prohibits changes in their "compensation" during an existing "term," it is evident that employes may have terms of employment within the meaning of the word as used in this statute. I am of the opinion that an employe has a term within the meaning of this statute in cases where there is an understanding between the employer and the employe that he shall serve for a definite term. If there be no such understanding, but the employe is appointed for an indefinite time, subject to removal at any time, he has no term of employment. If, therefore, it was understood by the board of managers and the superintendent of the Ohio State Reformatory at the time of his appointment or reappointment, that he should serve for a definite term, the Ervin law will not become operative as to him until the expiration of such term. If there was no such understanding he should be paid at the statutory rate from the date when the Ervin bill became a law.

You also ask whether the board of managers has the right under Section (7388-20) to increase or decrease the annual compensation of the superintendent at the beginning of a new fiscal year.

The legislature, by the recent law, has itself fixed the compensation of the superintendent of the reformatory, and no power remains in the board of managers to increase or decrease the compensation so fixed.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## CONTRACT FOR INSTALLATION OF BOILER—CHANGE IN.

July 6, 1906.

*Board of Managers Ohio State Reformatory, Mansfield, Ohio.*

GENTLEMEN:— You desire to know whether, in my opinion, you have the power to accept the proposal of the Atlas Engine Works, dated June 29th, 1906, in which said company proposes to install two 350 horse power boilers instead of the two 265 horse power boilers yet to be installed as required by the original contract.

The proposal involves no increase in cost beyond the amount fixed by the original contract. The company proposes to make this substitution because the two boilers installed have failed to meet the specifications as to horse power.

Section 786 R. S. provides in substance, that no change in the plans or specifications of any public improvement, the cost of which change will exceed \$1000, shall be made until the proposed change has received the approval of the Governor, Auditor and Secretary of State, etc.

“But all changes in the contract of less than \$1000 shall be by contracts in writing with full specifications and estimates and shall become a part of the original contract and be filed with the auditor of state with the original contract; but the amount of such change in the contract, plans, descriptions, bills of material or specifications less than \$1000 shall not in the aggregate increase the cost of construction of said institution, asylum, building or improvement more than 2½% of the original contract price or cost.”

I believe this statute authorizes you to accept in substance, the proposal of the Atlas Engine Works. The details of the proposed change should be set out in a supplementary contract in accordance with the provisions of the statute just quoted.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## RECESS APPOINTMENT—COMPENSATION OF APPOINTEES FAILING OF CONFIRMATION.

State salary law, 98 O. L. 365, regarding salary of members of board of managers of Ohio state reformatory, does not affect compensation of incumbents appointed during recess, failing of confirmation by senate, though such incumbents were “reappointed” by governor after adjournment of general assembly.

October 9, 1906.

HON. FRED S. MARQUIS, *Secretary Board of Managers. Ohio State Reformatory, Mansfield, O.*

DEAR SIR:— Your letter of October 5th states that two members of the Board of Managers of the Ohio State Reformatory were appointed by Governor Herrick while the Senate was not in session. I assume that these appointments were made to fill vacancies in the office. The appointments were reported to but were not confirmed by the Senate at its last session. Subsequent to the adjourn-



ment of the Senate the same gentlemen were re-appointed by Governor Harris. You desire to know whether they are entitled to the salary fixed by the act of April 2nd, 1906, (98 O. L. 365), which provides:

Sec. 4. "This act shall take effect from and after its constitutional enactment; provided it shall not operate to affect the compensation of any officer or employe named herein during his existing term, but shall operate during any lawful extension of any such existing term."

A similar prohibition is found in Article II, Section 20, of the constitution.

It therefore becomes material to determine whether the existing term of the officers in question began prior to the enactment of the law increasing the salary attached to their offices.

Article VII, section 3 of the constitution, referring to directors and trustees of state institutions is as follows:

"The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the general assembly, and until the successor to his appointee shall be confirmed and qualified."

Clearly the term of office of an appointee, under this section, does not cease upon the failure of the Senate to confirm his appointment. By the express terms of the constitution he continues in office until his successor has been confirmed and qualified. In case the Senate does not advise and consent to the original appointment, it is the duty of the Governor to make a new appointment. (Sec. 12, R. S.) But if the Governor fails to make a new appointment while the Senate is in session, or if the Senate fails to confirm a new appointment actually made, the new appointee cannot be confirmed and qualified until the next session of the Senate.

The re-appointment by Governor Harris is, then, of no effect as a recess appointment since there was no vacancy at the time such re-appointment was made. As a new appointment, made because of the failure of the Senate to confirm the former appointment, it will not become effective until confirmed by the Senate. At the present time, therefore, the two members in question, being in office by virtue of an appointment made before the salary law was passed, for a term which has not yet expired, are not entitled to the increased salary.

It remains to be considered whether, in case their re-appointment should be confirmed by the Senate, they will be entitled to the increase after the date of confirmation.

The re-appointment by the Governor should be for the unexpired term. Section (7388-17) R. S. provides that,

"Whenever a vacancy occurs in the board of managers otherwise than by the expiration of the term of office of a manager, such vacancy shall be filled by appointment by the governor for the unexpired term by and with the advice and consent of the senate."

Other provisions of this statute show that it was the intention of the legislature that but one vacancy should arise by expiration of term in any one year.

It is plain then that no new term of office will be created by the confirmation of Governor Harris' appointments. The two members in question will be re-appointed to fill their own unexpired terms. It has been held that a person in office at the time a salary law is passed does not become entitled to the benefit

of the new law by resignation and re-appointment to fill the vacancy caused by his own resignation. (State v. Hudson Co., 44 N. J. L., 388.)

Nor is it within the power of the legislature to evade the constitutional prohibition by rejecting a recess appointment made before the salary law was passed and then confirming a new appointment of the same official for the unexpired term.

I am, therefore, of the opinion that the appointees in question will not be entitled to compensation under the new law.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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GUARDIAN — OF INMATE OF SOLDIERS' HOME — AUTHORITY  
TO APPOINT.

Probate court of Erie county may appoint non-resident of said county as guardian of incompetent inmate of state soldiers' home.

September 27, 1906.

GENERAL J. W. R. KLINE, *Commandant State Soldiers' Home, Sandusky, Ohio.*

DEAR SIR:— Your letter of September 24th requests my opinion as to whether the probate court of Erie county has authority to appoint persons residing in other counties of the state to act as guardians of members of the Home who are citizens of Erie county, and who through age, imbecility or other causes are incapable of managing their own affairs.

Section 6304, R. S., declares that laws relating to guardians of minors shall be applicable to guardians of idiots, imbeciles and lunatics, except as otherwise provided. But there is no express requirement in the statutes that the guardians of either class shall be residents of the same county as their wards.

Clearly there is no vital objection to the selection of a non-resident guardian, since by the terms of Section 6267, R. S., a person appointed by will, by a father or mother of any child is "entitled to preference in appointment over all others without reference to his place of residence."

It is true that Section 6272, R. S., names removal from the county as one of the causes which justify the probate judge in removing a guardian from office, but the probate judge has absolute discretion in the matter. Both statutes impliedly recognize that there may be circumstances under which the disadvantage arising from non-residence may be more than counterbalanced by the personal qualifications of a particular appointee. Such circumstances, of course, exist before, as well as after appointment, and the probate judge should have the same power to exercise his discretion in making an appointment that he unquestionably has in making removals.

I am, therefore, of the opinion that your question should be answered in the affirmative.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## GARNISHMENT—STATE NOT SUBJECT TO.

State cannot be garnisheed for wages of employes.

June 8, 1906.

MR. THOMAS J. COLLINS, *Financial Officer, O. S. & S. O. Home, Xenia, Ohio.*

DEAR SIR:—In response to yours of June 1st, I beg to say that my predecessor rendered to the steward of the Ohio Hospital for Epileptics an opinion as follows:

Columbus, Ohio, January 4, 1904.

H. C. BARNES, ESQ., *Steward Epileptic Hospital, Gallipolis, Ohio.*

MY DEAR SIR:—In response to your inquiry as to whether you should, as Steward of the Hospital for Epileptics pay any attention to cases in which the wages of employes of that institution are garnisheed, I beg to state that you should not recognize garnishee process. The State is a sovereign, and is not subject to be sued or to the process of garnishment. No person has a right to receipt for wages except the employes themselves.

This proposition is of universal application, and I do not deem it necessary to cite authorities upon the subject. (See, however, 8 Am. & Eng. Enc. of Law, page 1135, et. seq., where the subject is fully discussed.)

I am fully cognizant of the decision of the court in the case of Newark v. Funk, 15 O. S., 462, in which the court held that a municipality was not free from the process of garnishment. That case, however, does not militate in any particular against the principle above announced.

Very truly yours,

J. M. SHEETS,  
*Attorney General.*

I beg to add that after the above opinion was rendered to the steward of the Ohio Hospital for Epileptics a creditor of one of the employes of that institution sued an employe and attempted to garnishee the steward for wages owing the employe. The steward did not respond to the proceedings and thereafter was sued by the creditor and judgment taken against him by default. I caused the action to be appealed to the court of common pleas and after a full hearing in that court it was determined that the wages of an employe of the state were not subject to garnishment and that the steward of a public institution was not obliged to respond to a writ of that kind.

The case mentioned was never reported and no further proceedings were had therein. I beg to advise therefore that, in my opinion, you, as an officer of the State, are not subject to proceedings in garnishment where the action primarily lies against and seeks to recover from an employe of the State.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## OHIO AND MIAMI UNIVERSITIES — RIGHTS OF, UNDER ACT DEFINING POLICY OF STATE, ETC.

Act in 98 O. L., 309, defining policy of state as to maintenance of universities, does not prohibit Ohio and Miami universities from giving such instruction in engineering as is usually given by non-technical colleges.

July 16, 1906.

DR. ALSTON ELLIS, *Athens, Ohio.*

DEAR SIR:— In reply to your letter of July 9th I beg to advise you that the provisions of H. B. No. 45 (98 O. L., 309) do not, in my opinion, prohibit Miami University or Ohio University from giving rudimentary instruction in electrical engineering as a part of the work of the department of physics in the college of liberal arts, nor from giving similar instruction in civil engineering in the department of mathematics.

The purpose of the act referred to, as I understand it, is to prevent Ohio and Miami universities from entering into competition with the engineering departments of the Ohio State University, in order that the state funds may hereafter be applied to the complete equipment of one institution for technical education rather than distributed among three competing institutions. It was not necessary to the accomplishment of this purpose to prohibit Miami or Ohio universities from continuing such technical instruction as is usually given by non-technical colleges as a part of courses leading to the degree of Bachelor of Arts. If I am right in holding that the ultimate purpose of the statute is to insure the economical expenditure of state funds then surely the statute should not be given a construction which would result in preventing two institutions, which are still maintained at the expense of the state as colleges of liberal arts, from giving such instruction as is usually considered a necessary part of the course of instruction in such institutions.

As to your second question, I am of the opinion, that the expense of courses of technical instruction which are prohibited by H. B. No. 45, cannot be defrayed out of any funds provided by law.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## COMPATIBILITY OF OFFICES.

Offices of prosecuting attorney and auditor-secretary of Ohio University compatible.

November 17, 1906.

HON. ISRAEL M. FOSTER, *Trustee Ohio University, Athens, Ohio.*

DEAR SIR:— Your communication under date of November 15th, inquiring whether or not there is any prohibition against one holding the office of prosecuting attorney and at the same time being auditor-secretary of the Ohio University, is received.

In reply I beg leave to say the duties of the two offices are not incompatible, and I am of the opinion that the same person may hold both offices.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

( To Members of the General Assembly.)

SPECIAL RELIEF BILLS.

Special relief bills are unconstitutional.

January 4, 1906.

HON. FRANKLIN BRIGGS, *House of Representatives, Columbus, O.*

DEAR SIR:— You have submitted to me a proposed house bill entitled "An Act for the relief of Conley E. Guilford, Treasurer of Fulton County, Ohio," and you inquire whether, if such bill in the form presented should be enacted as a law, such law would be in contravention of the provisions of the constitution of Ohio.

The bill proposes to authorize the commissioners of the county of Fulton to allow a bill for the sum of \$701.50 to reimburse Conley E. Guilford for the loss of said amount sustained by him as Treasurer of Fulton county, by reason of a burglary of his office. And this proposed bill seeks to authorize the County Auditor to issue an order on the county treasury for the reimbursement of Guilford for the loss of said money.

On January 30th, 1904, the question of the constitutionality of a special relief bill was submitted to me by the committee on county affairs of the House of Representatives of the 76th General Assembly, the particular bill being for the relief of one Dwight A. Austin, Treasurer of Geauga County, Ohio, by which bill it was sought to reimburse Mr. Austin for public moneys lost by him as County Treasurer through failure of a certain banking house with which said moneys were deposited.

In the opinion rendered by me to the committee on county affairs, after an extended examination of authorities, I held the proposed relief bill to be unconstitutional for the following reasons:

First: That it violated section 2 of article I of the constitution which declares that government is instituted for the "equal protection and benefit" of all the people.

Second: Because the proposed bill violated the provision of section 26 of article II, which ordains that all laws of a general nature shall have a uniform operation throughout the state.

Third: That said proposed bill violates section 28 of article II of the constitution which declares that the General Assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts.

Subsequent to the date of the above opinion the Supreme Court of Ohio in *State ex rel. Karg v. Commissioners of Crane Tp.*, 71 O. S., 496, unreported, affirming the decision of the Circuit Court of Wyandot County, declared special relief bills to be unconstitutional. Your proposed bill, therefore, being a special relief bill, if enacted into a law, would, in my opinion, be in contravention of the provisions of the constitution of the State of Ohio.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## JUSTICE OF THE PEACE—CONSTITUTIONAL CLASSIFICATION OF.

Justices of the peace are neither state nor township officers, within the meaning of the constitution.

February 14, 1906.

HON. U. S. BRANDT, *Senate Chamber, Columbus, Ohio.*

DEAR SIR:—Your communication dated February 9th in which you request an opinion as to whether, within the meaning of the constitution, justices of the peace are state officers or township officers, is received. In reply I beg leave to say that while section 1 of article IV of the constitution vests a part of the judicial power of the state in justices of the peace, yet the constitution contains no provision classifying justices of the peace as either state, county or township officers. Neither has the general assembly classified them by statute further than to fix the limits of their jurisdiction.

Section 9 of article IV of the constitution provides that justices of the peace shall be elected by the electors in each township in the several counties, and the Supreme Court of New York has held under a similar provision in the case of *Gertum v. Supervisors*, 109 N. Y., p. 170, that justices of the peace are town (township) officers. The general assembly of Ohio in the enactment of section 1442 of the Revised Statutes of Ohio, did not evidently regard justices of the peace as township officers, in as much as the section provides for the election of township officers and *justices of the peace*, and fixes the time when township officers shall begin their respective terms of office but makes no provision for the beginning of the term of justices of the peace.

I am therefore of the opinion that within the meaning of the constitution and statutes of Ohio justices of the peace are not regarded as either state or township officers, and as the biennial election amendment provides that state and county officers are to be elected in the even numbered years and all other elective officers in the odd numbered years, justices of the peace will be elected in the odd numbered years.

Very truly yours.

WADE H. ELLIS,

*Attorney General.*

## HEALTH OFFICER—ABOLITION OF OFFICE OF, DURING TERM OF INCUMBENT.

Village council, having created office of village health officer by ordinance, may subsequently, during the term of incumbent of said office fixed thereby, abolish said office by resolution and terminate such term.

February 28, 1906.

HON. WM. ROLF, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—I hand you herewith the several communications which were left with this department by you in my absence with a request for an opinion thereon.

In compliance therewith I beg to say that from the facts as shown by the enclosed correspondence, resolutions and ordinances, on July 16th, 1903, the village council of Collinwood adopted an ordinance abolishing the board of health and providing for a health officer in lieu thereof. Dr. Williams was thereupon

appointed as health officer and, in September, 1905, was reappointed for a term of one year to expire September 11th, 1905. This appointment was confirmed.

On January 8th, 1906, the council, by resolution, abolished the office of health officer and substituted therefor a board of health and thereupon Dr. McClenahan was appointed health officer, which appointment was confirmed. Dr. Williams' term, it would thus appear, would not expire until September 11th, 1906, while the new health officer, Dr. McClenahan, was appointed on the 8th day of January, 1906. The validity of Dr. McClenahan's appointment would depend upon whether or not the council could abolish the office of health officer and substitute therefor a board of health.

It has been repeatedly held in this state by our Supreme Court and other courts, that an officer whose term of office is dependent upon the existence of some ordinance of a city would have his term of office terminated if the office were abolished by repeal of the ordinance. The same rule prevails with regard to offices created by ordinance as applies to offices created by statute. If a statute is repealed the office is thereby vacated. It would therefore appear that the council did possess the power exercised by it to remove the health officer by repealing the ordinance by which his office was created, and substituting therefor a board of health, and Dr. McClenahan should be considered as the rightful appointee as health officer.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

#### GRANT OF EXEMPTION FROM TAXATION IS A CONTRACT THE OBLIGATION OF WHICH MAY NOT BE IMPAIRED.

House bill number 705, providing that certain lands forever exempted from taxation by act incorporating Miami University shall be subject to taxation violates provisions of federal and state constitutions respecting impairment of the obligation of contracts.

March 5, 1906.

HON. R. M. BILLINGSLEA, *House of Representatives, Columbus, Ohio.*

DEAR SIR:— You have requested an opinion as to the constitutionality of House Bill No. 705, relating to lands of the Miami University. The bill contains, among others, the following provisions:

"All other lands and lots of said university lands and lots now under lease, or which may be leased, together with all the dwellings, buildings, and other improvements thereon, or which may hereafter be placed thereon, shall be subject to state taxes, which shall be levied and collected in the same manner as state and county taxes are levied and collected and by the same officials."

The Supreme Court of this state in the case of Matheny v. Golden, Treas., 5 O. S., 361, held that where the state, by an act incorporating the Ohio University, vested in that institution two townships of land for the support of the university and in the same act authorized the university to lease said lands for ninety-nine years, renewable forever, and provided that lands thus to be leased should forever thereafter be exempt from all state taxes, the acceptance of such leases at a fixed rent or rate of purchase by the lessees constituted a binding contract between the state and the lessees.

"A subsequent act of the legislature levying a tax on said lands is a 'law impairing the obligation of contracts' within the purview of the tenth section of the first article of the constitution of the United States and is therefore *pro tanto*, null and void."

In the case of *Kumler et al. v. Henry Traber*, Treas. of Butler County, 5 O. S., 443, the question of the constitutionality of legislation taxing lands leased by the Miami University was before the court and *Matheny v. Golden* was followed.

The bill also repeals the provision of the original charter which requires lessees to "pay 6 per cent per annum on the amount of their purchase during the continuance of their lease;" and further provides that the "lessees (leases) of said university lands and lots shall hereafter be held to be and to be equal to a title in fee simple." In other words, the act stops the payment of rents to the university under existing leases and vests a title in fee simple in the present lessees.

Section 15 of the original act of incorporation (7 O. L., 190) reserves to the legislature power to "alter, limit or restrain in any of the powers by this act, vested in the said company, as shall be necessary to promote the best interests of the said university, with all necessary powers and authority for the better aid, preservation and government thereof."

The above provisions of House Bill No. 705 clearly impair the obligation of the charter contract with the university unless they are a valid exercise of the powers reserved by the section just quoted. The lands were vested in the corporation by the act of the legislature and an executed grant is a contract within the protection of article 1, section 10, of the federal constitution.

*Fletcher v. Peck*, 6 Cranch, 87;

*Franklin Co. Grammar School v. Bailey*, 62 Vt. 476.

The reserved power to alter, limit or restrain does not, however, enable the legislature to appropriate to the state or to individuals property which has been vested in the corporation for the support of the university, nor does it enable it to divert from the uses declared by congress land vested in the state legislature by congress "for the purpose of establishing an academy." The fact that in lieu of said lands and the rentals thereof an annual payment of "an amount equal to 6 per cent. on the valuation of said university lots and lands as now fixed or which may hereafter be fixed" is provided, does not affect the constitutionality of the act. It is a substitution of another source of income which may be of greater or less value for property which is itself charged with a definite trust.

In the case of *Trustees of Vincennes University v. The State of Indiana*, 14 How. 268, the facts were similar to, but not identical with those involved in this question. The majority of the court held that title to the lands set apart for the use of a seminary of learning in Vincennes never vested in the state, but was in abeyance from 1804 when the dedication to this use was made by congress, until 1806 when the board of trustees of Vincennes University was incorporated by the Indiana legislature, at which date the title vested in said corporation. There was no direct conveyance by the federal congress to the state legislature upon an express trust, as was the case with the lands of Miami University, but the lands were nevertheless held to be the subject of a trust which the state had no power to defeat.

"The legislative power of the Territory and State, in advancing the public interests was bound to afford all the facilities necessary to carry out and secure the benign objects of congress in making these township reservations. \* \* \* The donation in no sense proceeded from the



State. It was made by the federal government and it is no more subject to State power than if it had been given by an individual for the same purpose. \* \* \* The complainants by accepting and exercising their corporate powers, acquired certain rights, and made certain contracts, which could not be impaired by the legislature. They constituted an eleemosynary corporation, in which the state has no property, and can exercise no power to defeat the trust."

Trustees for Vincennes University v. Ind., 14 How. 277:

Chief Justice Taney in a dissenting opinion held that the title of the land passed directly from the United States to the State as trustees, but says, page 278:

"This reservation from sale \* \* \* undoubtedly dedicated them to the uses for which they were reserved; and they cannot be appropriated by the State to any other purpose."

The act incorporating Cincinnati college in this state contained the following provision:

"This act shall be subject to such alterations as the general assembly may from time to time see proper to make."

The opinion of the court in the case of Ohio v. Neff, 52 O. S. 375, 405 and 406, which dealt with an attempted alteration of the charter of this college fully answers the question of the constitutionality of the bill before me.

"Whether The Cincinnati College is regarded as the owner in its own right of the property donated to it, or as the representative of the donors, charged with the execution of their purpose, is not material; in either view the property is private as contradistinguished from public, and as such is within the protection of that provision of the constitution which declares private property to be inviolate.

"We now come to the consideration of the provision in the charter of The Cincinnati College, which reserves to the general assembly the right of amendment. This reservation would be wholly unnecessary if The Cincinnati College had no rights of property which the general assembly was bound to respect. If the legislature at its will could divest this corporation of its property, the legislative control of the institution would be absolute, for by taking away its entire property rights, all effectual corporate action would be at once paralyzed. Thenceforward it would be powerless to advance the purposes of its creation.

"The authorities agree in holding that the legislative power of amendment and alteration thus reserved in charters, is not absolute, although its boundaries are not yet established.

"Whatever difficulties have been encountered by the courts in ascertaining the limits of this reserved legislative power, they concur in denying that under it, the legislature can strip a corporation of its right of property.

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, *the vested*

*rights of property of corporation in such cases are surrounded by the same sanctions and are as inviolable as in other cases.'*

"If good faith is to be kept with these donors, we must deny to the legislature the powers to seize the fund thus raised, and transfer it from these chosen agents to others, in whose discretion they did not confide. This power, we think, is prohibited by section 19, of article I, of the constitution of 1852, which declares the inviolability of private property."

My conclusion is that House Bill No. 705 violates the tenth section of the first article of the constitution of the United States, and the nineteenth section of the first article of the constitution of Ohio.

This opinion is not to be construed as holding that the university corporation must always retain the fee to the land. The legislature with the consent of the corporation, or the corporation with the consent of the legislature may probably vest title to part of the land of the corporation in third parties, provided the consideration received for such transfer goes to the corporation for the benefit of the university.

Armstrong v. Treasurer of Athens Co., 10 O., 244;

Trustees of Vincennes v. Indiana, *supra*;

Cooper v. Roberts, 18 How., 173, 181.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

PROSECUTING ATTORNEYS—COMPENSATION OF, MAY BE FIXED BY ENACTMENT OF STATUTE EFFECTIVE DURING EXISTING TERMS. EFFECT UPON TENURE OF OFFICE OF SHERIFFS AND TREASURERS OF CONSTITUTIONAL AMENDMENT EXTENDING EXISTING TERMS OF SAID OFFICERS.

Where there is no compensation fixed for an office under existing laws, a statute may be enacted fixing compensation for such office, which statute will be effective during existing terms:—concerning enactment of salary law for prosecuting attorneys. Constitutional amendment (Article XVII, section 3), authorizing extension of existing terms of certain officers, including sheriff and county treasurer, does not affect provision of article X, section 3, rendering any person ineligible to said offices for more than four years in any period of six years.

March 5, 1906.

HON. CARL F. SHULER, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—Upon the several matters inquired of in your letter just at hand I advise you as follows:

(1). In my opinion there is no existing constitutional statute providing compensation for the work performed by prosecuting attorneys other than that under section 1274, nor has there ever been since the adoption of the present constitution. I am of the opinion, therefore, that a statute may be enacted providing such compensation and affecting those prosecuting attorneys now in office. It has been held, at least in other states, that a salary might be fixed after the beginning of the term of office of an office for profit without contravening a constitutional provision that salaries should not be increased or diminished during the term.

(2). In my opinion the constitutional amendment authorizing the extension of the terms of officers to conform to the requirements of that amendment as to biennial elections does not in any way affect the provisions of section 3, article X of the constitution rendering any person ineligible to the office of sheriff or county treasurer for more than four years in any period of six years.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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#### COUNCIL — VILLAGE — COMPENSATION OF MEMBERS.

Village council, members of which elected to serve without compensation, may provide compensation by ordinance effective during incumbency of such members. Village council may dismiss building inspector subject to liability imposed by common law for dismissal of employe without cause.

March 8, 1906.

HON. WILLIAM Z. ROLL, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—I beg to submit answers to the two questions you ask of this department.

First: "Can councilmen in villages who are elected to office without compensation, vote themselves a salary while in office?"

In my judgment this may lawfully be done. Section 197 of the municipal code as amended April 20th, 1904, (97 O. L., 118) provides that in vilhages

"Members of council may receive as compensation the sum of \$2.00 for each meeting, not to exceed twenty-four meetings in any one year."

Originally, the power to fix any compensation for councilmen in villages was not conferred by the municipapl code; and if no compensation has been fixed by the predecessor of any council the latter may exercise the power even though it affects members during existing terms. This proposition is sustained by several well considered cases. In the case of *Purcell v. Parks*, 82 Ill., 346, the second paragraph of the syllabus is as follows:

"Where the county board has not fixed the compensation of the county clerk before his election, the power to do so remains, and they may fix it after his election, and it will not be a violation of the constitutional provision prohibiting the increasing or diminishing of his compensation during his term of office, because *until fixed* by the board he has no compensation to be either increased or diminished."

Your second question is as follows:

"When a building inspector is appointed to the office as building inspector, by ordinance, say for one year, and after his term of office expired is reappointed for one year by resolution, has the council right to appoint a man in his place without rescinding the resolution?"

Paragraph 13 of section 7 of the municipal code gives to councils the right to provide for the inspection of buildings. The council does not thereby have the

right to create an office, but the position of inspector is merely an employment as distinguished from an office and the inspector is an employe of council and not an officer. The same rule would govern the village council as would govern a private party in an attempted dismissal of an employe without cause, and should the inspector be dismissed without cause the same rule of damages would apply to him as between individuals when a contract of employment had been broken without sufficient cause so to do.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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#### EXTENSION OF EXISTING TERMS.

Power of general assembly to extend existing terms limited to such legislation as is necessary to effect the purpose of article XVII, section 1, of the constitution.

March 19, 1906.

HON. SAMUEL H. WEST, *Senate Chamber, Columbus, Ohio.*

DEAR SIR:—Replying to your request for an opinion upon the subject, I beg to advise you that in my judgment the General Assembly is without constitutional power to extend the term of any elective public officer for any length of time whatever, beyond that absolutely necessary to carry into effect the purpose of Sec. 1 of the new amendment to the constitution, providing for biennial elections. With respect to those county offices, the terms of which will expire under existing laws in odd numbered years, and in which case successors can be elected hereafter in November of the preceding even numbered years, there appears to be no such necessity for an extension of said terms as would be justified by the grant of power in the new constitutional amendment.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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#### PUBLIC AFFAIRS—BOARD OF TRUSTEES OF—EFFECT OF PROPOSED AMENDMENT OF SECTION 205, M. C. UPON APPOINTMENT OF.

Amendment of section 205, M. C., so as to authorize mayor to appoint members of board of trustees of public affairs whenever council provides for existence of such board.

March 20, 1906.

DR. YOUNG STEPHENSON, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—Section 205 of an act to provide for the organization of cities, etc., provides that,

“In the event that the council shall in accordance with the provisions of this act, prior to the first election of municipal officers to be held under the provisions of this act, establish such board of trustees of public affairs, the mayor of such village shall appoint the members of such board subject to confirmation by the council, who shall hold

their respective offices until such time as their successors shall have been elected in accordance with the provisions hereof, and such successor shall be elected at the next regular election of municipal officers held in such village."

The power of the mayor to appoint the members of the board is by the terms of this act limited to the time intervening between the time of the passage of this act and the first election of municipal officers held under the provisions of this act. This is the natural meaning of the words used. Section 222 of the act fixes the date when the first election of municipal officers shall be held as the first Monday in April, 1903.

The bill as amended by striking out the words, "prior to the first election of municipal officers to be held under the provisions of this act," will give the mayor power to appoint the board, subject of course to confirmation by the council, at any time when the council provides for the existence of such a board; and such appointees will hold office until the next regular election of municipal officers.

It might be well also to amend the last sentence of paragraph one of section 205 by striking out the words, "in like manner as the original appointments were made" and substituting the words "by appointment by the mayor subject to confirmation by the council." The words now used probably have the same meaning as the proposed amendment but are less certain, and refer to a prior appointment which may never have been made. In as much as you are making one change in the act it might be as well to make this additional change in the direction of greater certainty.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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#### POLICE POWER AS TO FIXING HOURS OF EMPLOYMENT.

House bill number 328, abridging right of parties to fix, by contract, number of hours constituting day's work of telegraph and telephone operators, constitutional.

March 22, 1906.

HON. HOWARD W. PEARS, *House of Representatives.*

DEAR SIR:—The Supreme Court has held that it is not within the power of the legislature by the enactment of a positive law to abridge the right of parties to fix, by contract, the number of hours that shall constitute a day's work nor to deny effect to the stipulations and agreements of the parties themselves touching such matters, *except only as the exercise of such power may be authorized for the common welfare*; and the right to so exercise its power of restraint extends only to matters affecting the public welfare, or the health, *safety* and morals of the community.

House Bill No. 328, the provisions of which apply only to telegraph or telephone operators employed in connection with the despatching of trains, seems to come within the exception above stated. The safety of the public is affected by the efficiency of such employes. The bill would probably be held constitutional.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

DISCHARGE OF COUNTY TREASURERS AND SURETIES FROM  
LIABILITY.

Effect of House bill number 44, providing for release of county treasurers and their sureties from liability for loss of public funds in certain cases; said bill is not retroactive.

March 24, 1906.

HON. A. R. PHILLIPS, *House of Representatives, Columbus, Ohio.*

DEAR SIR:— You request my opinion as to the effect upon pending or past cases or transactions of House Bill No. 44, entitled "A Bill to provide for the release and discharge of county, city, village, township and school district treasurers and their sureties in certain cases."

This bill authorizes the release of treasurers and sureties above enumerated from liability for loss of public funds where such loss is caused by fire, robbery, failure of bank, etc., but without fault or negligence on the part of such treasurers or sureties. It provides for the determination by a designated local authority of the existence or non-existence of negligence on the part of the officers and allows an appeal from such finding to the court of common pleas. It further provides that after a finding of no fault or negligence has been made, and before the release or discharge is granted, the question of discharging the treasurer and his sureties may be submitted to the people and decided by popular vote of the qualified electors in the interested political subdivision of the state. Further it is made the duty of such local board to submit this question of release or non-release to a vote of such electors on demand of 25 per cent. of the qualified voters within the district.

In my judgment this law is not retroactive, and its provisions would not apply to cases where a loss has already been sustained; nor is there any authority to release any treasurer or his sureties where the right under existing laws to insist upon the payment of the loss has already accrued.

The constitutionality of the act, in so far as it may be questioned on other grounds is assumed. It has a uniform operation throughout the state, and does not take from the county, city, village, township or school district the right to insist on a strict enforcement of the terms of the bonds of their respective treasurers; although there may be some question as to the constitutional power to confer upon the local board or electors the right to determine the question of negligence of the public officer and thus fix his liability under the law.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

COMMISSION DOES NOT DETERMINE TERM OF OFFICE FIXED BY  
STATUTE.

Term of office of county treasurer fixed by statute, not by commission.

March 26, 1906.

HON. C. B. WINTERS, *House of Representatives.*

DEAR SIR:— In reply to the inquiry submitted to you by William Goodsite, treasurer of Erie county, relative to the expiration of his term of office, I beg

leave to say that the term designated in the treasurer's commission in no way affects the duration of his term of office.

The term of office of a county treasurer is fixed by section 1079 of the Revised Statutes of Ohio, which provides that a county treasurer shall hold office for a term of two years, from the first Monday of September next after his election. Therefore Mr. Goodsite's term of office will expire at the end of two years from the first Monday of September next after his election.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

#### COUNTY AGRICULTURAL SOCIETY—MEMBERS OF BOARD OF MANAGERS OF, ARE TOWNSHIP OFFICERS.

Members of board of managers of Shelby county agricultural society, organized under special act in 95 O. L., 833, are township officers.

March 29, 1906.

HON. J. E. RUSSELL, *Ohio Senate, Columbus, Ohio.*

DEAR SIR:— You inquire whether the members of the board of managers of the county agricultural societies, such as are provided for by section 5 of House Bill No. 563, 95 O. L. 833, are county or township officers.

Section 7 of this act provides that,

“The election of members of the agricultural board shall be governed in all respects by the same laws governing the election of other township officers.”

I am of the opinion, therefore, that the members of this board are township officers, and should therefore be elected in the odd numbered years.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

#### TOWNSHIP DITCH SUPERVISOR—EFFECT OF PROVISION, IN BILL CREATING OFFICE, FOR APPOINTMENT OF, BY TOWNSHIP TRUSTEES, FOR INTERVAL UNTIL FIRST ELECTION FOR TOWNSHIP OFFICERS.

Bill providing for creation of office of township ditch supervisor, if enacted into law, would be valid and constitutional as to its other provisions, though provision requiring appointment to said office by township trustees for interval until first election for township officers be held unconstitutional; whether general assembly may create a vacancy in an elective office, and provide for appointment of officer to fill same, *quaere*.

March 28, 1906.

HON. D. D. SPANGLER, *House of Representatives.*

DEAR SIR:— Your letter of March 22nd, as I understand it, refers to a bill creating the elective office of township ditch supervisor. You wish my opinion as to the constitutionality of that provision of the bill which requires the township

trustees, on demand of at least five land owners, to appoint a township ditch supervisor to serve during the interim between the date of the passage of this act and the next annual election.

Section 27, article II of the constitution provides that the filling of all vacancies not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law, but no appointing power shall be exercised by the general assembly. That this section gives the legislature power to vest in an existing board or officer, as such, power of appointment to fill a "vacancy" in an elective office "not otherwise provided for," by the constitution is settled.

State v. Brewster, 44 O. S., 589;

Walker v. Cinti., 21 O. S., 14;

State v. Pugh, 43 O. S., 110.

The Ohio constitution provides, article X,

Sec. 1. "The general assembly shall provide by law, for the election of such county and township officers as may be necessary."

Sec. 4. "Township officers shall be elected by the electors of each township, at such time, in such manner, and for such term, not exceeding three years, as may be provided by law; but shall hold their offices until their successors are elected and qualified."

Article XVII of the constitution, adopted November, 1905, provides:

"All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by law."

Whether the legislature can provide for the appointment of an officer to fill a township office created by the legislature during the interim between the passage of the act creating the office and the first election which may lawfully be held to fill such office, has never been decided by the courts of this state. The answer to this question depends on whether such interval is a "vacancy" within the meaning of Article II, Section 27. The inter-relation of Article X, Sections 1 and 2, and Article II, Section 27, and the meaning of the word "vacancy," are considered by Judge Shauck in the case of *State v. Thrall*, 59 O. S., 398, 399:

"It has never been held by this court that the legislature may create a vacancy in an *existing* county office to be filled by appointment, although it was held that the official term of an elected clerk of the court may, by the operation of the constitutional provision referred to and an act of the legislature, be in effect extended beyond the term for which he had been elected, the extended term not exceeding any limitation placed thereon by the constitution.

"Although the power exercised by the general assembly in this instance is legislative in character it must be exercised conformably to the pertinent sections of the 10th article of the constitution. Section 1. The general assembly shall provide by law for the election of such county and township officers as may be necessary. Section 2. County officers shall be elected on the first Tuesday after the first Monday in November by the electors of each county, in such manner and for such term, not exceeding three years, as may be provided by law. Section 3. No person shall be eligible to the office of sheriff or county treasurer for more than



four years in any period of six years.' The mandatory provision that the general assembly shall provide by law for the election of county officers is a clear denial of its power to provide for their appointment, and the requirement that such officers shall be elected on the day named negatives the view that they may be appointed by any authority. *State ex rel. v. Brennan*, 49 Ohio St., 33. The power if the general assembly with respect to the subject is completely comprehended in these sections of the 10th article and section 27 of the second article: 'The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law \* \* \*.' The nature and terms of the power granted by this section indicate that, in its application to county offices, it is subordinate to the provisions of the 10th article. The vacancies for which it authorizes the legislature to provide are those which occur fortuitously, as by death or resignation, in offices for which there has been provided, in obedience to the 10th article, an elected incumbent. The power to provide for the filling of such vacancy does not imply a power to create an interval in the office between the official terms of two persons elected to fill it. With respect to the interval which the general assembly has attempted to create by the legislation in question it is 'otherwise provided' by the 10th article, and as to the principles involved the act does not differ from that considered in the *State v. Brennan*."

A distinction might be made between a vacancy in an existing office created by an attempted change in the date of election to such office and the vacancy which must necessarily exist in a new office between the date of its creation by the legislature and the first election of an incumbent. It was a vacancy of the former sort that was before the court in *State v. Thrall*, supra; in other words a vacancy in an elective office was created by the voluntary action of the legislature.

The definition of the word "vacancies" in the above opinion makes it doubtful whether the distinction suggested would be considered important by the court in determining the constitutionality of legislation providing for an appointment to fill this preliminary vacancy. It has been frequently held in other jurisdictions that a vacancy is *ipso facto* created by the creation of a new office and that the legislature may provide for an appointment to fill such vacancy, although the office be an elective office under the constitution.

*Stocking v. State*, 7 Ind. 326, 329;  
*Walsh v. Commonwealth*, 89 Pa. St. 419;  
*In Re 4th Jud. Dis.* 4 Wyo. 133, 148;  
*Clark v. Irwin*, 5 Nev. 111, 125.

The whole bill is not before me, but if the other provisions are constitutional the law would be operative *pro tanto* even though the provisions with reference to appointment should be held unconstitutional.

It is not to be presumed that the general law establishing the elective office of township ditch supervisor would not have been passed even if the legislature had known that they could not provide for filling such offices at once, by appointment

The bill may therefore be passed in its present form.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

GENERAL ASSEMBLY—MEMBER OF, ELIGIBLE TO APPOINTMENT  
AS MEMBER OF COMMISSION TO ERECT HOME FOR CRIPPLED  
AND DEFORMED CHILDREN

Membership on commission to erect home for crippled and deformed children, being an appointment for the performance of a specific duty, upon which performance rights and duties attaching to such membership must terminate, does not constitute an "office," within the meaning of article II, section 19 of the constitution and section (18-1) R. S.

May 28, 1906.

HON. JOHN W. HARPER, *Member Senate, 77th General Assembly, First District, Cincinnati, Ohio.*

DEAR SIR:—The question presented in your letter of May 25th as to your eligibility to appointment as a member of the commission for the erection of a home for crippled and deformed children, is not entirely free from difficulty.

Article II, Section 19 of the constitution provides:

"No senator or representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this state, which shall be created or the emoluments of which shall have been increased, during the term for which he shall have been elected."

What constitutes an office has been the subject of frequent consideration by the courts of this state. In *State v. Halliday*, 61 O. S., 171, the court says:

"The distinguishing characteristic of a public officer is, that the incumbent, in an independent capacity, is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public as required by law. The office must be of a continuous character as opposed to a temporary employment, though the time be divided into terms to be filled by election or appointment in accordance with the genius of our system of government; and a bond and an oath of office are generally, though not always, required for the faithful performance of the duties of the incumbent: and compensation is made either by salary or fees, or both."

And in *Barker v. State*, 69 O. S., 68-72, the court says that the two most essential characteristics of a public office are, first, the fact that the incumbent is clothed with some part of the sovereignty of the state, etc., and second, that the duties are of a continuous character as opposed to a temporary employment. Emolument is not a necessary incident of a public office. *State v. Brennan*, 49 O. S., 38.

In the case of *Commissioners v. Pargillis*, 10 C. C., 376, affirmed by the supreme court, 53 O. S., 680, it is held that a building committee appointed by the circuit court to act with the county commissioners in making and approving plans and awarding contracts for a county court house, were not county officers within the meaning of section 1, of Article X of the Constitution.

The case of *Slatmyer v. Springborn*, 1 N. P. N. S., 157, is to the same effect.

The cases seem to be uniform in holding that persons appointed to perform some specific duty, and not for any definite term and whose rights and duties:

terminate when the specific duty for which they were appointed is performed, are not public officers within the meaning of the constitution.

Section (18-1) R. S., provides that no member of the general assembly shall be appointed,

“Trustee of any benevolent, educational, penal or reformatory institution of the state supported in whole or in part by funds drawn from the state treasury.”

The duties of the commission appointed by 98 O. L., 57, terminate when the buildings are completed. The board of trustees, to whom the general management and control of the established institution is intrusted, must be appointed as soon as the buildings are completed. The function of the members of the commission is quite different from that of the trustees, and I do not therefore believe that the statute just referred to prohibits your appointment as a member of the commission.

The act creating the commission, section 3, provides that,

“The members of said commission appointed by the governor, before entering upon the duties of their office, shall take and subscribe an oath or affirmation before some competent authority, faithfully to discharge all the duties required of them by this act.”

This language seems to indicate that the legislature considered that the members of said commission held offices.

I am of the opinion, all things considered, that no constitutional or statutory provision renders you ineligible to appointment as a member of the commission. I cannot positively assert, however, that a court would be of the same opinion, as there is no direct or controlling authority on the exact question presented.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### CITIZENSHIP IN STATE LOST BY PERMANENT ABANDONMENT OF RESIDENCE THEREIN.

Residence in another state with intention of becoming citizen thereof terminates right of suffrage in Ohio and tenure of office as member of general assembly.

October 30, 1906.

HON. D. D. SPANGLER, *New Batavia, Ohio.*

DEAR SIR:—Your inquiry of recent date inquiring whether or not you can move to the state of Maryland with the intention of becoming a citizen of that state sometime in the future and, at the same time, retain your citizenship in Ohio and your seat in the legislature until your term expires, is received. In reply I beg leave to say if you move to Maryland with the intention of becoming a citizen of that state now, or in the future, it is in effect an abandonment of your residence in Ohio and, in my opinion, you would not be entitled to exercise your suffrage in Ohio or retain your seat in the legislature.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## (To the Prosecuting Attorneys.)

## PROSECUTING ATTORNEY—DUTIES OF.

Prosecuting attorney is not by law the legal adviser of township officers (prior to enactment of Conroy law).

January 13, 1906.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication dated January 12th inquiring whether or not the prosecuting attorney is the legal adviser to township officers, is received. In reply I beg leave to say that the prosecuting attorney is not, by law, the legal adviser of the township trustees and is not entitled to compensation out of the county treasury for legal services rendered them. Under section 1274, R. S., the prosecuting attorney is only made the adviser to the county commissioners and other county officers. The township trustees, may, however, employ the prosecuting attorney as their counsel but the compensation would have to be paid out of the township treasury.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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WORTHY BLIND—ADMINISTRATOR MAY NOT RECEIVE ALLOWANCE FOR SUPPORT OF.

Certificate from probate judge for support of worthy blind person not payable to administrator after death of blind person.

January 18, 1906.

HON. HAMILTON E. HOGE, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Your communication dated January 17th is received. You say that the probate court of your county issued a certificate to a person coming within the provisions of the act to provide relief for the worthy blind; that this certificate was filed with the county auditor in the month of August, 1904, and payment refused for the reason that the county commissioners had made no appropriation for its payment; that the person in whose favor the certificate was made died in March, 1905, and an administrator has been appointed for her estate; that the commissioners made the necessary appropriation for the year 1905; that the administrator is now claiming the several amounts that the probate court has certified to from time to time during the life of the decedent from the county treasury, and you inquire whether or not these certificates are valid claims against the county.

In reply I beg leave to say that the act to provide relief for the worthy blind is intended to assist in the support of worthy blind persons who come within its provisions.

Section 5 of the act, R. S. (670-5), provides that payment shall be made to the beneficiary upon the presentation of the certificate, either personally or through the United States mail. As the money is only intended for the support of the applicant, the administrator of the estate would have no claim against the county.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## PROSECUTING ATTORNEY—COMPENSATION OF.

County commissioners have no authority to fix the compensation of the prosecuting attorney.

January 19, 1906.

HON. CHARLES C. KEARNS, *Batavia, Ohio.*

DEAR SIR:—Your communication dated January 16th, relative to the authority of the county commissioners under section 1297 of the Revised Statutes, to fix the compensation of the prosecuting attorney at less than \$2.00 per hundred, is received. In reply I beg leave to say that under section 1297, county commissioners are only authorized to direct at what times and in what installments the compensation of the prosecuting attorney shall be paid, and have no authority in fixing the compensation. Prior to the amendment of section 1297, 95 O. L., 486, county commissioners were authorized to fix the compensation of prosecuting attorneys within certain limitations, as found in 92 O. L. at page 358.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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## PROSECUTING ATTORNEY—EMPLOYMENT OF AS LEGAL COUNSEL.

County commissioners may employ prosecuting attorney as legal counsel under section 845, R. S., (prior to enactment of Conroy law).

January 22, 1906.

HON. ROBERT R. NEVIN, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Your letter dated January 17th relative to your making a contract with the county commissioners under section 845, as amended, is received.

In reply I beg leave to say, I know of no reason why the county commissioners cannot contract with the prosecuting attorney to perform the duties required under said section. Of course you will understand, if the prosecutor is employed under section 845 he will not be entitled to any allowance under section 1274.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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## FISH AND GAME LAWS.

Construction of sections 409a, 409d and 409g, R. S.

January 27, 1906.

HON. C. R. HORNBECK, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Your several letters asking for a construction of sections 409a and 409d of the Revised Statutes are received.

Original section 409a is now section 6 of an act approved April 26th, 1904 (97 O. L., 463), and is substantially in the same words as original section 409a. Under this section prosecution for offenses not committed in the presence of the

warden or other police officer should be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed or under the direction of the attorney general.

Section 409d, as it appears in the Revised Statutes, has not been amended.

You state, however, in your communications that in the particular case referred to the warden found some "skins of birds" in the possession of the person who was arrested, and that thereupon prosecution was instituted, without such prosecution having been first approved by the prosecuting attorney or directed by the attorney general, and you ask whether such prosecution was properly begun, and whether the costs made in such prosecution are to be certified and paid under section 409d of the Revised Statutes.

Section 12 of the act creating the fish and game commission, approved April 26, 1904 (97 O. L., 463), makes it unlawful for any person to have in his possession, either dead or alive, any of the birds mentioned in said section, and also provides that no part of the plumage, skin or body of any such bird shall be sold or had in possession for sale, except as provided in the section following.

By this section an offense is committed when any person is found to have in his or their possession, the birds, or plumage, skin or body of such birds.

If the birds referred to in your letter are birds included within the terms of section 12, I am inclined to the opinion that the warden would be justified in presuming that such possession was unlawful and could institute proceedings under the fish and game act, and if such proceeding is lawfully instituted, then the costs of the prosecution are to be certified and paid under section 409d of the Revised Statutes.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

**FEEES OF MAYOR AND CHIEF OF POLICE IN STATE CASES. ROAD COMMISSIONER MAY NOT SERVE AS SUPERINTENDENT OF CONSTRUCTION. PROSECUTING ATTORNEY—RIGHTS OF, AS MEMBER OF COMMITTEE TO EXAMINE REPORT OF COUNTY COMMISSIONERS.**

Mayor entitled to fees earned in state cases; chief of police may draw such fees, but must turn same into city treasury; magistrates and constables entitled to fees in misdemeanor cases when defendant discharged.

Offices of commissioner of road district and superintendent of road improvement incompatible.

Prosecuting attorney, as member of committee to examine annual report of county commissioners, may file dissenting report; said report should be published.

Itemized statement unnecessary under section 1274, R. S. (prior to enactment of Conroy law).

January 29, 1906.

HON. CHAS. M. WILKINS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your letter of January 26th submitting several inquiries is received. You inquire, first, as to the right of a mayor and chief of police to an allowance by the county commissioners for fees earned in state cases.

The bureau of inspection and supervision of public offices has ruled that a mayor and chief of police are entitled to an allowance by the commissioners for fees earned in state cases; that the mayor is entitled to retain the allowance made

him, while the chief of police is required to turn the fees into the city treasury. This ruling has been approved by this department.

Second. Can magistrates and constables draw fees in cases of misdemeanor when defendant is discharged?

The commissioners may make an allowance to magistrates and constables in cases of misdemeanor within the limitations prescribed in section 1113, R. S.

Third. Can the commissioners of road districts, under the provisions of section (4757-1) and following sections, act as superintendents or inspectors of improved roads and draw pay therefor?

Section (4751-1) provides for the appointment of road commissioner. Section (4757-7) fixes their term of office and provides that said commissioners shall, before entering upon the discharge of their duties take an oath of office. It also fixes their compensation for each day actually employed, and said compensation to be the same as township trustees.

Section (4757-13) authorizes the road commissioners to select a superintendent to superintend the construction of road improvements whenever, in their opinion, the engineer may not have time to perform such duties, and provides that the superintendent's compensation shall not exceed \$4.00 per day for the time actually employed, and in any event not more than \$100 per month.

Section (4757-15) provides that such superintendent, when appointed, shall before entering upon his duties take and subscribe to an oath of office and give bond.

In my opinion, the office of superintendent of construction is separate and distinct from road commissioner and incompatible therewith. Therefore a road commissioner may not be appointed superintendent of construction.

Fourth. Under the provisions of section 917 of the Revised Statutes is the prosecuting attorney required to sign the report if he does not concur with the statements therein contained? If he does not sign the report, can he file a separate report, and if so, which report is authorized to be published as the report of the committee?

Section 917 does not expressly provide that the report shall be signed by either the committee appointed by the court or the prosecuting attorney, but only provides that said committee when they have completed their examination shall leave the report of their examination with the auditor of the county for the use of the commissioners, who shall immediately thereafter cause said statement, together with the report of the committee, to be published, etc.

I am of the opinion that if the prosecuting attorney cannot agree with the committee appointed by the court as to the nature of the report to be made, that separate reports may be made by the prosecuting attorney, and either or both of the persons composing the committee, and that under section 917 each of said reports should be published.

Fifth. Is the prosecuting attorney required to itemize his bill for allowance to be made by the commissioners on the first Monday in December?

Section 1274 of the Revised Statutes provides that,

"The prosecuting attorney shall be the legal adviser of the county commissioners and other county officers \* \* \*; and for these services the county commissioners shall annually, at their December session, make him such allowance as they think proper."

In my judgment it is not necessary that the prosecuting attorney should submit an itemized bill to the county commissioners under this section.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## IMPROVED ROADS—REGULATION OF BURDENS ON.

Authority of county commissioners to regulate burdens on improved roads.

February 1, 1906.

HON. E. T. HUMES, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—Your communication dated January 31st relative to the authority the county commissioners have under section 4904, R. S., as amended 97 O. L., 36, to regulate burdens on improved roads, is received. You say that the county commissioners provide in their resolution that from December 1st to April 1st, no person is permitted to transport over said improved road a weight of over 3,400 lbs. including weight of vehicle, when the said improved roads are in a soft or unsettled condition. You inquire whether or not said provision is authorized under section 4904 as amended. Said section provides that the county commissioners of every county shall constitute a board of directors for their respective counties, with power to prescribe the increased gross weight in quantity greater than 3,400 lbs. that may be carried, including weight of vehicle, in vehicles having a width of tire 3 in. or upwards, and cause such regulations to be recorded in their journal. Under this provision the county commissioners may make such regulations as they deem necessary, affecting all vehicles having a width of tire 3 in. or upwards, as to the weight of burden they may transport, in excess of 3,400 lbs.

As you say, the resolution passed by your county commissioners may work a hardship upon some persons yet, in my opinion, the resolution is within the authority conferred by the statute.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## LOCAL OPTION—ELECTION.

Construction of "votes cast" as used in section (4364-20e) R. S.

February 8, 1906.

HON. JOHN H. CLARK, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—Your communication dated February 7th relative to a construction of the words "votes cast" as found in section (4364-20e) R. S., is received. In reply I beg leave to say that in my opinion the words "votes cast" mean all the votes that were legally offered and placed in the ballot-box, without regard to whether the individual voter voted for all or a part of the candidates on the ticket.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*



## VETERINARY SURGERY.

## Qualifications to practice veterinary surgery.

February 12, 1906.

HON. L. R. ANDREWS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your communication dated February 10th relative to the right of persons to practice veterinary surgery within the State of Ohio under an act entitled "An act to regulate the practice of veterinary medicine and surgery," as passed by the legislature May 21st, 1894, (91 O. L., 391), is received.

In reply I beg leave to say that section 1 of this act provides:

"That all persons who now, or shall hereafter practice veterinary medicine and surgery in the state of Ohio, *and have not been engaged in such practice for at least three years prior to the passage of this act*, in the state of Ohio, shall be examined as to their qualifications by a state board of veterinary examiners, to be appointed as hereinafter provided."

Under this provision no person is permitted to practice veterinary surgery within this state, without first taking the required examination and receiving a certificate, except those persons who had been engaged in the practice of veterinary surgery for at least three years prior to the passage of the act. Such persons are not required to take the examination nor hold the certificate provided for in said act.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

## COSTS—ALLOWANCE FOR, WHEN STATE FAILS TO CONVICT.

County commissioners may make an allowance in causes of felonies where the state fails, for any cause, to convict.

February 14, 1906.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Your communication dated February 13th, relative to the allowance of lost costs by the county commissioners under section 1309, is received. In reply I beg leave to say that section 1309 provides that:

"The county commissioners may \* \* \* make an allowance \* \* \*  
\* in causes of felonies where the state fails," etc.

Under this provision, if the state fails to convict for any cause, the commissioners are authorized to make the allowance.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

## LOCAL OPTION — MUNICIPAL — JURISDICTION OF PROSECUTIONS.

Common pleas court has jurisdiction of prosecutions under municipal local option law.

February 15, 1906.

HON. E. E. EUBANKS *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:— Your communication dated February 12th, inquiring whether or not the common pleas court has jurisdiction of prosecutions under the municipal local option law, is received. In reply I beg leave to say that the common pleas court has jurisdiction of such prosecutions and the fine imposed by said court should be turned into the county treasury.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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## SHERIFF — FEES OF, FOR RETURNING PRISONER FROM PENITENTIARY FOR TRIAL — HOW PAID.

Fees of sheriff for conveying prisoner confined in penitentiary to county jail pending trial in common pleas court for another offense should be taxed as costs.

February 15, 1906.

HON. W. R. GRAHAM, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:— Your communication dated February 14th, inquiring whether or not the sheriff is entitled to his fees for services rendered under section 7235, immediately upon the return of the prisoner to the county jail, is received. In reply I beg leave to say that section 7235 provides that

“The sheriff shall receive fees at the rate allowed by law for conveying convicts to the penitentiary.”

but in my judgment such fees should be taxed in the cost bill and paid in the usual way.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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## DOW TAX — REFUNDER OF.

Refunder of Dow tax may be made to person entitled thereto after fund derived from such tax has been in part distributed.

February 24, 1906.

HON. IRVIN McD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:— Your letter of February 22nd received. You state that a number of persons, recently engaged in traffic in malt and vinous liquors, have discontinued the business and have demanded a refunder for the balance of the year of the Dow tax paid by them. You also state that the “Dow fund” has been in

part distributed in so far that the percentage of the Dow tax collection has been remitted to the state treasurer, and the balance of the Dow tax is still undistributed and in the hands of the county treasurer.

Upon this state of facts you inquire, whether or not the auditor of the county may issue an order of refunder to the persons referred to upon the county treasurer, and whether or not the treasurer should pay such warrants.

The persons applying for a refunder, if they bring themselves within the provisions of the law, are entitled to a warrant of refunder to be paid out of the moneys in the hands of the treasurer derived from the Dow taxes and still undistributed, and the county or sub-division may reimburse itself for that portion of the refunder charged to the state, at the next settlement.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### TUBERCULOSIS — SEPARATION OF PAUPERS AFFECTED WITH.

County commissioners, acting with infirmary directors, may provide separate place at county infirmary for persons affected with tuberculosis.

March 2, 1906.

HON. W. R. GRAHAM, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:— Your communication dated February 21st, relative to the right of county commissioners to provide a place at the infirmary or elsewhere for the confinement of persons affected with tuberculosis, is received. In reply I beg leave to say that while the county commissioners would not be authorized to construct, at the public expense, a sanitarium or hospital for persons affected with consumption, yet I see no reason why they might not, in conjunction with the infirmary directors, make provision at the county infirmary whereby paupers afflicted with tuberculosis could be kept separate and apart from the other inmates. The commissioners will not be authorized to provide a place for the care and treatment of people in general afflicted with tuberculosis on the ground that consumption is regarded as a contagious disease.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### FEES — IN CASE OF CHANGE OF VENUE.

Fees of sheriff and clerk in case of change of venue when defendant acquitted not chargeable to county in which indictment is found; jury fees in such case are so chargeable.

March 3, 1906.

HON. CHARLES S. SHEPPARD, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:— Your communication dated February 28th, relative to the payment of sheriff, clerk and jury fees by the county in which the indictment is found in a case where there has been a change of venue and the defendant acquitted, is received.

In reply I beg leave to say that under section 7264, R. S., the costs accruing

from a change of venue, including the compensation of the attorneys appointed to assist the prosecuting attorney, the reasonable expenses of the prosecuting attorney incurred in consequence of such change of venue, the fees of the clerk of the court, the sheriff and the jury fees are to be paid by the commissioners of the county in which the indictment was found.

The supreme court has held in the case of *Commissioners v. State ex rel.*, 49 O. S., 373, that where, in a criminal case the venue is changed, and the state fails to convict, the county in which the indictment is found, is not liable for the fees of the sheriff of the county in which the trial was had. This holding would also apply to the clerk of the court.

The circuit court in the 4th circuit at the February term, 1897, in the case of *State ex rel. Board of Commissioners of Gallia County v. The Commissioners of Meigs County*, held that the provisions of section 7264, R. S., as to the payment of costs, did not include jury fees.

Section 7264 was amended, however, February 7th, 1898, making specific provision for the payment of jury fees.

In my opinion, the county in which the indictment was found, is liable for the jury fees only.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### WARRANT — COUNTY TREASURER — INTEREST.

Warrants on county treasury do not draw interest after notice required by section 1109, R. S., is given.

March 7, 1906.

HON. A. P. MILLER, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR: — Your letter dated March 6th, inquiring whether or not warrants issued on the county treasury by the auditor stamped "Not paid for want of funds" will draw interest after the treasurer has given the notice required in section 1109 of the Revised Statutes of Ohio, is received. In reply I beg leave to say section 1109 provides:

"So soon as there are sufficient funds in the treasury of the county to redeem the warrants drawn thereon, and on which interest is accruing, the county treasurer shall give notice in some newspaper printed in his county, or circulating therein, that he is ready to redeem such warrants; and from the date of such notice, the interest on such warrants shall cease."

This section expressly provides that the interest shall cease upon the notice being given by the treasurer and, in my judgment, if the holder of the warrant fails to present it for redemption within the time specified in the notice given by the treasurer and then afterwards presents it and the fund out of which it should be paid is again depleted and the warrant could not be redeemed the holder of such warrant would not, by reason of said fact, be entitled to interest after the date of the notice given by the county treasurer.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## TOWNSHIP TRUSTEES—EXTENSION OF EXISTING TERM.

Township trustee elected in spring of 1903 holds over.

March 21, 1906.

HON. CHARLES H. GRAVES, *Prosecuting Attorney, Oak Harbor, Ohio.*

DEAR SIR:—Your letter of March 7th is at hand. You state that at the spring election in 1903, John Peters was elected township trustee of Carroll Township, Ottawa County; that the electors of said township at the November election in 1905 elected one John Winters to fill the interim from April, 1906, to January, 1907. Your question is, who will be entitled to the office at the expiration of the three years for which John Peters was elected?

The constitutional amendment fixing the time for holding elections and terms of office provides:

“And the general assembly shall have power to so extend existing terms of office as to effect the purpose of section 1, of this article.”

“Every elective officer holding office when this amendment is adopted shall continue to hold such office for the full term for which he was elected and until his successor shall be elected and qualified, as provided by law.”

This clearly indicates that the interval between the terms of officers elected under the old law and those elected under the present law is to be filled by the extension of the term of the officers in office at the time the amendment was adopted.

The election of a township officer to fill an office held by a duly elected official whose term does not expire until some months after the date of such election and who holds office “until his successor shall be elected and qualified as provided by law,” is not provided for by any law.

Section 1452 provides for the filling of vacancies in the office of trustee after vacancies have actually occurred. It does not authorize an election or appointment to fill a prospective vacancy. In view of the constitutional provision above quoted and in view of section 1442 as amended March 31st, 1904, pursuant to the constitutional provision, I am of the opinion that there was not even a prospective vacancy in the case you have stated.

The term of office of John Peters continues until the first Monday in January, 1908. His successor should be elected at the November election in 1907. If the constitutional amendment providing that elections for elective officers other than state and county officers should be held in the odd numbered years, had not been passed, Mr. Peters' successor would have been elected at the November election this year. The election of John Winters last November was without authority of law and, consequently, of no effect.

A similar question to that which you have presented arose in connection with the election of a township treasurer in Logan county in 1905, and in Lucas county in 1904, and the same ruling was made by this department.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## FISH AND GAME CASES — COSTS.

When defendant in fish and game case is convicted and committed in default of payment of fine and costs, costs, including jury fees certified to county auditor, who must issue his warrant for same.

March 23, 1906.

HON. JONATHAN E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication dated March 23rd, inquiring as to whether a person convicted under section 9 of an act creating a fish and game commission (R. S. 409d), prescribing its duties, powers, etc., as found on page 463, 97 O. L., should upon conviction and commitment in default of payment of fine or costs, be kept in imprisonment until the jury fees, as provided in said section, are paid, is received.

In reply I beg leave to say that section 9 of said act provides as follows:

“And if the defendant be acquitted, or if convicted and committed in default of payment of fine or costs \* \* \* the costs in such cases shall be certified under oath to the county auditor who, after correcting the same, if found incorrect, shall issue his warrant on the county treasurer in favor of the person or persons to whom such costs and fees are due, and for the amount due each person respectively.”

Under this provision, if the defendant in the case to which you refer, was convicted and committed in default of payment of fine or costs, then the costs in the case including the jury fees should be certified under oath to the county auditor to be paid as directed in said section.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

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 PROBATE COURT — CRIMINAL JURISDICTION OF.

Section 6454, R. S., providing for concurrent jurisdiction of probate court in certain counties, is constitutional.

March 28, 1906.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Your letter dated March 24th, inquiring as to the constitutionality of section 6454 of the Revised Statutes of Ohio, which gives to the probate court concurrent jurisdiction with the court of common pleas in all misdemeanors and all proceedings to prevent crime in certain counties within the state, is received.

In reply I beg leave to say that the fact that this section does not operate uniformly throughout the state is no objection to its constitutionality. Section 8 of article IV of the constitution governing jurisdiction of probate courts is as follows:

“The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the

settlement of the accounts of executors, administrators and guardians, and such jurisdiction in habeas corpus, or issuing of marriage licenses and for the sale of land by executors, administrators and guardians, *and such other jurisdiction in any county or counties as may be provided by law.*"

The supreme court has held in the case of *Kelley v. State*, 6 O. S., 269, that,

"Jurisdiction may be given to the probate court in one county which is not conferred in another. \* \* \* The probate court may, in some counties, possess a jurisdiction concurrent with the common pleas, which is denied to it in others;"

Also in the case of *Giesey v. C. W. Z. Ry Co.*, 4 O. S., 308, the court say:

"That the words 'in any county or counties,' were probably used rather as enabling than restrictive language, and were designed to permit the general assembly— notwithstanding the provisions of the 26th section of the II article, requiring all laws of a general nature to have a uniform operation throughout the state—in its discretion to confer upon the probate court more extended powers in some counties than in others."

Brown county is included in the list of counties enumerated in section 6454, R. S.; therefore, under section 8 of article IV of the constitution and the cases above cited, the probate court of your county has concurrent jurisdiction with the common pleas court in all misdemeanors and all proceedings to prevent crime.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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WORTHY BLIND — ADMINISTRATOR MAY NOT RECEIVE ALLOWANCE FOR SUPPORT OF.

Certificate from probate judge for support of worthy blind person not payable to administrator after death of blind person.

March 31st, 1906.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:— Your communication dated March 29th is received. You submit the following case:

An application was made under the worthy blind act, and the probate judge after hearing the application adjudged the applicant to come under the provisions of said act and issued a certificate for the amount then due said applicant. This certificate was presented to the county auditor, on which payment was refused, and while the question as to the authority of the county auditor to refuse payment was pending in the courts, the applicant died. You desire to know whether or not the executor or administrator is entitled to receive from the county treasury the money provided for in said certificate, from the time of the granting of the same to the death of the applicant? In reply I beg leave to say that the worthy blind act is only intended to provide for the *support* of the worthy blind and, in my opinion, any obligation on the part of the county ceases upon the death of the applicant.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## FISH AND GAME CASES—JURY FEES.

Jury fees in fish and game cases are not a part of the costs.

April 4, 1906.

HON. JONATHAN E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication dated March 28th is received. In reply I beg leave to say that section 9 of the fish and game laws (R. S., section 409d) contains no provision that the jury fees shall be a part of the costs, and the courts have held that unless there is such a provision in the statute the jury fees are not a part of the costs in the case. Therefore I am of the opinion that the jury fees in all prosecutions under section 9 of said laws should be paid by the county.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## SHERIFF—EXPENSE OF.

Expense incurred without legal authority by sheriff during riot may not be paid by county.

April 4, 1906.

HON. JOHN B. MCGREW, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Your communication dated March 26th, relative to paying certain expenses incurred by the sheriff of your county during the recent riot, by the county commissioners, is received.

In reply I beg leave to say in view of the holding of our supreme court that services performed by a public officer are presumed to be gratuitous unless the statute expressly provides payment for the same, I am of the opinion that the county commissioners would not be authorized in paying the expenses referred to in your letter. I agree with you that they should have authority to do so. I suggest to you that you advise the sheriff to present his claim to the claims committee of the general assembly. The service rendered was for the benefit of the state, and I see no reason why the state should not reimburse the officer.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## INHERITANCE TAX—COLLATERAL.

Devise made in consideration of existing legal obligation not subject to collateral inheritance tax.

April 5, 1906.

HON. N. H. NEWELL, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—I have yours of April 4th, 1906, advising me that in a will recently probated in your county there is an item devising to one "as pay for her services and care all my property real and personal, etc.," and in the residuary



item a devise to the same person of "all other property not herein mentioned that I may own at the time of my death."

The question arising is whether or not these legacies are taxable under the provisions of the collateral inheritance tax law. The answer to this question depends upon whether there was at the death of the testator an existing legal obligation of an amount equal to the value of the property devised. So far as such legal obligation existed the provisions of the will are to be considered as satisfying such obligation and are accordingly not taxable. Where, however, no legal obligation existed under which the legatee could have enforced payment at law the legacy is deemed a gift, notwithstanding some moral obligation in favor of the legatee may have impelled testator in making distribution of his property. Upon a similar question it was held in *New York, Doty's Estate*, 7 Misc., 193:

"Unless some legal and enforceable claim exist against the testator by reason of them, a legacy stated in the will to be given in consideration of services rendered should be considered as a bounty, and not the payment of a debt, and is not exempt from taxation."

A Pennsylvania decision, 13 W. N. C., 99, reads as follows:

"Where the debt for which a legacy is given is one of legal obligation, and the legacy does not exceed the amount due, the latter, if accepted in satisfaction, being regarded as a payment and not as a mere bounty, is not subject to collateral inheritance tax. But this principle cannot apply where, as in the present case, no claim such as could have been enforced by suit exists, and where the legacy is a pure gratuity based upon a faithful performance of services, which is not already compensated, must have been rendered without expectation of reward and without liability on the part of the person receiving them."

I am of the opinion, therefore, that all of the property passing under the will submitted by you, is subject to the tax excepting such amount as may be sufficient to satisfy any existing legal obligations held by the legatee against the testator.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### PROSECUTING ATTORNEY—VOUCHER FOR SALARY OF.

Voucher for salary of prosecuting attorney under "Conroy act," 98 O. L. 160, need not be approved by county commissioners.

April 9, 1906.

HON. CHARLES C. KEARNS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—YOUR letter dated April 6th, is received. You inquire whether or not the monthly installments of the prosecuting attorney's salary, under the Conroy act, should be approved by the county commissioners before payment.

In reply I beg leave to say, in my opinion the voucher issued by the auditor for the monthly installment of the prosecutor's salary is a law voucher and does not require the approval of the county commissioners.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## SPECIAL SCHOOL DISTRICTS.

Acts creating special school districts unconstitutional.

April 9, 1906.

HON. N. H. MCCLURE, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—Your communication dated April 7th in which you refer to the opinion rendered Hon. William G. Ulery, prosecuting attorney of Lucas county, found on page 111 of the last annual report of the attorney general, is received.

You inquire whether or not under section 3928 of the Harrison school code, special school districts created by special acts are legal districts?

In reply I beg leave to say that the supreme court has held, since the adoption of the Harrison school code, in the case of Bartlett et al. v. The State of Ohio, 73 O. S., 54, section 3928 of the Harrison school code to be unconstitutional and void in so far as it declares all special school districts to be legal and valid which have been created under the provisions of special acts of the general assembly.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## PROSECUTING ATTORNEY—COMPENSATION OF.

Salary of prosecuting attorney under "Conroy act," 98 O. L. 160, covers all services rendered township officers.

April 9, 1906.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Your letter dated April 7th, relative to the construction to be placed upon section 1297 as amended by the Conroy bill is received.

In reply I beg leave to say that the salary provided in section 1297 includes payment for all services rendered township officers.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## SURVEYOR OF COUNTY—VACANCY IN OFFICE OF.

Where county surveyor elected in November, 1905, dies before commencement of term of office for which he was elected, incumbent of said office will continue therein until election and qualification of successor.

April 11, 1906.

HON. WILL P. STEPHENSON, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Your letter of April 6th states that a county surveyor elected for Adams county in November, 1905, has died since his election. You desire

to know, first, whether there will be a vacancy in the office after the third Monday in September, 1906, and second, in what manner and for what term the office will be filled after that date.

I assume that the office is now held by a duly elected surveyor whose full term of three years will expire in September, 1906. But for the recent constitutional amendment there would be a vacancy on that day. (*State v. Brewster*, 44 O. S., 590) Article XVII of the constitution, however, provides that,

“The term of office of all elective county, township, municipal and school officers shall be such even number of years, not exceeding four years as may be so prescribed.”

It is not necessary to determine whether by virtue of section 8 R. S., the present incumbent would be entitled to hold over, since the third section of Article XVII expressly provides that every elective officer holding office when this amendment is adopted shall continue to hold such office for the full term for which he was elected and until his successor shall be elected and qualified as provided by law.

Article XVII, Section 1 provides that elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years.

The present incumbent will therefore continue in office until his successor shall be elected and qualified. His successor should be elected at the November election, 1906. His term of office will commence on the third Monday of September, 1907, unless a change in the date when the term shall begin has been provided for by the last legislature. The present surveyor will hold until that date.

I have not yet received copies of all laws passed by the recent legislature and cannot therefore advise you positively as to the date when the term of the surveyor to be elected in November will begin.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### POLICE OFFICERS — WITNESS FEES.

Police officers entitled to witness fees in criminal prosecutions in common pleas court; railroad policemen are “police officers.”

April 17, 1906.

HON. F. B. GOTT, *Ass't Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR: — I have before me your letter of April 6th, in which you request my opinion as to the construction of Section 1315 R. S. Your questions are,

First: Are police officers entitled to witness fees in criminal cases tried in the court of common pleas?

Second: Are railroad policemen, appointed under Section 3427 R. S., police officers within the meaning of Section 1315?

Section 1315 is as follows:

“No watchman or other police officer is entitled to witness fees in any cause prosecuted under any criminal law of the state, or any ordinance of a city of the first or second class, before any police judge or mayor of any such city, justice of the peace, or other officer having jurisdiction in such causes.”

The grammatical construction of the statute and its punctuation both indicate that the words "before any police judge or mayor of any such city, justice of the peace or other officer having jurisdiction in such causes" limit the words "any criminal law of the state" as well as the words "any ordinance of a city of the first or second class." If the limiting phrase "before any police judge, etc.," is read as though referring back to "ordinance" only, no reason could have existed for mentioning justices of the peace in this connection. No criminal prosecutions for violations of city ordinances can be brought before justices of the peace. Furthermore the words "police judge, mayor or other officer" comprehend all officers or tribunals before which prosecutions for violations of ordinances can be brought. Why should there have been an enumeration of certain officers if the statute was intended to prevent the allowance of witness fees to police officers in any criminal prosecution before any tribunal whatsoever? If such had been the intent of the legislature it would have been clearly expressed by so much of the statute as precedes the word "before." From the terms of the statute then, aside from any consideration of its purposes, it appears that the clause enumerating certain officers, refers to prosecutions for offenses under criminal laws of the State as well as under city ordinances, but was not intended to embrace all tribunals before which cases under such laws and ordinances might be tried. The court of common pleas, the chief tribunal before which prosecutions under criminal laws of the state are tried, is not specifically mentioned in this statute. That the legislature would have specified justices' courts and left courts of common pleas to be comprehended under the term "other officers having jurisdiction in such causes" is not probable if they intended prosecutions before such court to come within the purview of the statute. By the enumeration of certain officers of limited jurisdiction the phrase "other officers" is limited to other officers of the same class as those enumerated.

It seems to me that there is a basis in reason for the distinction apparently made between the right of police officers to receive witness fees in prosecutions before the officers enumerated, and their right to receive such fees in prosecutions in the court of common pleas. One purpose of the statute probably was to prevent police officers from making unnecessary arrests for the purpose of receiving witness fees. It is conceivable that there might be many instances of unfounded prosecutions before magistrates for the sake of the fees, but the same opportunity for commencing unfounded prosecutions before the court of common pleas does not exist.

Local police officers are called upon to testify before the police judges and mayors much more frequently than in the court of common pleas; but the legislature may have considered that instances in which police officers would be summoned from other counties would arise more often in trials in the court of common pleas than before magistrates. In such cases it is just that the police officer should receive his witness fees and mileage.

I am therefore of the opinion that Section 1315 does not deny to police officers the right to witness fees in criminal cases tried in the court of common pleas.

Railroad policemen appointed by authority of section 3427 R. S., are clearly police officers within the purview of Section 1315. They are commissioned by the governor "to act as policemen," and possess all the powers and are subject to all the liabilities of such officers while acting within their jurisdiction.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## HUMANE SOCIETY — COSTS OF PROSECUTIONS.

Costs in humane society prosecutions not to be paid by county unless brought by agent of society or police officer.

April 18, 1906.

HON. EUGENE CARLIN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Your letter of April 12th requests an opinion as to the liability of the county to pay the costs in a prosecution under Section 3718 and 3718a, R. S., where such prosecution is not brought by the agent of a humane society or association, but is prosecuted by a person not appointed as an agent of such association.

I am of the opinion that in cases prosecuted under the provisions of these statutes the county is not liable for costs, unless such cases are prosecuted by a duly appointed agent of a human society, or by a sheriff, deputy sheriff, constable, marshal, watchman or police officer when in the discharge of his official duties.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## SCHOOL BONDS — MANNER OF SALE OF.

Board of education has discretion as to whether or not school bonds shall be sold by competitive bidding; if so sold, sale should be advertised.

April 20, 1906.

HON. H. W. ROBINSON, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Your communication of recent date inquiring as to the manner of sale and advertisement, by a board of education, of school bonds, under Section 3922, is received.

In reply I beg leave to say that the language "which may be by competitive bidding at the discretion of the board" refers only to the sale and not to the advertisement. That is, the board is to use its discretion whether or not the bonds shall be sold by competitive bidding. Should the board determine that there shall be competitive bidding, then the advertisement should be made under Section 22b.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## SURVEYOR OF COUNTY — COMPENSATION OF.

Repeal and re-enactment of Section 1183 R. S. by both of two acts in 98 O. L., pages 245 and 296, does not render either of said acts inoperative in so far as they are mutually consistent; compensation fixed by House Bill 449, 98 O. L. 296, for county surveyors, determines compensation of county surveyor, his expenses and the fees of his employes; House Bill 663, 98 O. L. 245, fixes the manner of appointment of deputies and employes; county engineers may not be employed.

April 20, 1906.

HON. KARL T. WEBBER, *Prosecuting Attorney of Franklin County, Ohio, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 17th enclosing a letter from Mr. Walter Braun, County Surveyor, in which he asks a number of questions as to the construction of the laws recently enacted relating to the duties and compensation of county surveyors. You have requested my opinion on the questions presented.

Mr. Braun was mistaken as to the date when H. B. 663, became a law.

H. B. 449 and H. B. 663 were passed on April 2nd, signed by the president of the Senate on the same day, both presented to the governor on April 3rd and, not having been acted on by him within ten days, both became laws on the same day. Both provide, in their respective preambles, that Section 1183 R. S. "be amended to read as follows." The provisions of Section 1183 as amended by one act are totally different from the provisions of Section 1183 as amended by the other. Section 2 of H. B. 449 provides that "said Sections 1183, 4506 and 4664 are hereby repealed." Section 2 of H. B. 663 provides "that original sections 1163, 1166, 1167, 1178, 1181 and 1183 of the Revised Statutes of Ohio be and the same are hereby repealed." The question is presented whether both sections 1183, as amended by these acts, are in force, and if not, which one, if either, is the law?

If the two acts designated as Section 1183 are not inconsistent and if it does not appear contrary to the express intention of the legislature that both should be laws, then both should be given effect. Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. (Lewis's Sutherland, Section 268.) The mere fact that each purports to enact a complete statute, designated as Section 1183, does not, in my opinion, prevent effect being given to both, if such was the apparent intention of the legislature.

The general rule where two statutes repeal and re-enact the same original act, is stated in the syllabus of *State v. Brewster*, 39 O. S. 658:

"Where a section of the Revised Statutes is repealed and re-enacted in a changed form a subsequent statute which in terms again repeals and re-enacts the original section in still another form is, as a general rule, to be regarded as a repeal of the section in its amended form, and the section in its last form will take its place in the revision as part of the Revised Statutes."

In a later case, *The State v. Wood* (52 O. S. 601), the opinion of the court is as follows:

"That Sections 5189a and 5189b, Revised Statutes, as enacted April 6, 1892 (89 Ohio Laws, 222), are not repealed so far as they relate to Montgomery County, by the act of April 24, 1893 (90 O. L. 254), nor by any subsequent statute. The rule of construction stated in *State v. Brewster*, 39 Ohio St. 653, is a general one, and not to be applied so as to defeat the manifest intention of the legislature."

On reference to the acts referred to in the above opinion it appears that the later statute referred in the preamble to "Section 5189b as amended April 26th, 1890" and repealed "original Section 5189b as aforesaid." The act of 1893 applied to counties having cities of certain enumerated classes, but did not mention counties having cities of the second grade of the second class. The

act of 1892 did expressly apply to such counties. So in the present case H. B. 663, repealing "original Section 1183," did not repeal H. B. 449 amending such original section, even though enacted later, provided such does not appear to have been the intention of the legislature. It does not become important to determine which act first became a law if the legislature did not intend that one should repeal the other.

What was the intention of the legislature? The fact that the two acts were passed the same day, and that neither makes any reference in the repealing clause to Section 1183 "as amended," indicates that the acts were intended to stand together, rather than that one should replace the other.

H. B. 663 is the more comprehensive of the two acts, making many important changes in existing laws governing county surveyors, while H. B. 449 merely increases, in certain instances, the fees allowed by the statutes amended. The records of the House and Senate show that H. B. 663 was the last to pass. It was, therefore, the latest expression of the intention of the legislature. It repeals original Section 1183 which was the general statute fixing the compensation of county surveyors. Section 1183 as amended by H. B. 663 makes no provision whatever for the compensation of this officer. If, therefore, H. B. 663 repealed both original Section 1183 and Section 1183 as amended by H. B. 449, the act would, at the same time, impose new and important duties upon the surveyor and leave in force no general statute fixing his compensation. It does not seem likely that such was the intention of the legislature. I am, therefore, of the opinion that Section 1183 of H. B. 449 and Section 1183 of H. B. 663 are both in force and should be construed together as Revised Statutes Section 1183.

The words "all necessary assistants, deputies, draughtsmen, inspectors, clerks and employes in his office" in Section 1183 of H. B. 663 must be construed to refer to such employes as have a more or less permanent employment. This is indicated by the words "in his office," by the requirement that the compensation fixed by the surveyor shall be paid monthly out of the treasury, and by the fact that the per diem fees of such employes as chainmen, rodmen, markers, axmen and other hands who are often employed temporarily, are fixed by Sections 1183, 4506 and 4664. It is not in accordance with ordinary usage to speak of the laborer employed in connection with a single piece of work as "in the office" of the official employing him. Temporary employes may, in my opinion, be paid per diem fees and the amount so paid should not be considered a part of the aggregate sum fixed by the county commissioners out of which all permanent employes must be paid. Permanent employes attached to the office, compensated out of such fund, are, of course not entitled to any additional per diem fee when acting as markers, chainmen, etc.

I will now take up the questions presented in your letter of April 17th.

1. What statute now fixes the compensation of the county surveyor and what is the compensation now allowed by law to the county surveyor, and how may the same be paid?

The compensation of county surveyors is now governed by Sections 1183, 4506 and 4664 as amended by H. B. 449 and by original Sections 1171, 1177, 1192 and 1194. Section 1183 as amended by H. B. 449 was identical with original Section 1183 except that it increases the compensation of the surveyor to \$5.00 per day and allows necessary and actual expenses. It also fixes the compensation of carriers and markers at \$2.00 per day.

Section 4506 fixes his fees for services therein referred to, at \$5.00, and allows necessary and actual expenses for the time so employed. Chainmen,

axmen and rodmen receive \$2.00 per day for the time actually employed and other necessary hands \$1.75 each.

Section 4664 also fixes the surveyor's fees at \$5.00 and actual necessary expenses for services therein provided for. The fees of reviewers, chain carriers and markers are fixed at \$2.00 each.

The surveyor is no longer entitled to fees for copying records required by Section 1176.

Original Sections 1171, 1177, 1192 and 1194 are still in force. The act of April 25th, 1904, which partially repealed such sections, having been held unconstitutional. (*State v. Rogers*, 71 O. S. 203; *State v. Buckley*, 60 O. S. 273). But the provisions of Section 1171 fixing fees of chainmen and markers at \$1.00 is superseded by Section 1183, fixing their fees at \$2.00.

The fees of the county surveyor should be paid out of the same fund, and in the same manner, as heretofore.

2. What authority now exists under the statutes of the State of Ohio for the appointment of deputies in the office of the county surveyor? What is their compensation and how may the same be paid?

Section 1166 as amended by H. B. 663, contains no provision for the appointment of deputy surveyors; but Section 1183 as amended by the same act is as follows:

"On or before the first Monday in June of each year the county surveyor shall file a statement of the number of and aggregate compensation to be allowed for all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office, for the year beginning September first next succeeding, with the county commissioners of such county who shall examine the same and after making such alterations therein as may be just and reasonable, shall fix an aggregate sum to be expended for such year for the compensation of such assistants, deputies, draughtsmen, inspectors, clerks, or employes. The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he shall deem necessary for the proper performance of the duties of his office and shall fix their compensation, but such compensation shall not exceed in the aggregate the amount so fixed by the county commissioners as herein provided, and the compensation after being so fixed shall be paid to such assistants, deputies, draughtsmen, inspectors, clerks or employes monthly out of the treasury upon the warrant of the county auditor out of the general fund."

Deputies are mentioned also in Sections 1178 and 1181 as amended. Deputies may, therefore, be appointed under Section 1183. They are further governed by the following Sections of the Revised Statutes.

Section 9. "A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him; and the principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment; but in all cases the principal is answerable for the neglect or misconduct of his deputy or clerk."

Section 10. "A deputy, when duly qualified, shall have power to perform all and singular the duties of his principal."



Section 1183, *supra*, answers your question as to their compensation and the manner of payment.

3. What authority now exists for the employment of assistants in the office of the county surveyor and what compensation may legally be paid to such assistants, and how may the same be paid?

This question is answered by Section 1183, *supra*.

4. May the county commissioners now employ a county engineer under Section 845, or are all of the deputies of a county engineer now imposed upon the office of the county surveyor? If an engineer may be appointed, what compensation may be allowed him and how shall the same be paid?

Section 1166 clearly requires that all county surveying and engineering work shall be done by the county surveyor. The county commissioners have no power to employ any other engineer. As many engineers as are necessary to do all county work may be employed, but they must be employed as deputies or assistants, and compensated as provided by Section 1183, *supra*.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### PROSECUTING ATTORNEY—COMPENSATION OF.

Contract between county commissioners and prosecuting attorney for employment of latter as legal counsel terminated by enactment of "Conroy law" 98 O. L. 160.

April 20, 1906.

HON. ROBERT S. WOODRUFF, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—In response to your request by telephone, I herewith enclose you a typewritten copy of the Conroy bill fixing the compensation and duties of prosecuting attorneys. This law became effective April 16th.

The last section of the law provides the county commissioners shall, at their regular meeting in May, make an allowance under Section 1274 for the services rendered from the 1st day of January, 1906, up to the time of the passage of this act. In all counties where prosecuting attorneys have special contracts with county commissioners under Section 845, as amended, settlements should be made at the regular meeting of the county commissioners in May, for the services rendered under such contracts from the 1st day of January, 1906, up to the time of the passage of this act and such contracts should then terminate.

While Section 3 of the Conroy bill provides that existing contracts made by boards of county commissioners of any county in accordance with Section 845 Revised Statutes of Ohio, shall remain in full force and effect, yet the Conroy bill by imposing upon prosecuting attorneys all the duties involved by such contracts thereby avoids the effect of all such contracts made with prosecuting attorneys.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## COUNTY COMMISSIONERS — TRANSFER OF FUNDS BY.

County commissioners may, by proper proceedings, transfer balance in road fund to any other fund.

April 23, 1906.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication dated April 21st relative to the transfer of funds by the county commissioners of your county is received.

In reply I beg leave to say that the county commissioners are authorized under Section (22b-2) and succeeding sections, by proceedings in the common pleas court, to transfer the public funds under their supervision from one fund to another in the manner therein provided.

In my opinion your county commissioners may, under the provisions of these sections, transfer the balances in the road fund raised under Section 4919 Revised Statutes, to any other fund they may desire.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## PROSECUTING ATTORNEY — SALARY OF.

Salary of prosecuting attorney under "Conroy act," 98 O. L., 160, cannot be drawn before date when same became effective.

April 23, 1906.

HON. LYMAN W. WACHENHEIMER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your communication dated April 21st, relative to the effect of the Conroy act upon prosecuting attorneys, is received. You say that by reason of the circuit court's decision holding the old prosecutors' law (sec. 1297) unconstitutional, you have received no compensation for the last 90 days.

If I understand your inquiry, you desire to know whether or not you can receive compensation under the Conroy act for the ninety days preceding its enactment. In reply I beg leave to say that compensation can only be drawn under the provisions of the Conroy act after April 16th, 1906. To attempt to extend the provisions of the Conroy act over a period of time prior to its enactment would be to make the law retroactive.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## TOWNSHIP DEPOSITORY.

Unincorporated banks may become township depositories.

April 25, 1906.

HON. C. J. FISHER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—In response to your request for an opinion of this department construing section 1513, R. S., as amended March 31st, 1906, I beg to advise that

that section of the Revised Statutes should not be so construed as to limit the language "such bank, banks or depository within the county in which such township is located" to incorporated state banks and banks created under the national banking act. In my opinion, both incorporated and unincorporated banks, banking associations or trust companies would have the right pursuant to such act to compete at the bidding for township moneys. Such banks are, by sections 3817 and 3818, as amended by the act of April 23rd, 1904 (97 O. L., 266), and by section 2762, R. S., as amended by the act of April 23rd, 1904 (97 O. L., 279), recognized as banks or banking associations, and for the purposes mentioned in the act under consideration, should be extended the privileges conferred upon other banks, unless plainly excluded therefrom.

It is true that the state depository law, being the act of May 3rd, 1904, and the county depository law, being the act of March 31st, 1906, limit the right to bid for state and county funds to such banks as are incorporated under the laws of this state or organized under the laws of the United States, but the fact that the exclusive language used in those acts was not used in section 1513, R. S., as amended by the act of March 31st, 1906, does not militate against the view that unincorporated banks or banking associations may lawfully become depositories for township funds, while they may be excluded from bidding for both state and county funds.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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#### SPECIAL SCHOOL DISTRICT.

Special school district created by special act not a legal district.

April 30, 1906.

HON. N. H. McCLURE, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—Your communication dated April 25th, relative to the Leroy special school district, is received.

You say that Leroy special school district was created by a special act of the legislature some thirty or thirty-five years ago. It is, therefore, under the holding of the court in the Bartlett case not a legal school district, and if the district is not a legal one there would be no school directors either *de facto* or *de jure*. In my opinion proceedings should be instituted *de novo* under sections 3928 and 3929, R. S., for the creation of a special school district.

Very truly yours,  
W. H. MILLER,  
*Assistant Attorney General.*

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#### BRIDGES—PLANS FOR REPAIRS.

Plans for repairs on bridges, involving an expenditure of less than \$200 must be drawn; county commissioners may themselves draw such plans.

May 3, 1906.

HON. WM. T. DEVOR, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—Your letter dated April 25th, relative to the letting of contracts for the repair of bridges, etc., by county commissioners, under section 798, R. S.,

as amended by the last legislature, is received. You inquire whether or not in letting a contract for the repair of a bridge that will cost less than \$200.00 the county commissioners are required, under section 795, to have complete and accurate plans made by a competent architect or a civil engineer. In reply I beg leave to say that while section 798, R. S., authorizes county commissioners to let private contracts without publication or notice thereof when the amount to be expended does not exceed \$200, yet section 795 expressly provides that

"In *all* cases when it becomes necessary for the commissioners of any county to erect or cause to be erected any public building or any sub-structures for a bridge or bridges, or when it is necessary to make any addition or alteration of the same \* \* \* before entering in any contract for the erection, alteration or repair thereof shall make or may procure some competent architect or civil engineer to make full, complete and accurate plans therefor."

The provision above quoted requires that before *any* contract is let full, complete and accurate plans therefor must be made, either by the commissioners or some competent architect or civil engineer. It is not necessary that the county commissioners employ an architect or the county surveyor to make said plans. The statute reads that the "*commissioners shall make* or may procure some competent architect or civil engineer to make full, complete and accurate plans therefor."

The commissioners may, in any case, if they see fit, dispense with the services of an architect or engineer and make the plans themselves.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### MAD DOG — PRESENTATION OF CLAIM BY PERSON INJURED BY.

Proper presentation of claim for expense incurred by person injured by mad dog.

May 8, 1906.

HON. H. T. SHEPHERD, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR: — Your communication dated May 3rd relative to presenting a claim to the county commissioners under an act to provide for the protection of persons injured by mad dogs, ((4215a-1,) R. S.), passed by the legislature March 29, 1904, (97 O. L., 68), is received.

In reply I beg leave to say that it is necessary that the detailed statement provided for in section 1 of said act be presented within four months after the injury was received at a regular meeting of the county commissioners of the county where the said injury was received, before the county commissioners will be authorized to allow the claim and order its payment by the county treasurer.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

COUNTY SURVEYOR—DEPUTIES AND ASSISTANTS—COMPENSATION OF.

Assistant engineers employed by county commissioners for definite period will continue to receive compensation fixed by contracts of employment during time provided in such contracts; deputy county surveyors entitled to per diem fees for services performed prior to September 1st, 1906; such fees should be charged in accordance with provisions of act in 98 O. L., 245; employment of deputies by county surveyor; supplementary to opinion of April 20th.

May 9, 1906.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your letter of May 7th requests an additional opinion as to the construction of House Bill No. 449 and House Bill No. 663, relating to county surveyors. The questions presented are substantially as follows:

1st. How shall assistant engineers employed by the county commissioners under section 845 be compensated for work done between the date of the passage of these acts and September 1st, 1906?

2nd. How shall deputies be compensated during said period and what law fixes the amount of their compensation?

3rd. May the county surveyor use the deputies and assistants, who shall be appointed and shall receive salaries under section 1183 as amended, in making surveys provided for by section 1187, R. S., and in making similar surveys for which he receives compensation from sources other than the county?

I will take up these questions in their order.

Assistant engineers with whom the commissioners had contracted for a definite period at the time the recent laws were enacted will continue to draw compensation in accordance with the terms of their contracts until the time contracted for has expired. No new contracts for the employment of assistant engineers should be made.

As the provision for the compensation of deputies by salaries does not become operative until September 1st, 1906, I am of the opinion that the surveyor is entitled to receive the per diem fee for the services of such deputies until that date. The fees prescribed by House Bill No. 449 should be charged for services performed since it became a law.

The surveyor may use deputies in any work which he is required by law to do.

Section 10, R. S., provides, "A deputy when duly qualified shall have power to perform all and singular the duties of his principal."

The surveyor will, of course, not be entitled to a per diem compensation out of public funds for the work done by his salaried deputies.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

PROSECUTING ATTORNEY—COMPENSATION OF.

Effect of enactment of "Conroy law," 98 O. L., 160; prosecuting attorney entitled to fee of 10 per cent. on collection made through suit in which judgment rendered prior to enactment of said law; not entitled to such fee when judgment

rendered subsequent to enactment of law; salary provided by said law may be received by prosecuting attorney in office at the time of enactment thereof, for balance of term then existing; contracts between prosecuting attorney and county commissioners for legal services terminated by enactment of said law.

May 15, 1906.

HON. JOHN B. MCGREW, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:— Your letter dated May 14th, relative to the operation of the Conroy law which provides compensation to prosecuting attorneys, is received.

You submit the following inquiries:

First. Are you entitled to 10% under section 1298 of the Revised Statutes of Ohio on the amount collected on a forfeited bond, suit being entered on the same January 31st, 1906, and judgment rendered and paid on April 7th, 1906?

Under section 1298, R. S., a prosecuting attorney is entitled to 10% on all money collected on fines, forfeited recognizances and costs in criminal cases. The suit being instituted and the money collected in this case before the Conroy law went into operation, you are entitled to receive from the county treasury 10% of the amount collected.

Second. You entered suit on a forfeited bond on March 20th; judgment was rendered and paid on May 2nd; are you entitled to 10% on the amount collected?

The Conroy law became effective on the 14th day of April, 1906. Under its provisions a prosecuting attorney can receive no compensation other than that provided in said bill. The collection being made in this case after the Conroy law went into operation, you are not entitled to the 10% in this case.

Third. Can prosecuting attorneys in office at the time of the passage of the Conroy law receive compensation under said law during existing terms?

Section 20 of Article II, of the Constitution, provides that no change in any law passed by the general assembly, fixing the term of office and the compensation thereof, shall affect the salary of any officer during his existing term.

At the time of the passage of the said Conroy law, the salary of prosecuting attorneys was fixed by section 1297 of the Revised Statutes of Ohio. Said section was, however, declared unconstitutional by the circuit court of Lucas county prior to the passage of said law on the ground that the salary so fixed by said section 1297, R. S., was not of uniform operation, thereby leaving the prosecuting attorneys without legal compensation for services rendered in criminal prosecutions. All compensation received by prosecuting attorneys other than that provided in section 1297 is in the nature of fees and the effect of the decision of the circuit court of Lucas county above referred to, was to deprive prosecuting attorneys of any salary.

I am therefore of the opinion that prosecuting attorneys in office at the time of the passage of the Conroy law, may receive the salary therein provided during their existing terms, for the reason that there was no legal statute providing a salary at the time of the passage of said law.

Fourth. May a prosecuting attorney, who has a contract with the county commissioners under Section 845, as amended, receive the compensation provided for in said contract, and also the salary provided in the Conroy law?

Section 3 of the Conroy law provides that,

“Existing contracts made by a board of county commissioners in any county in accordance with section 845 of the Revised Statutes of Ohio, shall remain in full force and effect.”

Under Section 845 the county commissioners were authorized to contract

with counsel other than the prosecuting attorney, and all such contracts made with such other counsel are by virtue of Section 3 of the Conroy law to remain in full force and effect.

Where the county commissioners under Section 845, as amended, have contracted with prosecuting attorneys, the Conroy law, by imposing upon prosecuting attorneys all the duties involved by such contracts, thereby avoids the force and effect of all such contracts made with prosecuting attorneys. In other words, all the duties devolving upon the prosecuting attorney under a contract made with the county commissioners by virtue of Section 845, as amended, are made official duties under the Conroy law, and for a prosecuting attorney to receive the compensation provided for in such contract and also to receive the salary provided in the Conroy bill, would in effect be to receive two compensations for the same service.

I am therefore of the opinion that in all counties where prosecuting attorneys have special contracts with the county commissioners under Section 845, as amended, settlement should be made at a regular meeting of the county commissioners for the services rendered under such contracts from the first day of January, 1906, up to the time of the passage of the Conroy law, and such contracts should then terminate.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### SHEEP CLAIMS—LIQUIDATION OF.

Pro rata payment of sheep claims out of insufficient funds liquidates such claims.

May 17, 1906.

HON. J. R. FITZGIBBON, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Your letter of May 16th states the following facts:

"Some years ago, in 1902 and 1903, our county was unable to pay the sheep claims in full, so a percentage was paid. Now we have had an excess in the fund and the auditor wants to know whether he can declare another dividend, as it were, on the sheep claims."

Section 4215 provides for the distribution of a fund arising from tax on dogs, and states:

"If such fund is insufficient to pay all such claims in full they shall be paid pro rata, and if after paying all such claims at the June session, there remains, etc."

Section 1052 provides for annual reports to be made by county auditors to state auditors, in connection with this fund, and Section 177 stipulates that the state auditor shall also make annual reports to the secretary of the state board of agriculture. The intention appears, evidently, to provide for annual settlements of this fund and there is no provision for the payment in any succeeding year of any shortage which may occur.

It is my opinion that after the county commissioners have exhausted the fund and paid the claims pro rata, those claims are liquidated and cannot be paid out of any subsequent fund.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### BRIDGES—ISSUE OF BONDS FOR CONSTRUCTION OF.

County commissioners may not issue bonds for general bridge repairs, in amount exceeding \$15,000, without submitting question of such issue to vote of people; purpose of such issue must be distinctly specified in resolution.

May 18, 1906.

HON. H. W. ROBINSON, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Your communication of May 12th enclosing copy of resolution of your board of county commissioners is received. You inquire whether this resolution is sufficient to legalize the issue of bonds proposed thereby.

#### RESOLUTION.

“Whereas, the board of county commissioners of Shelby county, Ohio, being this day in session, does find that the bridge fund of said county is inadequate and insufficient to properly construct and repair the necessary bridges on the public highways of said county, and,

“Whereas, said board finds it necessary to borrow money and issue the bonds of said county for the purpose of procuring funds with which to construct and repair the necessary bridges of the highways of said county. Be it therefore Resolved, that the sum of forty thousand dollars be borrowed for the purposes aforesaid, and that the bonds of this county be issued in said amount in denominations as follows: First 8-1500 each balance \$1,000.04 each, bearing interest at the rate of 4<sup>00</sup>/<sub>100</sub> per annum, payable semi-annually on the 1st days of January and July of each year, that the principal of said bonds be payable as follows: \$1,500.00 January 1st, 1907, \$1,500.00 July 1st, 1907, \$1,500.00 January 1st, 1908, \$1,500.00 July 1st, 1908, \$1,500.00 January 1st, 1909, \$1,500.00 July 1st, 1909, \$1,500.00 January 1st, 1910, \$1,500.00 July 1st, 1910, and \$2000.00 every six months thereafter.

“The auditor of said county is hereby directed to advertise said bonds for sale forthwith.”

The power of the county commissioners to borrow money for certain purposes is granted by the general assembly under Section 871 R. S. as follows.

“The commissioners \* \* \* for the purpose of erecting or acquiring \* \* \* any necessary building or bridge or for the purpose of enlarging, repairing, improving or rebuilding any such building or bridge \* \* \* may borrow such sum or sums of money as they deem necessary \* \* \* and issue the bonds of the county, etc.

“Provided, that in the case of bridges over streams on abandoned



turnpikes the provision of Section 2825 of the Revised Statutes shall not apply."

Section 872.

"The bonds so issued \* \* \* shall specify distinctly the object for which they were issued."

The limitation of this power is found in Section 2825 as amended April 26th, 1904 (97 O. L. 491).

"A county commissioner shall not levy any tax or appropriate any money for the purpose of building public county buildings, purchasing sites therefor or for lands for infirmity purposes, or for *building any bridge* except in case of casualty and except as hereinafter provided, the expense of which will exceed \$15,000.00 without first submitting to the voters of the county the question as to the question, etc."

The exception to the general power granted, therefore, is when the expenditure is to exceed \$15,000.00 but this exception does not apply, first, in cases of bridges over streams on abandoned highways (Sec. 871), second, in cases of casualty (Sec. 2825) or third, probably not in cases of improvement, enlargement or repair.

Commissioners of Defiance County v. Croweg, 24 O. S., 492, on page 500 the court say:

"It will be observed that the limitation of the general power of commissioners to build or repair bridges in the third section does not extend to the repair of bridges nor does it apply where an improved bridge has been destroyed by casualty."

The purpose of the proposed issue of bonds, as shown by the resolution submitted, is to provide a fund "to properly *construct and repair* the necessary bridges on the public highways of said county," and the reason given is simply that "the bridge fund of said county is inadequate and insufficient."

In my opinion, neither the purpose nor the reason as stated in said resolution is sufficient to take this case outside the general inhibition of the statutes, and the proposed issue of bonds would be unwarranted first, because in excess of \$15,000.00 and second, because the object is not distinctly specified.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### TEACHER — COMPENSATION OF.

If tuition fund of school district sufficient to pay each teacher minimum salary of \$40 per month provided by "Duvall law," such district may not receive state aid under said law.

May 18, 1906.

HON. A. P. MILLER, *Prosecuting Attorney, Pomeroy, Ohio*

DEAR SIR: — Your letter dated May 15th, relative to the operation of the Duvall law is received. You say that in one of your school districts six teachers

are employed, two of whom receive \$55.00 per month; the salary of the other four averaging about \$25.00 per month; that the maximum levy will not create a tuition fund sufficient to raise the salary of the four teachers to \$40.00 per month and still pay the higher grade teachers \$55.00 per month. You inquire whether or not the higher grade teachers can be paid \$55.00 per month and state-aid received to increase the salary of the lower grade teachers. In reply I beg leave to say section 1 of the Duvall law provides:

"That no person shall be employed to teach in any public school in Ohio for less than \$40.00 per month; and that, when any *school district* in Ohio has not sufficient money to pay its teachers \$40.00 per month for eight months of the year after the board of education of said district has made the maximum school levy authorized by law, three-fourths of which shall be for the tuition fund, then said *school district* is hereby authorized to receive from the state treasury sufficient money to make up this deficiency."

You will observe that the language used is "when any school district in Ohio has not sufficient money to pay its teachers \$40.00 per month," etc., clearly indicating that if the tuition fund is insufficient to pay each of the teachers in the district \$40.00 per month then no state aid can be received.

I herewith enclose you a copy of the law furnished me by the state commissioner of common schools.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### LOCAL OPTION—MUNICIPAL—DUTY OF SHERIFF PENDING CONTEST OF ELECTION IN CIRCUIT COURT.

Pendency in circuit court proceedings in error to judgment of probate court reversing decision of judges of special election under "Beal law," no stay of execution having been granted, does not vacate judgment of probate court; effect of said judgment having been to declare the result of said election to be in favor of the "drys", it is the duty of the sheriff to execute a writ under the "search and seizure act," 98 O. L. 12.

May 22, 1906.

HON. J. R. FITZGIBBON, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Your letter of May 16th states that a local option election under the Beal law was held in the village of Hebron, January 19th, 1905; that the judges of election announced the result to be in favor of the wets; that the validity of the election was contested in a proceeding before the probate court under the provisions of Section (4364-20i), that the probate court decided that the result of the election was in favor of the drys and that a journal entry to this effect was filed in the court and a copy sent to the clerk of the village council. In a petition in error from the probate court to the common pleas court the judgment of the probate court was affirmed. A petition in error has been filed in the circuit court but no stay of execution has been granted or allowed by either the common pleas or circuit courts.

The status of the proceedings to contest the election being as above stated, affidavits were filed with the judge of the common pleas court under the search:

and seizure act and a writ placed in the hands of the sheriff commanding him to levy upon the goods and chattels used in the conduct of the business at Hebron.

Your question is as to the duty of the sheriff under this writ.

The judgment of the probate court was not vacated nor was its force suspended by the filing of the petition in error in the circuit court to reverse such judgment. (State ex rel. Lewis v. Commissioners, 14 O. S. 515; State v. Commissioners, 31 O. S. 451, 456.)

Section 1 of the search and seizure act (98 O. L. 12), provides that when an affidavit is filed before a judge of the court of common pleas in accordance with the terms of said act such judge

“shall issue his warrant directed to any officer whom the complainant may designate, having power to serve criminal process, commanding him to search the premises described and designated in such complaint and warrant, and if such liquors are there found to seize the same with the vessels in which they are contained, and all implements and furniture used or kept for such illegal selling, furnishing or giving away of intoxicating liquors and them safely keep and make immediate return on said warrant.”

I am therefore of the opinion that the sheriff should seize all the intoxicating liquors found on the premises, and all implements and furniture used or kept for such illegal selling, and hold the same subject to the order of the court.

I assume, of course, that the affidavit and the warrant are in accordance with the terms prescribed by said act; and also that the probate judge was authorized under the provisions of Section (4364-20i), to render the judgment referred to in the statement of facts, supra. This opinion is solely as to the effect of the pendency of the proceedings in error on the duty of the sheriff in the execution of the warrant.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### ELECTIONS — DEPUTY STATE SUPERVISORS OF — COMPENSATION OF.

May 28, 1906.

HON. CHARLES F. HOWARD, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Your letter dated May 25th relative to the compensation of deputy supervisors of elections is received.

In reply I beg leave to say that section (2966-4), R. S., as amended 97 O. L. 221, provides that,

“Each deputy state supervisor shall receive the sum of \$3.00 for each election precinct in his respective county, and the clerk shall receive for his services the sum of \$1.00 for each election precinct in his respective county; and the compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. \* \* \* Such compensation shall be paid quarterly out of the general revenue fund of the county treasury upon vouchers of the board made and certified by the chief deputy or the clerk thereof.”

A deputy supervisor of elections shall receive \$3.00 for each precinct in his county at the November election of the next preceding year. No provision is made for additional compensation for special elections.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

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#### COUNTY SURVEYOR—EXPENSE OF.

County surveyor, when employed by the day, may receive actual expense only, not mileage; may not charge per diem fee for clerical work performed by assistant prior to September 1, 1906.

May 31, 1906.

HON. FRED H. WOLF, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—A county surveyor, when employed by the day on county work, is entitled to receive from the county treasury all *necessary* expenses *actually incurred* by him for livery, railroad fare and hotel bills.

Section 1183, as amended, gives the surveyor power to appoint assistants, deputies, draftsmen, inspectors, clerks and employes, but all such employes will, after September 1st be compensated by salaries. In the meantime, I am of the opinion, that the surveyor is not entitled to charge a per diem fee for assistants employed in clerical work. He is, I believe, entitled to charge a per diem fee for deputies employed by the day in engineering work.

Section 1166 R. S., under which existing deputies were appointed, indicates that such deputies must be surveyors. The compensation of the surveyor for clerical work performed before September 1st is governed by Section 1183, as amended by House Bill No. 449, which prescribes fees for different items of clerical work.

I believe the above answers the questions submitted in your letter of May 23, 1906.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### COUNTY SURVEYOR—EXPENSE OF.

County surveyor, when employed by day, may receive actual expense only, not mileage.

June 4, 1906.

HON. H. W. ROBINSON, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I have received your letter of May 31st in which you request my opinion as to the right of county surveyors to charge for mileage, livery hire and meals in certain cases.

Section 1183, as amended by the last legislature, provides that when employed by the day the county surveyor shall receive "five dollars for each day and actual and necessary expenses." He cannot receive both mileage and actual expenses, nor can he elect which he will take. In such case he is only entitled to receive

the amount necessarily expended by him. The amounts actually paid for necessary livery hire and meals would be proper items of expense. When not employed by the day the surveyor is entitled to mileage at the rate of five cents per mile going and returning.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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#### LOCAL OPTION — MUNICIPAL — DISPOSITION OF FINE.

Fines and costs collected in local option prosecutions under indictment in common pleas court should be paid into county treasury.

June 1, 1906.

HON. W. R. ALBAN, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Your letter of recent date is received. You inquire whether or not fines and costs collected under Section (4364-20g) of the Revised Statutes, wherein the prosecution is had under the state law by indictment and the fines collected in the court of common pleas, are to be paid into the treasury of the municipal corporation?

Section (4364-20g) is as follows:

“Money received from fines and forfeited bonds collected under the provisions of this act shall be paid into the treasury of the municipal corporation *wherein said fine was imposed or bond forfeited*, and shall be applied to such fund or funds as the council of the said corporation may direct.”

The act, of which this section is a part, commonly known as the “Beal Law,” provides for the prohibition of the sale of intoxicating liquors within the limits of municipal corporations, and it is evidently contemplated by Section (4364-20g) that the prosecutions for the violation of said act will be had in the municipalities wherein the offenses were committed. However, should a prosecution for a violation of this act be had in a municipality other than the one in which the offense was committed, the fine under Section (4364-20g) would be paid into the treasury of the municipality wherein the offense was prosecuted.

Neither Section (4364-20g) nor any other section of the act provides any direction for the disposition of the fine where the offense is prosecuted under an indictment in the court of common pleas. In as much as a prosecution in the court of common pleas cannot be considered to be in a municipal corporation, and there being no direction for the disposition of the fine when imposed by the court of common pleas, other than the general provision in Section 6802 R. S., I am of the opinion that the fine should be paid into the county treasury.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

VILLAGE SCHOOL DISTRICT—STATUS OF, WHEN VILLAGE HAS  
SURRENDERED ITS CORPORATE POWERS.

When a village has surrendered its corporate powers, the village school district becomes a part of the township school district wherein it is situated and the property thereof vests in the township board of education; village board of education may, subsequently to such surrender, levy and collect taxes to pay outstanding bonds of village district.

June 4, 1906.

HON. S. A. HOSKINS, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Your letter dated May 26th is received. You say that the village of St. Johns, in your county, has properly and legally surrendered its corporate powers and has properly filed the certificate of such surrender with the county recorder; that prior to the dissolution of said corporation, the village district of St. Johns erected a new school building and issued bonds of the village district to pay for the same; that a portion of said bonds are still outstanding and unpaid; that prior to the incorporation of the village of St. Johns, the school district was a special school district and was changed to a village district by virtue of Section 3888 of the Harrison school code. You inquire as to the present status of said school district.

Section 3888 provides that:

“When a village surrenders its corporate powers the village school district shall be thereby abolished and the territory formerly constituting said village district shall become a part of the township school district or districts of the civil township or townships in which it is situated, and all school property shall pass to and become vested in the township board of education of the civil township in which it is situated; the provisions of Section (1536-4) of the Revised Statutes of Ohio in regard to the settlement of the affairs of a village that has surrendered its corporate powers shall also apply to the village school district and the board of education of the same,” etc.

The village district of St. Johns, therefore, becomes a part of the township school district of the civil township in which it is situated, and all the school property becomes vested in the board of education of said township district.

Section (1536-4) which authorizes the surrender of the corporate powers of a village provides:

“That such surrender of corporate powers shall not affect vested rights or accrued liabilities of such village, or the power to settle claims, dispose of property, or levy and collect taxes to pay existing obligations.”

This provision being made to apply to the abolishment of village school districts it follows, therefore, that while the village district becomes a part of the township school district and all the school property vests in said township district, yet the board of education of the village district is authorized to levy and collect taxes to pay the existing obligations against said village district.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## FRATERNAL ORDER — TAXATION OF PROPERTY OF.

Real and personal property, the title of which is vested in a local fraternal order, as distinguished from a grand lodge, is not exempt from taxation.

June 6, 1906.

HON. GEORGE E. YOUNG, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—In response to yours of June 4th I beg to say that Section (2732-3) Bates Annotated Statutes of Ohio, does not exempt from taxation real or personal property, the title whereof is vested in a local order. There is an exemption from taxation of real or personal property belonging to the grand lodge of free and accepted masons not operated with a view to profit.

I can advise you more particularly in the premises if furnished with more definite information of the case at hand.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

PROSECUTING ATTORNEY — EFFECT OF CONTRACT WITH  
COUNTY COMMISSIONERS FOR LEGAL SERVICES.

Contract between board of county commissioners and prosecuting attorney and law firm jointly not enforceable after enactment of "Conroy law," 98 O. L. 160, by prosecutor as against county but enforceable by commissioners against law firm.

June 8, 1906.

HON. ROBERT R. NEVIN, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I have examined the contract made and entered into on the 11th day of January, 1906, by and between the county commissioners of Montgomery County, Ohio, party of the first part and Robert R. Nevin, prosecuting attorney of said Montgomery County, Ohio, and Bosler & Emanuel, attorneys-at-law, a partnership composed of Charles H. Bosler and Albert Emanuel, parties of the second part, relative to its enforcement under the new salary law fixing the duties and compensation of prosecuting attorneys.

Section 3 of the new prosecutors' salary law provides:

"Existing contracts made by boards of county commissioners of any county in accordance with Section 845 of the Revised Statutes, shall remain in full force and effect."

Under this section said contract is given full force and effect in so far as said force and effect is not avoided by other provisions contained in said prosecutors' salary law.

Section 1274 of said law expressly provides that the prosecuting attorney,

"shall also perform all duties and services as are required to be performed by legal counsel under Section 845."

The compensation therefor is fixed by Section 1297 of said law.

I have therefore held that a prosecuting attorney may not for the performance of the services enumerated in Section 845 receive the compensation fixed by Section 1297 of the prosecutors' salary law, and also the compensation provided for by contract between said prosecuting attorney and the county commissioners under Section 845 for the reason that it would in effect be receiving two compensations for the same services.

I am therefore of the opinion that while said contract, so far as the prosecuting attorney is concerned, can be given no effect after April 16, 1906, provided the prosecuting attorney thereafter receives the compensation fixed in the prosecutors' salary law, yet said contract is enforceable as against the law firm of Bosler & Emanuel.

I herewith return contract.

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

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#### MAD DOG—ALLOWANCE TO PERSONS INJURED BY.

County commissioners may allow car fare and hotel bill as part of "actual expense incurred" by persons injured by mad dog.

June 8, 1906.

HON. ALLEN R. MCBROOM, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—Your communication relative to the allowance made by the county commissioners to persons injured by mad dogs, is received. In reply I beg leave to say Section 1 of the act passed March 29, 1904, 97 O. L. 68, contains this provision:

"That any persons who shall be bitten or injured by a dog or canine, which at the time of the biting or injury to said person was suffering from or afflicted with what is known as rabies, \* \* \* may present a detailed itemized account of the *actual expenses incurred* and the amount paid for medical or surgical attendance."

This section further provides that upon the proper presentation of said account to the county commissioners, said commissioners may in their discretion order a payment of all or a part of said account. The portion of the section above quoted authorizes the person presenting said account to include therein, not only the amount paid for medical and surgical attendance, but also all additional expenses actually incurred and within my judgment would cover car fare and hotel bills.

Very truly yours,  
 WADE H. ELLIS,  
*Attorney General.*

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#### SURVEYOR—COUNTY—DUTY OF, TO DRAW CERTAIN PLANS.

County surveyor required to prepare plans and specifications only when in judgment of county commissioners plans are necessary, or when law expressly provides such plans shall be made.



June 8, 1906.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your letter dated June 7 is received. You inquire whether or not under the new surveyors' act, 98 O. L., 245, it is necessary for the county surveyor to prepare plans and specifications as enumerated in section 1166 of said act for the repair of a certain culvert in Grafton township, your county, the total cost of which will not exceed \$45.

In reply I beg leave to say in my judgment the duty of the county surveyor to prepare the plans, specifications, details, estimates of cost, submission of contracts and the inspection of work authorized by said section 1166 is to be exercised only in those cases where in the judgment of the county commissioners said plans and specifications, etc., are necessary or the law authorizing the improvement expressly provides that such plans, specifications, details, estimates of cost, etc., shall be made.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### SURVEYOR—COUNTY—FEES OF.

County surveyor not entitled to mileage when employed by the day prior to April 16, 1906; entitled to mileage when not so employed, prior to said date; county commissioners may employ county surveyor as draftsman under sections 2789a and 2789b, R. S.

June 9, 1906.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR:—Your letter of June 6th requests my opinion as to the right of a county surveyor to receive mileage in connection with work done prior to April 16th, 1906, the date when H. B. 449, amending section 1183, R. S., became a law.

Under section 1183, R. S., the county surveyor was not entitled to mileage when employed by the day, but was entitled to mileage at the rate of 5c per mile going and returning, when not so employed.

You also request my opinion as to the right of the county commissioners to employ a county surveyor as draftsman under sections 2789a and 2789b, as amended 97 O. L., 489. The sections of the statutes last referred to were not expressly repealed by the county surveyors' acts passed by the last general assembly and I am unable to find any provisions in the recent acts which are so inconsistent with these sections as to operate as a repeal by implication. I am therefore of the opinion that the county commissioners may employ the county surveyor as a draftsman in accordance with the provisions contained in sections 2789a and 2789b of the Revised Statutes.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

SURVEYOR — COUNTY — COMPENSATION OF DEPUTIES AND  
EMPLOYEES.

County surveyor has discretion to determine basis of compensation of deputies and employes; aggregate sum expended only within control of county commissioners.

June 9, 1906.

HON. H. T. SHEPHERD, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR: — Your letter of June 5th presents, substantially, the following question: Does section 1183, as amended 98 O. L., 245, require the county surveyor to fix a salary for each of his deputies and employes, which salary shall be paid monthly without regard to amount of work done by employe during the month, or may the compensation of such employe be fixed at a certain amount for each day's work, the employe to be paid at the end of the month for the time actually employed in county work?

I am of the opinion that the surveyor may compensate his employes either by salaries payable monthly, or by per diem fees, accordingly as the one method or the other may, in his judgment, be best adapted to secure to the county adequate service at the lowest expense. Clerks or draftsmen whose employment is continuous throughout the year could doubtless be most advantageously employed on a salary basis, while expert assistants whose services would be needed only on special occasions could probably be employed most economically if paid per diem fees for work actually done. The manner of compensation, however, is a matter to be determined by county surveyors.

Section 1183 requires the surveyor to file with the county commissioners a statement of the number of employes and the "aggregate compensation" to be allowed them during the year. The county commissioners, after making such changes in the statement submitted as they deem just, "shall fix an aggregate sum to be expended for such year for the compensation" of such employes.

While the statement submitted should indicate the number of employes and the probable amount to be paid to each to enable the commissioners to intelligently correct it and fix the aggregate compensation it is not, apparently, the intention of the statute to make such corrections as may be made in the details of his estimate, mandatory upon the county surveyor. He has still the power to appoint such assistants as he deems necessary for the proper performance of the duties of his office, and he may fix their compensation, subject only to the limitation that the aggregate compensation of all employes shall not exceed the amount fixed by the county commissioners. While the fact that payments are to be made monthly is a slight indication that all employes should receive salaries the fact that the word "compensation" is used argues strongly that it was the intention of the legislature that employes might be paid either by fees or by salaries. It is doubtful if any legislative assembly ever had more occasion to appreciate the distinction between the meanings of the words "compensation, fees and salaries" than the 77th General Assembly, which passed the act here considered. It would certainly be proper and advisable for the county surveyor to fix the rate of compensation of each employe of his office before the first day of September and to file a schedule of fees and salaries so fixed, with the county auditor.

The amounts actually expended by a county surveyor for necessary railroad fare, hotel bills, etc., while in the discharge of his duties, are proper items of expense within the meaning of section 1183, as amended.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## SURVEYOR — COUNTY — DEPUTIES AND ASSISTANTS — COMPENSATION OF.

Assistant engineers employed by county commissioners for definite period will continue to receive compensation fixed by contracts of employment during time provided in said contracts; expense of deputy county surveyors may be paid; expense of rodmen may not be paid; supplementary to opinion of May 9th.

June 13, 1906.

HON. JONATHAN E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR: — Your letter of June 4th requests my opinion on several questions presented in a letter addressed to you by the county surveyor of Wood county. These questions have already been considered in former opinions rendered by this department and the conclusions arrived at are as follows:

*First.* Assistant engineers with whom the county commissioners had contracts for a definite period at the time the recent surveyors' laws were enacted, will continue to draw compensation in accordance with the terms of their contracts until the time contracted for has expired.

*Second.* No new contracts should be made by the county commissioners for the employment of assistant engineers. Until September 1st, 1906, the engineering work of the county must be done by the surveyor, his three deputies and assistant engineers whose contract of employment has not terminated.

*Third.* The actual and necessary expenses of deputy surveyors may be paid.

*Fourth.* The law does not authorize payment of the expenses of a rodman, although he be a regular employe. A regular employe of the office who enters on his employment after September 1st and is employed under section 1183 as amended, would be entitled to receive his expenses on whatever work he was employed, but as pointed out in the printed opinion, with a copy of which you have already been furnished, the statute does not contemplate the employment of a rodman under this section. Rodmen regularly receive per diem fees of \$2.00 without expenses.

I enclose copy of an opinion with reference to the mode of compensation of deputies and assistants after September 1st, about which you made some inquiries when you were in the office last week.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## SCHOOL DISTRICTS — ABOLITION OF JOINT SUB-DISTRICTS.

Levy for school funds necessary for maintenance of building formerly in joint sub-district must be made by township board of education of township in which said building is located.

June 20, 1906.

HON. CHAS. C. UPHAM, *Prosecuting Attorney Canton, Ohio.*

DEAR SIR: — Your letter dated June 18th relative to levying the tax for school purposes in a certain joint school district in your county is received. You say that part of the territory embraced in said school district is in one township and part in another township; that there is a contention between the auditor of Stark

county and yourself as to whether the county auditor or the board of education of Sandy township should levy the tax on the lands in Sandy township which forms a part of said district.

In reply I beg leave to say section 3923 of the Harrison School Code provides as follows:

"Joint sub-districts are hereby abolished and the territory of such districts, situated in the township in which the school house of the joint sub-district is not located, shall be attached for school purposes to the township school district in which said school house is located, and shall constitute a part of said township school district, and the title of all school property located in said joint sub-district, is hereby vested in the board of education of the township to which the territory is attached."

Under this section the school board of the township district in which the school house is located will make the levy for the school fund and said levy will be placed by the auditor against all the territory included in said township district.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### LOCAL OPTION — MUNICIPAL — SALE OF INTOXICATING LIQUORS OUTSIDE OF MUNICIPALITY.

Sale of intoxicating liquors outside of municipality where plant is located regulated by law of territory in which sale made.

June 23, 1906.

HON. CHARLES S. SHEPPARD, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR: — The case of the Village of East Palestine v. Bower, referred to in your letter of June 22nd, was a prosecution for a violation of an ordinance passed by a municipality under section (4364-20), R. S. The statute, at the time this case arose, only gave municipalities power to regulate *places* where intoxicating liquors were sold. As amended, 95 O. L., 87, the statute gives municipalities power to regulate the selling, furnishing and giving away, as well as "places" where such acts take place. The difference between the statute construed in that case, and the provisions of the local option law is pointed out in paragraph 2 of the syllabus, which states that:

"While the township local option act authorizes townships to prohibit the sale of intoxicating liquors as well as the keeping of places where such liquors are sold within the township, municipalities by Sec. (4364-20), R. S., are only authorized to prohibit "places" where intoxicating liquors are sold within the corporate limits."

The provision in section (4364-20b) that a manufacturer may sell, deliver and furnish his product in wholesale quantities to any person or persons residing outside of the limits of the municipality does not, in my opinion, confer any right on manufacturers situated in dry municipalities to make sales in townships which have been voted dry. Whether or not sales made by such manufacturers outside of

the municipality where the plant is located are legal, depends upon the law of the territory where the sale takes place, as determined by ordinance or local option election at such place.

I enclose copy of the opinion referred to in your letter.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### ROADS — MACHINERY FOR.

County commissioners have no authority to purchase machinery for construction and repairs of roads.

June 25, 1906.

HON. W. R. GRAHAM, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your letter relative to the authority of the county commissioners to purchase a road roller and stone crusher to be used on the public highways of the county, the cost of which being between \$2500 and \$3000, is received.

I have carefully examined the statutes relative to the general powers of boards of county commissioners and also as to the specific powers of such boards in the construction and repair of public highways, and I have found no provision of law that would authorize county commissioners to expend public money for the purpose suggested.

Section 4735 of the Revised Statutes does authorize township trustees to furnish tools, implements and machinery for the construction, repair and maintenance of the roads in the several road districts within their townships, and further provides that such road machinery, when purchased, shall be delivered to the road supervisors. This section, however, can have no application to county commissioners. The powers and duties of boards of county commissioners in the construction and repair of the public highways are defined by statute, and such boards are without authority to expend public money for such construction and repair unless the statute expressly authorizes the expenditure.

I am therefore of the opinion that the county commissioners may not expend public money for the purchase of road rollers and stone crushers for the use of the county.

Very truly yours,

W. H. MILLER,

*Assistant Attorney General.*

#### COUNTY COMMISSIONERS — COMPENSATION FOR DITCH WORK.

Limitation of section 897, R. S., as to total amount received by county commissioners per diem for ditch work not removed by provision of section 4506, R. S., as amended 98 O. L., 296.

July 10, 1906.

HON. HAMILTON E. HOGE, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Your communication dated July 9th is received. You inquire, first, whether or not section 4506, R. S., as amended, 98 O. L., 296, fixing the per

diem of county commissioners for ditch work, does in effect remove the limitation of \$300.00 as fixed by section 897, as amended April 21st, 1904.

Section 897 fixes the compensation of county commissioners and provides that said commissioners,

“Shall receive \$3.00 per day for the time they are actually employed in ditch work, the total amount so received for such ditch work not to exceed the sum of \$300.00 in any one year.”

Section 4506, as amended, is only intended to fix the per diem county commissioners are to receive for services rendered on county ditches, and does not, in my judgment, in any way affect the \$300.00 limitation as fixed in section 897.

I herewith enclose copy of a portion of an opinion rendered the prosecuting attorney of Clark county, which, I believe, fully covers your second inquiry.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

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DEPOSITORY — COUNTY — FORM OF SURETY COMPANY BOND RE-  
QUIRED BY LAW.

July 19, 1906.

MR. CHARLES GERHARDT, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—The question presented by you regarding the form of surety bond to be executed by fidelity and indemnity insurance companies pursuant to the act of the general assembly of March 31st, 1906, (98 O. L., 274, amending secs. (1136-1-9), inclusive, R. S.) known as the “county depository law,” I beg to say that when the depository or depositories have been provided for by the commissioners of the county and the awards of the money of the county have been made to the bank or banks that offer the highest rate of interest therefor, it is required that before such an award shall be binding on the county, there shall be executed by such bank or banks, a good and sufficient undertaking to be acceptable to the commissioners, as provided in section 4 of the act; or there can be deposited certain character of bonds as security for the money so awarded. In case of the execution of a bond by a fidelity and indemnity insurance company the statute in question does not contemplate the execution of a number of bonds dividing the liability of any one depository. This is made evident from the consideration of section 7 of the act.

In the event of more than one surety company being offered by such depository they should be required to execute a common bond, so that the liability thereon would be joint and not several. You will understand that pursuant to section 4 of such act the undertaking may be signed by at least six resident freeholders as sureties in the place of a surety company.

Very truly yours,

S. W. BENNETT,  
*Special Counsel.*

## PROSECUTING ATTORNEY — EXPENSE OF.

July 26, 1906.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR: — Your letter of the 21st inst. presents the question: When the prosecuting attorney serves boards of education, township trustees, etc., as required by section 1274, R. S., should such boards be charged with the expenses, if any, incident to such services or should the expense be charged to the county in the prosecutor's expense account?

Section 1298, R. S., as amended by the act of March 31, 1906, (98 O. L., 161), is as follows:

"In addition to his salary, the prosecuting attorney shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties, or in furtherance of justice, which expense account shall be itemized and duly verified, and shall, if found correct, be allowed by the county commissioners and be paid monthly out of the general revenue fund of the county."

Without expressing a doubt as to whether more than one kind of official acts is embraced in this statutory classification, or, whether the general assembly meant to distinguish between "expenses incurred in the performance of official duties," and those incurred "in the furtherance of justice," yet, it seems reasonably clear, the new duties imposed by section 1274, R. S., upon the prosecutor, (98 O. L., 160), are "official duties," and being such the expenses incurred in their performance, when found correct by the county commissioners, should be paid monthly out of the general revenue fund of the county.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## TAXATION OF STOCK IN FOREIGN CORPORATION.

Resident of Ohio is liable for tax on shares of stock in foreign corporation, regardless of taxation of such stock in another state.

July 27, 1906.

HON. EDWIN E. POWER, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR: — I am in receipt of yours of the 26th inst., submitting for the opinion of this department thereon, the following question:

Mary J. Claypool, a resident of Muskingum county, inherited from her father, capital stock of the Farmers and Traders State bank of Bonaparte, Ia., amounting to \$2,000. Her father died prior to the year 1896. Said stock is held by said bank, agent of Mary J. Claypool, and has not been in her possession otherwise than as above stated, since that time. The bank pays the taxes on its property in the state of Iowa. Under proceedings instituted by the county auditor and tax inquisitor

these bank shares were charged against her upon the duplicate of the auditor and she paid thereon taxes and expense of collection amounting to \$232.40. She has asked the board of county commissioners to allow her the sum of \$176.62 as erroneous and illegal taxes paid by her by reason of the premises.

The authorities cited by counsel representing the applicant do not sustain the contention made by her. *Moss and others, executors, v. Bonn, auditor* (6 O. C. R., 452) presents the question merely as to where executors of an estate are required to list the property of the estate. Haynes, J., states on page 453:

"The petition is brought for the purpose of restraining the county auditor from placing upon the tax duplicate of the county of Erie, certain personal property, belonging to the estate of Hawk, deceased, which it is claimed should be placed upon the duplicate by reason of the fact that J. O. Moss, one of the executors, is domiciled in the state of Ohio."

You will observe on page 458, from the authorities cited by the court, that no question was raised as to the power to tax *cestuis que trust* personally for any property they owned.

Here the question is presented, the ownership of the stock not being denied, as to the liability of Mrs. Claypool for taxes in this state, the estate of her father having been administered upon in the state of Iowa. The facts submitted show that although she is the owner of the bank shares they held by the bank for her. The question presented in the Bonn case, *supra* is, therefore not in point.

The case of *Grant v. Jones* (39 O. S., 506), is also cited by them. The court held in that case that for the purposes of taxation, under the peculiar facts in that case, Grant was not a resident of the State of Ohio, and the notes and mortgages owned by him were not taxable here. That decision was based upon the fact that Grant had never acquired a residence in the State of Ohio.

In the case submitted Mrs. Claypool's residence is admitted; her ownership of the shares of stock is admitted. Under the authority of *Bradley et al. v. Bauder* (36 O. S., 28) an owner of shares of stock in a foreign corporation, who resides in Ohio, is required to list the same for taxation, notwithstanding the capital of the corporation is taxed in the state where the corporation is located. This same principle has been followed in *Grant v. Jones*, 39 O. S., 514; in *Myers v. Seaberger*, 45 O. S., 235. It was also again announced by the supreme court of this state in *Lee v. Sturgis*, 46 O. S., 163, 173, and the principle was sustained in *Sturgis v. Carter*, 114 U. S., 521. The whole subject was again reviewed by our supreme court in the case of *Landor, Treas., v. Burke*, 65 O. S., 532, and here the former decisions were approved. This has also been followed in other states in many reported cases unnecessary here to cite.

For the foregoing reasons the application of Mrs. Claypool should be disallowed. The county commissioners have no authority to order a return of the taxes paid by her upon such bank shares.

Very truly yours,

WADE H. ELLIS,

Attorney General.



SPECIAL ACT — EFFECT OF CERTAIN ACT DETACHING LANDS  
FROM CITY OF LANCASTER.

July 27, 1906.

HON. F. M. ACTON, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:— I have yours of July 25th, enclosing letter of the deputy auditor of state to the county auditor of Fairfield county, and of the county auditor of Fairfield county to yourself, inquiring the effect of the passage of three different acts detaching certain lands from the city of Lancaster and restoring them to the township of which they were originally a part. There is probably no doubt that under the recent holdings of the supreme court legislation of the character referred to would be held to be unconstitutional. It is not so clear, however, that such would have been the conclusion of the courts at the time these several acts were passed. Inasmuch as they were passed and acted upon by those affected thereby at a time when they might have been sustained by the courts it seems to me very doubtful whether the court will now disturb that action.

I advise that the board of review of the city of Lancaster cannot safely assume jurisdiction over such property and should not attempt so to do until a proper proceeding in the courts determines that the several acts mentioned violated the constitution and that no rights accrued thereunder in favor of the various property owners.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## CLERK OF COURTS — FEES OF.

Clerk of courts of county not entitled to additional fees for entering each day's attendance of witnesses.

July 30, 1906.

HON. JAMES GLENN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:— The question presented in your letter of July 19th was considered in an opinion of Attorney General Sheets, rendered March 31st, 1900. (Report of Attorney General, 1900, p. 63.) The opinion is as follows:

"HON. W. D. GUILBERT, *Auditor of State.*

"DEAR SIR:— Yours containing cost bill in case of Ohio v. Billow, is at hand. You ask the opinion of this office as to the legality of the fees and expenses therein charged, which the state is required to pay in order to aid the warden of the penitentiary in passing upon the items of the bill. We shall call attention to such items as appear upon the face of the cost bill to be incorrect.

"1. The item of \$133.12, which the clerk charges for entering the appearance of witnesses,, is, in my opinion, incorrect.

"It appears upon the face of the cost bill that there were but two hundred and eighty-eight witnesses in attendance upon the trial of the case. Sixteen of these were excused and re-subpoenaed. Section 1260, R. S., provides that the clerk shall receive for 'entering the attendance of each witness four cents.' A witness appears in a case in obedience to a subpoena and remains in attendance until excused.

"The statute does not say that the clerk shall receive four cents for each day the witness attends. This is the method employed by the clerk in computing this item, which we think is wholly erroneous. We are aided in this construction not only by the plain words of the statute, but by the fact that the fees charged are wholly out of proportion to the services rendered, and it will not be presumed that the legislature intended the clerk should have more than reasonable fees for the services required. As there were two hundred and eighty-eight witnesses in attendance, sixteen of whom were excused, and re-subpoenaed, the clerk is entitled to four cents for entering the attendanc of three hundred and four witnesses or \$12.16."

I do not think the fact that the judge required the witnesses to report to the clerk each day entitled the clerk to any additional fee. It was the duty of the clerk to keep some record of the daily attendance of the witnesses in the absence of such an order by the judge.

The uniform practice throughout the state has been in accordance with the ruling of Judge Sheets.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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#### ROADS—APPLICATION OF GENERAL FUND TO CONSTRUCTION AND REPAIR OF.

County commissioners may not apply part of funds raised by general levy to construction and repair of roads.

July 31, 1906.

HON. ROBERT S. WOODRUFF, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—I have yours of July 28th, advising me that the commissioners of Butler county desire my opinion upon their power to pay for a part of a certain road improvement out of the general county fund, the road fund having been wholly set apart as a bridge fund under Section 2824 of the Revised Statutes. I am not authorized by law to render opinions to county commissioners but treating the communication as a request from the prosecuting attorney under favor of section 208 of the Revised Statutes of Ohio, I beg to say that, inasmuch as the county levy provided for by section 2823 is made expressly for "purposes other than for roads, etc.," the proceeds of such levy cannot, in my opinion, be lawfully diverted to that purpose except in the manner provided by statute. Section (22b-2) et seq., Bates' Annotated Ohio Statutes affords a method by which a transfer may be made from one fund to another if the facts justify such proceeding and until such transfer is so made or until another levy has placed sufficient money in the road fund the commissioners cannot lawfully proceed with such improvement.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

## EXTRADITION — ABANDONMENT OF CHILD.

Parent guilty of abandonment of child may be extradited from another state.

August 2, 1906.

HON. C. R. HORNBECK, *Prosecuting Attorney, London, Ohio*

DEAR SIR:—I am of the opinion that a parent guilty of the offense of abandonment of a child, as defined by Section (3140-2) R. S., may be extradited from another state.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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## SPECIAL SCHOOL DISTRICT — DISPOSITION OF FUNDS OF.

Funds raised by levy in special school district created by special act revert to legal district of which territory embraced in such special district is a part.

August 2, 1906.

HON. A. C. DENBOW, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—In answer to yours of July 31st, 1906, I beg to say that I do not understand that any officer of a special school district created by a special act of the general assembly, can have any claim against the supposed school district or against any one else for services performed, since such acts have been held unconstitutional. The proceeds received from any levy made by such a board should undoubtedly revert to the district of which such special district became a part by virtue of the decision holding such act to be void.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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ELECTIONS — BOARD OF DEPUTY STATE SUPERVISORS OF —  
EXPENSE OF.

Expense of chief deputy and clerk of board of deputy state supervisors of elections payable out of county treasury.

August 3, 1906.

HON. CHARLES F. HOWARD, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—In response to your inquiry of June 30th, 1906, I beg to say that expenses incurred by the chief deputy and clerk of the board of deputy state supervisors of elections under Section (2966-30) Bates' Annotated Statutes, are not to be deemed the personal expenses of those acting as chief deputy and clerk and are, therefore, not covered by the compensation provided for by Section (2966-4). The chief deputy and clerk in performing the duties imposed by Section (2966-30) are acting as officers and representatives of the whole board and expenses incurred thereby are the expenses of the whole board and should be paid

out of the county treasury under that part of section (2966-4) which authorizes the payment of "all proper and necessary expenses of such board of deputy state supervisors."

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### TREASURER — COUNTY — FEES OF.

County treasurer entitled to 8/10 of 1% of the amount of interest collected under county depository act.

August 6, 1906.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—In answer to your inquiry of August 1, 1906, I beg to say that in my opinion the county treasurer is entitled under Section 1117 of the Revised Statutes to eight-tenths of one per cent of the amount of interest collected by him under the county depository act, 91 O. L., 403, 92 O. L. 353 and 93 O. L. 376. (R. S. (1136-1.))

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

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#### PROSECUTING ATTORNEY MAY SERVE AS MEMBER OF CITY BOARD OF EDUCATION.

Restriction of Section 3977 R. S. applies only to such boards of education as prosecuting attorney is legal adviser of.

August 7, 1906.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your letter dated July 20th, inquiring as to whether a prosecuting attorney can serve as a member of the board of education of a city district, is received. In reply I beg leave to say that I have been unable to find a copy of the letter to which you refer, but am of the opinion that the restriction in Section 3977 only applies to boards of education of which the prosecuting attorney is the legal adviser.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

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#### DEPOSITORY — COUNTY — SECURITY REQUIRED TO BE OFFERED.

Indebtedness of municipality for construction of water works constitutes a part of "indebtedness" under county depository law.

August 7, 1906.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—The question presented in yours of the 2nd inst., is whether an indebtedness of a municipality for the construction of waterworks constitutes part of the municipal indebtedness within the provisions of section 7, of the county depository law, passed April 2d, 1906 (98 O. L. 274, 279). By the terms of the so-called Longworth bonding act (95 O. L. 318), the indebtedness authorized by that act includes "erecting and purchasing water-works, and supplying water to the \* \* \* corporation and the inhabitants thereof." I know of no exemption of such indebtedness by which it should not be considered as municipal indebtedness.

Section 7 of the depository law provides that if the securities offered to the commissioners are those of a municipal corporation the indebtedness whereof does not exceed 10 per cent., the commissioners may accept the same in lieu of the undertaking. I am not otherwise advised than by your letter, that the total indebtedness of the municipality in question, including the water-works debt exceeds ten per cent., if so, the interest bearing securities of such municipal corporation cannot be accepted by the commissioners for the purposes of such deposit.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

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PROSECUTING ATTORNEY—COMPENSATION OF.

Salary provided by Section 1297 R. S., as amended by "Conroy act," 98 O. L. 160, covers service rendered by prosecuting attorney under Section 1277 R. S., in restraining misapplication of public funds.

August 7, 1906.

HON. H. C. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR:—Your letter dated August 2nd inquiring whether or not the compensation fixed in Section 1297 R. S., as amended March 31st, 1906, covers services performed by the prosecuting attorney under Section 1277, is at hand.

Section 1297 as amended after fixing the compensation a prosecuting attorney shall receive, further provides that:

"Such salary shall be in full and in lieu of all compensation consisting of salaries and fees heretofore paid to prosecuting attorneys for their services as such, and in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether the same relates to either criminal or civil matters."

In my opinion this provision covers the services rendered under Section 1277.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

## SECRET SERVICE OFFICER—EXPENSE OF.

Expense of secret service officer employed in criminal matters may be included in expense account of prosecuting attorney.

August 8, 1906.

HON. JOHN B. MCGREW, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—On my return from Athens, Ohio, where I have been engaged for the past three weeks in the trial of the case of the State of Ohio v. Scott, I find a communication from you under date of July 16th, relative to the allowance of certain expenses incurred by you in the discharge of your official duties. In my judgment the provision in the Conroy bill providing that:

“the prosecuting attorney shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties or in the furtherance of justice”

only applies to the personal expenses of the prosecuting attorney.

Section (470-1) provides for the appointment of a secret service officer for the prosecuting attorney's office whose duty it shall be to aid the prosecuting attorney in the collection and discovery of evidence to be used in the trial of all criminal cases and in matters of a criminal nature. No provision, however, is made for the expenses of said secret service officer. I am therefore of the opinion that the personal expenses of said officer, while in the discharge of his official duties, may be properly included in the expense account of the prosecuting attorney and paid under the provisions of the Conroy bill above quoted.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

## STENOGRAPHER—FOR PROSECUTING ATTORNEY—COMPENSATION OF.

Common pleas judge cannot be compelled to fix aggregate amount to be expended for compensation of stenographer for prosecuting attorney; such compensation may not be included in expense account of prosecuting attorney.

August 9, 1906.

HON. D. R. WILKIN, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Your communication under date of August 8th, relative to the duty of a common pleas judge to fix an aggregate sum for the compensation of a stenographer in a prosecuting attorney's office under Section 1271 R. S. is received. You inquire whether or not this section invests the common pleas judge with any discretion in the matter. In reply I beg leave to say section 1271 provides:

“The judge of the court of common pleas in each county, or if there be more than one judge, then the judges of said court in joint session, may, immediately on the passage of this act, fix an aggregate

sum to be expended for the remainder of the year 1904, and *may*, on or before the first Monday in January of each year thereafter fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office."

The word "may" as used in this section does, in my judgment, invest a discretion in the common pleas judge as to whether or not an aggregate sum be fixed for the purposes set forth in said section, therefore an action in mandamus would not lie to compel a common pleas judge to exercise the power conferred by said section unless there was an abuse of sound discretion.

You further inquire as to the authority of a prosecuting attorney to employ a stenographer and include the compensation therefor in his expenses under Section 1298 as amended in 98 O. L., p. 161. In my judgment the provision in Section 1298 allowing the prosecuting attorney his reasonable and necessary expenses incurred in the performance of his official duties, or in the furtherance of justice, refers to personal expenses only and does not include the compensation of a regularly employed stenographer.

Very truly yours,

W. H. MILLER,  
*Asst. Attorney General.*

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#### COUNTY COMMISSIONERS — AUTHORITY OF, TO COMPROMISE CLAIMS AGAINST COUNTY.

County commissioners may compromise claim against county auditor for sums by them illegally allowed him:

August 9, 1906.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:— Your letter of July 24th to the attorney general relative to bringing suit for the recovery of certain moneys from the county auditor unlawfully allowed by the county commissioners, was received in the absence of the attorney general and myself. On my return to the office after an absence of three weeks in Athens County, in the trial of the Scott case, the chief clerk handed me your letter saying that he had acknowledged receipt of the same.

As I understand from the resolution adopted by the county commissioners, said commissioners compromised for \$100.00 a claim of \$1,901.74 found to have been received by the auditor without warrant of statute, by the bureau of inspection and supervision of public offices. The inquiry you submit is whether or not the county commissioners were authorized under Section 855 R. S. to so compromise and adjust said claim; and if not, whether suit should be instituted to recover the full amount (\$1,901.74) from said auditor?

Section 855 of the Revised Statutes authorizes the board of county commissioners to compound for or release, in whole or in part, any debt, judgment, fine or amercement due the county, and for the use thereof, except in cases where either of the members of said board is personally interested. If the \$1,901.74 which was found to have been unlawfully received by said auditor belongs to the county then, in my judgment, under the provision of Section 855, as above quoted, the county commissioners would have the authority to release the claim in whole or in part.

I observe, however, that \$1,533.36 of this claim was money received by the

auditor during his term of office for writing ditch notices, and must have been paid by the land owners receiving benefits from the ditch improvement, therefore that part of the claim would be due to the individual land owners who paid the assessments, instead of to the county, and it might be that said land owners would have a right of action against said auditor for the recovery of the same. If any part of the claim of \$1,901.74 is due the state then I am clearly of the opinion that the county commissioners were without authority to release that portion of the claim.

I am inclined to the opinion that since the county commissioners have compromised and settled this claim under the power conferred in Section 855 R. S. the courts will be without authority to modify or set aside the same.

I herewith return the enclosure.

Very truly yours,

W. H. MILLER,

*Asst. Attorney General.*

#### HUMANE OFFICER—COMPENSATION OF. ISSUE OF BONDS FOR ROAD IMPROVEMENTS.

Salary of humane officer appointed and confirmed under Section 3718 R. S. covers all services; officer not entitled to informer's fees and costs under Section 3718a R. S.

Time for which bonds may be issued and levy made by county commissioners to pay for road improvements in counties where road commissioners are appointed.

August 10, 1906.

HON. JOHN H. CLARK, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—Your communication relative to the compensation of humane officers appointed under Section 3718 Revised Statutes, as amended, 98 O. L. 44, is received. In reply I beg leave to say Section 3718 as amended provides that humane officers appointed by humane societies must have the approval of the mayor of the city or village for which the appointment is made and all such officers appointed outside of any city or village must have the approval of the probate judge of the county. This section further provides that such officers so appointed and approved shall be paid monthly salaries by the council of the city or village for which the appointment is made or if outside a city or village by the county commissioners of the county. Therefore I am of the opinion that humane officers are not entitled to any compensation or fees under Section 3718a.

You also inquire whether the act entitled "An act to authorize the commissioners of any county to issue bonds to refund the indebtedness of boards of road commissioners appointed by the county commissioners therein, incurred on account of road improvements," passed by the last legislature, 98 O. L. 32, authorizes the levying of a tax for a greater number of years as stated in the petition for the one mile free turnpikes and whether it applies to pike petitions or assessments made after the passage of the act. This act provides that commissioners of any county in which road commissioners were appointed by said county commissioners, and indebtedness has been incurred on account of road improvements under color of any legislative act, are authorized, for the purpose of extending the time of the payment of such indebtedness, to issue the bonds of the county in such amounts and *for such length of time* as such county commissioners may determine. The act further provides that commissioners are author-



ized to levy a tax sufficient to pay the principal and interest of said bonds annually, on all of the taxable property of every kind within the limits of any election precinct or road district for which said road commissioners were appointed. The effect of this act is to authorize the commissioners of any county in which road commissioners have been appointed and in which indebtedness has been incurred on account of road improvements under color of *any legislative* act, to issue and sell bonds and to levy a tax annually to pay the principal and interest of the same.

I am unable to see the relevancy of Sections 4774 and 4777, Revised Statutes, to this act. These sections refer specifically to one mile assessment pikes, while the act in question applies to the indebtedness of road districts wherein the road commissioners have been appointed by the county commissioners.

Very truly yours,

W. H. MILLER,  
*Asst. Attorney General.*

#### SOLDIERS RELIEF FUND.

Authority of soldier's relief commission and county commissioners, respectively, as to levy for soldier's relief fund; compensation and expense of soldier's relief commission not payable out of proceeds of levy for said fund.

August 10, 1906.

HON. PETER J. BLOSSER, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—In answer to yours of August 8th, 1906, I beg to say that Section 2 of the soldier's relief commission law, Section (3107-51), as amended in 94 O. L. 158, is unintelligible in some respects and so far as unintelligible probably does not repeal the section as it appears in 91 O. L. 84. The section as it appears in 91 O. L. 84, clearly gives the soldier's relief commission power to determine *not* the rate to be levied but the amount to be raised by the levy and it is the duty of the county commissioners to make such levy, not exceeding three-tenths, as will produce the amount that the relief commission has found necessary, and the county commissioners have no power to determine that a less amount will be sufficient. Whatever the amended section in 94 O. L. 158 may accomplish, its language will not justify the conclusion that the law was changed in this particular.

Second: The proceeds of the three-tenths levy are to be used for the exclusive purposes for which the levy was made and the compensation and expenses of the relief commission are not among those purposes. Such compensation and expenses are provided for by Section 5 of the act, Section (3107-54) Bates, and are payable out of the general county fund.

Very truly yours,

W. H. MILLER,  
*Asst. Attorney General.*

#### CORONER — DUTY OF.

Coroner of county in which is found body of person whose death is supposed to have been caused by violence, not coroner of county in which violence supposed to have been received, must hold inquest.

August 15, 1906.

HON. E. E. EUBANKS, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Your communication dated August 14th, submitting the following inquiry is received:

“A person having received violence in Vinton County, Ohio, afterwards dies from such violence in Jackson County, Ohio. Shall the coroner of Jackson County hold the inquest?”

Section 1221 of the Revised Statutes of Ohio provides:

“When information is given to any coroner that the body of a person whose death is supposed to have been caused by violence has been found in *his* county, he shall appear forthwith at the place where such body is, \* \* \* and proceed to inquire how the deceased came to his death, etc.”

Under this provision it will be the duty of the coroner of Jackson County to hold the inquest if he have information that death was caused by violence.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### PROSECUTING ATTORNEY—COMPENSATION OF.

Prosecuting attorney performing services under Section 1277 R. S., in restraining misapplication of public funds, before “Conroy law,” 98 O. L. 160, became effective, entitled to compensation therefor under Section 1278a R. S.

August 16, 1906.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—In reply to your communication of August 6th, I enclose copy of an opinion furnished Hon. C. H. Henkel, prosecuting attorney, Galion, Ohio, which I believe covers your inquiry as to services of prosecuting attorneys under Section 1277 performed after the Conroy bill went into effect.

Prosecuting attorneys who have performed services under Section 1277 before the Conroy bill became effective would be entitled to compensation for said services under Section 1278a.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### TREASURER—COUNTY—FEES OF.

County treasurer not entitled to fee of 8/10 of 1% on proceeds of notes issued in anticipation of taxes.

August 21, 1906.

HON. D. F. OPENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your communication dated August 18th relative to the right of the county treasurer to receive 8/10 of 1% on money paid into the county

treasury as proceeds of certain notes issued in anticipation of taxes levied for the purpose of restoring an important bridge of your county as provided by Section 2824 of the Revised Statutes, is received.

I herewith enclose you a copy of an opinion furnished Hon. George C. Barnes, prosecuting attorney of Brown County, holding that the county treasurer is entitled to 8/10 of 1% on the interest collected by him under the county depository law. This opinion is based on the following provision found in Section 1117 R. S.:

“And on all other moneys collected on the first ten thousand dollars, 8/10 of 1%.”

Section 1117, however, contains this provision:

“But no compensation, percentage, commission or fees shall be allowed on any money received by him (treasurer) from the state treasurer or from his predecessors in office, or the legal representatives or sureties of such predecessors, or on any moneys received from the proceeds of the bonds of the county, or of any municipal corporation.”

While the word notes is not used in this provision, yet I am inclined to the view that the money received from notes issued in anticipation of taxes levied should be regarded the same as money received from bonds issued in anticipation of taxes levied, and that the county treasurer would not be entitled to the 8/10 of 1% upon such money.

Very truly yours,

W. H. MILLER,  
Asst. Attorney General.

#### TREASURER—COUNTY—FEES OF.

County treasurer entitled to fee of 8/10 of 1% on money refunded to infirmary directors on unpaid store account, and by them paid into county treasury.

August 25, 1906.

HON. IRVIN McD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Your communication dated August 24th, submitting the following inquiries, is received:

“Is the county treasurer entitled to any fees or percentage upon the interest accruing upon county deposits, under the act of April 2, 1906?”

“Is he entitled to percentage or commission on unexpended balances returned by turnpike superintendents out of moneys advanced to them by the commissioners to repair the turnpikes?”

“Is he entitled to percentage or commission on moneys refunded to the infirmary directors by way of an unpaid store account, and by the infirmary directors deposited in the treasurer’s office?”

In answer to your first inquiry I beg leave to say that the Attorney General, in an opinion furnished Hon. George C. Barnes, prosecuting attorney of George-

town, Ohio, under date of August 6th, 1906, held that the county treasurer is entitled, under Section 1117 of the Revised Statutes to 8/10 of 1% of the amount of interest collected by him under the county depository act. This holding is based on the following provision contained in Section 1117:

“And on all other moneys collected on the first ten thousand dollars eight tenths of one per cent.”

As to your second inquiry, I am unable to find the section of the statutes authorizing the county commissioners to advance money to turnpike superintendents. Please cite the section.

As to your third inquiry, I am of the opinion that the provisions of section 1117, quoted above, apply and that the treasurer is entitled to the percentage on the money refunded.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

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#### PROSECUTING ATTORNEY—COMPENSATION OF.

Prosecuting attorney must prosecute actions for delinquent taxes brought by county treasurer at instance of auditor of state, under section 1104, R. S., without compensation other than that provided by section 1297, R. S., as amended 98 O. L., 160.

August 28, 1906.

HON. A. P. MILLER, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Your letter of August 25th, inquiring whether or not a prosecuting attorney is entitled to fees for collecting taxes when employed by the county treasurer under section 1104 of the Revised Statutes, is received.

In reply I beg leave to say I am unable to find any provision in section 1104 authorizing the county treasurer to employ the prosecuting attorney. The last paragraph of said section authorizes the auditor of state to direct the prosecuting attorney of the county to institute suit for the collection of taxes when the county treasurer refuses or neglects to do so, and provides that the prosecuting attorney shall receive for his services 25% of the amount collected. However the compensation provided in the prosecutors' salary law, passed by the last general assembly, covers all the services to be performed by prosecuting attorneys under section 1104.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### DEPOSITORY—COUNTY—SECURITY REQUIRED TO BE OFFERED BY.

Bond of surety company, offered under county depository act, providing for termination of liability of surety upon 60 days' notice, may not be accepted by county commissioners; nature of security permitted by act.

August 27, 1906.

HON. JOE T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—Your communication under date of August 23rd, relative to the power of the county commissioners, under the county depository act (98 O. L., 274) to accept a bond containing the following conditions: "Provided, however, and upon the following express conditions: That the American Surety Company of New York shall have the right to terminate this suretyship under this obligation by serving notice in writing of its election so to do upon said obligee, and thereupon the said American Surety Company of New York shall be discharged from any and all liability hereunder for any default of said The Citizens National Bank of Wilmington, Ohio, occurring after the expiration of sixty days after the date of service of such notice," is received.

In reply I beg leave to say the acceptance of the bond containing this condition by the county commissioners empowers the bonding company to terminate its liability upon giving sixty days' notice. This, in my opinion, the county commissioners may not do.

Section 6 of the act provides that after the award is made and the bond accepted the bank shall become the depository of the money of the county and *remain such for three years*. This period of three years, therefore, becomes the measure of the time for the bond and the liability of the surety thereon.

Section 4 provides the conditions that shall be in the bond, which are as follows:

"For the receipt, safe-keeping and payment over, of all money which may come under its custody, under and by virtue of this act, and under and by virtue of its proposal and the award of the commissioners, together with the interest thereon at the rate specified in the proposal, and the undertaking shall be further conditioned, for the faithful performance by the bank or banks or trust companies of all the duties imposed by this act upon the depository or depositaries of the money of the county."

Nowhere in the county depository act is there a provision authorizing the county commissioners to release the liability of the surety.

Section 6 of the act does, however, authorize the county commissioners, if they deem the same necessary, to require *additional security* to that already given.

Sections 5837 and 5838 of the Revised Statutes provide a method whereby a surety may be released from further liability upon his bond. These sections are restricted in their application to the bonds of certain officers enumerated therein. However, the existence of these sections clearly indicates that without specific legislation, the liability of the surety is, in point of time, co-extensive with the term. In as much as the power of the county commissioners in the acceptance of the bond under the county depository act, is statutory, and in the absence of an express provision authorizing a condition limiting the duration of the liability, I am of the opinion that the county commissioners may only accept such bond as binds the surety for the entire statutory period, and the county commissioners have no right to provide any condition in the bond whereby the surety's liability may be qualified.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

P. S.—The county depository act authorizes the acceptance by the county commissioners of three kinds of security. First, bonds such as are enumerated in

section 7; second, by a fidelity and indemnity insurance company authorized to do business within the state and having not less than \$250,000 capital; third, not less than six resident freeholders. In my judgment the county may accept any or all of these securities. That is, the commissioners may accept a fidelity and indemnity insurance company bond for part of the liability; bonds such as are enumerated in section 7 of the act as part of the liability, and freeholders' security for the remainder. I have no suggestion to make as to the advisability of the county commissioners accepting more than one of the three classes of surety enumerated other than the consequent confusion of liability if a suit were brought to enforce the same.

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#### RELIGIOUS ORGANIZATION — TAXATION OF REAL ESTATE OF.

Real estate owned by religious organization not exempt from taxation unless actually used for public worship; intention to erect house of worship to be used in future insufficient.

August 29, 1906.

HON. C. H. HUSTON, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR: — I have yours of August 27th, inquiring whether real estate purchased by a religious organization, upon which a house of worship is to be erected, is exempted from taxation.

An examination of section 2732 of the Revised Statutes discloses that only such grounds as are attached to houses used exclusively for public worship are exempt from taxation.

In my opinion, therefore, the real estate in question, is subject to taxation until the house of worship is not only erected but in actual use.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

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#### DEPOSITORY — SCHOOL DISTRICT — SECURITY REQUIRED TO BE OFFERED BY.

Requirement of section 3968, R. S., that banks receiving funds of school district on deposit shall offer surety company bond unconstitutional.

August 31, 1906.

HON. C. J. FISHER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR: — Your communication dated August 29th, inquiring whether or not a bank receiving the funds of a school district under section 3968 is compelled to give a guaranty company bond, as provided in said section, is received.

In reply I beg leave to say, the supreme court of Ohio, in the case of the State of Ohio ex rel. v. Robins 71 O. S., 273, held the act passed April 20th, 1904, commonly known as the "Crafts Bonding Act," unconstitutional and void, being in violation of Article I, sections 1 and 2, of the constitution. Judge Davis in the opinion says:

"It is contended on the part of the respondent that no citizen has an inalienable right to act as a legal representative or public officer; that the general assembly has power to provide for the descent and distribution of estates and for the appointment and qualifications of executors and administrators, including the giving of bonds; that the general assembly has power to prescribe the manner of election to a public office and the qualifications therefor; and that it logically follows from these premises that the general assembly has authority to determine the kind and sufficiency of the security to be given. The general soundness of this argument is not to be questioned; but it is pressing the conclusion too far to maintain that the legislature may go beyond the purpose of the security to be given, and may require things to be done which do not increase the protection of the obligee, which abridge individual rights without contributing to the general welfare, and which enrich a designated class of sureties to the exclusion of all others. Such a conclusion would lead not only to violation of article I, section 1, of our constitution, as already shown, but article I, section 2, also, which declares that 'government is instituted for the *equal* protection and *benefit*' of the people."

"The Crafts Bonding Act" provided that the execution of all bonds for the faithful performance of official or fiduciary duties or the faithful keeping, applying or accounting for funds or property, or for one or more of such purposes within certain exceptions, should be by a surety company or companies.

Section 3968 provides that,

"Such bank or banks shall give a good and sufficient bond of some approved guaranty company in a sum at least equal to the amount deposited."

Manifestly the limitation placed upon the right of a person to contract for a bond is the same in the provision quoted from section 3968, as in the provision contained in the "Crafts Bonding Act." Therefore, I am of the opinion that the provision in section 3968, requiring a bond of some "approved guaranty company" is unconstitutional; that the bank, in this instance, has a right, under the decision of the supreme court in the case cited, to tender a good and sufficient bond, other than the bond of an "approved guaranty company," and the board of education may not refuse to accept the same on the sole ground that the bond of an "approved guaranty company" is required."

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

#### INFIRMARY DIRECTORS—AUTHORITY OF, TO PROVIDE FOR DESTITUTE PERSONS OUTSIDE OF INFIRMARY.

Infirmary directors have discretionary authority to provide for destitute persons outside of infirmary.

September 6, 1906.

HON. W. R. ALBAN, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—YOUR communication dated September 4th, relative to the authority of infirmary directors to provide for destitute persons outside of the county infirmary in a county having an infirmary, is received.

In reply I beg leave to say the following provision in section 974 of the Revised Statutes: "and the directors are satisfied that said person should become a county charge, they shall forthwith receive said person and provide for him or her in said institution (infirmiry), or otherwise," vests a discretion in the infirmiry directors as to whether or not they shall provide for a person who is found to be entitled to admission to the county infirmiry by furnishing necessary relief outside of said infirmiry.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### STENOGRAPHER — FOR PROSECUTING ATTORNEY — COMPENSA- TION OF.

Compensation of stenographer for prosecuting attorney may not be included in his expense account.

September 7, 1906.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication dated September 3rd, 1906, relative to the expenses of a stenographer for the prosecuting attorney under old section 1274, is received.

In reply I beg leave to say that section 1271 of the Revised Statutes, as amended, 97 O. L., 315, makes provision for the payment of stenographers to prosecuting attorneys. I am, therefore, of the opinion that where an allowance has not been made for a stenographer, as provided in section 1271, the prosecuting attorney may not include compensation for a stenographer in his expense account as authorized in the new salary law for prosecuting attorneys.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### TEACHERS — COMPENSATION OF.

Provision of "Duvall law," regulating employment of school teachers, as to state aid for weak districts, inoperative because of failure of general assembly to make requisite appropriations; remainder of said law effective.

September 15, 1906.

HON. HARRY W. MILLER, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Your letter of September 8th desires my opinion as to the effect of the failure of the last legislature to make any appropriation for the payment to weak school districts of the sums to which they may be entitled under the provisions of the act of April 2, 1906 (98 O. L. 200).

The first clause of the act, "That no person shall be employed to teach in any public school in Ohio for less than \$40.00 a month" applies to all school districts within the state. The districts which would not be entitled to state aid in any event are not in any way affected by the lack of an appropriation. It is the duty of the boards of education in such districts to pay teachers at least \$40.00 per month.



The provision of the act as to state aid to weak districts is inoperative by reason of the fact that there is no fund now in existence out of which the payments provided for can lawfully be made. Boards of education in districts which are entitled to state aid may contract to pay teachers \$40.00 per month, but such contracts should expressly provide that the payment of the full salary is contingent upon a subsequent appropriation by the legislature to meet any deficiency in the tuition fund caused by compliance with the act above referred to.

There is, of course, no certainty that the legislature will make such an appropriation.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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PUBLICATION OF REPORT OF EXAMINERS OF COUNTY TREASURER. TOWNSHIP TRUSTEES—LIABILITY OF, FOR MEDICAL SERVICES FURNISHED TO POOR.

Probate judge has no authority to direct any publication of report of examiners of county treasurer other than that authorized by law.

Township trustees, having entered into contract with physician to furnish medical services to poor, not liable for such services so furnished by another physician.

September 15, 1906.

HON. JOHN H. CLARK, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—Your communication under date of September 7th, in which you submit the following questions, is received:

Has a probate judge, under Section 4367 of the Revised Statutes, authority to authorize the publication of the report of the examiners of the county treasury?

In my opinion the publication of the report of the examiners of the county treasury is governed by Section 1129 of the Revised Statutes. This statute is of later enactment than Section 4367, and since it prescribed the time and place of publication of this report, the county officials have no discretion under Section 4367 to make any different or further publication.

Second. When the trustees of a township have entered into a contract with a physician to furnish medical relief and medicines for the poor of their township, are the township trustees liable, in any case, for services performed by physicians other than the one regularly employed?

Under Section (1499-3) of the Revised Statutes the township trustees having entered into a contract, as authorized by Section (1499-1), are not, in my opinion, liable for medical relief other than that provided in the contract.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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ROADS—IMPROVEMENT OF BY TOWNSHIP—LEVY FOR. ELIGIBILITY TO OFFICE OF TOWNSHIP TRUSTEE.

Taxes for township road improvement should be levied against property within incorporated village located within such township.

Elector residing in incorporated village eligible to office of township trustee.

September 17, 1906.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Your communication under date of September 8th, relative to the levying of taxes for the improvement of roads, under the provisions of the act of April 22d, 1904 (97 O. L. 550), in a township having within its territory an incorporated village, is received. In reply I beg leave to say Section 18 of the act, (4686-18) R. S. provides:

“When the trustees of any such township have determined to improve any road, as herein provided, in order to provide for the payment of such improvement \* \* \* shall, in addition to the other road taxes authorized by law levy annually upon each dollar of valuation of *all taxable property of such township* an amount not exceeding 3 mills on each dollar of such valuation.”

Under this provision the taxes levied will be against all the property in the township, including all property within the incorporated village.

You also inquire whether or not an elector residing within an incorporated village is eligible to the office of township trustee. The jurisdiction of the township trustees covers the entire township including the municipal corporations therein. An elector residing within a municipal corporation is also a resident of the township which includes within its territory said municipal corporation and is, therefore, eligible to the office of township trustee.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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PROSECUTING ATTORNEY—SALARY OF—VOUCHER FOR.

Monthly voucher for salary of prosecuting attorney under Section 1297 R. S. as amended 98 O. L. 160, need not be approved by county commissioners.

September 18, 1906.

HON. GEORGE E. YOUNG, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR—Your letter dated September 17th, inquiring whether or not the monthly salary of the prosecuting attorney should be allowed by the county commissioners or paid upon the warrant of the auditor without such allowance, is received.

In reply I beg leave to say, Section 1297 of the Revised Statutes, as amended 98 O. L. 161, provides a fixed salary to the prosecuting attorneys of the various counties, based upon population, and further provides that such salary is to be paid in equal monthly installments out of the general fund of the county. I am, therefore, of the opinion that the voucher issued by the auditor for the monthly installment of the prosecutor's salary is a law voucher, and it is unnecessary for the prosecuting attorney to present his bill to the county commissioners for allowance before such voucher may be issued.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## BRIDGE—ON STATE LAND—REPAIR OF.

Power of county to expend money for repair of bridge across canal feeder on state land.

September 25, 1906.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your letter of September 18th states that several years ago a pike which runs across state lands for about a thousand feet and crosses the Miami river on state property, was constructed in Logan county. There was no express authority for the construction of this pike across the land of the state. The county built a bridge at the point where this road crosses the Miami. You desire my opinion as to the power of the county to expend money to keep such bridge in repair. Section (218-81) R. S. provides:

“In all cases where a new road or public highway is laid out by legal authority, in such direction as to cross the line of any canal or navigable feeder, authorized by the laws of this state, after the line of such canal or navigable feeder is permanently located and established, and in such manner as to require the erection of a new bridge over such canal or feeder, for the accommodation of said road, such bridge shall be constructed and forever maintained at the expense of the county in which such bridge is situated; provided, however, that no bridge shall be constructed across either of said canals or navigable feeders, without first obtaining for the model and location thereof, the consent, in writing, of one of the acting commissioners, or the principal engineer of the canal to be intersected by said road;”

This section indicates an intention to permit public highways to be laid out in such directions as to cross canals, provided only the crossings are made at places and in the manner approved by the canal commissioners. Such highways necessarily pass for a certain distance across state lands. Whether the highway runs for a hundred feet or a thousand feet over state land is not, in my opinion, material. The authority to fix the place where the line of the highway may cross the line of the canal cannot, however, be construed as a grant of authority to permit the construction of roads parallel to and along the banks of canals or reservoirs.

The bridge at Lewiston having been constructed by the county many years ago, without objection by the canal commissioners, I am of the opinion that the county may lawfully expend money for its repair. It may be that the county has no vested right to maintain the road in its present location. The board of public works may still have authority to require the approaches of the bridge to be changed so as not to injure the banks of the reservoir. On this point I express no opinion. For the existence or non-existence of power in the board of public works to order a change in the location of the approaches to the bridge does not affect the power of the county to expend money for its repair.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## PROSECUTING ATTORNEY — COMPENSATION OF.

Prosecuting attorney must prosecute actions for delinquent taxes brought by county treasurer at instance of auditor of state, under Section 1104 R. S., without compensation other than that provided by Section 1297 R. S., as amended, 98 O. L. 160.

October 1, 1906.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication under date of September 20th, inquiring whether or not it is a part of the duties of the prosecuting attorney to begin and prosecute actions for delinquent taxes at the request of the county treasurer or county commissioners, and if so, whether or not the prosecuting attorney is entitled to compensation for said services other than that provided by the prosecutor's salary law, is received.

In reply I beg leave to say that section 1104 provides that when any taxes or assessments against lands or lots become delinquent, and when so requested by the auditor of state, the county treasurer shall institute a civil action in his own name for the collection of said delinquent taxes or assessments.

Section 1274 R. S., as amended by the last legislature, requires the prosecuting attorney to perform all duties and services to be performed by legal counsel employed under Section 845.

Section 845, enumerating the duties of legal counsel employed thereunder, provides that such legal counsel "shall prosecute and defend all suits and actions, which any of the parties above named may direct, or to which it or any of said officers may be a party, etc."

I am, therefore, of the opinion that actions brought by the county treasurer under the direction of the auditor of state for the collection of delinquent taxes on real estate must be prosecuted by the prosecuting attorney, and that his compensation for said services is fixed by section 1297 R. S., as amended by the last legislature.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## SURVEYOR — COUNTY — EXPENSE OF.

County surveyor entitled to actual expense under Section 4664, R. S.; employes not entitled to such expense.

October 4, 1906.

HON. W. R. ALBAN, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—In my opinion the surveyor alone is entitled to actual expenses under Section 4664 R. S. This construction is not only the most natural one to place upon the language used but is in accordance with the express provisions of Section 4506 R. S., as amended in the same act. The latter section clearly allows the surveyor a per diem fee of \$5.00 and expenses, but limits chainmen, axmen, rodmen and other employes to a per diem fee without expenses.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## IMBECILES—ADMISSION TO COUNTY INFIRMARY.

Imbeciles may be admitted to county infirmary.

October 11, 1906.

HON. FRANK M. ACTON, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Your communication of recent date inquiring whether or not the county infirmary directors have authority to admit imbeciles to the county infirmary is received.

In reply I beg leave to say Section (971-1) of the Revised Statutes only prohibits the admission of insane and epileptic persons. I am, therefore, of the opinion that imbeciles are not excluded, and the infirmary directors have authority to admit them to the county infirmary.

Very truly yours,

W. H. MILLER,

*Attorney General.*

## INHERITANCE TAX—COLLATERAL—APPLICATION OF.

Where devise is made in consideration of services to be rendered testator after date of will, so much of the value of such devise is subject to collateral inheritance tax as is in excess of value of services actually rendered.

October 23, 1906.

HON. LOUIS W. WICKHAM, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I have yours of October 12th advising me that a will executed upon the day of the death of the testator devised to H "my farm situated in Peru township consisting of about sixty acres and all the live-stock on the farm, provided that he take \* \* \* of me the rest of my life." It appears that the devisee under this clause denies liability for the taxes imposed by the collateral inheritance law. In my opinion you should resist the application of the devisee for a release from the tax. Dos Passos on Inheritance Taxes, page 343 and following, fairly establishes the generally prevailing rule that bequests made in satisfaction of a debt are taxable so far as the bequests exceed the debt.

It is possible that the Ohio statute may be even broader than this general rule. A comparison will show that the Ohio statute and the New York statute are very similar in their terms. In the matter of Gould, 156 N. Y. 423, the court of appeals of the state of New York held that even where a bequest was made in consideration of services performed, so long as the legatee was claiming by virtue of the will, such bequest was subject to the tax. In other words that if a creditor desired to claim as such and escape the application of the tax he would have to prove his claim as a creditor, while if he was claiming by virtue of the will he could not avoid the tax imposed upon successions to property made by the will.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

VILLAGE SCHOOL DISTRICT—CREATION AND PROPERTY RIGHTS OF.

Incorporation of village creates village school district and *ipso facto* vests in board of education thereof all school property located within the limits thereof.

October 29, 1906.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your communication of recent date in which you submit the following inquiry, is received:

“The village of Grandview Heights was created some months ago. By its creation it included within its boundary a certain portion of the Franklin township school district, including one of their school-houses. The question at issue is simply this: By the mere fact of creating said village whose boundaries included this school building, does that fact alone place the control and title to said school building with said village, or is it necessary before said village can take possession of said school building to act according to Sections 3893 and 3894 of the Revised Statutes of Ohio?”

In reply I beg leave to say that Section 3893 applies to territory *annexed* to a city or village, while Section 3894 applies to the transfer of territory from one school district to another by agreement between the boards of education. Neither of these sections have any application to the territory of a village school district created by the incorporation of a village. In my opinion all school property included within the limits of the village school district vests in the school board of said district as a result of the incorporation of said village.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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PROSECUTING ATTORNEY—DUTY OF.

Prosecuting attorney is not required to prosecute bastardy proceedings.

November 9, 1906.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR:—Your communication of recent date inquiring whether or not prosecuting attorneys are required under Section 1273 of the Revised Statutes, as amended, to prosecute bastardy proceedings, is received.

In reply I beg leave to say while a bastardy proceeding is *quasi* criminal, the state is not a party to the action, and Section 1273 does not require prosecuting attorneys to prosecute such proceedings.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

ROADS—CONSTRUCTION AND REPAIR OF—EMPLOYMENT  
OF ENGINEER.

Road commissioners may not employ more than one engineer under Section (4757-7) R. S., as amended, 98 O. L. 292.

November 9, 1906.

HON. W. R. GRAHAM, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your communication under date of November 5th, relative to the authority of road commissioners to employ more than one engineer under an act to improve roads in certain districts, passed by the legislature April 26, 1898, and amended April 19, 1904, and April 16, 1906 (4757-7) R. S., 98 O. L. 292), is received.

In reply I beg leave to say this act provides that the commissioners shall employ a competent engineer and such assistants as they deem necessary. It further provides that the engineer shall not receive more than \$4.00 per day and that each assistant shall be allowed not more than \$1.50 per day. I am of the opinion that this law only authorizes the employment of one engineer at a compensation of \$4.00 per day, while the assistants employed may be engineers, yet they cannot receive more than \$1.50 per day.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

## COUNTY COMMISSIONERS—TERM OF OFFICE OF.

Term of office of county commissioner elected November 6, 1906, begins on third Monday in September, 1907.

November 12, 1906.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your communication dated November 9th, inquiring when your county commissioner, elected November 6, 1906, will enter upon his term of office, is received.

In reply I beg leave to say the supreme court has held in the case of State ex rel. Attorney General v. Mulhern, 74 O. S., 363 that the provisions in Section 839 Revised Statutes, as amended, 98 O. L. 272, fixing the beginning of the term of county commissioners at the first day of December next after their election, to be inoperative for the reason that said provision is in irreconcilable conflict with the provisions of the first section of the act which extends the terms of certain county commissioners to the third Monday in September of the odd numbered years next succeeding the time when they would otherwise expire.

Therefore all county commissioners elected at the November election, 1906, will assume the duties of their offices on the third Monday of September, 1907.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

## TURNPIKE DIRECTORS—COUNTY COMMISSIONERS MAY ACT AS.

Authority of county commissioners to act as turnpike directors not terminated by enactment of act in 98 O. L., 327.

November 14, 1906.

HON. H. W. ROBINSON, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Your communication under date of November 9th, inquiring whether or not House Bill No. 385, as passed by the last legislature (98 O. L., 327) takes away the powers of the board of county commissioners to act as turnpike directors and abolishes the office of pike superintendent, is received. In reply I beg leave to say this act does not refer to the repair of turnpikes (see title), neither does the repealing clause repeal Section 4896 R. S. and succeeding sections which create the board of turnpike directors and enumerate their powers and duties. It therefore follows that the county commissioners still have authority to act as turnpike directors as provided in Section 4896 R. S. and succeeding sections.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## INSANE PERSON—ADMISSION TO STATE HOSPITAL.

When admission of indigent insane person to one state hospital for the insane is refused for the reason that the quota of the county in which such person resides is full, application to governor for transfer to another asylum may be made.

November 14, 1906.

HON. CHARLES C. KEARNS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Your communication under date of November 12th, relative to the admission of an indigent insane person to the Dayton hospital for the insane, is received.

I regret to say that your former letters concerning this matter, addressed to this department, have not reached my desk.

I assume, although your letter does not so state, that the indigent insane person referred to has been refused admittance into the Dayton hospital for the insane for the reason that your county already has its full quota. If this be true, an application will have to be made to the Governor for an order of transfer to some other asylum within the state as provided in Section 701, Revised Statutes of Ohio.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## DEPOSITORY—COUNTY—SELECTION OF AGENT BY.

County depository established outside county seat may delegate authority to receive funds to agent within county seat.

November 16, 1906.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your communication under date of November 10th, submitting the following inquiry, is received.



"If a county depository is established outside of the county seat (but within the county) can such depository delegate authority to an agent in the county seat to receive the funds of the county from the treasurer and deposit them with the depository afterward?"

In reply I beg leave to say, Section 3 of the act authorizing county commissioners to provide depositories for public money and for other purposes, passed April 2nd, 1906, (98 O. L., 274, 279) contains the following provision:

"That if such award shall be to a bank or banks, or trust companies outside the municipality at which the county seat of such county is fixed, *the expenses and risks of making deposits therein* by the county treasurer, as hereinafter provided for, shall *be borne* by such bank or banks, or trust companies to which such award shall have been made."

The depository in this instance being outside the municipality at which the county seat is fixed, the risks of making deposits therein must be borne by such depository. I am, therefore, of the opinion that the county depository established outside of the county seat may delegate authority to an agent at the county seat to receive the funds of the county from the county treasurer, and that said county treasurer, his bondsmen, and the county will be protected from all responsibility for such funds as are turned over by the county treasurer to such duly constituted agent of said depository.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### SPECIAL ELECTION — SCHOOL CENTRALIZATION.

Special election upon question of centralization in township school district illegal and void.

November 19, 1906.

HON. WILLIAM T. DEVOR, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR: — Your letter of November 17, with enclosures requests an opinion as to the effect of a vote against the continuance of centralization in a township school district, taken at a special election in August, 1906. I concur in the opinion of the secretary of state that the statutes do not authorize a special election upon the question of centralization.

The fact that an election was held in good faith and without objection, though on a day other than that fixed by law, may influence a court in determining whether it will interfere by writ of quo warranto or injunction, but does not affect the abstract question of the legality of the election. The election having been held without authority of law was of no effect.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## SURVEYOR — COUNTY — INSTRUMENTS.

County commissioners may not purchase instrument for county surveyor's use in private work.

November 20, 1906.

HON. CHARLES C. KEARNS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Your communication under date of November 19th, inquiring when the county commissioner, elected November 16th, 1906, will begin his term of office, is received. In reply I herewith enclose you a copy of the opinion furnished Hon. E. P. Chamberlin, Prosecuting Attorney of Logan county, which fully covers your inquiry.

You also ask if the county commissioners are authorized under section 1181, Revised Statutes, as amended, 98 O. L., 246, to purchase a surveying instrument, or instruments, for the use of county surveyors in making surveys of lands, etc.

Section 1181, as amended, provides that the county commissioners shall furnish the surveyor's office with all necessary tools, instruments, books, blanks, and stationery for the proper discharge of the *official duties* of said county surveyor. In my opinion this provision only applies to such tools, instruments, etc., as are required in the discharge of official duties and does not include instruments to be used by the county surveyor in private work.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## DOG TAX — COLLECTION OF.

Dog tax may not be separated by county treasurer from other taxes levied on real property; he must accept payment of whole sum levied, or none.

November 27, 1906.

HON. E. E. EUBANKS, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Your communication under date of November 26th, inquiring whether or not it is lawful for a county treasurer to separate the dog tax, placed on the tax duplicate against the real estate upon which said dog is kept or harbored, as provided in House Bill 99, 98 O. L., 87, from the whole tax placed against said real estate, and permit the owner to pay the tax on said real estate less the dog tax, is received.

In reply I beg leave to say section 2833, as amended, 98 O. L., 87, contains this provision:

“Which per capita tax shall be levied upon and entered against the real estate upon which said dog is kept or harbored and *collected as are other taxes* upon real estate, etc.”

Under this provision the county treasurer is, in my judgment, without authority to distinguish between the dog tax and other tax assessed against any real estate and could not, therefore, at any tax collection period receive the taxes assessed against real estate unless the dog tax so assessed against said real estate is also included and paid.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

LOCAL OPTION—RESIDENCE DISTRICT—SALES IN WHOLESALE  
QUANTITIES.

Intoxicating liquors may be sold and delivered in wholesale quantities to residences in local option district under "Jones law," by wholesale dealers located outside such district.

November 27, 1906.

HON. WILLIAM H. SHELDON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—In answer to your letter of November 20th I beg to advise you that in my opinion the act of March 22nd, 1906, (98 O. L., 68) does not prohibit the sale and delivery, by wholesale dealers located outside the local option district, of intoxicating liquors, in wholesale quantities, to *bona fide* residences in such district.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

BRIDGE OVER CANAL—CONSTRUCTION OF.

It is the duty of county commissioners to construct bridge over canal within limits of municipal corporation.

November 27, 1906.

HON. H. W. ROBINSON, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Your communication under date of November 21st, relative to the powers and duties of the county commissioners of your county to construct a bridge over the Miami and Erie Canal, such bridge to be constructed within a municipality and said municipality receiving no part of the bridge funds of the county, is received.

In reply I beg leave to say that in my opinion, under section 860 of the Revised Statutes, it is the duty of the county commissioners to pay for the construction of said bridge and to keep the same, when constructed, in repair.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

DEPOSITORY—COUNTY—DUTY OF COUNTY TREASURER TO  
MAKE DEPOSITS.

It is the duty of the county treasurer to deposit daily in county depository collections made by deputy collectors in various parts of county.

December 1, 1906.

HON. H. T. SHEPHERD, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Your communication under date of November 30, relative to the duties of the county treasurer, under section 8 of the county depository law, in making daily deposits in the county depository where taxes are being collected in different places in the county by collectors under authority from the county treasurer, is received.

In reply I beg leave to say section 8 provides that the treasurer shall "deposit \* \* \* to the credit of the county, all money in his possession, except such as may be necessary to meet current demands \* \* \* before noon of each business day." Under this provision it is the duty of the county treasurer to make the deposits daily in the county depository. I am therefore of the opinion that the daily collections made by deputy collectors should be either transmitted at once to the county treasury or placed to the credit of the county treasurer in the local bank or banks. The county treasurer should then, before noon of each day, in accordance with the provision of section 8 of said act, deposit in said county depository all monies, except an amount sufficient to meet current demands, in his possession in the county treasury or placed to his credit in the banks where the various collections are being made in the county.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

#### ROAD — CONSTRUCTION OF, THROUGH MUNICIPALITY.

County commissioners have power to construct road through municipal corporation.

December 4, 1906.

HON. H. W. ROBINSON, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR: — Replying to your inquiry of the 23th ult., I beg to say that the question which you propose as to the power of the county commissioners to construct a road through a municipality, seems to be fully answered by the supreme court of this state in the cases of Wells vs. McLaughlin, 17 O. 99, and Butman vs. Fowler, 17 O. 101. The more recent cases of Railroad Company vs. Commissioners, 35 O. S., 1-9, and of Commissioners vs. Railroad Company, 45 O. S., 401, 406, seem to maintain the view expressed in the former case, sustaining the power of the county commissioners so to do, and upholding the exclusive authority of the municipal officers to thereafter exercise jurisdiction over the road and keep it in repair.

The character of road, it is understood, is not such as was mentioned in the case of Laylin vs. the Commissioners, third circuit court 338, but such as would be laid out and constructed under chapter 2, title 7, volume 2, Revised Statutes.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### DEPOSITORY — SCHOOL DISTRICT — DISQUALIFICATION FOR INTEREST.

Bank not disqualified to act as depository for school funds because member of board of education is stockholder thereof.

December 4, 1906.

HON. C. J. FISHER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR: — Your letter of December 30th states that there are three banks in the school district referred to and that one member of the board of education is the cashier and stockholder in one bank; another member the assistant cashier

and a stockholder of a second bank; while a third member is an assistant cashier of, but not a stockholder, in a third bank. This third member claims that the other two members are prohibited by section 3974, R. S., from voting in favor of the banks in which they are stockholders upon the question of selecting a depository for school funds.

Section 3968, R. S., directs that the board of education in the resolution by which they provide for the deposit of the funds shall determine the method by which bids shall be received, the authority which shall receive them, etc. The interest of a member of the board in a bank which might or might not become a bidder under such resolution, would certainly not disqualify him from voting on this preliminary resolution. The resolution having been passed it is not left to the board to determine, after the bids are in, which they will accept, for the statute itself directs that the deposits shall be made in the bank or banks situated in the district that shall offer at competitive bidding the highest rate of interest. The purpose of the statute is to procure the highest rate of interest by the fullest competitive bidding. If banks within the district, stockholders of which are members of the board of education, may not bid for the deposit it is evident that competition would be greatly restricted and, in many cases, there would be no eligible depository in the district.

If section 3974 is applicable at all it would render voidable all contracts between a bank and a school board on which there was a single member who was also a stockholder in a bank, regardless of whether his vote was necessary to pass the resolution. (*Bellaire Goblet Co. v. Findlay*, 5 O. C. C., 418.)

That rule applied to the present case would render two of the three banks of the district clearly ineligible and, as a necessary consequence, would prevent the letting of the contract to the third bank, unless banks outside the district were also permitted to bid, since there could be no competitive bidding within the district if only one bank therein was eligible to bid.

My opinion therefore is that a bank is not disqualified to act as a depository of school funds by reason of the fact that one of its stockholders or officers is a member of the board of education controlling the fund.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### PROSECUTING ATTORNEY — COMPENSATION OF — STENOGRAPHER FOR.

Compensation of prosecuting attorney provided by section 1297, R. S., as amended by "Conroy law," 98 O. L., 160, covers services rendered township officers.

Compensation of stenographer for prosecuting attorney may not be included in his expense account under section 1298, R. S., as amended by same act.

December 10, 1906.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR: — Your communication under date of December 7th, relative to the compensation of prosecuting attorneys for services rendered township officers under section 1297, R. S., as amended, also as to allowance of reasonable and necessary expense incurred in the performance of official duties under section 1298, as amended, is received. In reply I beg leave to say that section 1274 of the Conroy

bill makes the prosecuting attorney the legal adviser for all township officers and the compensation provided in section 1297 covers services rendered township officers.

The following language used in section 1298 of said law,

“his reasonable and necessary expenses incurred in the performance of his official duties, or in furtherance of justice,”

is, in my opinion, to be construed to include the *personal* expenses of prosecuting attorneys only and cannot be made to include compensation paid stenographers. Section 1271, R. S., provides a method whereby prosecuting attorneys may compensate stenographers under an allowance made by the common pleas court.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### SURVEYOR — COUNTY — DUTY OF, TO MAKE PLANS, ETC.

County surveyor must make all *necessary* plans, specifications and estimates for all public improvements undertaken by county.

December 18, 1906.

HON. ISRAEL M. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—In reply to your letter under date of December 12th, relative to the duties of the county surveyor under Section 1166, as amended, (98 O. L. 245) I beg leave to say the opinion furnished the prosecuting attorney of Lorain county, referred to in your letter, was based upon the view that the amendment to Section 1166 contemplates the county surveyor shall perform all the duties that have heretofore been performed by civil engineers.

The word “shall” as used in said Section 1166, as amended, means in my judgment that while heretofore county commissioners have been authorized in the construction of certain public improvements to employ a civil engineer to draw the necessary plans and specifications, make the necessary estimates and inspect and superintend the construction of the improvements, hereafter all such plans, specifications, estimates of costs and forms of contracts for the construction or repair of all bridges, culverts, roads, drains, ditches and other public improvements shall be made by the county surveyor, and that the county surveyor shall be responsible for the inspection of the same.

I do not believe that in cases where by reason of the nature of the improvements, plans, specifications and inspection are unnecessary, the county surveyor is authorized under said section to perform said services at a needless expense to the county.

Very truly yours,

W. H. MILLER,

*Ass't Attorney General.*

#### TEACHER — COMPENSATION OF, FOR ATTENDING TEACHERS' INSTITUTE.

Provision of contract of teacher with board of education that no compensation shall be received for attending teachers' institute invalid

December 18, 1906.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—Your letter of December 12th states that on August 20th, 1906, the board of education of Perry township entered into a contract for the employment of a teacher for the ensuing school year. At the time the contract was signed the teacher had already attended the teachers' institute. You request an opinion as to the validity of that clause of the contract which provides that the teacher shall receive no pay for attending the institute.

The supreme court in the recent case of Beverstock v. Board of Education (O. L. R. Vol. 4, No. 33, p. 42) construes section 4091 R. S. as follows:

"The same construction of language will control cases where a teacher is not under employment at the time the institute is held. In his case, he is to be paid by the board next employing him after such institute, provided the term of said employment begins within three months after such institute closes. When he so becomes employed his rate of compensation is fixed and on presentation of the proper certificate, showing that he had attended the preceding institute for a week, his compensation for that week is ascertainable and his right to receive it complete, if his term of employment begins within three months after said institute closes."

If contract provisions similar to the one in the contract you have submitted, were valid, it would be within the power of boards of education to nullify the statute by always inserting such clauses in contracts of employment. The statute is not, in form, a grant of power to boards of education, nor is it merely directory. It is mandatory and apparently intended to encourage the attendance of teachers' institutes by guaranteeing extra pay for such attendance. I am therefore of the opinion that the clause referred to is of no effect.

In compliance with your request I enclose herewith a copy of the former opinion to Hon. E. A. Jones.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*


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#### PROSECUTING ATTORNEY—DUTY OF.

It is not the duty of prosecuting attorney, in enforcement of criminal law, to perform services of a detective; provision for employment of secret service officer.

December 27, 1906.

HON. A. O. DICKEY, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Your communication under date of December 20th, in which you inquire as to your duty as prosecuting attorney to make personal investigations of reported violations of the criminal law, is received. In reply I beg leave to say the general duties of the prosecuting attorney in the enforcement of the criminal law are fixed by Section 1273 of the Revised Statutes of Ohio. In addition to that the prosecuting attorney is required to sit with the grand jury during its investigations. No place in the law is it made specifically the prosecuting attorney's duty to perform the services of a detective. Section (470-1) provides

for the appointment of a secret service officer for the prosecuting attorney's office whose duty it shall be to aid the prosecuting attorney in the collection and discovery of testimony to be used in the trial of all criminal cases and in matters of a criminal nature. Just how far a prosecuting attorney will go on his own behalf in performing the duties of a secret service officer, or a detective, in ferreting out crimes and offenses, is a question for the individual prosecutor to determine.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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#### ROADS—REPAIR OF.

Township trustees have no authority to provide fund for road repairs after time for making levy for road taxes is past; provision for state aid from state highway commissioner.

December 27, 1906.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Your communication under date of December 20th, in which you say that the trustees in many of the townships in your county have made no levy for road repairs for the year 1907, and inquire whether or not there is any law under which said trustees can provide a fund for road repairs in 1907, is received. In reply I beg leave to say the time for levying road taxes for the year 1907 is now passed and I know of no action the township trustees may take at this time to provide a fund for road repairs to be used the coming year.

Each county of the state is, however, entitled to state aid for the repair of roads. This aid is obtainable through the state highway department. I suggest that you take the matter up with Hon. Sam' Huston, Commissioner of Highways, and it may be that Highland county is entitled to receive her pro rata share of the appropriation.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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#### STENOGRAPHER—FOR PROSECUTING ATTORNEY—COMPENSATION OF. PROSECUTING ATTORNEY—COMPENSATION OF.

Compensation of stenographer for prosecuting attorney may not be included in his personal expense account.

Prosecuting attorney entitled to receive compensation under contract for legal services with county commissioners entered into prior to enactment of "Conroy law," 98 O. L. 160, for services rendered under such contract prior to time when said law became effective, but not for such services rendered after such time.

December 27, 1906.

HON. HARRY W. MILLER, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Your communication under date of December 22d, relative to stenographers' compensation under Section 1271 is received. In reply I beg leave to say the enactment of the prosecutors' salary law does not in any way affect



the appointment or the compensation of stenographers for Prosecuting Attorneys, as provided in Section 1271. A prosecuting attorney is not, however, authorized to draw the compensation due a stenographer under a said section in his own name. Said section provides that the compensation shall be paid to the stenographer out of the county treasury upon warrant of the county auditor out of the general fund.

You further inquire as to your right to compensation upon certain contracts made between you, as prosecuting attorney and the county commissioners, for the defense of certain damage cases, said contracts having been entered into prior to the enactment of the county prosecutors' salary law.

In answer to this inquiry I would say you are entitled to compensation under said contracts for all services rendered before said salary law went into effect. Your compensation under the new salary law covers the services you may have performed under said contracts since said salary law became effective.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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MAYOR'S COURT—ALLOWANCE BY COUNTY COMMISSIONERS TO  
CITY SOLICITORS FOR PROSECUTIONS IN.

Mayor's court is not a "police court," within meaning of Section 137 M. C.; county commissioners have no authority to make allowance to city solicitor for prosecutions conducted therein.

December 26, 1906.

HON. HENRY M. HAGELBARGER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Replying to yours of the 22d inst., I beg to say that in an opinion rendered by my predecessor under date of February 3d, 1903, it was held that a mayor's court was not a police court as used in Section 137 M. C. In the opinion thus expressed I concur.

I am further of the opinion that county commissioners have no authority to make an allowance to the city solicitor, or assistant city solicitor, pursuant to the provisions of the above quoted section, except in those cities which have a police court as distinguished from a mayor's or municipal court.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## (Miscellaneous.)

## VEHICLE TAX — MUNICIPAL — APPLICATION OF, TO UNITED STATES PROPERTY.

Municipal corporation may not levy and collect vehicle tax on property of United States.

September 26, 1906.

COL. WORTHINGTON KAUTZMAN, *Assistant Adjutant General, Columbus, Ohio.*

DEAR SIR:—On September 20th, you referred to me a communication from Capt. Harold M. Bush, in which he requests advice as to the power of the city of Columbus to assess and collect a vehicle tax on four gun carriages, the property of the United States. He also requests information as to what course he should pursue in case an attempt should be made to enforce the collection of this tax by the arrest of himself or his subordinates.

In reply I beg to advise you that the city of Columbus is entirely without authority to assess or collect a tax of any sort on property belonging to the United States and used for government purposes. I do not anticipate that any attempt to enforce the collection of the tax will be made but in case an officer should attempt to arrest Capt. Bush for non-payment of the tax on the property mentioned I would advise that he submit to the arrest as he could at once obtain his release through a writ of habeas corpus.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

## ABSTRACT OF TITLE TO CERTAIN REAL PROPERTY.

December 6, 1906.

HON. A. B. CRITCHFIELD, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I have examined the abstract of title to the south-west quarter of the south-west quarter of Section No. 21, township No. 7, range No. 16, Erie-township, Ottawa county, the property of Charles Brier.

The abstract fails to set forth the certificate to which reference is made, to the effect that the south half of the south-west quarter of Section 21, etc., was entered on December 16th, 1833, by Nathan Kirk. If the records of the general land office show that such is the fact, there was no defect of title in Nathan Kirk.

In the deed from Henry Kleinhaus and wife to Artebanes Kirk, there is a reference to a mortgage executed to James Dunham from the said Henry Kleinhaus and wife. The abstract fails to set forth this mortgage or any cancellation or release thereof. If the same were never recorded it would not amount to a lien upon the property. The abstract should state whether or not this mortgage appears of record.

The inaccuracy of the description of the property conveyed by the deed from Isaac Stephens to Valentine Gutschalk, repeated in the deeds shown in the two succeeding sections of the abstract, is corrected in the deed of Hannah Walters and Fred Walters to William E. Hyde, and is of no consequence because of the fact that William E. Hyde is shown to have obtained title to the whole tract of forty acres through the conveyance from Artebanes Kirk. The abstract:

fails to show any cancellation or release of the mortgage from Charles Brier and wife to W. E. Hyde.

The certificate does not specify as to whether an examination has been made in the United States circuit or district courts for pending suits or judgments, nor does it specifically state that an examination has been made for taxes and special assessments.

Subject to the exceptions above noted I am of the opinion that the abstract shows a good title to the property as described to be in Charles Brier.

From the general certificate at the end of the abstract, I assume that there is no record of any mortgage from Henry Kleinhaus and wife to James Dunham. I am informed that the mortgage from Charles Brier and wife to W. E. Hyde has been cancelled.

Upon the foregoing assumption I beg to advise you that a good and sufficient deed from Charles Brier will pass perfect title to the premises in question.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### COMMON PLEAS JUDGES—STATUS OF.

Common pleas judges are state officers.

January 29, 1906.

HON. R. KINKADE, *Toledo, Ohio.*

MY DEAR JUDGE:—Your letter of Saturday is just at hand. There is, in my judgment, no sound basis upon which a contention could be founded that common pleas judges are not state officers.

Section 1, of Article IV of the Constitution declares that "the judicial power of the state is vested in a supreme court, circuit court, courts of common pleas," etc.

In the matter of their jurisdiction, their compensation, their removal and the appointment to fill vacancies, they are clearly to be regarded as serving the state. The test of whether one is a public officer or not is determined by the answer to the further question of whether or not he has conferred upon him some portion of sovereign power; and the question as to whether he is a state officer, a county officer or a municipal officer is answered by the further question as to whose servant he is. This is not always determined by the manner of his appointment or election. Our courts have held frequently that officers appointed by the governor, or some other state authority, are county officers, and therefore that the acts requiring such appointment are unconstitutional since county officers must be elected by the people of the county. So our courts have frequently held that officers appointed to serve in some local capacity and paid out of the county or a municipal treasury, are nevertheless state officers. For example, police commissioners appointed by the governor were held to be an arm of the state; so election officers, under the present election laws, are deputy state supervisors, and so even boards of review for municipalities, who are appointed by the state board of appraisers and assessors, serve only the city and are paid by the city.

In other words, the way to determine whether or not one is a state officer is by considering all the facts and circumstances connected with the creation of the office, the duties to be performed, the way the officer is paid, the manner of his selection and removal, as well as the sub-division of the state whose electors may be permitted to choose him. Clearly the common pleas court of Ohio is established as a branch of the judicial department of the state government.

The members of the court serve the whole state. They are paid by the state. They may be removed by the state, and when a vacancy occurs it is filled by the state. The division of the state into judicial districts, and the election of the judges as well as the performance of the duties within certain sub-divisions, are all mere matters of convenience for the better performance of the court's functions.

Certainly it would not be said that the judges of the supreme court of Ohio were not state officers if they were elected from judicial districts instead of from the state at large. Certainly it would not be said that the judges of the court of appeals of Kentucky were not state officers because they are elected from judicial districts, the sole purpose of such divisions being to distribute representation upon the court throughout the entire state. The sole purpose of the judicial sub-divisions with respect to the common pleas courts of the state is to distribute such representation and insure, as far as possible, a trial court for the convenience of all localities.

I do not think that there is any danger of this suggestion that common pleas judges are not state officers being seriously considered in any quarter. Certainly such a view would not attract any lawyer who has examined the subject.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### FISH AND GAME LAWS—RELEASE OF PRISONERS CONVICTED AND SENTENCED UNDER.

County commissioners have no authority to release prisoners convicted and sentenced under fish and game laws except upon payment of fine or service of term; costs made in prosecutions under said laws must be paid by county.

April 18, 1906.

COL. J. C. PORTERFIELD, *Chief Fish and Game Warden, Columbus, Ohio.*

DEAR SIR:—You have requested an opinion as to the right of county commissioners or county auditors to release prisoners duly tried, convicted and committed to jail for violation of the fish and game laws. In the correspondence which you have submitted it is stated that a person imprisoned for such offense, the validity of whose imprisonment had been determined in habeas corpus proceedings, was released either by the commissioners or the auditor of Belmont county.

As stated in a former opinion from this department construing Section 10, of the fish and game laws, (409e):

“The county commissioners have no authority to discharge or release persons convicted for violation of the fish and game laws, except upon the payment of the fine and costs remaining unpaid, or unless the full term has been served.”

Reports of the Attorney General, 1905, p. 97; 1904, p. 146.

Neither would the auditor have any such authority. It is the duty of the sheriff of the county to at once re-arrest such a prisoner released under a mistaken belief in the power of the county commissioners to order his release, and to detain such prisoner until the balance of fine and costs have been paid, or the full term of imprisonment served.

The correspondence which you have submitted also states that a county auditor has stated that he would issue no warrants for payment of costs in prosecutions for violation of the fish and game laws. It is provided in Section 409d R. S. that:

"In all prosecutions and condemnation proceedings under the provisions of this act, \* \* \* if the defendant be acquitted, or if convicted and committed in default of payment of fine and costs, or if the property seized be released, the costs in such cases shall be certified under oath to the county auditor who, after correcting the same, if found incorrect, shall issue his warrant on the county treasurer in favor of the person or persons to whom such costs and fees are due, and for the amount due each person."

The county auditor is required, by this section, to issue his warrant for the payment of costs certified under oath as required. He may correct any illegal items in the cost bill but has no discretion to withhold the warrant for payment of proper costs.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

#### UNIMPROVED ROAD—STATE AID FOR.

Where part of road for reconstruction of which state aid is asked is unimproved, such state aid may be applied only to reconstruction of improved portion.

March 28, 1906.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your communication of recent date is received. You inquire whether under Section 19 of the act creating a state highway department, state aid can be given for the reconstruction of the Stetzer and Fifth Avenue road in Mifflin township, Franklin county, Ohio, 1,400 feet of the east end of said road being unimproved.

In reply I beg leave to say that section 19 of said act (R. S. 4614-29) provides for the reconstruction of any *turnpike* or *improved road*, and can only cover that portion of the road which is to be reconstructed. The portion of the road which is unimproved will have to be improved under Section 3 of said act, which provides:

"Any public road or section of road, located within said county, being at least one mile in length, or being less than one mile in length is an extension or connection with some permanently improved or paved street may be improved by the construction of a macademized road, etc."

Section 4876, which provides for repairing improved roads does not apply to the state highway department. In my judgment the portion of said road that is improved can be reconstructed under Section 19 of the act establishing a highway department, while the remainder of said road will come under the provisions of section 3 of said act.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

## ASSISTANT SURVEYOR—COMPENSATION OF.

Assistant surveyor performing work of surveyor entitled to same compensation as surveyor.

March 28, 1906.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your communication dated March 26th, in which you enclose a bill of the costs of making survey, plats, profiles, estimates, etc., of the Cheever road improvement is received.

You inquire as to what compensation the assistant surveyor is entitled to for this work. In reply I beg leave to say that Section 4664 which provides compensation for county surveyors for work upon county roads fixes said compensation at \$5.00 per diem. The enclosed bill does not indicate the character of work performed by the assistant surveyor. If he did the work of the surveyor, he would, in my judgment, be entitled to the same compensation as the surveyor.

Very truly yours,

W. H. MILLER,  
*Ass't Attorney General.*

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## ASSISTANT SURVEYOR—COMPENSATION OF.

Assistant surveyor acting as chainman or rodman entitled to compensation of chainman or rodman, not to that of surveyor.

March 31, 1906.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your letter dated March 29th, inquiring as to whether a deputy county surveyor acting as a chainman or rodman, is entitled to \$1.00 or \$5.00 per day, is received. In reply I beg leave to say that under section 4664 county surveyors are entitled to receive for work upon county roads, \$5.00 per day; chain carriers and markers \$1.00 per day. Under this section if a deputy county surveyor acts as chainman or rodman he is entitled to \$1.00 per day.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

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## CULVERTS—DUTY OF HIGHWAY COMMISSIONER TO PROVIDE.

Expense of culverts for drainage under road a part of total cost of said road, to be paid by state highway commissioner; no obligation attaches to state highway commissioner with respect to culverts for farm road approaches.

June 27, 1906.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion on the following questions:

First. "In constructing roads under the highway department law, who pays for small culverts that are necessary to carry drainage under

the road, the county commissioners or township trustees, or are they part of the work of road construction, paid under the same conditions as the rest of the highway department contract?"

I am of the opinion that the expense of culverts necessary to carry drainage under the road is a part of the total cost and expenses mentioned in section 10 of the act establishing the state highway department and should be apportioned as therein provided.

Second. "What responsibility must the highway department assume in providing culverts and approaches for farm roads?"

There is no obligation on the part of the state or its agent, the state highway commissioner, to provide culverts or approaches for farm roads, nor is the state or the highway commissioner liable for damages resulting from change in grade.

Section 8 of the act establishing the state highway department, as amended 98 O. L., 232, provides:

"In case such proposed highway shall deviate from the existing highway, the officials making application must provide for securing the requisite right of way by condemnation proceedings or otherwise, prior to the actual commencement of the work of improvement, and shall secure release from damage to property by reason of change of grade."

Section 9 of the original act also provides that,

"The state of Ohio shall in no case be liable for any damage suffered."

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

#### STATE HIGHWAY COMMISSIONER — ADVERTISEMENT FOR BIDS.

State highway commissioner, amending estimate, when no bid has been received within the estimate made, under section (4614-19), R. S., must readvertise for bids.

August 31, 1906.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:— Your communication dated August 30th, inquiring whether or not the provisions in section 9 of the act to establish a highway department, (4614-19), R. S., authorizing the highway commissioner to amend his estimate, where no bid has been received within the estimate made, requires a readvertising for bids, is received.

In reply I beg leave to say, the provision above referred to is as follows:

"But if no bid otherwise acceptable be made within such estimate, such highway commissioner may amend his estimate, certify the same to the board of county commissioners, and upon the adoption of it of a resolution as provided in section 6, based on such amended estimate, proceed anew to obtain bids and award the contract as herein provided."

In my opinion, the language "proceed anew \* \* and award the contract as herein provided," as contained in the above provision, clearly implies that where the estimate is amended by the state highway commissioner all the requirements provided for the receiving of bids must be complied with the same as if no previous action had been taken.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

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#### STATE HIGHWAY COMMISSIONER—ADVERTISEMENTS FOR BIDS.

State highway commissioner may make no advertisement for bids for work on road improvements other than those authorized by section (4614-19), R. S.

December 27, 1906.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your communication under date of December 21st, relative to your right to make additional advertisements to those provided for in section 9 of the highway laws and pay the expense of same out of your contingent fund, is received. In reply I beg leave to say section 9 of the highway law provides that:

"The state highway commissioner shall advertise for bids for two successive weeks in two newspapers of general circulation and of opposite politics, published in the county in which the road is to be built, according to said plans and specifications which shall be on file at the county commissioner's office and shall award such contract to the lowest responsible bidder."

No advertisement other than the one provided for herein is authorized and, in my opinion, the highway commissioner is without authority to make additional advertisements in engineering and contracting periodicals and pay the expense of same out of the contingent fund of his office.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### JUSTICE OF THE PEACE—TERM OF.

Term of justice of the peace begins at date of election.

March 13, 1906.

HON. J. R. CAMPBELL, *Justice of the Peace, Akron, Ohio.*

DEAR SIR:—Your letter of March 12th, enclosing your commission as justice of the peace, is at hand.

The Supreme Court has recently held that the term of office of a justice of the peace begins on the day of his election and expires three years from that date, without regard to the date of his commission. Your term therefore does not run until April 18th, but does continue until three years from the date of your election.



The justice who was elected to succeed you should not assume the duties of his office until that date.

I return your commission herewith.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

#### JUSTICE OF THE PEACE—EXTENSION OF TERMS OF.

Terms of office of justices of the peace existing November 7, 1905, extended by constitutional amendment (Art. XVII, section 3), adopted on that date, until such time as successors may be elected and qualified according to provision of said constitutional amendment and laws enacted by general assembly in pursuance thereof; new commission for such extension of term not necessary; new bond for same should be given.

April 23, 1906.

HON. J. H. LAFFERTY, *Justice of the Peace, Deshler, Ohio.*

DEAR SIR:—The recent constitutional amendment, and the acts of the last general assembly to carry the same into effect have resulted in inquiries from a number of justices of the peace, yourself among the number, as to the effect of the recent legislation upon existing terms of justices. The questions presented are as follows:

First. When the three year term of a justice of the peace expires between November 7th, 1905, and November, 1907, is there a vacancy in the office which may be filled by appointment under section 567, R. S.?

Second. If in such cases, the justice of the peace in office November 7th, 1905, holds over by virtue of Article XVII, sec. 3 of the Constitution until a successor shall be elected and qualified, must he give a new bond?

Third. Must a justice holding over procure a new commission for the extended term?

It is provided in Senate Bill No. 168, passed April 2nd, 1906, that justices of the peace shall be elected for a term of four years on the first Tuesday after the first Monday in the *odd numbered years*, and that their terms of office shall commence on the first day of January next after their election. The constitutional amendment adopted November 7th, 1905, provides:

“Sec. 3. Every elective officer holding office when this amendment is adopted shall continue to hold such office for the full term for which he was elected, and until his successor shall be elected and qualified as provided by law.”

Section 1 of the same amendment provides that elections of officers, other than state and county officers, shall be in the odd numbered years, and section 2 provides:

“The term of office of justices of the peace shall be such even number of years, not exceeding four, as may be prescribed by the general assembly—And the general assembly shall have power to so extend existing terms of office as to effect the purposes of section 1 of this article.”

Construing these sections together, I am of the opinion that the joint effect of this amendment and the statute is to extend until January 1st, 1908, the terms of justices of the peace who were in office November 7th, 1905, and to whom no successors were elected at the November election, 1905.

The terms of existing officers having been expressly extended by the constitution itself, the numerous decisions, that the term of an elective officer whose term is fixed by the constitution cannot be extended by the legislature, are not applicable.

There will, therefore, be no vacancy in the office of a justice of the peace in office November 7th, 1905, and to whom no successor was elected at the last November election, although the three years' term for which such justice was elected may expire during this year.

New bonds should be given for the extended term.

State v. Crooks, 7 Ohio, 2nd part, 222, 223;  
King v. Nichols, 16 O. S., 80-85;  
Cambria Iron Co. v. Keynes, 56 O. S., 511.

It is not, I believe, necessary that a justice of the peace should procure a new commission covering the period for which his term has been extended. A justice of the peace receives a commission from the governor "upon producing to the proper officer or authority, a legal certificate of his being duly elected or appointed." (Sec. 83, R. S.) He is ineligible to perform any of the duties of his office until he receives such commission. But when an existing term is extended, the incumbent does not hold by virtue of any new election or appointment which can be certified by any officer.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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#### JUSTICE OF THE PEACE — EXTENSION OF TERM OF.

Term of justice of the peace begins at date of election; successor of justice of the peace elected in November, 1904, will be elected in November, 1907, to take office January 1, 1908, incumbent's term being extended; tenure of office of justice of the peace elected November 7, 1905, will cease November 7, 1908, when there will be a vacancy in his office to be filled by appointment.

May 26, 1906.

HON. OSCAR REDDING *Justice of the Peace, West Toledo, Ohio.*

DEAR SIR:—Your letter of May 23rd requests my opinion on the following questions:

1. "If a justice's three year commission expires on May 8th, 1908, shall his successor be elected in November, 1907, or does he hold over until November, 1909?"
2. "If a justice's three year commission expires in May of 1909, shall his successor be elected in November, 1907, or does he hold over until November, 1909?"

The supreme court has recently held that the term of a justice of the peace under the laws existing prior to the amendment of section 1442 by the 77th gen-

eral assembly, commenced on the date of election and expires three years from that date. I presume that the justice referred to in your first question was elected at the November election, 1904. His term, which would have terminated in November, 1907, has been extended by section 3 of article XVII until January 1st, 1908. His successor should be elected at the November election, 1907.

Section 581 (97 O. L., 38), which provides for the election at the November election, each year, of successors to all justices of the peace whose terms would expire within one year from the first day of November, was repealed by S. B. No. 168 (98 O. L., 171).

The terms of justices of the peace hereafter elected will commence on the first day of January next after their election. If successors to justices of the peace whose terms will expire after January 1st, 1908, should be elected at the November election, 1907, a conflict of terms would result. Since no statute now requires elections to fill vacancies which will occur at any time during the year following the election, I am of the opinion that the successors of justices of the peace whose terms expire after January 1st, 1908, should not be elected until November, 1909.

The justice whose commission expires in April or May, 1909, was not holding office during November, 1905. His term is not, therefore, extended by the constitutional amendment. There will be a vacancy in his office *three years from the date when he was elected*, which should be filled by appointment by the trustees, as provided by section 567, as amended 95 O. L., 171.

I enclose copy of a former opinion which answers your question as to the term of justices whose statutory term expired this spring, and to whom no successors were elected at the November election, 1905.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### JUVENILE COURT — JURISDICTION OF.

Jurisdiction of juvenile court of offenses of parents, etc., contributing to delinquency of children; process.

June 29, 1906.

HON. GEORGE S. ADDAMS, *Judge Juvenile Court, Cleveland, Ohio.*

DEAR SIR: — Replying to your recent inquiry proposing the question as to the power of juvenile courts to punish those contributing to delinquency of a child, I again refer you to that portion of the opinion of this department of the 12th inst., in which the following language is used:

"Section 21 of the original act, (97 O. L., 561, 568) provides certain fines for the offenses therein defined, and confers jurisdiction upon the juvenile court to hear the same and enforce its orders. In that class of cases such court has jurisdiction. In the class of cases mentioned in section 23 (98 O. L., 317), I am inclined to believe that such court also has jurisdiction to hear and determine as to the guilt or innocence of the persons accused of the offenses defined therein, etc."

Concerning this portion of the opinion of that date you ask,

"How are we to get them into court? And if they came voluntarily, on what would a judgment of the court be based?"

Section 21 of the former act (97 O. L., 568), provides that,

"In any case in which the court shall find a child neglected, dependent or delinquent, it may, in the same or subsequent proceeding upon the parents of said child, or either of them, being duly summoned or voluntarily appearing, proceed to inquire into the ability of such parent, or parents, to support the child, or to contribute to its support, and if the court shall find such parent or parents able to support the child, or contribute thereto, *the court may enter such order or decree, relating to such report (support) as the equity of the case demands,* and if the decree of the court be that any such parent discipline and control a delinquent child, then the court may enforce such order by fine imposed on any such parent, not to exceed, for the first offense, twenty-five dollars (\$25.00) and for each subsequent offense one hundred dollars (\$100.00)."

Section 23 of the amendatory act (98 O. L., 317) should be construed as defining a further and additional penalty for persons responsible for the abandonment, or for causing, encouraging or contributing to the delinquencies, dependency, or neglect, of such child, and in expressing the view contained in the opinion of this department of the 12th inst., that the same court has jurisdiction to hear and determine as to the guilt or innocence of such accused, I find no adequate reason for changing the opinion therein expressed.

The question of the power of the court to summon the individuals, or "to get them into court" is answered by the former act, section 5 thereof, wherein it describes the "summons or other process," and by section 21 thereof, wherein it uses the language "being duly summoned or voluntarily appearing."

This language is to be construed by the rule set forth in section 29 of the amendatory act (98 O. L., 319) to-wit, "liberally construed to the end that its purpose may be carried out," and in this view the same authority to summon or serve other process in a proceeding to inquire into the delinquency of a child, should also be extended to those cases against parents or other persons responsible for such delinquencies as defined in section 23 (98 O. L., 317). Jurisdiction has been defined to be the power to hear and determine a given matter. This jurisdiction is unquestionably conferred.

As the questions proposed by you only relate to the issuing of summons or other process, I consider the opinion herein above expressed as a full answer to such questions. I remain,

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

#### FREE EMPLOYMENT AGENCIES — PRIVATE.

Private free employment agencies not required to take out license; construction of act regulating such agencies.

June 28, 1906.

HON. M. D. RATCHFORD, *Commissioner of Labor, Columbus, Ohio.*

DEAR SIR: — In answer to your request for my opinion as to the construction of the act of April 25th, 1904, relating to employment agencies, I beg to advise you that, in my opinion, a person or corporation which maintains a private em-

ATTORNEY GENERAL.

ployment agency in this state is not liable to the fine imposed by section 1 of the act for doing business without a license, provided such agency is not operated "for hire." Section 3 of the act defines private employment agencies, and certain agencies come within the definition, whether a fee or commission is charged or not; but section 1 requires a license only from such private employment agencies defined by section 3, as are operated for hire.

I am also of the opinion that the display of a sign which reads "Free Employment Bureau" is not prohibited by the provision of section 1 that:

"No agency shall print, publish or paint on any sign, window or insert in any newspaper or publication a name similar to that of the Ohio Free Public Employment Offices."

The sign "Free Employment Bureau" does not contain either the word "Ohio" or the word "Public" and therefore does not convey the idea that the agency advertised is a state or public agency.

The facts stated in the letter from Mr. Patterson which you left at this office do, however, show that an offense has been committed. The last clause of section 1 of the act provides that:

"No person, firm or corporation shall conduct the business of any employment office in or in connection with any place where intoxicating liquors are sold."

I enclose a form of affidavit for use in prosecutions for violations of this provision of the act.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

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YOUNG MEN'S CHRISTIAN ASSOCIATION — OPERATION OF EMPLOYMENT AGENCY BY.

Operation of employment agency by Young Men's Christian Association not a violation of section (4365-3) R. S., though a fee is charged.

November 14, 1906.

HON. M. D. RATCHFORD, *Commissioner of Labor Statistics, Columbus, Ohio.*

DEAR SIR:— Your letter of November 13th requests an opinion upon the following question:

"Is it or is it not a violation of the law governing private employment agencies, for the Young Men's Christian Association, or any of its branches, to impose and collect a fee from its members, or others, for finding them employment?"

Section 3 of the Act of April 25th, 1904, is as follows:

"A private employment agency is defined and interpreted to mean any person, firm or corporation furnishing employment or help, or who shall display any employment sign or bulletin, or through the medium of

any card, circular or pamphlet, offering employment or help, shall be deemed an employment agency, and subject to the provisions of this act, whether a fee or commission is charged or not; provided that charitable organizations are not included."

The Young Men's Christian Association is subject to the provisions of the act "whether a fee or commission is charged or not" unless it is a charitable organization within the meaning of this section. Whether or not it is a charitable organization within the meaning of this particular statute must be determined by a consideration of the terms of the act, the purpose of the law and the reason for the exception. The purpose of the law is evidently not to raise revenue, but to protect persons who use the employment agencies from oppression, extortion or seduction. The reason for the *exception* is that it is presumed that charitable organizations — organizations the very object of whose existence is to promote the welfare of the community in some particular — will not, if they engage in the operation of an employment agency, operate such agency with any other purpose than the benevolent one of helping the needy to obtain employment. The fact that a small fee is charged for such service is not necessarily inconsistent with such purpose. A charitable organization may not have sufficient funds available from other sources to fully defray the necessary expense of operating an efficient employment bureau. It does not, in my opinion, cease to be a charitable organization merely because a small fee is charged for its services and applied to defraying such expenses.

The present case is readily distinguishable from those cases where the property of a Young Men's Christian Association has been held not to be exempt from taxation, as belonging to a charitable organization, (61 N. J. L., 420), or where such association has been held liable for injuries sustained as a result of the negligence of its employes. (165 Mass., 280.)

An exemption from taxation of property applied to charitable uses is upon the theory that since the property is already wholly devoted to public use, it is unwise to impose a tax upon it for the benefit of other public uses. But the exemption in the present case, as suggested above, is not because the property and activities of the exempted organization are wholly devoted to public uses, because the general purpose of such organization is such that state regulation and supervision would be, in the majority of cases, wholly unnecessary.

I am, therefore, of the opinion that Young Men's Christian Associations, as a class, are not subject to the provisions of the act merely because a fee is charged for the services of employment bureaus. If, on the other hand, you have evidence that any association, under the name and guise of the Young Men's Christian Association is not in fact an organization conducted as such associations usually are, but is conducting an employment bureau not primarily for the benefit of the unemployed, but as a means of raising funds to be used for the special benefit of the members of the association, then such particular association would not be a charitable organization, and would, of course, be subject to the terms of the act above referred to.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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#### COAL MINERS — EMPLOYMENT OF.

Act of legislature in 98 O. L., 259, respecting employment of coal miners invalid; enrollment of bill and signing thereof by presiding officers of both houses essential to validity of law; act as so enrolled and signed is the law.

May 22, 1906.

HON. GEORGE HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR: — In response to your request of May 21st, 1906, I have examined the act entitled "An Act in relation to the safety, competency and the employment of coal miners, and to punish for infraction of the same," passed April 2, 1906.

Section one of this act provides that no inexperienced miner shall be permitted to mine coal unless accompanied by some competent miner. This section, however, contains a proviso as follows:

"Provided that this act shall not apply to mines generating fire damp, gas or combustible matter."

This I quote from the bill as enrolled and signed. It appears, however, from the engrossed bill that this provision should read:

"Provided that this act shall only apply to mines generating fire damp, gas or combustible matter."

In other words, it is claimed that by error or otherwise, the bill which was aimed only at certain dangerous mines, was made to read as though it applied to all others than those against which the legislature was aiming.

Whatever the general assembly may have intended no measure can be said to be a law until it has been enrolled and signed by the presiding officer of each branch of the general assembly. If the act under consideration is a law at all it must therefore be with the provision that it shall *not* apply to mines generating fire damp, gas or combustible matter; and however well established it may seem to be that the intent of the general assembly was to legislate against the dangers only in the class of mines mentioned, no such bill has been signed by the presiding officers as required by the constitution and no such law can now be said to exist.

I see no reason to question the power of the legislature to provide reasonable qualifications for miners in all mines, and it probably has the power to determine the qualifications of miners in those mines only in which appear dangers such as those referred to in this act. I am quite clear, however, that it has no power to provide such regulations in the safer mines and provide no protection at all to those who most need the same, that is those who work in mines generating fire damp, gas or combustible matter. Such an exception is, in my judgment, sufficient to invalidate the whole act. Because of the failure of the presiding officers to sign a bill applying only to dangerous mines there is no such law existing and because of a lack of power in the general assembly to regulate the safer mines to the exclusion of the others, the act as enrolled cannot be sustained. With these views it seems to be unnecessary to consider the other questions presented.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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**MINES — CHIEF INSPECTOR OF — VIOLATION OF RULES AND REGULATIONS OF.**

Persons not operators of mines nor their employes may not be prosecuted for violation of rules and regulations of chief inspector of mines.

December 27, 1906.

HON. GEORGE HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR: — Upon examination of the written request made to you by W. D. Johnson, superintendent of a coal mine at Ginther, Ohio, I find that the offense complained of is one that is not in the province of the mine inspector's department to prosecute. The rules and regulations of your department as to the operation of mines apply only to employers and employes. Whenever said rules are violated by spectators or persons not in the employ of the operator the criminal action instituted by you would be against the operators of the mine for permitting the rules and regulations to be violated. The operator has his remedy against the individual who is not an employe for violation of said rules and regulations by forbidding him to enter the mine, or a prosecution for trespass.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## STATE INSPECTOR OF OILS — CREATION OF OFFICE OF.

Act creating office of state inspector of oils effective May 15, 1906.

April 30, 1906.

HON. JOHN R. MALLOY, *Inspector of Oils, Columbus, Ohio.*

DEAR SIR: — Your letter dated April 25th, inquiring when the law creating the office of state inspector of oils becomes operative, is received.

In reply I beg leave to say that I have had no opportunity to examine this law, as it is not included in the advanced sheets furnished this office. However, assuming your quotation from the law to be correct, it is my opinion that the powers and duties of the district inspectors and their deputies will terminate on the 14th of May, 1906, and that the officers provided for in the new law will assume their duties on the 15th of May, 1906.

Very truly yours,

W. H. MILLER,

*Assistant Attorney General.*

## STATE INSPECTOR OF OILS — CREATION OF OFFICE OF.

Supplementary to foregoing opinion.

May 2, 1906.

HON. JOHN R. MALLOY, *Inspector of Oils, Columbus, Ohio.*

DEAR SIR: — Your letter dated April 30th, enclosing a copy of the act providing for the appointment of a state inspector of oils, etc., is received.

A careful examination of the act, particularly those portions underscored, confirms my view as stated in my letter dated April 30th.

Section 395, as amended, expressly provides that the appointment of a state inspector of oils shall be for a term of two years *commencing* May 15th, 1906, and further provides that the present inspectors of oils for the first and second districts shall perform the duties of the state inspector of oils under this act *until* May 15th, 1906. The preposition "until" as here used, is equivalent to "up to." That is,



the present inspectors of oils shall perform the duties of the state inspector of oils under this act *up to* May 15th. Therefore the duties of the present inspectors of oils, under this act, will terminate on the 14th day of May and the state inspector of oils will assume the duties on the 15th day of May, 1906.

Very truly yours,

W. H. MILLER,  
*Assistant Attorney General.*

#### OIL — SUB-STATIONS FOR SALE OF.

State inspector of oils may not limit number of sub-stations at which refined oil may be prepared for sale.

October 5, 1906.

HON. W. L. FINLEY, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:— Your communication under date of September 28th, relative to the authority of the State Inspector of Oils to limit the number of, and designate the sub-stations at which refined oil may be barreled and prepared for sale, is received.

In reply I beg leave to say the rules and regulations for inspection referred to in your letter which the state oil inspector under section 395, R. S., as amended, (98 O. L., 360) is authorized to prepare can be made to apply only to the official duties of the deputy oil inspectors for the reason that said section 395 expressly provides that "such rules and regulations shall be uniform and binding on all deputy inspectors in both districts of the state." I am therefore of the opinion that the state oil inspector, under the present law, is without authority to either limit or designate the sub-stations at which oil may be inspected.

If as you say the maximum number of inspectors allowed by law is insufficient to inspect the oil prepared for sale by reason of the number of sub-stations at which oil may be inspected, the fault lies with the legislature. The law authorizing the state oil inspector to appoint deputy inspectors should be so amended as to give the state oil inspector authority to appoint as many deputy oil inspectors as the inspection of the oil prepared for sale, requires.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

#### PROBATE JUDGES — COMPENSATION OF, FOR SERVICES IN CRIMINAL CASES.

Manner in which probate judges paid for services in criminal cases discretionary with county commissioners.

May 18, 1906.

HON. W. W. PENNELL, *Probate Judge, Georgetown, Ohio.*

DEAR SIR:— Your letter dated May 12th, inquiring at what times allowances should be made the probate judge under section 6470, Revised Statutes of Ohio, is received.

In reply I beg leave to say that said section only provides that,

"The judges of probate courts shall be paid for their services in criminal cases such sums as the commissioners of said counties may allow, which sums shall be paid out of county treasury of said counties."

No provision is made as to the time payment shall be made. The practice in some counties is to make an annual allowance, such as was made the prosecuting attorneys under section 1274, R. S., while in others compensation is allowed the probate judge for services rendered in each criminal case tried. The determination of the question as to when the allowance shall be made rests in the discretion of the county commissioners.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

#### PROBATE COURT — JURY FOR CRIMINAL TRIALS.

Jury for trial of criminal cases in probate court need not be drawn and impanelled anew for each case.

May 31, 1906.

HON. GEORGE H. PONTIUS, *Probate Judge, Circleville, Ohio.*

DEAR SIR:— Your letter dated May 29th is received. You say that seven persons charged with the violation of the Sunday closing law are bound over to appear before your court at the next term beginning June 4, 1906, for trial; that the first case will be tried June 7th, and a jury is demanded. You inquire whether or not under section 6466 of the Revised Statutes of Ohio a new jury will have to be drawn and impanelled for each of the seven cases.

Replying I beg leave to say that section 6466 of the Revised Statutes is as follows:

"The jury for the trial of criminal cases in the probate court, shall be drawn as for the court of common pleas, before or during any term of the said probate court, as the said probate court may order, and a venire for such jury to either forthwith, or on a day named, shall be issued by the said probate court; which venire shall be served and returned in the same manner as a venire from the court of common pleas."

This section provides that the jury for the trial of criminal cases in the probate court shall be drawn as for the court of common pleas and therefore may be required to do jury service the same as in the court of common pleas, subject to the provisions of section 5179, Revised Statutes of Ohio. The law makes no provisions for the drawing or impanelling of a jury in the probate court for each criminal case tried.

Very truly yours,  
WADE H. ELLIS,  
*Attorney General.*

## INHERITANCE TAX — COLLATERAL.

Devise to son-in-law when daughter died prior to death of testator not subject to collateral inheritance tax.

July 30, 1906.

HON. C. A. STEUVE, *Probate Judge, Wapakoneta, Ohio.*

DEAR SIR: — I have yours of July 28th, requesting my opinion upon the question of whether a devise to a son-in-law is subject to the collateral inheritance tax where the daughter of the testator died prior to the death of the decedent.

In constructing the collateral inheritance tax law of the state of New York, which is, in this respect, exactly the same as the Ohio statute, the courts of that state have held that the tax does not attach to such inheritance.

19 Abb. N. Cas., 232;

6 Dem., 145.

If this construction is correct it renders unnecessary the consideration of the other questions suggested by you.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## PROBATE JUDGE — EXPENSE OF, IN HOLDING INQUEST OF INSANITY.

Probate judge not entitled to expense incurred in personally visiting one upon whom an inquest of insanity is being held.

July 31, 1906.

HON. U. C. DEFORD, *Probate Judge, Carrollton, Ohio.*

DEAR SIR: — In response to your inquiry made under date of July 30th, 1906, I beg to say that inasmuch as no provision has been made by statute for the judge of the probate court to receive any expenses incurred in personally visiting one upon whom an inquest of insanity is being made, under the provisions of section 703 of the Revised Statutes, that such judge cannot collect such expenses, but is required to bear the same himself.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## JUVENILE COURT — CERTIFICATION OF ARREST TO.

Arrest of child under 17 is to be certified from justice's court to juvenile court only when made without warrant.

September 27, 1906.

HON. CHARLES C. BOW, *Probate Judge, Canton, Ohio.*

DEAR SIR: — Your communication dated September 21st, asking construction of section 10 of the juvenile court act (98 O. L., 317) relative to certifying cases of arrest of children under the age of seventeen years from a justice's court to the juvenile court, is received. In reply I beg leave to say section 10 only provides that in case a child under the age of seventeen years is arrested *without warrant*

and is taken before a justice of the peace, or judge of the police court it shall be the duty of such justice of the peace or judge of the police court to transfer the case to the juvenile court. In my opinion this section does not apply to cases where the arrest is made upon a warrant regularly issued.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*

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#### RAILROADS AND TELEGRAPHS—COMMISSIONER OF—DUTY OF.

It is the duty of the commissioner of railroads and telegraphs to obtain copies of agreements supposed to exist between railroad companies, under section 256, R. S.

April 4, 1906.

HON. J. C. MORRIS, *Commissioner of Railroads and Telegraphs, Columbus, Ohio.*

DEAR SIR:—I am in receipt of yours of March 31st, advising me that an attorney interested in private litigation against a railroad company operating in Ohio has demanded of you copies of agreements assumed to exist between such railroad company and other companies, mentioned in section 256, R. S.

I understand that you are of the opinion that contracts, copies of which are desired, do exist between the companies mentioned, and you desire to know whether or not it is your duty to secure from the railroad company a copy of such contract for the benefit of the person so desiring the same.

Section 256 of the Revised Statutes provides that copies of all such contracts shall be furnished the commissioner of railroads and telegraphs upon his demand. If the commissioner has reason to believe that the law of the State of Ohio is being violated in any respect, it is his duty to investigate the facts whether the resulting disclosures may or may not be serviceable to either party in private litigation, and it is likewise his duty to secure from the railroads copies of all the documents mentioned in said section so far as the same may be of assistance to him in determining whether or not the law is being or has been violated. Without any more definite knowledge of the nature of the information desired by the citizen making the inquiry I can only say that if the copies of documents sought by him would make it easier for either the public or a private citizen to enforce or protect either public or private rights, it would seem to be a reason why copies of such documents should be filed in your office. Of course if you for any reason make demand on railroads for copies of such contracts and they are forwarded and become a part of the files of your office, they are open to the public use and inspection under such reasonable regulations as you may adopt. My own opinion is that all of the information that can be secured by the commissioner of railroads and telegraphs under section 256 should be obtained by him and be on file in his office for the public use, but the wisdom and propriety of such action seems to be confined entirely to the commissioner.

Very truly yours,

WADE H. ELLIS,  
*Attorney General.*