IV.

OPINIONS OF THE ATTORNEY GENERAL FROM JANUARY 1, 1907, TO JANUARY 1, 1908.

(To the Governor)

CONVICT LABOR—INVESTIGATION OF CONTRACT OF THE BALDWIN FORGING & TOOL CO.

January 2nd, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio.*

DEAR SIR:—Pursuant to the request contained in your letter of October 30th I caused to be made an investigation of the alleged violations of the provisions of sections (7432-1) and (7432-2) of the Revised Statutes of Ohio, commonly known as the "convict labor law," the charges having been filed with me by certain manufacturers of scoops and shovels, located within this state, and being made against the Baldwin Forging & Tool Company, a corporation engaged in manufacturing various tools and implements under a contract made with the board of managers of the Ohio penitentiary.

A copy of the evidence upon such investigation I transmit herewith.

The contract with such corporation calls for the services of 75 ablebodied and 50 infirm prisoners, 125 in all, to be furnished such corporation by the board of managers during the existence of the contract in question. The contract was made in the month of July 1905, and is to continue for a period of five years from that date.

The business, occupation or manufacture in which such corporation is engaged and upon which the prison labor provided for in the contract was to be employed, is described in the contract as that of "manufacturing steel stampings, forgings, tools, handles, and other articles not in competition with existing contracts in the Ohio peniteniary."

The evidence taken discloses that from the month of August 1905, the beginning of the present contract, to December 1906, the average number of prisoners employed per diem, both able-bodied and infirm, was 97.

The prisoners are assigned to each of the contractors by the warden and deputy warden and, after such assignment is made, the work in which the prisoners are engaged is directed by the contractor or his agents. A time-book or register of the number employed each day, upon each contract, is kept by direction of the warden and the contractor and settlement is made monthly upon the basis of such agreed number. In this manner no discrepancy in the number employed can be carried into the accounts with the board of managers and no question as to such fact appears in the evidence, but it is agreed to without contest. (Testimony of Frank Baldwin, page 21.)

Section (7432-2) R. S. provides that:

> "It is hereby made the duty of the commissioner of labor statistics and the attorney-general to enforce the provisions of this act; and immediately after the passage of this act, and thereafter when, upon complaint or otherwise the commissioner of labor statistics has reason to believe that the limitations of this act are being exceeded in the employment of prison labor in any industry or industries, he may, if he deem it advis-

able, investigate and ascertain the number of all persons in this state outside of the penitentiaries, workhouses and reformatories employed in manufacturing the kind or kinds of goods in question, and also the number of prisoners and inmates employed in each penitentiary, workhouse and reformatory in the manufacture of such product or products. * * * "

Pursuant to such provision upon request being made by this department of Hon. M. D. Ratchford, commissioner of labor statistics, an investigation was caused to be made by him as to the number of persons in this state outside of the penitentiaries, workhouses and reformatories, employed in manufacturing shovels, spades and scoops, as such implements were being manufactured by the Baldwin Forging & Tool Company and were embraced in the contract of that company with the board of managers.

I herewith submit a copy of the report of Mr. G. W. Leahy, appointed as a special agent of the commissioner of labor statistics for such purpose, which report shows that the number of free laborers employed during the period embraced in such investigation, to wit: in the month of May 1906, in the manufacture of "shovels, spades and scoops," was 218.

The report evidences that the special agent of the commissioner in making such investigation confined his inquiry to the number employed in the manufacture of the implements mentioned and his report is limited to that industry alone.

For the purpose of the investigation requested by you I relied upon the result of the investigation made by the commissioner by which he determined the number of free laborers employed in such industry within the state and confined my inquiry to the number employed upon the contract referred to.

The investigation discloses that there is no substantial issue as to the fact of the number employed in the industries but that the contract of the Baldwin Forging & Tool Company does not limit that company to the manufacture of "shovels, spades and scoops," but as hereinbefore shown the language is much more general and includes many industries which may not be related in character to that of the manufacture of such implements, to wit: "manufacturing steel stampings, forgings, tools, handles and other articles not in competition with existing contracts in the Ohio penitentiary."

We are thus brought to the consideration of the question whether in making computation of the number of persons permitted to be employed in the penitentiary provided for by section (7432-1) R. S. the 10 per centum therein mentioned should be limited in the contract under consideration to 10 per centum of the number of persons engaged in the manufacture of shovels, spades and scoops, or 10 per centum of all persons engaged in the manufacture of "steel stampings, forgings, tools, handles and *other articles.*" If the former, accepting the conclusions of the commissioner of labor statistics that there are but 218 free laborers engaged in such manufacture within this state, we would be forced to the conclusion that the number of prison laborers engaged in the manufacture of *such implements* could be but 21. But if the language of the contract be accepted as including other and different articles, implements and products than "shovels, spades and scoops," the computation of the 10 per centum should be based upon the number of all persons in this state, outside of prisons, employed in the manufacturing of such other implements, etc., as would be included within the language used in the contract.

Evidently the purpose of the statute referred to was to protect free labor engaged in certain industries from the competition of prison labor engaged in the same industries. In seeking to determine the number of prisoners permitted to be employed it is absolutely essential to determine the industry or industries affected.

It is contended by the contractor, with much show of reason, that its contract under the clause contained therein of "steel stampings" permits it to manufacture all forms of stampings which are capable of being made by merely changing the die in the machine, and that it can make a skillet and pan or stove shovel with the same facility that it can make a shovel, spade or scoop, and that the ultimate form of the stamping depends entirely upon the die placed in the machine.

The term "forgings" is still broader and more inclusive, including any article which may be forged or shaped by hammering. The word "tool" may be said to mean *not* a single instrument but all implements used in working, moving or transforming material, such as a hammer, chisel, spade, plane, etc. The word "handles" is broad enough to include all forms of handles, for all implements, large or small, and because of the present machinery employed by the contractor it has limited itself for the time to manufacturing handles for shovels, spades scoops and forks with probably one or two other forms, yet the contract permits the manufacture of all kinds of handles necessary in all the trades or employments. The descriptive term "and other articles" is so general as to include anything of the nature or character like those embraced within the descriptive terms with which such language as associated.

It is again contended, by the contractor, that in actual operation they are making crow-bars and iron wedges, riveted hoes and other implements. The evidence shows that the contractor takes the timber in the log and reduces it, by saw-mill work, plane and lathe work, to various forms of handles and that the prisoners working under the contract in question are thus engaged in various callings or branches of industry and severally enumerated as polishers, forgemen, finishers, saw-mill hands, electricians, carpenters, tinners, woodyard men, teamsters, teamsters' helpers, time-keeper, turners, weighers, lumber scalers, office clerks, stenographers, scale men, storeroom helpers, stockroom workers, pattern-makers, inspectors, blacksmiths, machinists, day and night watchmen, engineers, firemen, etc., and it is contended that a fair construction of the law in question shows that it was intended to protect the laborer and to limit competition with free labor, and in estimating the number of men used by the contractor that consideration must be given to the trade they are employed in and that the contractor would be entitled to use, in each separate trade thus enumerated, prisoners to a number not exceeding 10 per centum of the number in the same trade or business outside the prisons.

It will be seen from a consideration of the contract and the investigation of the facts made by this department that while the complaint is that the contractor is employing, contrary to law, a number of prisoners in excess of 10 per cent. of the total number of free workmen in the state engaged in the manufacture of "shovels, spades and scoops," the contract itself authorizes the manufacture of many additional articles and, in the performance of the contract, many additional articles have been and are being made.

I have not attempted to secure the data respecting such other trades and employments throughout the state as would be involved if the contention of the contractor in this case is correct, for I believe the question of law to be important enough, affecting, as it may, other prison contracts not yet abrogated under the new policy of state, to demand an early adjudication in the courts. I therefore return the evidence taken in the investigation requested by you with the suggestion that I will have such proceeding brought as will definitely determine the questions involved herein.

Very truly yours,

WADE H. ELLIS,

Attorney General.

MINISTERIAL LANDS — CITY OF MARIETTA.

Consent of ministerial trustees is a condition precedent to the execution by the governor of a deed for a portion of section 29 situated in the city of Marietta by virtue of the act in 97 O. L. 310.

January 12th, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio.*

DEAR SIR: — The letter of Hon. B. G. Dawes, addressed to you under date of the 3rd inst. accompanying a resolution passed by the city council of the city of Marietta, has been submitted to me for an opinion upon the questions therein presented.

They involve the construction of the act of the general assembly of April 23rd, 1904 (97 O. L. 310, 311) which, with the preamble omitted, is as follows:

> "That upon the application and request of the city council of Marietta, Ohio, by resolution duly passed, and the application and request of the ministerial trustees of section 29 in said city of Marietta, the governor of the state of Ohio is hereby authorized and empowered, in behalf of the state of Ohio, to convey to the United States of America, as may be designated by said city council and ministerial trustees, any or all of the parcel of land in the city of Marietta, Ohio, bounded by Putnam street, Front street, Butler street, and the Muskingum river, except that part already conveyed away by the state of Ohio, or to which the state has otherwise lost title."

The question arises as to the character of title or interest the trustees for ministerial lands have in and to the lands in question. The act of the general assembly of the state of Ohio recognizes that the lands sought to be conveyed to the general government, pursuant to its provisions, are at least in part composed of section 29, and as such were set apart by the ordinance of May 20th, 1787, for the purposes of religion, and have since that date been commonly known as ministerial lands.

Certain legislation was enacted by the territorial legislature and subsequently by the general assembly of the state of Ohio whereby there was created a body politic and corporate by the name and style of "The trustees for managing lands granted for religious purposes and for the support of schools, in the county of Washington," and the ministerial sections were vested in the state of Ohio in trust for religious purposes and the state of Ohio has vested such sections in such trustees in trust for the purpose of carrying out the intention manifested by the legislature in connection with such lands.

The title or interest of such trustees in such lands is limited strictly to the scope of the trust, and the legislation pertaining thereto placed such lands

> "under the care, charge and inspection of the trustees aforesaid, and they are hereby vested with full power and authority, when and so often as they think proper, by legal process, to remove any person or persons from the possession of any of the lands granted as aforesaid, when such person or persons have not taken a lease and refuse or neglect to take the same, or are on such lands as the trustees think proper to reserve for woodland, commons, or other useful purposes. And the said trustees are authorized to prosecute any person or persons for committing trespass or waste on any of the lands granted as aforesaid, in any court proper to try the same."

The lands in question are known as "the ice harbor lot," and by the act of the general assembly passed March 27th, 1898 (93 O. L. pp. 53, 56) a portion thereof had been conveyed to the government of the United States for the purpose of maintaining a lock-keeper's house to be used in connection with the improvement and control of the Muskingum river, being then engaged in by the general government.

In the legislation enacted by the general assembly of the state of Ohio, as set forth in the foregoing act, a method of procedure was adopted requiring not only the city of Marietta, which had been vested with general corporate powers over said premises, to give its consent by appropriate resolutions of its city council, but further requiring the ministerial trustees by their resolution to acquiesce in the use for which said premises were to be conveyed.

In passing upon the form of deed which you, as governor of the state of Ohio, are to execute pursuant to the act of April 23rd, 1904, I beg to say that it would be necessary for the trustees, by resolution or otherwise, to request you, as governor, to convey such lands to the United States government and the deed should recite the resolution of the council of the city of Marietta as well as the resolution of the ministerial trustees of section 29, and in the absence of such resolutions no power is vested in you by the act in question to execute such deed.

It is unnecessary further to examine the history of these ministerial lands, or to consider whether or not the state of Ohio could convey the same either to the United States government or to any other grantee without the consent of the trustees or in abrogation of the rights of the beneficiaries of the trust as represented by such trustees, for the reason that in the present instance the state had not attempted to do so. The whole question, therefore, which is now submitted to this department is answered in the act of 1904. This provides that you, as governor, shall execute a deed to such lands for the purpose indicated, *upon the consent by resolution of the city council of Marietta and the ministerial trustees.* This is a condition precedent imposed by the general assembly. The city council has already favorably acted. When the ministerial trustees do so, you may give the deed and the federal building may be constructed on the land. If the ministerial trustees refuse you cannot lawfully transfer the property. The power for the present seems to be entirely in their hands.

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

BENEVOLENT AND PENAL INSTITUTIONS — INVESTIGATION OF.

Board of trustees of penal or benevolent institution may not compel attendance of witnesses in investigation thereof nor administer oaths.

Governor may order such investigation to be made by committee of board of state charities; powers of board; witnesses testifying before board in such investigation not entitled to fees.

January 17th, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio.*

DEAR SIR: — Supplementing our conversation in relation to the investigation of the penal and benevolent institutions of the state I beg to advise you as follows:

It is the manifest duty of the board of trustees or other governing body of such institution to conduct informal investigations upon its own motion from time to time as occasion may seem to demand. There is, however, no authority residing in such a board to surround its investigations with the safeguards generally

deemed essential, to-wit, the power to compel the attendance of witnesses and production of papers and to administer oaths. While an oath might be administered at such an investigation by one so authorized by law, its violation would not constitute perjury, because that charge can only be predicated upon false testimony "as to any material matter in a proceeding before any court, tribunal, or officer created by law, or in any matter in relation to which an oath is authorized by law" (Section 6897 R. S.). The board of trustees of such an institution has no authority to conduct any such a "proceeding" and its administration of an oath is consequently futile.

The only method provided by statute for such an investigation at the instance of the governor is that fixed by section 656 of the revised statutes from which I quote:

> "The governor, in his discretion, may, at any time, order an investigation by the board, or by a committee of its members, of the management of any penal, reformatory or charitable institutions of the state, and said board or committee, in making any such investigation, shall have power to send for persons and papers, and to administer oaths and affirmations; and the report of such investigation with the testimony, shall be made to the governor, and shall be submitted by him, with his suggestions, to the general assembly."

The objection naturally arising to employing this agency in the investigation is that the members of the board of state charities serve without compensation and that it is burdensome to them to devote so much time to the service of the state. The statute, however, confers the same power on a committee of the board that the whole board is possessed of and the governor is, *ex-officio*, the president of the board and as such may designate the committee and such committee may consist of one or more members as the governor may deem advisable.

The statute does not provide for any fee or mileage for witnesses responding to the subpoena of the board, and I am of the opinion, therefore, that the witness should be paid from the funds of the board of state charities his actual expenses and no more. If at any time it shall seem necessary or desirable to order such investigation made I shall, at the request of the governor, personally, so far as possible, conduct the examination of witnesses with a view to bringing out all the facts involved. I am of the opinion, however, that any interested party should be permitted representation by counsel under such rules as the board or its committee might in each such investigation present.

Very truly yours.

WADE H. ELLIS,

Attorney General.

COMMISSIONER OF DEEDS FOR OHIO.

Women are eligible to appointment as commissioners of deeds for state of Ohio.

January 25th, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio.*

DEAR SIR: — Your recent letter requests my opinion as to the eligibility of women to appointment as commissioners of deeds for the state of Ohio.

Article 15, section 4, of the constitution of Ohio prohibits the appointment "to any office in this state" of any person who has not the qualifications of an

elector. It has been held that notwithstanding this provision the legislature may authorize the appointment of women to offices which are a part of the public school system. But in the case of State ex rel. vs. Adams, 56 O. S. 612, the supreme court said, page 616:

> "It was held in those cases that the qualifications of an elector are not essential to the holding of positions of an official character under the school laws, because of the effect of the constitutional provisions relating especially to the subject of schools. Those cases have not sufficient breadth or strength of foundation to admit of additional superstructure."

It is not clear that the words "any office in this state" were intended to distinguish offices, the duties of which are to be performed within the territorial limits of the state, from offices, the duties of which are to be performed outside the state. The same words are used in article 2, section 5, which disqualifies persons thereafter convicted of embezzlement of public funds, and again in article 15, section 5, excluding duelists from office. It may be claimed with some reason that the same instrument which expressly denies the power of the legislature to authorize the appointment to any office in this state of any person who has embezzled public funds, or is a duelist, or who is not a male person over twenty-one years of age, was not intended to leave the legislature free to authorize the appointment to an office of the state of a person disqualified in all those respects, merely because the duties of such office are to be performed outside the state.

The words "office in this state" might be construed to include all offices of the state or of any of its political subdivisions recognized by the constitution.

It does not seem probable, however, that it was the intention of the makers of the constitution to render it impossible for the office of commissioner of deeds to be held by non-residents. The office existed at the time the present constitution was adopted and has been continued and recognized as a legal office ever since. Brannon vs. Brannon, 2 Dis. 224. Winkler vs. Higgins, 9 O. S., 599-605.

We must, therefore, assume that it was within the power of the legislature to authorize the appointment of a non-resident to this office and that the qualifications as to residence prescribed by article 15, section 4, and article 5, section 1, are not applicable.

In the absence of express constitutional provisions indicating in any way an intention to exclude women from office they have frequently been held to be ineligible.

State ex rel. vs. Davis, 20 L. R. A. 3'1 (Tenn.)
Opinion of the Justices, 62 Me. 596.
Opinion of the Justices, 165 Mass. 599, 32 L. R. A. 350.

The courts of other states have taken an opposite view.

In re Hall 50 Conn. 131.
State vs. Hostetter, 137 Mo. 636, 38 L. R. A. 208.

While the question is not entirely free from doubt I prefer the view that since the constitution does not expressly prohibit the appointment of women to offices outside of the state they are eligible to such offices.

As stated in the Connecticut case above cited:

> "All restrictions upon human liberty, all claims for special privilege are to be regarded as having the presumption of law against them

and can be sustained only by the clear expression or clear implication of the law."

It is the tendency of the times to enlarge the sphere of women's usefulness. In this state women have been admitted to the bar as well as to offices which are a part of the school system. There can be little question that other offices would have been thrown open to women by the legislature but for the bar of the constitution. I am, therefore, of the opinion that women are eligible to appointment as commissioners of deeds for the state of Ohio. This is in accordance with the opinion of my predecessor in office, reported in 45 Bulletin, 313, Opinions of the Attorney General, 1901, page 91.

Even if the courts should subsequently hold that women are ineligible to this office the official acts of women commissioned by you would be valid as the acts of *de facto* officers.

Wilson vs. Kimmell, 109 Mo. 260, 19 S. W. 24.
People vs. Hacket, 27 L. R. A. 203.
Building Association vs. Sohn, 46 S. E. 222.
Guernsey County vs. Cambridge, 3 C. D. 669.
State vs. Gardner, 54 O. S. 24.
Mechem on Public Officers, Secs. 318, 320, 328.

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

SUPERVISOR OF PUBLIC PRINTING—APPOINTMENT AND TERM OF J. W. JOHNSON.

Failure of senate to confirm appointment made by governor creates vacancy in office which may be filled by governor at any time, subject to confirmation by senate when in session.

Appointee to fill vacancy caused by failure of senate to confirm appointment to office of supervisor of public printing holds office for full term of two years commencing with date of appointment.

February 16th, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio.*

DEAR SIR:—In response to your inquiry concerning the expiration of the term of office of J. W. Johnson, supervisor of public printing, I beg to say this office is provided for in section 311 and succeeding sections of the Revised Statutes, and the term of office is fixed at two years. No specific time is designated in any of these sections when the term shall begin or end, nor is there any provision for filling a vacancy.

In determining the question submitted, three propositions are to be considered.

1st. Was there a vacancy in the office when Mr. Johnson was appointed?

2nd. Was the appointment for an unexpired term or for the full term of two years?

3rd. When did Mr. Johnson's term begin and when does it end?

The record in the executive department discloses that Mark Slater was appointed supervisor of public printing by Governor Herrick; December 30, 1905;

that said appointment was rejected by the senate, and that on June 1, 1906, after the senate had adjourned, Governor Pattison appointed J. W. Johnson, whose appointment has not yet been confirmed by the senate.

In the light of these facts was there, as suggested above, a vacancy in the office when Johnson was appointed? This question has been decided by the circuit court of Franklin county in the case of the State of Ohio ex rel. Slater v. Johnson, and is based upon section 12 of the revised statutes, which 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.*"

In the opinion the court say "the last clause of the foregoing section applies exactly to the circumstances of this case. The senate did *not* 'so advise and consent' to Slater's appointment; therefore Slater's legal incumbency ceased and it became the duty of the governor, at once to make a new appointment."

Under this decision, there was a vacancy in the office when the senate rejected Slater's appointment, and the governor acted within the authority conferred upon him by section 12 when he appointed Johnson to fill the vacancy.

Second. Was the appointment for an unexpired term or for the full term of two years?

The circuit court in the case referred to, has held that Johnson's appointment was made in pursuance of section 12 of the revised statutes, and this being the only section authorizing the filling of a vacancy in the office of supervisor of public printing, the duration of the term of appointment will of course be governed by this provision. This section provides that "if the senate advise and consent to the appointment made by the governor the person so appointed shall hold office for the *full term.*" Therefore, the determination of the question as to whether or not Johnson will hold office for the "full term" must await the action of the senate when his appointment is presented for confirmation. If the senate rejects his appointment there will again be a vacancy in the office. Should the appointment be confirmed, Johnson will hold office for the *full term* of two years.

This leaves but one question. When did Johnson's term begin and when does it end? In the case of State of Ohio v. Constable, 7 O. 1st part, page 1, it was held that "when no day is mentioned in the law from which the term of service shall commence, it must commence from the day of election." There being no provision in the statutes respecting the office of supervisor of public printing for the commencement of the term, such question should be answered by applying the analagous principle announced in the case just cited, and Johnson's term of office would begin with the day of his appointment. If this appointment is confirmed by the senate he will be entitled to serve the full term, and the statutes having fixed the full term at two years, he would serve for two years from the date of his appointment.

Very truly yours,

WADE H. ELLIS,
Attorney General.

INFIRMARY — COUNTY — INVESTIGATION OF.

Governor may not order investigation of county infirmary by board of state charities or otherwise.

May 24th, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR: — Your letter of May 21st requests my opinion as to your authority to order an investigation of a county infirmary.

The only statute which could possibly be construed to confer such authority is section 656, Revised Statutes. That statute requires the board of state charities, of which the governor is president ex-officio, to "investigate the whole *system* of public charities and correctional institutions of the state." The particular clause of the statute which confers this power upon the board authorizes it to examine into the condition and management of county as well as state institutions, and requires the officers in charge to furnish the board such information and statistics as it may require. The purpose of this portion of the statute is apparently to enable the members of the board to inform themselves fully as to the practical workings of all charitable and correctional institutions in the state in order that they may recommend such changes in legislation as may be necessary to correct defects in the existing system.

There is nothing in this part of the statute which suggests that it is the function of the board to investigate complaints as to the management of particular local institutions. Neither the board nor the governor is given any power to correct such mismanagement in case it should be discovered. The final clause of the statute provides that,

> "The governor, in his discretion, may, at any time, order an investigation by the board, or by a committee of its members, of the management of any penal, reformatory or charitable institutions of the state, and said board or committee, in making any such investigation, shall have power to send for persons and papers, and to administer oaths and affirmations; and the report of such investigation, with the testimony, shall be made to the governor, and shall be submitted by him, with his suggestions, to the general assembly."

This language clearly confers upon the governor power to investigate state institutions, penal, reformatory or charitable, but it is by no means apparent that the legislature intended to extend this inquisitorial power over local institutions managed by elective officers. State institutions are directly under the control of the legislature, and the governor may remove the trustees thereof for misconduct. On the other hand, a report to the legislature of the conditions existing in some particular county institution would seldom afford a basis for any valid remedial legislation.

Inasmuch as the existence of a power in the head of the state government to order a special investigation of a county institution is opposed to the system of local self government recognized by statute law and judicial decisions in this state, I am of the opinion that any doubt thereof should be resolved against the existence of the power, and I therefore advise you to decline to order the investigation in question.

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

INFIRMARY — COUNTY — FINANCIAL IRREGULARITIES — DUTY OF GOVERNOR.

Report of bureau of inspection and supervision of public offices relating to financial irregularities in county infirmary may not be filed with governor; governor may not take official action as to such facts coming to his knowledge.

May 24th 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR: — Your letter of May 21st, 1907, requests my opinion as to your duty to take action upon a report, recently filed in your office by the bureau of inspection and supervision of public offices, relating to conditions existing in the Butler county infirmary.

There is no statute authorizing the filing of this report in your office. Section (181*a*-8) R. S. requires one copy of such report to be filed in the office of the auditor of state and one in the auditing department of the taxing district reported upon. In case the examination has disclosed malfeasance, misfeasance or nonfeasance in office on the part of any public officer or employe, an additional copy of the report is required to be forwarded to the proper legal authority of the taxing district for such legal action as is proper in the premises. In case the legal authority of the taxing district neglects to take prompt and efficient action, it is the duty of the auditor of state, through the attorney general, to institute the necessary proceedings in the courts.

The report does not, therefore require any action on your part.

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

BENEVOLENT INSTITUTIONS, ETC. — DUTY OF TRUSTEES, ETC., TO PURCHASE NATIVE BEEF.

June 11th, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of your communication of June 10th, 1907, in which you request my construction of section (633-2) R. S. The material portion of that statute is as follows:

> "It shall be the duty of the directors, boards, superintendents, managers, stewards of the penal, reformatory, charitable and benevolent institutions of the state of Ohio, and the counties thereof, that are maintained or supported by taxation, to purchase healthy native cattle, sheep and hogs, or native beef for the use of the inmates in any and all of said institutions, and no cattle, sheep or hogs shall be considered native until said animals have been within the state of Ohio for at least 60 days preceding the killing of said animals. * * *"

The words "native beef" are not defined, but it is clear from the context that this term was intended to refer to the meat of animals which have been within the state for at least sixty days preceding their slaughter. The second section of the act makes the wilful violation of the provisions of section 1 a misdemeanor.

The obvious purpose of this statute is to promote the interests of Ohio farmers and stockmen by insuring the consumption of native beef at state institutions. It may well be that in some instances a contract for foreign dressed beef would be more beneficial to the institution from a business standpoint, and would therefore be preferred by trustees who have at heart the best interests of the institution under their control. Such contracts are, however, forbidden by the statute above quoted. If the difference between bids for native beef and the price for which foreign beef of equal quality can be purchased, is excessive, all bids should be rejected and the contract should be readvertised until competition is stimulated. Cattle, sheep and hogs are raised so generally and in such quantities in this state that it is not likely that prices would be long maintained at an unusually high figure.

It is not sufficient that a contract in terms requires native beef to be furnished if such beef is not actually supplied. No benefit accrues to Ohio producers from the presence of the stipulation for native dressed beef in a contract unless such requirement is enforced.

The letters which you have enclosed are somewhat at variance in their statements of fact, one stating that the contract with Armour & Company requires "the meat to be furnished in accordance with our advertisement and in compliance with the statute which requires 'Ohio dressed beef'," while another states that Armour & Company's bid was for "Western dressed beef." Neither informs you whether foreign or native beef is actually supplied. If Armour & Company have contracted to supply native beef, the officers of the institution should see that the company complies with its contract, and if it fails to do so a contract should be made with some other dealer.

Trusting that the above will give you the information you desire, I am,

Very truly yours,

WADE H. ELLIS,

Attorney General.

INDIAN LAKE — POWER OF BOARD OF PUBLIC WORKS TO SELL CERTAIN STRIP OF LAND.

Board of public works may sell strip of land near to but not immediately adjoining Indian Lake, upon finding that the same can not be leased so as to yield six per cent. on the valuation thereof; facts of this particular case considered.

June 12th, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR: — You referred to me yesterday a communication from the board of public works in reference to the proposed sale of a small tract of canal land near Indian Lake, with a request that I advise you fully as to your right to make a deed of the property in question.

Section (218-231) R. S. (88 O. L. 507) is as follows:

> "Any land or lands belonging to the state of Ohio, near or remote from the line of any canal in this state, that cannot be leased so as to yield six per cent. on the valuation thereof, as determined by said commission, may be sold by said commission at not less than three-fourths of such valuation, upon such terms of payment as may be fixed by the commissioners of the sinking fund, and such land shall be offered

for sale at public vendue, at the court house in the county where the same is situated, after at least thirty days' notice given by publication in two papers of opposite politics of general circulation in such county, provided, however, that said commission, together with the governor and attorney general of the state of Ohio, shall have power to sell any such land or lands which are appraised at five hundred dollars or less at private sale, at a price not less than the appraised value thereof; the governor to execute deeds to purchasers of any such lands, whether sold at public or private sale; provided, further, that such land or lands shall not be sold or offered for sale unless the said commission, board of public works, and the chief engineer of the board of public works shall have, by a majority vote in joint session, determined that such land or lands are not necessary or required for the use, maintenance, and operation of any of the canals of this state."

Section (218-308) R. S. (95 O. L. 284) passed subsequent to the act above quoted provides:

"No state lands, in or adjacent to said Buckeye Lake, Indian Lake, and Portage Lakes shall ever be sold, but the board of public works, the chief engineer of the public works, and the Ohio canal commission may lease such lands as said joint board may deem proper under the laws governing the leasing of canal lands."

The act passed April 2nd, 1906 (98 O. L. 304) confers all the powers and duties of the canal commission on the board of public works and provides that no sale of canal or state lands shall be made "except with the written approval of the governor and attorney general." The communication from the board of public works shows full compliance with the requirements of section (218-231) R. S., except a finding by the board that the property proposed to be sold "cannot be leased so as to yield six per cent. on the valuation thereof," as determined by the board. If the board has made such finding it should be incorporated in its communication to you as it is a prerequisite to its right to sell the land.

The land in question is near Indian Lake but is separated from the state land immediately adjoining the lake by a strip of land owned in fee simple by the T. & O. C. R. R. The property which it is proposed to convey is a narrow tract adjoining the present right of way of the T. & O. C. R. R. and southwest thereof. It contains only eighty-five one-hundredths of an acre. As shown by the blue print attached to the communication from the board of public works the acquisition of this land will enable the Indiana, Columbus & Eastern Traction Company to avoid two grade crossings over the tracks of the T. & O. C. R. R. It is therefore, very desirable that this sale should be made if it is authorized by law. Assuming that the board has found that the property cannot be leased so as to yield six per cent. on its valuation, the only question that can be raised as to the right of the board to dispose of this property arises from section (218-308) R. S., above quoted: Is the land in question adjacent to Indian Lake?

The words "adjacent to" have been variously interpreted by the courts. See Words and Phrases Judicially Defined, Volume 1, page 184. The true rule seems to be that the interpretation depends upon the context. The Iowa supreme court in the recent case of Wormley v. Supervisors, 108 Iowa, 825, said:

"The word "adjacent" does not at all times mean adjoining or abutting; but it is many times so used, and the purpose of its use is to be known from the context. Synonyms of the word are, "abutting,"

"adjoining," "attached," "beside," "bordering," "close," "contiguous," "neighboring," "next," "nigh."

If the word "adjacent" as used in section (218-308) R. S., means "abutting," "contiguous" or "immediately adjoining," then the statute does not prohibit the sale of the tract in question; if, however, it means "close," "neighboring" or "near," this tract would be fairly within its terms. In view of the circumstances, the public benefit resulting from the abolition of grade crossings, the fact that the proposed sale will not diminish the value or availability for public use of the land retained, and the further fact that the land in question does not immediately adjoin Indian Lake, I am of the opinion that we will be justified in holding that this particular tract is not adjacent to Indian Lake within the meaning of the statute. The facts of this case are so peculiar that the present sale cannot be urged as a precedent for the sale of other lands.

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

REQUISITION — WHO IS A FUGITIVE FROM JUSTICE.

Accessory before the fact is a fugitive from justice although absent from the state at time principal crime was committed, and although act by which he becomes accessory is committed in county other than that in which he is indicted.

In re Daniel Baxter.

June 19th, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR: — I have received your communication together with the application and other papers which you have referred to this department for consideration in the matter of the application of the prosecuting attorney of Williams county for a requisition upon the governor of the state of Michigan for the extradition of Daniel Baxter who stands charged, by indictment, with the crime of burning property to prejudice the insurer thereof, committed in said Williams county on the 4th day of August, 1906.

Your communication states that an application for a requisition was made in this case some time ago and was refused on the ground that the said "Baxter was not in the state of Ohio at or near the time of the commission of the offense, and therefore could not be a fugitive from justice under the provisions of the United States laws," and that the application is now renewed, accompanied with a full statement of the facts and authorities relied upon.

Upon an examination of the application I find it to be accompanied by a certified copy of the indictment which is supported by an affidavit of the prosecuting attorney of Williams county. I assume, therefore, that no question is raised as to the regularity of the application, and that the sole question for determination is whether or not the said Daniel Baxter is in fact a "fugitive from justice."

In the indictment Baxter stands charged as principal in the commission of the alleged offense, while the statement of facts contained in the prosecuting attorney's brief recites that,

> "Shortly prior to August 4th, 1906, at the city of Toledo, Ohio, Mr. Baxter employed one John Page to burn his, Baxter's, residence located in Williams county, Ohio, and arranged with Page that the

burning should take place at or about the time that it did occur when Baxter would be out of the state of Ohio. Thereafter, on August 4th, the fire occurred, having been fired by Page pursuant to the instructions of Baxter, and the property was destroyed. Baxter thereupon made out his proofs of loss and presented them to the insurers of the property, and claimed the amounts stipulated in the several policies of insurance. Settlement was thereafter made and the sums agreed upon were paid to Baxter and received by him."

"The agreement to destroy the property was made in Ohio, while Baxter was in Ohio, the proofs of loss were made in Ohio, and the payments were made by the insurance companies in Ohio and the money was received by Baxter while in Ohio. It is not known that Baxter was in Ohio at the time the fire occurred, and it is claimed that he was not then in Ohio. Baxter was thereafter indicted by a grand jury of Williams county, and charged with burning property with intent to prejudice the insurer thereof, and upon this indictment a requisition is asked."

The above statement is all the information submitted relating to the facts and I base my conclusion thereon.

Section 2 of article IV of the constitution of the United States provides that,

"A person charged in any state with treason, felony, or other crime, *who shall flee from justice, and be found in another state,* shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Assuming that Baxter did, shortly prior to August 4th, 1906, at the city of Toledo, Ohio, employ John Page to burn his, Baxter's, residence located in Williams county, and that when the building was actually burned, Baxter was not in the state of Ohio, and that said Baxter is now without the demanding state, is he, under the provision of the constitution of the United States, above quoted, a fugitive from justice?

On the above statement of facts, Baxter procured Page to commit the alleged crime by employing him in the city of Toledo, Ohio, shortly before August 4th, 1906, to burn said building, and therefore under section 6804 of the Revised Statutes of Ohio he may be prosecuted and punished as if he were the principal offender. The rule is well settled that a constructive presence in the demanding state at the time of the commission of the alleged crime is not sufficient to make the accused a fugitive from justice. The accused must have been actually present in the demanding state at the time of the commission of the act with which he stands charged.

Wilcox v. Nolze, 34 O. S. 520; Hyatt v. Corkran, 188 U. S. 691.

The court say in the first paragraph of the syllabus in Hyatt v. Corkran, above cited, that,

"A person * * * * who shows conclusively and upon conceded facts that he was not within the demanding state at the time stated in the indictment nor at any time when the acts were, if ever, committed, is *not* a fugitive from justice within the meaning of Revised Statutes of New York, section 5278, and the federal statute upon the subject of interstate extradition and rendition."

The statement of facts in this case shows that while Baxter was not in the demanding state at the exact time alleged in the indictment yet he was present in the state of Ohio a short time before in the city of Toledo where the acts were committed that made him an accessory before the fact of the crime alleged to have been committed.

If Baxter procured Page to burn his house in Williams county for the purpose of collecting insurance thereon, he is guilty of a crime under the laws of Ohio, and the law says he may be prosecuted and convicted in like manner as though he had himself burned the building, and it will not be necessary, in order to convict, to prove that Baxter was in Ohio at the time the building was burned, to-wit, August 4th, 1906. It will be sufficient to prove that shortly prior to that time Baxter did, in the city of Toledo, Ohio, employ Page to burn said building with intent to defraud the insurer thereof, and that Page did, in pursuance of said employment, actually burn said building.

A question of jurisdiction may arise in the trial of the case in Williams county by reason of the fact that the acts alleged to have been committed by Baxter were committed in Lucas county, yet he was actually present in the demanding state, and under the holding of Judge Okey in the case of Ex parte Larney, decided by the supreme court, December 6th, 1881, is a fugitive from justice. In that case the point raised by the prisoner was that he had never been in the *county* named in the demanding state in which the crime was committed, and the court held that,

> "Notwithstanding he had never been in the county named, still he may have been in that state and committed larceny in that county and be a fugitive from the demanding state."

It being assumed that Baxter was in the state of Ohio, in the city of Toledo, a short time prior to the commission of the offense as alleged in the indictment, and that while there he employed Page to burn his house, and Page afterwards, in pursuance of said employment, did burn the house, I am of the opinion that under section 6804 of the Revised Statutes, he is properly charged as principal in the indictment, and that you are warranted in regarding him a fugitive from justice.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

SHERIFF — REMOVAL FROM OFFICE.

Governor may not remove sheriff from office.

June 25th, 1907.

HON. ANDREW L. HARRIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR: — I have received your communication accompanied by a letter addressed to you by Rev. Byron C. Piatt, of Marion, in which the removal of the sheriff of Marion county is requested for alleged dereliction of official duty.

In reply I beg to advise you that in my opinion the governor is without authority to comply with the request made.

The only section of the statutes authorizing the removal of a sheriff that has any bearing upon the facts charged in the letter addressed to you is section 6917, reading as follows:

"A clerk, sheriff, coroner, constable, or other ministerial officer, who wilfully refuses or neglects to perform any duty he is required by law to perform, in any criminal case or proceeding, and every officer whose duty it is to execute the same, who delays to serve any warrant, legally issued in any criminal case, which is delivered to him to execute, when in his power to serve the same, either alone or by calling assistance, shall, if the offense charged be a felony, be fined not more than five hundred dollars, or imprisoned not more than thirty days, or both; or, if the offense be a misdemeanor, be fined not more than one hundred dollars, or imprisoned not more than twenty days, or both. An officer convicted under this section may be removed from office by order of the court."

Without assuming to say whether or not the facts alleged by Mr. Piatt come within the provisions of this section, I am of the opinion that the relief sought can be had only in the method therein provided.

In State ex rel. v. McLain, 58 O. S. 313, a sheriff was charged with suffering a mob to lynch a prisoner in his custody by failing to "make proper proclamation to disperse the mob, cause the arrest of persons composing it and employ the military forces at his command for the protection of the prisoner."

The action was one in quo warranto and the facts charged were relied upon to oust the sheriff from office. The court held that the only statutory provisions that prescribed causes for the removal of sheriffs, are those contained in sections 1329, 6900, 6909 and 6917; and that section 6917 was the only one that had any relevancy to the case. The relief sought was denied upon the ground that the remedy provided for by section 6917 was exclusive, the second paragraph of the syllabus being as follows:

"Where the causes of removal from office are prescribed by statute which also provides a special mode of procedure for such removal, the statutory remedy is the exclusive one, and quo warranto will not lie."

I advise you, therefore, that if the alleged delinquencies of the sheriff justify any procedure against him, the desired relief can be had only as provided in section 6917 as above quoted.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

(To the Secretary of State)

BANKS — INCREASE OF CAPITAL STOCK.

Bank organized under "Free Banking Act" may increase its capital stock in the manner provided by the general corporation act.

January 10th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your letter of the 5th instant enclosing therewith the letter of Lewis Brucker, attorney-at-law, Mansfield, Ohio, I beg to say that if the bank in question, referred to in the letter of Mr. Brucker, has been organized under the free banking act, being sections (3821-64) et seq., authority is given by section (3821-66) of that act to increase its capital stock which provides that "any such company may, from time to time, increase its capital stock to any amount not exceeding five hundred thousand dollars."

As there is no specific method to be followed under said act to increase the capital stock of such corporation, I am of the opinion that section 3269 R. S. is applicable thereto and that the provisions of chapter 1, title II, division 2, part second of the revised statutes apply and that the procedure outlined in section 3262 R. S. should be adopted for such purpose.

I herewith return you the letter of Mr. Brucker.

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

ARTICLES OF INCORPORATION — SAVINGS AND LOAN ASSOCIATION — PURPOSE CLAUSE.

Savings and loan association may not be authorized expressly to deal in steamship tickets, nor to deal in stocks and securities except as provided in section 3806 R. S.

Articles of incorporation of the Peoples Bank Company of Alliance disapproved.

January 25th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have received from you the articles of incorporation of the Peoples Bank Company, of Alliance. Among other purposes set forth are:

> "buying and selling and dealing in steamship tickets and all forms of bonds, stocks and choses in action."

Without expressing any opinion upon the question of whether or not the sale of steamship tickets is within the implied powers of a bank I beg to say that, if so, the expression of this power in the articles of incorporation is unnecessary; if the bank has no such implied power the articles submitted express a double purpose and are, therefore, beyond the law.

The power of savings banks to invest in bonds and stocks is governed by section 3806 R. S. and the articles of incorporation are faulty in that they seek broader powers than those enumerated in that section.

I therefore return herewith the articles of incorporation without my approval

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION — MULTIPLICITY OF PURPOSES.

Manufacturing corporation may not be authorized to deal generally in dissimilar commodities manufactured by others.

February 5th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to yours of recent date containing a copy of the purpose clause of some corporation sought to be organized to carry on a manufacturing and mercantile business, the name of which is not disclosed, I beg to say in reference thereto that in my opinion the same should not be sanctioned by your department because the different businesses contemplated by this purpose clause are not so related as to properly include them within the same corporation.

The language of Judge Spear in State ex rel. v. Taylor, 55 O. S., quoting from page 67, bears upon this contention:

> "We cannot assume that the general assembly would intentionally clothe corporations with capacity to unite all classes of business under one organization as this would tend strictly to monopoly."

Other cases bearing upon this proposition are as follows:

> "A corporation whose articles of incorporation state that its business shall be the manufacturing of clothing of every description and the sale of clothing so manufactured and the transacting of all other business necessary and incidental to such manufacture and sale of clothing is a manufacturing corporation exclusively and has no power to deal in clothing manufactured by others."

National Bank v. Frisk-Turner Company, 71 Minn. 413.

> "A corporation organized for the manufacture of electrical appliances has no power to engage in the business of selling electric supplies manufactured by others."

Powell v. Nurray, 157 N. Y. 717.

> "A manufacturing company authorized by its charter to manufacture only, cannot lawfully engage in buying and selling goods where such business is not necessary or incidental, nor can it engage in any other business not reasonably incidental to its manufacturing."

The rule is in Ohio that a corporation can be organized for only one purpose (except in a few instances where specially authorized by statute) and the one purpose cannot include a number of differing unrelated businesses.

I therefore return the same to you without my approval.

Very truly yours,

WADE H. ELLIS,

Attorney General.

BUILDING AND LOAN ASSOCIATION — NAME.

Building and loan association may not assume name of savings and loan association.

Articles of incorporation of the Central Savings & Loan Company disapproved.

March 1st 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I transmit herewith the articles of incorporation of the Central Savings & Loan Company, which have been submitted by you to this department.

This corporation seeks to be formed "for the purpose of raising money to be loaned among the members thereof, for use in buying lots and houses, and for such other purposes as are authorized by laws relating to building and loan associations."

It derives its powers from sections (3836-1) to (3836-27) R. S., being the chapter thereof defining the powers of building and loan associations.

It assumes to employ the name of a corporation organized pursuant to section 3797 R. S. as a savings and loan association while it oin fact does not attempt to assume the powers of such form of corporation.

In my opinion it is subject to the objection that the name assumed by it is likely to mislead the public as to the character or purpose of business authorized by its charter and for that reason, by virtue of section 3238 R. S., the same should not be approved by you.

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

CORPORATIONS — CHANGE OF COMMON STOCK INTO PREFERRED.

Corporation may by amendment to articles of incorporation change common stock into preferred stock, provided the amount of authorized stock is neither increased nor diminished.

Amendment to articles of incorporation of the Logan Clay Product Company approved.

March 5th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of your favor of the 28th ultimo, transmitting therewith a copy and certificate of amendment to the articles of incorporation of the Logan Clay Product Company. In connection therewith you have requested an opinion from this department as to the power of a corporation to change its common into preferred stock pursuant to the provisions of Section 3238*a* R. S. without securing the consent of all the stockholders.

Under date of November 21st, 1904, in a written opinion to your immediate predecessor, Hon. L. C. Laylin, I expressed the view that the power was given by section 3238*a* R. S. to the stockholders of a corporation to change part of its common into preferred stock without increasing the capital stock of the corporation, but in that particular instance consent had been given thereto by all the stockholders and so the question presented by you was not directly involved therein.

Section 3238*a* R. S. confers authority upon any corporation incorporated

under the general corporation laws of the state, at any meeting of its members or stockholders, after proper notice given,

> "To amend its articles of incorporation so as to change its corporate name or the place where it is located, or where its principal business is to be transacted; or so as to modify, enlarge or diminish the objects or purposes for which it is formed; or so as to add thereto anything omitted from, *or which might lawfully have been provided for in such articles originally,*"

provided that it does not, by such amendment, increase or diminish the amount of its capital stock, nor change substantially the original purpose of its organization.

As the authority therein conferred is qualified in the particulars above quoted and expressly provides that by such procedure a corporation might provide that "which might lawfully have been provided for in such articles originally," the sole question seems to turn upon the power of the corporation to originally so provide.

Section 3235*a* R. S. provides that the stock of a corporation may consist of both common and preferred and that at no time shall the amount of preferred stock exceed two-thirds of the actual capital paid in in cash or property. The capital stock of this particular corporation is $200,000 divided into 4,000 shares of $50 each. I assume for the purpose of the statement that all the capital is paid in. It has been divided as follows: "3,481 shares shall be common stock and 519 shall be preferred." The classification thus made is within the power contained in section 3235*a* and it is a classification that might lawfully have been provided for in the original articles. Therefore it would seem to follow that if the proceedings were duly had, pursuant to section 3238*a* of the revised statutes, the authority was and is contained therein to provide by amendment for a change of the capital stock in the manner adopted by the Logan Clay Product Company, and the same should be filed and recorded by you as required by the section last cited.

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

ARTICLES OF INCORPORATION — INCIDENTAL PROFESSIONAL BUSINESS.

Professional business may be authorized if incidental to lawful principal business proposed to be carried on by corporation.

Articles of incorporation of the Vorce Engineering Company approved.

March 6th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of the articles of incorporation of the Vorce Engineering Company transmitted to this department for an opinion as to the legality of the purpose contained therein.

In reply I quote the purpose clause of such articles as follows:

> "Said corporation is formed for the purpose of making plans, specifications and drawings, making estimates, superintending work, de-

signing and building all kinds of structures, and of carrying on and conducting a general architectural and engineering business."

The provision contained in section 3235 R. S. forbids that corporations be formed "for carrying on professional business" and the question is whether the purpose clause thus quoted brings it within such inhibition.

In the view I have taken of these articles it is unnecessary to determine whether or not the business of "making plans, specifications and drawings, making estimates, superintending work, and designing all kinds of structures,"—is or is not professional business for it is apparent that such business is but incidental to the main purpose of the corporation, viz., that of building all kinds of structures, and as the making of plans, specifications and drawings are but incidents to enable the corporation to carry into execution the specific power of building all kinds of structures, such power should not be invalidated unless plainly forbidden by the statute.

Corporations may be organized under the general corporation laws of Ohio for the purpose of building all kinds of structures and even if it be that the business of architectural drawing is professional within the purview of section 3235, yet that would not render the purpose of such corporation unlawful any more than the incorporation of a college or university would be unlawful because the teaching done therein would be professional business.

The implied powers of corporations exist to enable them to carry out the express powers granted to them;

> "Nor need the power be necessary in the sense of indispensible. All that is required is that it shall be reasonably appropriate and convenient. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such, in similar cases, has never been the legal acceptation of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted, has always been deemed a necessary one."
>
> Marshall on Corporations, Sec. 57.

Holding these views, I am of the opinion that the articles of incorporation of the Vorce Engineering Company should be approved.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION — INCIDENTAL POWERS.

Articles of incorporation authorizing the exercise of such incidental powers as may be "desirable" not invalid; word construed to mean "necessary."

Articles of incorporation of the Swanson Plumbing Company approved.

March 6th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I herewith return to you the articles of incorporation of the Swanson Plumbing Company of Fostoria, Ohio, and replying to your inquiry

concerning the same I would say that in my opinion the word "desirable," as contained in the following portion of the purpose clause of the articles — "acquiring, holding and disposing of at pleasure any and all real estate and other property that may be necessary, convenient or *desirable* in the conduct of its business"— does not render invalid the purposes of such coporation but the term "desirable" would be limited in its construction to such real estate or other property as would be *necessary,* and not inconsistent with the legitimate objects of the corporation (131 Mass. 174, 15 Am. Dec. 706). I, therefore, return the same to you approved.

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

ARTICLES OF INCORPORATION — DEALING IN STOCKS OF OTHER COMPANIES.

Articles of incorporation of the Standard Securities Company disapproved.

March 12th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry regarding the articles of incorporation of the Standard Securities Company, I beg to advise I know of no authority by which a corporation may be organized for the purpose of dealing in and buying, selling, exchanging, borrowing and lending the stocks of other corporations under the circumstances detailed in the purpose clause of the Standard Securities Company, therefore, I am of the opinion that no such power is conferred by the laws of Ohio. (Marshall on Corporations, Section 77.)

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

TOWNSHIP OFFICERS — EFFECT OF ARTICLE 17 OF THE CONSTITUTION UPON TERMS OF OFFICE — ELECTION OF SUCCESSORS.

Successor of justice of the peace elected in November, 1904, will be elected in November, 1907, and will take office January 1, 1908.

Successor to constable elected in November, 1905, will be elected in November, 1909, and will take office January 1, 1910.

Successor to township trustee elected in November, 1905, will be elected in November, 1909, and will take office January 1, 1910.

Successor to assessor elected in November, 1905, will be elected in November, 1907, and will take office immediately upon election.

March 18th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

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

1. Will the successor to a justice of the peace who was elected November, 1904, and qualified in April, 1905, for a term of three years, be elected this fall?

2. Will a successor to a constable elected November, 1905, for a term of three years whose term began on January 1, 1906, be elected this fall?

3. Will the successor to a trustee of a township who was elected November, 1905, for a term of three years, be elected this fall?

4. Will assessors who were elected at the fall election, 1905, hold over to perform the duties of that office for this year?

In answer thereto I beg to say:

First. The successor to a justice of the peace who was elected in November, 1904, and qualified in April, 1905, for a term of three years, will be elected at the November election, 1907. The fact that said justice of the peace qualified in April, 1905, is not material for the reason that at the time of the election, to-wit, November, 1904, there was no statutory provision fixing the time for the beginning of the term of a justice of the peace, therefore, under the decision of the supreme court the term of office began with the day of the election and will expire three years from that date. His successor (to be elected November, 1907) will not, however, begin his term until the first day of January, 1908 (Section 1442 R. S., as amended April 14, 1906, 98 O. L. 171).

Second. The successor to a constable elected in November, 1905, for a term of three years, whose term began on January 1, 1906, will not be elected until the November election, 1909. The present incumbent will hold over until January 1, 1910 (Constitution of Ohio, article 10, section 4 and article 17, section 1).

Third. A successor to a township trustee who was elected in November, 1905, for a term of three years, will be elected at the November election 1909. The present incumbent will hold over until the first day of January, 1910 (Constitution of Ohio, article 10, section 4 and article 17, section. 1.) Successors to township trustees that were elected in April, 1903, and November, 1904, respectively, will be elected at the November election 1907, for a term of two years and assume the duties of their offices on the first day of January 1908.

Fourth. Assessors who were elected in November, 1905, will hold office until their successors are elected at the November election, 1907.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION — MULTIPLICITY OF PURPOSES.

Oil and gas company may not be authorized to deal generally in products of oil and gas manufactured or produced by others.

Articles of incorporation of the Lander Oil & Development Company disapproved.

March 18th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging receipt of the articles of incorporation of the Lander Oil & Development Company, which you have transmitted to this department for an opinion thereon as to the legality of its purpose clause, I beg to say the purpose clause as contained in such articles is as follows:

"For the purpose of owning, leasing, selling and operating oil and gas properties; drilling for oil and gas, buying and selling oil and gas

and all products therefrom; to do a general business in the drilling, exploring for oil and gas; to manufacture and sell products from oil and gas; to do a general oil and gas business and all things incidental thereto."

In view of the opinion rendered by this department to you, under date of February 5th, 1907, based upon the opinion of the supreme court in State ex rel. v. Taylor (55 O. S. 61) and other authorities examined bearing upon this subject, I am of the opinion that that portion of the above purpose clause whereby there is attempted to be conferred the right to buy and sell all products arising from oil and gas and the right to manufacture and sell products from oil and gas — violates section 3235 R. S. and the same should not be accepted and filed by you.

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

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — INCIDENTAL POWER.

What powers are properly incidental to the principal purpose of developing oil and gas territory.

Articles of incorporation of Bethesda Heat & Light Company approved.

March 18th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to the inquiries presented by you regarding the articles of incorporation of the Bethesda Heat & Light Company as to whether the purpose clause contained therein violates section 3235 R. S. The clause in question is as follows:

"Said corporation is formed for the purpose of drilling for, and accumulating petroleum oil and natural gas, buying and selling oil and gas rights, privileges and leases, and oil and gas; leasing oil and gas territory; constructing and operating pipe lines; furnishing and selling gas for light, heat, power and other purposes, and for doing all things incident to said business."

I am of the opinion that these articles should be approved and filed by you as required by the statute governing your duties in that regard. The reasons therefor are that the main "business" or principal purpose of this corporation is that of developing petroleum oil and natural gas territory, and disposing of the products thus obtained. All the other businesses comprehended in the purpose clause are but incidental to the main purpose. Judge Spear, speaking for the supreme court of this state in the case of the State ex rel. v. Taylor (55 O. S. 65), commenting upon the related subjects of gas, natural or artificial, and electricity, said:

"It would seem, therefore, not unnatural or improper to authorize a company to combine the business of furnishing natural gas for the purpose indicated with the business of manufacturing gas and electricity and furnishing those commodities for the same and kindred purpose, to-wit: power. Light and power being generated by the same agency, common results from the same cause or causes, the two objects sought

> are germane. The main purpose of this company seems to have been light and heat, an incidental purpose power, i. e., power induced by electricity. The incident would follow the principal purpose, * * * And no substantial reason is perceived why, if a company had been incorporated for either of the main purposes here indicated, it might not, by proper amendment, be also authorized to join the incidental purpose referred to."

The learned judge there clearly indicated a rule by which it can be determined that these are related subjects and the right to sell the same is incidental to the right to produce; also the power sought in these articles of "constructing and operating pipe lines" is but an incident to the principal purpose but would, of course, be limited in its construction to that of piping and transporting its products. Section 3878 R. S. gives to companies organized for such purposes the right of eminent domain and in the classification thereof seems to recognize the singleness of purpose with the necessary incident as contained in these articles.

I transmit herewith the articles of incorporation and the check for $25.00 attached thereto.

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

ARTICLES OF INCORPORATION — REAL ESTATE COMPANY.

Corporation organized to deal principally in real estate may not be authorized to deal in choses in action.

Articles of incorporation of the New Exchange & Real Estate Company disapproved.

March 22nd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith the articles of incorporation of the New Exchange and Real Estate Company submitted to this department for an opinion thereon as to the purpose clause thereof which is as follows:

> "Said corporation is formed for the purpose of buying and selling real estate, buying, selling and negotiating the sale and purchase of promissory notes, negotiable instruments, choses in action, stocks and bonds and personal property of every sort and description, and carrying on a general collection business, and doing such things as are necessary and incidental to the carrying on and doing the things above enumerated. This corporation is formed for a period of twenty-five years. This corporation is formed for the further purpose of improving and constructing buildings upon the real estate acquired by this corporation, and for the further purpose of acquiring, holding and selling personal property."

A corporation formed for the purpose of buying or selling real estate is provided for by section 3235 R. S. That section, in placing a limitation upon the business for which a corporation may be formed, used the word "purpose" instead of "purposes" and limits corporations to the single "purpose" unless specially authorized by some other statute.

To buy and sell real estate is one purpose and a corporation organized for such purpose would be authorized by implication to do all things that would be necessary and incidental to carrying out such main purpose, but in my opinion such corporation could not have conferred upon it, under the laws of Ohio, the authority to sell and negotiate the sale and purchase of promissory notes, negotiable instruments, choses in action, stocks and bonds and personal property. (State ex rel. vs. Taylor, 55 O. S. 67).

For this reason I return the articles of incorporation to you advising you not to file or record the same.

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

ARTICLES OF INCORPORATION — INCIDENTAL POWERS.

Mining development corporation may not be authorized to exercise, as an incidental power, that of dealing in timber lands.

Articles of incorporation of the Eldorado Exploration Company disapproved.

April 5th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — The question of the legality of the purpose clause contained in the articles of incorporation of the Eldorado Exploration Company has been submitted to this department for an opinion thereon. Such clause is in the following language:

> "Said corporation is formed for the purpose of procuring, locating, owning, mining, drilling, operating, maintaining, selling, encumbering, and otherwise disposing of mineral lands, mines, and properties, doing a general mining business, and in connection therewith and as incidental thereto, the following:
>
> To procure, own, operate, develop, construct, improve, maintain, encumber, sell, and otherwise dispose of timber lands, water rights, water ways, wagon roads, railway sidings, terminals, lateral railroads, power plants, — either hydraulic, electric or otherwise, — saw mills, dwellings, tenement houses, and other buildings, stamp mills, amalgamation, concentration, cyanide, and other reduction plants; gold, silver, copper, lead, and other metals, ores; minerals, concentrates, bullion, timber, lumber and general merchandise; and to do all things else incidental and necessary to the foregoing."

The purpose of such corporation is clearly that of a mining development company. It is sought by the enumeration of power therein to grant to such corporation the right to own, operate, develop and otherwise deal in timber lands and other interests in real estate and as "incidental" to the main purpose above quoted. Does this violate the provisions of section 3235 R. S., limiting the powers of corporations to a single purpose? Sections 3862, 3866 and 3867 R. S. deal with the powers of mining corporations and such powers as are sought to be authorized in the above articles are not expressly mentioned in such sections. If the power to own, operate, develop, dispose of and otherwise deal in timber lands and other interests in real estate is merely "incidental" to the main pur-

pose of mining development, the corporation would possess those powers without having them enumerated in the articles, for in addition to the powers enumerated, powers are also implied as incidental to the particular corporation, if they are necessary to enable it to properly exercise the powers which are expressly granted and to accomplish the objects for which it is created.

> "The general rule is that the charter of a corporation impliedly confers upon it the power to make all contracts and to do all acts which are reasonably necessary to enable it to accomplish the objects of its creation."

But,

> "In order that the corporation may have the implied power to do the particular act, the act must be directly and immediately appropriate to the execution of the specific powers granted by the charter, and not bearing merely a slight or remote relation to them."

> "A power which the law will regard as existing by implication must be only in a sense necessary,— that is, needful, suitable, and proper to accomplish the object of the grant,— and one that is directly and immediately appropriate to the execution of the specific power, and not one that has but a slight, indirect or remote relation to the specific purposes of the corporation."

> "The implied power of a corporation to acquire and hold real property is limited by the purposes of the corporation. Even when there is no express restriction either in the charter or in the general law, a corporation has no power to purchase and hold lands for a purpose which is entirely foreign to or only remotely connected with the objects for which it was created."

Section 3862 R. S. in part defines the powers of mining corporations and among other things provides that

> "Any company incorporated * * * for the purpose of mining * * * for coal, iron, copper, lead or other minerals * * * and carrying on business connected with the main objects of such corporation may, *in its corporate name, take, hold and convey such real estate and personal estate as is necessary or convenient for the purpose for which it was incorporated.*"

This purpose for which it may require, hold and convey real estate is exclusive of all other purposes.

> "If the charter of a corporation expressly declares that it has the power to take and hold land for certain purposes, enumerating them, it is to be construed as impliedly prohibiting it from acquiring and holding property for any other purpose than those specified."

The above quotations are from Sections 57 and 58 of Marshall on Corporations and furnish additional reasons for the application of the rule announced by the supreme court in State ex rel. v. Taylor, 55 O. S. 67, to the question under consideration.

For the reason that the articles of this corporation violate the single purpose provision of section 3235 R. S., the same are returned to you with the recommendation that they be not filed until corrected in such particulars.

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

ARTICLES OF INCORPORATION OF THE FAMILY AMUSEMENT COMPANY APPROVED.

April 5th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith the articles of incorporation of the Family Amusement Company, which have been submitted to me for an opinion as to the legality of the purpose clause therein.

Having examined the same I am of the opinion that there is but one purpose expressed in these articles and that the enumerated powers stated in connection with such purpose are clearly incidental and directly related thereto.

I therefore return the same to you with the recommendation that they be filed by you.

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

ARTICLES OF INCORPORATION — INCIDENTAL POWER.

Manufacturing corporation may be authorized to own and acquire lands containing minerals to be used in the processes of its business.

Articles of incorporation of the Kenneberg Roofing and Ceiling Company approved

April 9th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I herewith return to you the articles of incorporation of the Kenneberg Roofing & Ceiling Company which you transmitted to me with a request for an opinion as to the legality of the purpose clause therein and the acknowledgments of the various signatures thereto.

I have examined the articles with reference to the questions presented, and am of the opinion that the purpose clause recites only such powers as may lawfully be granted to a manufacturing corporation. The owning and otherwise acquiring lands containing coal and iron would be limited to such as would be necessary for the purposes of the corporation and in my opinion it is perfectly lawful for a manufacturing corporation to provide for the ownership of lands containing coal and other minerals which such corporation may use in its business of manufacturing.

The acknowledgments seem to be sufficient in every respect. There appears to be but one defect in the articles and that is the recital in the opening paragraph thereof that all the undersigned are citizens of the state of Ohio while the acknowledgement shows that Samuel Shanker is a resident of New York. But as section 3236 R. S. only requires that the majority of the incorporators shall be citizens

of this state, such error is not material to the validity of the articles and I am of the opinion that they should be filed, as required by section 3238 R. S.

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

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Manufacturing corporation may be authorized to deal generally in articles manufactured by it.

Articles of incorporation of the Universal Animal Food Company approved.

April 9th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your favor of the 2nd instant regarding the articles of incorporation of the Universal Animal Food Company, presenting the inquiry whether the purpose clause thereof is in conflict with the statutes of this state, I beg to say such purpose clause quoted from the articles presented to me is as follows:

> "Such corporation is formed for the purpose of manufacturing, buying, selling, shipping and otherwise dealing in animal foods, animal regulators and preparations for the conditioning and regulating of animals, and for doing any and all things necessary to carry out said purposes, or incidental thereto, and for owning such property as may be necessary for the purpose of carrying on and conducting said business."

This purpose clause, as it expresses, is to manufacture, buy, sell and deal in the one class of merchandise or products. It does not, in my opinion, fall within the criticism contained in the opinion of this department under date of February 5th, 1907, as containing more than one purpose. It does not include a number of "different and unrelated businesses." I am of the opinion that a corporation organized under the laws of this state has the right to manufacture and sell or deal in the class of articles, products or merchandise which it manufactures. This is clearly contemplated by the forms of manufacturing corporations cited in Marshall's Private Corporations (Ohio) page 653.

I therefore return to you the articles referred to with the recommendation that they be filed as provided by law.

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

SAVINGS AND LOAN ASSOCIATION — REDUCTION OF CAPITAL STOCK.

Savings and loan association may not reduce capital stock below statutory limit.

April 9th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry of the 6th instant enclosing the letter of Holbrook & Monsarrat, attorneys-at-law representing the Central Savings Bank,

I beg to say such bank is represented to be a savings and loan association organized pursuant to section 3797 R. S.

The minimum capital stock of such association in a city the size of Toledo is $50,000.00. When a corporation has reduced its capital stock below that amount it cannot be authorized to do business within the state. I would, therefore, express the opinion that such associations have no authority to reduce their capital stock beyond the minimum allowed by statute and that in the instance cited section 3264 does not apply.

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

ARTICLES OF INCORPORATION — PURPOSE CLAUSE

Real estate company may not be expressly authorized to deal in stocks of kindred but not competing corporations.

Articles of incorporation of the Warren Realty & Trust Company disapproved.

April 10th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Your recent favor containing the articles of incorporation of the Warren Realty & Trust Company submitted by you for an opinion upon the legality of the purpose clause thereof, has received my consideration. The purpose clause contained therein is as follows:

> "Said corporation is formed for the purpose of buying, selling, leasing, otherwise acquiring, dealing in and improving real estate and carrying on a general real estate and trust business in realty; and purchasing or otherwise acquiring and holding shares of stock in other kindred but not competing corporations; and these articles of incorporation shall expire by operation of law in the maximum period fixed by statute."

In reference thereto I beg to advise that by amendment to section 3256 R. S. authority is given to any private corporation to purchase, acquire and hold shares of stock in other kindred but not competing corporations, whether domestic or foreign. Such power is incidental to all private corporations but it cannot be made one of the purposes of a corporation formed for buying, selling and otherwise dealing in real estate as that, in my opinion, would be violative of section 3235 R. S. In the articles under consideration it is made a special business purpose of the corporation, which section 3256 R. S. does not contemplate.

I further suggest to you that under section 3236 R. S. the name of the corporation is such as is likely to mislead the public as to the character or purpose of the business to be authorized by its charter.

I return the same to you with the recommendation that the articles should not be filed until corrected.

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

ARTICLES OF INCORPORATION OF THE WASHINGTON SAVINGS BANK & TRUST COMPANY APPROVED.

April 10th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith the articles of incorporation of the Washington Savings Bank and Trust Company to be located at Washington Court House, Fayette County, Ohio. I have approved the same with the understanding that the corporation is to engage exclusively in the business of a safe deposit and trust company provided for by sections 3821*a* to 3821*g* R. S., and that it is not to engage in the business of a savings and loan association, as provided for by section 3797 R. S., et seq. The name assumed by it is that of a savings bank and trust company and I assume that that implies a corporation under section 3821*a*, otherwise it would bear the name of "a savings and loan" association or company.

By the opinions of this department rendered to your predecessor under date of November 21st, 1904, and July 19th, 1905, I cited the distinctions between corporations of these different characters and the limitation placed upon the same in regard to the amount of the capital stock thereof. I refer you to these opinions as containing the reasons for the foregoing suggestions.

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

SAFE DEPOSIT AND TRUST COMPANY — CAPITAL STOCK.

Savings and loan association exercising powers of safe deposit and trust company must have capital stock of $200,000.

Articles of incorporation of the Anchor Bank & Savings Company disapproved.

April 11th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging receipt of the articles of incorporation of the Anchor Bank & Savings Company which you transmitted to this department for approval, I beg to advise that this corporation is sought to be formed to carry on the business of a savings and loan association as provided for by section 3797 and that of a safe deposit and trust company as provided for by section 3821*a* et seq. R. S.

Pursuant to the various opinions of this department and more particularly those of February 18th, 1901, February 3rd, 1904, and July 19th, 1905, construing section 3821*gg* R. S., it is necessary when such corporations assume the powers of both classes of corporations referred to, they are required to have a capital stock of at least $200,000. This corporation has a capital of but $50,000. I therefore return the same to you without my approval.

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

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Mercantile corporation may be authorized to engage in both wholesale and retail business.

Articles of incorporation of the Premium Merchandise Company approved.

April 15th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry of even date herewith, in re the purpose clause of the Premium Merchandise Company, I beg to say it is my opinion that such purpose clause does not violate any provision of the statute law of Ohio, and that it is perfectly legal to incorporate a company for the purpose of buying and selling merchandise at both wholesale and retail.

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

ARTICLES OF INCORPORATION — PURPOSE — PROFESSIONAL BUSINESS.

Corporation may not be authorized to employ remedies for the treatment of disease; such amounts to a professional business.

Articles of incorporation of the Windsor Hydriatic Institute Company disapproved.

April 15th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to your inquiry of the 12th inst., in re the Windsor Hydriatic Institute Company in reference to the legality of the purpose clause of such corporation, which is as follows:

> "Said corporation is formed for the purpose of employing hydrotherapeutic measures, drugs, surgery and any other remedial agent for the treatment, alleviation, cure and prevention of disease."

Section 3235 Revised Statutes provides that a corporation cannot be created under the laws of this state to engage in professional business. Is the foregoing a violation of that provision?

It will be observed that the purpose of such corporation is not to sell, vend or deal in "drugs, surgery and any other remedial agent for the treatment, etc., of disease," but is formed for the purpose of *employing* such measures, drugs, etc., for the treatment, etc., of disease. To employ such measures and remedies must be by and through the agency of natural persons, and the same is subject to the criticism made by the supreme court of this state in State ex rel. Physicians Defense Co. v. Laylin, Secretary of State, 73 O. S. 90-100, from which I quote:

> "How else we may ask, could the corporation, being an impersonal entity, discharge its contractual obligation, other than by the employment of natural persons as its authorized agents to carry out and perform its said contract? * * *.
>
> "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 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."

For the reason that the articles of incorporation referred to are violative of section 3235 in the respect cited, I return the same to you with the recommendation that they be not filed.

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

ARTICLES OF INCORPORATION — PURPOSE.

Lumber company may be authorized to construct and operate a railroad to carry out principal purpose.

Articles of incorporation of the Saw Mill Company approved.

April 26th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your favor of the 25th inst. relative to the legality of the purpose clause contained in the articles of incorporation of the Saw Mill Company, I beg to say that such purpose clause is, in all respects, legal. The right to construct and operate a railroad in connection with the principal purpose of such corporation and to carry out its objects, is conferred by section 3866 R. S. The various sub-divisions therein are all related to the single purpose of manufacturing and dealing in lumber and products of the forest. Therefore, in my opinion, they do not conflict with any provision of the Revised Statutes of this state.

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

ARTICLES OF INCORPORATION — PURPOSE.

Mercantile company may be authorized to engage in both wholesale and retail business.

Articles of incorporation of the Slavic Co-operative Company approved.

April 26th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry of this date regarding the legality of the purpose clause of the Slavic Co-operative Company, I beg to say that such clause describes what is purely a general store engaging in both wholesale and retail businesses, and the same I consider to be lawful, as shown by Marshall's Private Corporations, p. 651.

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

WILLIS LAW—APPLICATION OF TAX TO INCREASE OF CAPITAL STOCK.

Corporation liable for franchise taxes under Willis law on increase of capital stock made within six months prior to the time when its report must be filed.

May 1st, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—By inquiry from your department it is sought to secure an opinion as to the liability of a corporation to pay franchise taxes upon an increase of capital stock made within six months prior to the proper month provided for the filing of its annual report.

The fees required to be paid upon filing of the annual reports by corporations under the Willis law are taxes. (Southern Gum Co. v. Laylin, 66 O. S. 578; New Jersey v. Anderson, Trustee, etc., 17 Am. Bankruptcy Reports 63).

Exemptions from taxation are never implied, and even in cases where it is claimed that there has been an express grant of exemption it is an invariable rule that *every* presumption must be in favor of a continuance of the taxing power and against any surrender thereof. (Erie R. R. Co. v. Pa. 21 Wall. 498, Cincinnati College v. State 19 Ohio 110, New Orleans, etc. R. R. Co. v. New Orleans, 143 U. S. 192). This doctrine has been zealously upheld by the courts in all the states where it has been submitted and by the United States supreme court in the foregoing and many other similar cases.

The general rule that the intention to exempt must be clearly expressed is not restricted in its application to absolute exemptions but applies also to cases of commutation or limitation of taxation. (State v. Parker, 32 N. J. L. 426).

And where an exemption has been clearly granted the principles set out above apply with full force to an alleged extension of the exemption so as to cover additional property. (Phila. etc. R. Co. v. Maryland, 10 How. (U. S.) 376; Wilmington etc. R. Co. v. Alsbrook, 146 U. S. 279).

The exemptions expressly granted by the Willis law are contained in section 7 thereof (R. S. (2780-30)) as follows:

> "Provided that electric light, gas, natural gas, water works, pipe line, street railroad, electric interurban railroad, steam railroads, messenger, union depot, express, freight line, sleeping car, (telegraph), telephone and other public service corporations required by law to file annual reports with the auditor of state, and insurance, fraternal, beneficial, building and loan, bond investment and other corporations required by law to file annual reports with the superintendent of insurance shall not be subject to the provisions of the preceding sections of this act.
>
> "Provided further, that a corporation shall not be required to file its *first annual report* under this act until the proper month hereinbefore provided for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state."

It has been contended that this latter clause should be construed so that any increase of capital may be considered as a new corporation to the extent of such *increase* and that the company should be exempted as to such increase upon the filing of its first annual report *after* the expiration of six months from the date of its said increase.

Upon the authorities given above such construction would clearly be an unwarranted extension of the expressed exemptions and cannot be sustained.

Any domestic or foreign corporation, therefore, otherwise subject to report to you must pay a franchise tax based according to law upon its capital stock as it is shown to be at the time it is required to file its report.

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

ARTICLES OF INCORPORATION — FRATERNAL BENEFICIARY ASSOCIATION.

Articles of incorporation of fraternal beneficiary association must set forth names of all officers, etc.

Articles of incorporation of the Golden Rule Auxiliary of the National Union disapproved.

May 6th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of articles of incorporation of the Golden Rule Auxiliary of the National Union with your request for an opinion thereon I beg to advise that this association is one which proposed to be organized pursuant to the fraternal beneficiary act, being sections (3631-11) to (3631-23*u*) inclusive, Bates' Revised Statutes. Section 12 of that act designates the form of corporation articles required to be made and among other requirements, is that it must contain the names, residences and official titles of all the officers, trustees, directors or other persons who are to have and exercise the general control and management of the affairs and funds of the association, etc.

For the reason that these articles do not contain such information I return them to you to have the same supplemented in that respect.

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

ARTICLES OF INCORPORATION — FEE — MUTUAL BENEFIT ASSOCIATION.

Fee for filing articles of incorporation of mutual benefit association complying with section 3631*a* is $2.00.

Articles of incorporation of the Herron Mutual Aid Society approved.

May 9th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of the articles of incorporation of the Herron Mutual Aid Society on which you request the opinion of this department relative to the amount of the fee which should be paid for the filing of articles of this character.

Replying thereto, it is my opinion that these articles are prepared with reference to the provisions of section 3631*a* Revised Statutes, in which section the exception is contained that all such associations should not be subject to the provisions of the insurance laws of the state. This association does not possess the

powers contained in section 3630 Revised Statutes, and is only required to pay $2.00 for filing its articles of incorporation as provided by paragraph 5 of section 148*a* R. S.

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

ARTICLES OF INCORPORATION — PURPOSE.

Mining company may not be expressly authorized to deal in stocks of other kindred but not competing corporations.

Articles of incorporation of the Ohio Mines Development Company disapproved.

May 9th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Your letter of the 6th inst., enclosing articles of incorporation of the Ohio Mines Development Company has received my consideration. You desire to know whether the purpose of such corporation, as expressed in the purpose clause thereof, is legal.

It is my opinion that it is violative of section 3256, Revised Statutes. I refer you to the opinion of this department dated April 10th, 1907, from which I make the following quotation:

> "By amendment to section 3256 R. S., authority is given to any private corporation to purchase, acquire and hold shares of stock in other kindred but not competing corporations, whether domestic or foreign. Such power is incidental to all private corporations, but it cannot be made one of the purposes of a corporation formed for buying, selling and otherwise dealing in real estate. * * * In the articles under consideration it is made a special business purpose of the corporation which section 3256 R. S. does not contemplate."

The Ohio Mines Development Company is formed primarily for developing and operating mining properties. The purpose clause of such a corporation should not contain a provision for owning and dealing in mining stocks because the same is not contemplated by the section above cited.

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

ELECTIONS — RIGHT OF ACTION FOR DAMAGE TO VOTING BOOTH.

Board of deputy state supervisors and inspectors of elections may not bring action for damages to voting booth in city; right of action is in city.

May 10th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of a communication addressed to you by the board of deputy state supervisors and inspectors of elections for Franklin county in which inquiry is made as to the power of such board to bring and maintain an action for damages to property in the custody of such board.

It appears from this communication that the property in question is a voting house in the city of Columbus. The opinion has heretofore been expressed by this office that it is the duty of a municipal corporation to furnish the place for holding elections. I assume, therefore, that this voting house is the property of the city and not of the board of elections. In this case it seems to me that the real party in interest in this controversy is the city of Columbus, and that it alone can bring the proposed action.

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

ARTICLES OF INCORPORATION — PURPOSE MUST BE SINGLE.

Articles of incorporation of the Cincinnati Horse Shoe & Iron Company disapproved.

May 11th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I herewith hand you the articles of incorporation of the Cincinnati Horse Shoe & Iron Company and in reply to your inquiry concerning the same would advise that the purpose clause thereof is too broad for that of a manufacturing corporation or of a mining company, as such a multiplicity of purposes could not be granted to a corporation organized under the laws of this state. The opinion of the supreme court in the case of State ex rel. v. Taylor, (55 O. S. 67) limits all corporations organized under the laws of this state to a single purpose and it appears that the articles under consideration contain at least three definite purposes.

A corporation may be formed for the purpose of manufacturing iron and the different products of iron. And it may, if so desired, purchase lands bearing coal and iron ore so as to more economically use the same in the accomplishing of its main purpose, that of manufacturing. The articles under consideration attempt to vest in such corporation the power

> "to take, own, hold, deal in, mortgage or otherwise lien and to lease, sell, exchange, transfer or in any manner dispose of real property within or without the state of Ohio, wherever situated."

It further attempts to confer upon such corporation the right to deal in patents, copyrights, inventions, etc., and for all that the purpose clause indicates such purposes may not be incidental to or in any way connected with the main purpose of manufacturing and dealing in iron and iron products. For these reasons I return the same to you with the suggestion that they shall not be filed until such corrections are made therein as will comply with the view so expressed.

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

ARTICLES OF INCORPORATION — PURPOSE — BANKING POWERS.

Corporation may be formed under general act to act as depository for savings of employes of another corporation.

Articles of incorporation of the Republic Society for Savings Company approved.

May 16th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Pursuant to your request of the 10th inst., I have examined the articles of incorporation of the Republic Society for Savings Company to be located at Youngstown, Ohio, and especially the purpose clause of that company. In connection therewith I have noted what Messrs. Arrel, Wilson & Harrington have said in their letter of the 13th inst.

The purpose clause of such company is as follows:

> "Said corporation is formed for the purpose of encouraging and promoting savings among the employes of the Republic Rubber Company, and investing such savings in stocks, bonds, debentures, debenture stock, and securities of any government, state, corporation, public or private, or other body or authority, to vary the investments of the company, to sell or dispose of any of the investments aforesaid, and generally to do all or anything necessary, suitable, convenient or proper for the accomplishment of any of the purposes, or the attainments of any one or more of the objects herein enumerated, or incidental to the powers herein named."

Such purpose does not constitute this corporation in any sense a banking company or association and is not inhibited by the laws governing the creation of corporations.

I am therefore of the opinion that the same is legal and should be filed in your department.

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

SAFE DEPOSIT AND TRUST COMPANY — CAPITAL STOCK.

Safe deposit and trust company not exercising powers provided for in section 3821*c* need not comply with the requirements of section 3821*d* as to capital stock.

Capital stock of safe deposit and trust company may be reduced in accordance with provisions of general corporation act.

May 16th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to yours of the 13th inst. relative to the reduction of the capital stock of the Ohio Safe Deposit and Trust Company of Zanesville, Ohio, I beg to say that when a safe deposit and trust company organized pursuant to section 3821*a* R. S. desires to exercise only the powers in sections 3821*a* and 3821*b*, it can do so with a capital stock as assumed by this company. You will observe that the requirement concerning the capital stock of such companies as are mentioned in section 3821*d* R. S. only applies when such corporations accept any trust which may be vested in, transferred or committed to it, as provided in section 3821*c* R. S. (Opinions of Attorney General, June 5th, 1905.)

As there is no special provision contained in the chapter of the Revised Statutes governing savings and loan associations and safe deposit and trust com-

panies relative to the reduction of stock in such companies, the provision contained in the general corporation code applies. (See section 3264 R. S.)

I herewith enclose the papers enclosed with your letter.

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

CORPORATIONS — NAME.

Name of all corporations organized for profit under the general corporation law of Ohio must begin with the word "The" and end with the word "Company."

May 16th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to yours of the 10th inst. enclosing the letter of Messrs. Jenkins, Russell & Eichelberger of Cleveland, Ohio, relative to a proposed incorporation to be known as the "School of Industrial Economics," I beg to say it is my opinion that all corporations for profit organized pursuant to section 3236 R. S., should begin with the word "The" and end with the word "Company," and if the corporation is one of this class the articles of incorporation thereof should not be filed until such name is adopted as would comply with the requirement above cited.

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

SAFE DEPOSIT AND TRUST COMPANY — CAPITAL STOCK.

Savings and loan association exercising powers of safe deposit and trust company must have capital stock of $200,000.

Articles of incorporation of the Brooklyn Savings & Loan Company disapproved.

May 17th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to yours of the 16th transmitting to this department the articles of incorporation of the Brooklyn Savings & Loan Company, and requesting an opinion thereon, I beg to say that the purpose clause contained therein is that "of conducting business as a savings and loan association and safe deposit and trust company in accordance with the provisions of title II, chapter 16, of the Revised Statutes of Ohio."

The capital stock of the corporation is $50,000. In various opinions rendered by this department to the department of the secretary of state, under date of July 19th, 1905 and October 30, 1905 (Annual Report, 1905, pages 41-48), I expressed the view that a corporation could not be created in Ohio with all the powers of a savings and loan association and a safe deposit and trust company as defined by sections 3821*a*, 3821*b* and 3821*c* Revised Statutes, unless it had the minimum capital provided by section 3821*gg*, viz: $200,000. As this corporation has a capital of but $50,000, I return the same to you without my approval. If it was organized for the purpose of carrying on a savings and loan association,

as defined by section 3797 R. S., the amount of the capital named therein would be sufficient.

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

WILLIS LAW — LIABILITY FOR TAX.

Liability of corporation for Willis law tax exists until certificate of dissolution is filed with secretary of state, though corporation may have ceased to do business.

May 17th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry of the 16th inst., enclosing the letter of Mr. George W. Fluckey, attorney at law, Toledo, Ohio, relative to the return made by the Hartpence Oil Company pursuant to the provisions of the Willis law, I beg to say that this corporation, together with all other corporations similarly created, is subject to the Willis tax even though the purpose for which it is incorporated is not being carried on. The liability for the tax is not dependent upon whether or not the corporation is actually engaged in business; but until it is dissolved and report made to the secretary of state of its dissolution it is required to pay the fee provided for by sections 148*c* and 148*d* of the Revised Statutes.

Very truly yours,
WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION OF THE REAL ESTATE ABSTRACT & TITLE COMPANY DISAPPROVED.

May 20th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith to you the articles of incorporation of the Real Estate Abstract & Title Company which have been submitted to me for an opinion as to the legality of the purpose clause contained therein.

It is my opinion that the purpose clause contains certain powers similar to those vested in title guarantee and trust companies by section 3821*ggg* Revised Statutes, and further that the latter provision contained in such clause is professional business inhibited by section 3235 Revised Statutes. I therefore advise that the same be not filed by you.

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

FIRE PATROL AND SALVAGE COMPANIES—ACT PROVIDING FOR, UNCONSTITUTIONAL.

May 27th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In a recent letter you request my opinion as to your duty to receive and file articles of incorporation under the act of April 29th, 1902, entitled "An act to provide for the organization of corporations for the purpose of discovering and preventing fires and of saving property and life from conflagration." (95 O. L. 324, R. S. section (3691-24*h*).)

Some of the objections to the constitutionality of this act are pointed out in an opinion rendered by Attorney General Sheets to the superintendent of insurance, September 6th, 1902, and reported in Opinions of the Attorney General for 1902, page 82.

The letter which you forwarded to me from the attorneys who represent the applicants for incorporation admits the invalidity of sections 3, 4 and 5 of the act, but urges that sections 1 and 2 are unobjectionable and should stand alone as a valid law. With this view I am unable to concur.

Sections 1 and 2 authorize the incorporation of fire patrol companies having certain extraordinary powers. Section 3 provides that:

> *"Before any corporation organized under the terms of this act shall commence business,* and in the month of March every second year thereafter there shall be held a meeting of such corporation of which ten days' previous notice shall be given. * * * * At which meeting each insurance company, corporation, association, underwriter, person or persons doing a fire insurance business in said municipality or other sub-division of the state in which the corporation is organized and established, whether members of said corporation or not, shall have the right to be represented and shall be entitled to one vote. * * * ."

The provision of sections 1, 2 and 3 are "so mutually connected with, and dependent on each other, as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole" and to afford "reasonable ground for believing that the legislature would not have passed the act without the obnoxious provision."

> Bowles v. State, 37 O. S. 35;
> State ex rel. v. Commissioners, 5 O. S. 497.

But the very clause of section 1 which the present applicant desires to take advantage of, is, in my opinion, unconstitutional. That clause provides that:

> "Full power is hereby given to such superintendent and patrol *to enter any building at any time for the purpose of inspection* and any building on fire or which may be exposed to or in danger of taking fire from other burning buildings, for the purpose of protecting and saving said building and the property therein, etc."

This grant of power to the employes of a private corporation is inconsistent with the rights of the people to be secure in their persons, houses and possessions against unreasonable searches and seizures, guaranteed by article I, section 14, of the Ohio constitution.

The act in question should, therefore, be ignored by you in determining whether or not articles of incorporation submitted to you are in compliance with law.

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

ARTICLES OF INCORPORATION — PURPOSE.

Corporation formed for principal purpose of manufacturing and selling medicine may not be authorized to conduct hospital.

Articles of incorporation of the Peoples Co-operative Medical Company disapproved.

May 31st, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of yours of the 27th inst., enclosing the articles of incorporation of the Peoples Co-operative Medical Company. You have submitted these articles to this department for an opinion thereon as to the legality of the purpose clause. The purpose clause thereof is as follows:

> "Said corporation is formed for the purpose of manufacturing and selling of medicine, and maintaining and conducting hospitals."

In my opinion the above clause contains two purposes, that of manufacturing and selling medicine and that of maintaining and conducting hospitals. The one is not necessarily incidental to the other and, therefore is forbidden by section 3235 of the Revised Statutes (State ex rel. v. Taylor, 55 O. S. 67).

I therefore return the same to you with the suggestion that the articles be not filed or recorded by you.

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

WILLIS LAW — BASIS OF COMPUTATION OF TAX.

Willis law tax of one-tenth of one per cent. based upon issued and outstanding capital stock when, and only when such stock exceeds in amount subscribed stock; otherwise based upon subscribed stock.

In re report of the Produce Exchange Bank Company.

June 6th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of your letter of May 25th, enclosing the annual report for 1907, of the Produce Exchange Bank Company and check for $25.00.

The report shows the authorized capital stock of said corporation to be fifty thousand dollars; the subscribed capital fifty thousand dollars, the issued and outstanding capital twenty-five thousand dollars, and the paid up capital twenty-five thousand dollars.

The inquiry directed to this department is to determine whether the com-

pany should pay one-tenth of one per cent. upon its subscribed capital or one-tenth of one per cent. upon the issued and outstanding capital.

The language of the Willis law, Sec. (2780-25) in this connection is:

> "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 and to be not less than $10 in any case."

As soon as a subscription to capital stock is made it becomes an asset of the company, liable to collection at any time, the same as other accounts receivable unless limited by some special provision. Such subscription to stock is as much a valid possession of the corporation as a bill or note might be. The theory upon which the tax is based upon the capital stock is that such capital is the best measure of the value of the company's franchise as represented by its property, both tangible and intangible.

The statute in this case plainly provides that the collection of one-tenth of one per cent. shall be upon the subscribed capital or the issued and outstanding capital. It may be possible for the issued and outstanding capital to be greater than the subscribed capital, as, for instance, in cases where the treasury stock is issued as collateral for a loan, and such issue of stock would then represent property of value in possession of the corporation, and in such case the tax should be based upon the issued and outstanding capital stock.

In other words the clear intention of the statute is to base the tax upon the subscribed capital if that is more than the issued and outstanding capital or upon the issued and outstanding capital if that is greater than the subscribed capital.

I return herewith the report and check and it is my opinion that you should charge and collect a fee of one-tenth of one per cent. upon the subscribed capital in this case.

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

SAFE DEPOSIT AND TRUST COMPANY — CAPITAL STOCK.

Savings and loan association authorized to exercise powers of safe deposit and trust company must have capital stock of $200,000.

Articles of incorporation of the Fairport Banking & Trust Company disapproved.

June 7th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith the articles of incorporation of the Fairport Banking & Trust Company not approved by me for the reason that it has been the uniform construction of sections 3821a to 3821gg R. S., by this department, that a corporation cannot be created with all the powers of a savings and loan association and those of a safe deposit and trust company unless it has the minimum capital provided by section 3821gg R. S., namely, $200,000. This corporation has a proposed capital of $25,000.

If it desires to exercise the powers of a safe deposit and trust company alone it can do so upon that capital, or it can exercise the powers of a savings

and loan association alone upon that capital, but cannot combine the two powers unless it complies with the requirements of section 3821gg R. S.

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

SAVINGS AND LOAN ASSOCIATION — CAPITAL STOCK.

Capital stock of savings and loan association to be located in village must be at least $25,000.

Articles of incorporation of the Whitehouse Banking Company disapproved.

June 7th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging receipt of the articles of incorporation of the Whitehouse Banking Company I return the same to you without my approval, as I assume it is intended by these articles to create a corporation pursuant to the provisions of section 3797 R. S. et seq., and the minimum capital therein provided for is $25,000, while the capital provided for in the articles referred to is but $10,000.

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

ARTICLES OF INCORPORATION — PURPOSE.

Banking company may not be authorized to act as agent of fire insurance company.

Articles of incorporation of the Navarre Deposit Bank Company disapproved.

June 13th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith the articles of incorporation of the Navarre Deposit Bank Company at Navarre, Stark county, Ohio. I have not approved these articles for the reason that there is combined with the bank business the further business of conducting "a fire insurance agency or to act as agent for fire insurance companies."

This power cannot be united with that of a banking corporation.

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

FOREIGN CORPORATION — ADMISSION TO STATE — RULE FOR DETERMINING AMOUNT OF FEE UNDER SEC. 148c.

June 14th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — The enclosed correspondence forwarded to this office with your letter of June 6th is from the attorneys of the Muskingum Light & Fuel Co.,

and the Hatfield Motor Vehicle Company, both foreign corporations seeking the right to do business in Ohio, and present identical questions which may be answered in one opinion.

A foreign corporation, with an authorized capital stock of $100,000 has $5,000 of tangible property all located in Ohio, and inquires what fee should be paid for compliance with section 148c R. S.

The language of the statute to be construed in this connection is as follows:

> "Every foreign corporation, incorporated for purposes of profit, now or hereafter doing business in this state, and owning or using a part or all of its capital or plant in this state, shall, within thirty days after the passage of this act, or, in case of a company hereafter coming into this state, then before it proceeds to do any business in this state, under the oath of the president, secretary, treasurer, superintendent or managing agent in this state of such corporation make and file with the secretary of state, a statement, in such form as the secretary of state may prescribe, containing the following facts:
>
> 1. The number of shares of authorized capital stock of the company, and the par value of each share.
>
> 2. The name and location of the office or officers of the company in Ohio, and the name and address of the officers or agents of the company in charge of its business in Ohio.
>
> 3. The value of the property owned and used by the company in Ohio, where situate, and the value of the property of the company owned and used outside of Ohio.
>
> 4. The proportion of the capital stock of the company which is represented by property owned and used (and) by business transacted in Ohio.
>
> From the facts thus reported, and any other facts coming to his knowledge bearing upon the question, the secretary of state shall determine the proportion of the capital stock of the company *represented by its property and business in Ohio,* and shall charge and collect from the company, for the privilege of exercising its franchises in Ohio, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation represented by property owned and business transacted in Ohio."

Foreign corporations have no inherent right to exercise corporate powers within this state, and may only be admitted to transact their business here under the conditions imposed by the statute. This doctrine is established in this state by the supreme court in the following language:

> "Foreign corporations can exercise none of their franchises or powers within this state except by comity or legislative consent. That consent may be upon such terms and conditions as the general assembly under its legislative power, may impose."
>
> Western Union Telegraph Co. v. Mayer, 28 O. S. 521.

Other jurisdictions have upheld a similar doctrine,

> Delaware R. R. Tax Case, 18 Wall. 206;
> Attorney General v. Bay City Mining Co., 99 Mass. 148;
> Ducat v. Chicago, 10 Wall. 410;
> Pembina Mining Co. v. Penn., 125 U. S. 191;
> Horn Silver Mining Co. v. N. Y., 143 U. S. 305.

It remains then only to determine the meaning and intent of the language of the statute, and however arbitrary or capricious it may seem or whatever of hardship in special instances may result from the operation of the law it must be upheld.

This statute, known as the "Willis Law," requires that foreign corporations, for the privilege of exercising their corporate powers in Ohio, shall pay one-tenth of one per cent. upon that proportion of their authorized capital stock which is represented by property owned and used and business transacted in this state. It will be seen, first, that the tax is not one-tenth of one per cent. upon the property owned in Ohio; second, it is not one-tenth of one per cent. upon the property used in Ohio; and third, it is not one-tenth of one per cent. upon the business transacted in Ohio. It is one-tenth of one per cent. of that part of the total authorized capital stock which represents the proportion which the property owned and used and the business transacted in Ohio bears to all the property owned and used and all the business transacted everywhere. In a literal construction of the statute, therefore, we may make use of the following algebraic proportion: The property and business in Ohio is to the total property and business as the capital stock in Ohio is to the total capital stock, the unknown quantity to be determined being the capital stock in Ohio. Thus, if a foreign corporation has property and business in Ohio of the value of $10,000, a total of property and business of the value of $100,000, and a total authorized capital stock of $200,000, the portion of such capital stock subject to the Willis tax would be ascertained by the following sum:

$10,000 : $100,000 : : X : $200,000.

The unknown quantity X is thus $20,000, and such corporation would pay one-tenth of one percent. upon $20,000 for the privilege of doing business in this state.

But since the volume of business transacted in Ohio would generally bear the same relation to the total volume of business as the property owned in Ohio bears to the total property owned, the more practical rule would be to eliminate the question of business transacted, except insofar as the same may assist in determining the value of property owned, and impose the tax upon that portion of the total authorized capital which represents the proportion which the property in Ohio bears to the total property. The only apparent purpose in the statute of requiring a consideration of the amount of business done is to secure for Ohio, as a subject of taxation, its full share of the capital stock of foreign corporations, and to prevent such corporations reporting as such share only the value of their tangible property in this state, while their intangible property, such as good will, franchises, patents, copyrights and investments of stocks and bonds in other corporations (generally making up the bulk of their capital) are reported as being held in other states.

For the guidance of your department, therefore, I suggest that with respect to all foreign corporations subject to the Willis tax it be ascertained from the reports or otherwise: First, the value of the tangible property in Ohio; second, the value of all tangible property; third, the total authorized capital stock; and that the corporation be required to pay one-tenth of one per cent. upon that portion of its total authorized capital stock which represents the proportion its tangible property in Ohio bears to its total tangible property. Thus, if a corporation has $5,000 of tangible property in Ohio, a total of $10,000 of tangible property, and a total authorized capital stock of $100,000, it would pay the tax on one-half of its total capital or one-tenth of one per cent. upon $50,000. So, if it had *all* its tangible property in Ohio, and a total authorized capital of $100,000 it would pay such tax upon $100,000.

The courts generally, in construing statutes similar to the Willis law, have

sanctioned this rule. They have held that the business of a corporation is generally assumed to be transacted at the place where the plant is located (Adams Express Co. v. State Auditor of Ohio, 166 U. S. 185; American Express Co. v. State Auditor of Ohio, 165 U. S. 195), and further, that where a tax is laid upon the capital stock of a non-resident corporation operating within the state, such proportion of the whole amount of its capital stock as the value of its tangible property within the state bears to the value of all its tangible property may lawfully be taxed as capital stock within the state. (Commissioners v. Old Dominion S. S. Co., 39 S. E. Rep. 18). In Commonwealth v. West. Union Tel. Co. (Second Dauph. 30) one of the inferior courts of Pennsylvania says:

> "In the case of corporations whose capital stock is represented by tangible property situated partly within and partly without the state, the value of each being known, the proper mode of assessment is to determine the proportion which the value of property in the state bears to the total value of all the property of a corporation and this proportion represents the amount of capital stock taxable in the state."

I am therefore of the opinion that in the cases submitted each corporation should pay a fee of one-tenth of one percent. upon its entire authorized capital.

All correspondence is herewith returned.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION — PURPOSE.

Mining corporation may not be authorized to manufacture mining machinery nor to engage generally in drilling wells, etc.

Powers which may be lawfully exercised as incidental to a single purpose become unlawful when proposed to be exercised generally and not in futherance of such principal purpose.

Articles of incorporation of the Ohio Drilling Company disapproved.

June 14th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith the articles of incorporation of the Ohio Drilling Company transmitted to me from your department with a request for an opinion as to the legality of the purpose clause contained therein. That clause is as follows:

> Said corporation is formed for the purpose of drilling water, oil and gas wells, test holes for coal, lead, zinc and other minerals; to acquire and own leases and mining rights on oil, gas and mineral lands and to prospect and develop the same; *for buying, selling and dealing in such mineral lands, or products thereof; for manufacturing, repairing, buying and selling machinery suitable to be used in developing mineral lands;* for sinking test pits, shafts or air shafts to be used in connection with the development of coal or mineral lands; for owning all property, both real and personal, necessary for the conducting and carrying on of said business, and for *all things pertaining to a general prospecting, developing and contracting business,* either within or without the state of Ohio, and necessary or incident thereto.

It appears, therefore, that this company is formed for three purposes, which may be classified as follows: (1) dealing in mineral lands and their products; (2) manufacturing and selling mining machinery; (3) drilling wells and test holes, under contract, for third parties. The laws of this state do not authorize the formation of a single corporation for such diverse purposes. The business of manufacturing and dealing in mining machinery is not incidental to the business of dealing in mineral lands nor to the business of drilling wells, test holes, etc., for others.

> "An incidental power is one that is directly and immediately appropriate to the execution of a specific power granted and not one that has a slight or remote relation to it. * * * The exercise of a power that might be beneficial to the principal business is not necessarily incident to it."
>
> Burt v. Mead, 159 Ind. 252, 261.

The present articles of incorporation, therefore, should be rejected.

No doubt a corporation formed primarily for the purpose of dealing in mineral lands might, as incidental to such purpose, be empowered to drill wells, test holes, etc., and to manufacture machinery for its own use. The distinction between purchasing or manufacturing machinery to be used by the manufacturer or purchaser and the business of dealing in such machinery, i. e.: buying and selling it for profit, is clear.

The life of corporations formed for the purpose of "buying and selling and dealing in mineral lands" like that of corporations formed for the purpose of dealing in other real estate would, of course, be limited to twenty-five years.

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

ARTICLES OF INCORPORATION — PURPOSE.

Corporation may not be authorized to act as "parent company."

Liquor manufacturing company may not be authorized to manufacture and deal in advertising devices, nor to guarantee dividends of other corporations.

Articles of incorporation of the Lowenthal-Strauss Company disapproved.

June 29th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of the articles of incorporation of the Lowenthal-Strauss Company, with your request that I furnish you an opinion as to the legality of the purpose clause contained therein.

This clause is violative of the provisions of section 3235 R. S., as construed by the supreme court of this state in the case of State ex rel. v. Taylor, 55 O. S. 67, in that it contains more than one purpose. There is no authority in this state for the creation of a corporation "to act as a parent company to other corporations upon such terms and conditions as may be agreed upon with them."

This corporation is proposed to be organized for the purpose, among other things, of purchasing or otherwise acquiring and dealing in and manufacturing beverages, both spirituous and otherwise. It is further proposed to authorize it "to conduct a general advertising business, both as principal and agent, including

the preparation and arrangement of advertisements, and the manufacturing and construction of advertising devices and novelties." This is foreign and unrelated to the purpose above stated.

The purpose clause is further objectionable because it contains a provision authorizing this corporation "to guarantee dividends on the stock of any corporation in which it may be interested, whether as a stockholder or in a business way, and to endorse or otherwise guarantee the principal and interest of every and any indebtedness of any individual, co-partnership or corporation in which it may be interested."

For the foregoing reasons I return the same to you with the advice that the same be not filed or recorded until such amendment is made thereto as will comply with the foregoing.

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

ARTICLES OF INCORPORATION — NAME.

Building and loan association may not assume name of savings and loan association.

Articles of incorporation of the American-Hungarian Savings & Loan Company disapproved.

June 29th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I herewith return you the articles of incorporation of the American-Hungarian Savings & Loan Company, without my approval, for the reason that the corporation, as shown by the purpose clause, is formed under the laws relating to building and loan associations. It has attempted to assume the name of a savings and loan company. This it should not be permitted to do for, as pointed out in previous opinions rendered by this department, such name is likely to mislead the public as to the character or purpose of the business authorized by its charter.

I return the same to you with the advice that you do not file or record the same until such change is made in the articles as will comply with the foregoing.

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

ARTICLES OF INCORPORATION OF THE TOLEDO & FT. WAYNE ELECTRIC RAILWAY COMPANY DISAPPROVED — MULTIPLICITY OF PURPOSES.

June 29th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — You have submitted to me the articles of incorporation of the Toledo & Ft. Wayne Electric Railway Company with the request that I furnish you an opinion as to the legality of the purpose clause. Said purpose clause is as follows:

> "Said corporation is formed for the purpose of constructing, maintaining and operating a railroad and traction company, having Toledo,

Lucas county, Ohio, as one terminus, and Fort Wayne, Allen county, Ind., as the other terminus; of using electrical or any other motive power thereon; of selling, manufacturing, and furnishing light, heat and power, so far as that power may be exercised by a corporation organized as an Interurban or Street Railway Company; of running its said railroad through Lucas, Defiance and Williams counties, Ohio, and Allen county, Indiana, and other points; and of doing each and every act, and having all the rights and privileges of other railroad companies, including the right of Eminent Domain.

"It is for the purpose of this corporation, so far as the laws of the State will permit or hereafter permit it so to do, to have one or more offices, places of business, plants or factories; and to hold, purchase or otherwise acquire or to mortgage, sell or convey real or personal property within or outside the State of Ohio; to apply for, register, acquire and to use, hold, transfer, sell and dispose of any patent rights; to acquire, operate or dispose of any property interests or things of value along its lines or within the territory contiguous; to erect, purchase, hold, take or lease or otherwise acquire buildings or property which may be necessary for its business; to borrow money or contract debts within the lawful exercise of its corporate privileges or franchises or for any other lawful purpose or purposes and to use and dispose of its obligations therefor; and to secure the payment of all such obligations by mortgage or mortgages upon any or all of the property of every character of said corporation; and to purchase acquire, take, receive, hold, own, sell or otherwise dispose of the capital stock, bonds, debentures, securities or other obligations or evidences of indebtedness of any other person, firm, or corporation, private or public, municipal or otherwise, necessary or proper for the transaction of its business or for the exercise of its corporate rights, privileges or franchises or for any other lawful purpose; and to execute, make, give and perform any and every agreement or contract, necessary or desirable for carrying on any or all of the business of said corporation and to do all and every thing necessary, suitable or proper for the accomplishment of the purposes or attainment of any of the objects herein enumerated and which shall, at any time, appear expedient for the benefit or protection of said corporation or its rights, property or assets, or calculated to enhance the value thereof, and to do any and all of the things herein set forth to the same extent as a natural person might or could do and in furtherance and not in limitation of the general powers conferred by the laws of the State of Ohio, and also to do and perform all other things that it may legally do."

In my opinion the powers sought to be exercised by such a proposed corporation constitute a violation of the "single purpose" provision as contained in section 3235 R. S., and as construed by the supreme court of this state in the case of State ex rel. v. Taylor, 55 O. S. 67. The portion thereof which is violative of such provision is as follows:

"It is for the purpose of this corporation so far as the laws of the State will permit or hereafter permit it so to do, to have one or more offices, places of business, plants or factories; and to hold, purchase or otherwise acquire or to mortgage, sell or convey real or personal property within or outside the State of Ohio; to apply for, register, acquire and to use, hold, transfer, sell and dispose of any patent rights;

to acquire, operate or dispose of any property interests or things of value along its lines or within the territory contiguous."

I therefore return the same to you with the advice that you do not file or record them until such correction is made as will comply herewith.

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

ARTICLES OF INCORPORATION — FEE.

Fee for filing articles of incorporation of company formed not for profit but having a capital stock, is $2.00.

In re Delta Kappa Epsilon Chapter House Association of Miami University.

July 3rd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of the articles of incorporation of the Delta Kappa Epsilon Chapter House Association of Miami University with your request for an opinion as to the proper fee to be charged for filing the same, also as to the legality of the restrictions placed upon the capital stock, I beg to say that paragraph 5, section 148a provides the fee that should be charged for the filing of such articles, to-wit, $2.00.

The provisions contained in the articles as to the capital stock are, in my opinion, legal and may be provided for in the articles of incorporation and those becoming subscribers thereto agree to the conditions inserted therein.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

CORPORATIONS — REDUCTION OF CAPITAL STOCK — WILLIS LAW.

Reduction of capital stock of corporation effective, for purpose of determining amount of Willis law tax, from date of actual reduction by directors, not from date of filing of certificate thereof.

In re the Hinsch Coal & Coke Company.

July 15th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Answering your communication of June 25th, would say, the question presented by you relative to a reduction in the capital stock of the Hinsch Coal & Coke Company, arises from the following state of facts:

The corporation represents by its certificate of reduction of capital stock executed June 4th, 1907, that at a meeting of the directors of said company held on July 13th, 1906, its capital stock was reduced from $60,000 to $10,000. By its annual report for 1907, also executed June 4th, it makes the same representation and says that its issued and outstanding capital stock during the month of May, 1907, was $10,000. You inquire whether the certificate of reduction shall take effect for the purpose of the annual report as of the date of the meeting of the directors at which the actual reduction was authorized.

Capital stock may only be reduced in accordance with the requirements of the statute. Section 3264 R. S. provides for the reduction of capital stock of corporations in this state as follows:

> "The board of directors of any such corporation may, with the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on the books of the company, reduce the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor; but the rights of creditors shall not be affected or impaired thereby, and a certificate of such action shall be filed with the secretary of state."

The Willis law, under which the annual report is made, provides that the tax shall be one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock during the month of May of each year.

Clearly if the stock was reduced by proper action of the board of directors, and the subscribed or issued capital stock was thereby reduced by issuing stock in the reduced amount pro rata to its stockholders, the actual subscribed or issued capital stock during the month of May was in the reduced amount.

My opinion, therefore, is that the report showing the reduced capitalization, and the certificate of such reduction, when accompanied by the proper filing fees, should be received and filed.

As to whether such reduction is valid as between the stockholders or other creditors upon a date prior to the filing of a certificate thereof in your office, is not decided.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — ATTESTATION OF CERTIFICATE.

Seal of clerk of common pleas court is in itself a sufficient attestation of the officer executing the certificate attached to articles of incorporation.

In re the Raymondsville Irrigation Company.

July 15th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I herewith transmit to you the articles of incorporation of the Raymondsville Irrigation Company together with a draft for $10.00 payable to your order. You transmit the same to this department for an opinion as to whether the certificate attached to the articles of incorporation complied with the provisions of section 3238 Revised Statutes, and was a sufficient attestation of the officer executing the same. In my opinion the certificate is sufficient when accompanied by the seal of the clerk of the court of common pleas as in this instance. The seal evidences the office of the clerk and the requirements of the statute are thereby complied with.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION OF THE UNDERWRITERS SECURITIES COMPANY DISAPPROVED.

July 15th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I herewith return to you the proposed articles of incorporation of the Underwriters Securities Company together with the check of Sterling Parks for $25.00 attached thereto.

I beg to advise you to reject the articles of incorporation in the form submitted for the reason that the same might conflict with the provisions of Sec. 3821r et seq., Revised Statutes, unless there be a clause therein denying the intention of the incorporators thereof to do the business provided for in the statutes referred to.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — PURPOSE.

Corporation may not be authorized to acquire assets of other unrelated or competing corporations.

Articles of incorporation of the Federal Machine Company disapproved.

July 22nd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I enclose herewith the articles of incorporation of the Federal Machine Company, which you have submitted to this department for an opinion as to the legality of the purpose clause contained therein.

Replying thereto, I beg to say that a certain portion of the purpose clause is objectionable in this, that it attempts to confer upon such corporation authority "to acquire the good will, rights and property, and to assume the whole or any part of the assets and liabilities of any person, firm, association or corporation, and to pay for the same in cash, stocks or bonds of the corporation or otherwise." This does not seem to refer to those corporations which are kindred but not competing as mentioned in the Revised Statutes of this state, but attempts to confer, by such language, upon such corporation, the right to acquire the rights and property of whatever kind owned by any person, firm, association or corporation without regard to the character of the business in which such person, firm, association or corporation may be engaged.

In my opinion this is in violation of Sec. 3235 R. S. I therefore advise that you refuse to file or record the same until the purpose clause has been so amended as to remove this objectionable feature.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — MULTIPLE PURPOSE.

Articles of incorporation of the General Engineering and Development Company disapproved.

July 27th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of yours of the 26th inst., with which you have submitted to me the articles of incorporation of the General Engineering and Development Company, with a request for an opinion as to the legality of the purpose clause contained therein, I beg to say that the very full statement of the purposes for which this company is sought to be incorporated, discloses that they are violative of section 3235 Revised Statutes, as construed by the supreme court of this state in the case of State ex rel. v. Taylor, 55 O. S. 67.

The several purposes are not all related to one single and distinct purpose, but the latter part thereof discloses that the corporation seeks to do all of the acts and things therein set forth "as objects, purposes, powers or otherwise, to the same extent and as fully as natural persons might or could, as principals, agents, contractors, lessors, lessees or otherwise."

This evidences the multiplicity of purposes of the corporation, and the articles of incorporation are returned to you with the advice that you do not record or file the same until they have been so modified as to remove the objections cited.

Very truly yours,
W. H. MILLER,
Asst Attorney General.

ARTICLES OF INCORPORATION — AMENDMENT.

Corporation not for profit may not by amendment to articles of incorporation obtain authority to have capital stock.

In re the Lloyd Library and Museum.

July 29th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry of the 26th inst., accompanying the letter of Mr. John T. Rouse, attorney-at-law, and which is submitted to this department for reply, I beg to say that if the Lloyd Library and Museum is a corporation, organized under the laws of this state, not for profit and without capital stock, if it now desires to have capital stock to distribute among its trustees in proportion to the amount contributed to the corporation by them, it cannot do so by virtue of section 3238a R. S., by amendment to its articles of incorporation, for in my opinion it would be violative of the provision contained therein, that the procedure outlined in that section could not be resorted to so as to increase or diminish the amount of the capital stock of the corporation. If, as in this instance, the corporation has no capital stock, it cannot, by amendment to its articles obtain the authority to have capital stock, in view of the provision cited therein.

I herewith return the letter of Mr. Rouse.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — MULTIPLE PURPOSE.

Articles of incorporation of the General Development Company disapproved.

August 8th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith the articles of incorporation of the General Development Company with other enclosures referred to in your letter of August 6th.

Without reciting in full the manifold purposes set forth in these articles, I call your attention to the following:

First: To investigate, develop and promote properties of every description *for others.*

Second: To *acquire, own* and *operate* mills, factories and stores of every description.

Third: To own and deal in licenses, trade marks, copy-rights, inventions, patent rights, etc.

Under the guise of a development company a corporation cannot be organized in this state with power to own and conduct all sorts of unrelated businesses. State v. Taylor, 55 O. S. 61.

I therefore advise you not to file these articles of incorporation in their present form.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

COUNTY COMMISSIONERS — TERM OF OFFICE.

County commissioners elected in November, 1906, will take office on third Monday in September, 1907, for term of two years.

Term of office of county commissioners elected in November, 1904, extended to third Monday in September, 1909.

August 8th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — In compliance with your request for an opinion as to the term of office of county commissioners, I beg to advise you that county commissioners elected in November, 1906, will take office on the third Monday in September, 1907, and hold office for two years from that date. County commissioners elected in November, 1904, continue in office until the third Monday in September, 1909.

The supreme court has held that part of section 839 R. S., as amended, 98 O. L. 272, which provided that the term of office of county commissioners should commence on the first day of December next after their election, to be inoperative. State ex rel. v. Mulhern, 74 O. S. 363.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION OF THE L. H. WAIN LAND COMPANY APPROVED.

August 15th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of the articles of incorporation of the L. H. Wain Land Company, I beg to advise you that in my opinion the purpose clause in these articles complies with the provisions of section 3235 R. S., as the draftsman of such articles has specially limited the purpose clause to such acts as are pertinent and incident to a real estate corporation. I therefore suggest the approval of the same and the filing and recording thereof as required by law.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Corporation may be formed for purpose of dealing in stocks and bonds of other corporations for a commission.

Articles of incorporation of the Carran Commission Company approved.

August 16th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of yours of the 15th inst. enclosing articles of incorporation of the Carran Commission Company, and replying to your request for an opinion as to the legality of the purpose clause, I beg to say that it evidences the intention to create a corporation for the purpose of engaging in the commission business. In my opinion a corporation can be organized in this state for that purpose and can purchase and sell stocks, bonds and commodities of individuals or corporations and charge a commission therefor. I therefore suggest that the articles in question be filed and recorded by your department.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Manufacturing corporation may be authorized to deal in articles to be manufactured.

Manufacturing corporation may not be authorized to deal generally in real estate.

The clause "any other business or purposes whatsoever" is objectionable.

Articles of incorporation of the Western Electric Company disapproved.

August 16th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of yours of the 2nd inst., containing the articles of incorporation of the Western Electric Company, requesting an opinion of this

department as to the legality of the purpose clause. In reply thereto I beg to say that the proposed corporation is formed for the purpose of manufacturing and selling machinery, tools, appliances and apparatus especially of the character known as electric apparatus, and supplies for telegraph, telephone, heat, light, power or motor plants. It would be perfectly proper to combine as one purpose the power to manufacture as well as to vend the articles manufactured, and the articles need not be all of similar kinds or related to the same character of business. It is the manufacturing of the articles that characterizes the purpose of the corporation, and it has been held by numerous courts that the right to sell the articles manufactured may be joined with the power to manufacture the same.

The fault in the articles referred to above is that at the close of the first paragraph of the purpose clause there is a general provision to engage in "any other business or purpose whatsoever." This seems to infer that a corporation may be formed in this state with multiple purposes. This is denied in the case of State ex rel. v. Taylor, 55 O. S. 67.

In the third paragraph of the purpose clause the following language is used:

> "To acquire the good will, right, property and assets of all kinds by purchase or otherwise, and to undertake the whole or any part of the liabilities, of any person, firm, association or corporation. To purchase, lease or otherwise acquire and hold, sell, convey, mortgage or otherwise dispose of, within or without the state of Ohio, real estate and real property and any interests and rights therein."

No power can be conferred upon this character of company to purchase, lease or otherwise acquire and hold or deal in real estate or real property unless it be for the purpose of accomplishing the objects of the corporation. A real estate corporation may be formed under section 3235 R. S., subject to the limitations contained therein, but such power cannot be conferred upon the corporation in question.

If it is meant by the foregoing quoted portion of the purpose clause that the purchasing and otherwise dealing in real estate should be only as related to the object of the corporation, that is, for the purpose of manufacturing the apparatus in question, it should so specify and if so limited the articles would be approved.

I therefore advise that the articles in question shall not be filed or recorded by you until such alterations are made as will comply with the foregoing.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Oil and gas company may not be authorized to construct and operate pipe lines, nor to deal in real property.

Articles of incorporation of the Yellow Creek Oil & Gas Company disapproved.

August 22nd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith the articles of incorporation of the Yellow Creek Oil & Gas Company, which you have referred to this department for in-

formation as to the legality of the purpose clause contained therein. Replying thereto I beg to advise that you should defer recording the articles of incorporation until the purpose clause is so modified as to eliminate the right to construct and operate pipe lines, also the assumed power of buying and selling "lands, rights, privileges and minerals." Under the policy of this state as set forth in State ex rel. v. Taylor, 55 O. S. 67, I am of the opinion that the purposes aforesaid cannot be combined with that of developing and dealing in oil and natural gas.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — FEE FOR FILING.

Fee for filing articles of incorporation of corporations formed not for profit but having a capital stock is $2.00.

In re articles of incorporation of the Alpha Psi Chapter House Association.

August 22nd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry of the 21st inst. relative to the filing fee necessary to be paid by the Alpha Psi Chapter House Association, I beg to advise that in my opinion paragraph 5 of section 148a of the Revised Statutes is applicable thereto and that the fee therefor should be $2.00.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION OF THE TOOL STEEL MOTOR GEAR AND PINION COMPANY APPROVED.

August 24th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — In yours of the 19th inst. you have referred to this department the articles of incorporation of the Tool Steel Motor Gear and Pinion Company for an opinion as to the legality of the purpose clause. After an examination of the same I am of the opinion that the purpose clause contained in the articles is, in all respects, legal.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

The phrase "and for all other lawful purposes" is objectionable.

Articles of incorporation of the Cleveland Power Specialty & Manufacturing Company disapproved.

August 26th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of yours of the 23rd inst., enclosing the articles of incorporation of the Cleveland Power Specialty & Manufacturing Company, with a request for an opinion as to the legality of the purpose clause contained therein, I beg to say the clause to which you refer is as follows:

> "Said corporation is formed for the purpose of buying, selling, dealing in, and the manufacture of, all kinds of power machinery, power machinery parts, and especially devices used in connection with power machinery. And for the further purpose of doing a general engineering business, and with power to buy, sell, lease, or otherwise control real estate necessary for the carrying on of its business; and for all other lawful purposes."

There is only one part thereof that is not authorized by the corporation laws of this state, and that is the last sentence "and for all other lawful purposes." The insertion of that language is violative of section 3235 R. S., as construed by the supreme court of this state in State ex rel. v. Taylor, 55 O. S. 67.

I therefore advise that until such change is made in said purpose clause, striking therefrom the language above quoted, you should not file or record the same.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

PRIMARY ELECTIONS — QUALIFICATION OF ELECTORS — MINORS.

Minor who will be qualified to vote at election next succeeding primary election may vote at such primary.

August 30th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — In answer to your inquiry as to whether minors who will be qualified to vote at the next general election succeeding the primary election, may be permitted to vote at the primary, I beg to advise you as follows:

Section 2921a, sub-section 1 provides:

> "No person shall be allowed to vote at any primary election except he be an elector resident of the precinct, ward or township in which he desires to vote and except he voted with the political party holding such primary election at the last general election, providing he voted at all at such election, *unless he be a first voter;* nor shall any person vote more than one time, or at any other than at the polling place in that precinct, ward or township wherein he resides."

The clear inference from this section is that the fact that a person has not previously voted does not in itself disqualify him.

Section 2920 R. S. provides:

> "A qualified elector under the notice may challenge any vote offered, because the person offering it is not entitled to vote under the notice,

or is not a citizen of the United States, *or cannot be at the next election a legal voter of the precinct,* or has received or been promised, directly or indirectly, any money, fee, or reward for his vote for any candidate at such election, or has voted before on the same day, at that or some other precinct, in the same election."

This section indicates that the fact that the person is not a qualified voter of the precinct at the time of the primary election is not a ground of challenge, provided he may become such before the next election.

Section 2917 R. S. provides that notice of the primary election

" * * shall prescribe the qualification not inconsistent with the provisions of this chapter, of the persons to vote at such election; provided, however, in cities where registration of electors is required by law, none but *registered electors* shall be permitted to participate in such primary election, and the deputy state supervisors of elections, or board of deputy state supervisors and inspectors of elections as the case may be, when so requested in such notice and application, shall prior to such primary election, *make such provision as shall be reasonable* for the transfer upon the registration books and *the registration of all persons, who may qualify themselves to vote at the next general election to be held after such primary election.* * * * ."

Section 2926j R. S. provides:

"Every male person who is a citizen of the United States, and a lawful resident of this state, and of any city wherein registration is required, and who is, or *at the next ensuing election in such city will be entitled to vote therein, shall,* on application, in the election precinct where he lawfully resides, and complying with the requirements herein, *be registered as a resident and elector therein,* but not otherwise. * *"

I find nothing in any of these sections which prohibits minors, who will be of age at the election next succeeding the primary, from voting at the primary election under such regulations as may be prescribed by the deputy state supervisors of elections.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Manufacturing corporation may not be authorized to carry on a general mercantile business; such business, as incidental to principal business of manufacturing, limited to dealing in articles to be manufactured.

Articles of incorporation of the Diebold-Peters Company disapproved.

September 30th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return you herewith the articles of incorporation of the Diebold-Peters Company not approved by me for the reason that in the purpose clause there is set forth, "for the purpose of manufacturing any and all kinds

of machinery, tools, implements and their accessories, as well as any other article not included in the foregoing. Also for the purpose of buying and selling any and all kinds of machinery, tools and articles connected with manufacturing or other merchandise."

By opinion of this department under date of August 16th, last, it was decided that it was proper to combine as one purpose the power to manufacture as well as to sell the articles manufactured, and that the articles need not be all of similar kinds or related to the same character of business.

In the foregoing quoted purpose clause it will be observed that the corporation not only seeks to manufacture all kinds of machinery, etc., but any other article not included therein, and also seeks to buy and sell all kinds of machinery, tools and articles connected with manufacturing, *or other merchandise.* It would be objectionable to confer upon a corporation the right to buy and sell "other merchandise" in addition to that of manufacturing machinery and selling the same. There should be eliminated from the foregoing articles the words "or other merchandise" to make the purpose clause thereof conform with the decision of the supreme court in the case of State ex rel. v. Taylor, 55 Ohio St., 67.

I therefore advise that the articles in question be not filed or recorded by you until such alterations are made therein as will comply with this opinion.

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

ARTICLES OF INCORPORATION OF THE TYROLER COMPANY APPROVED.

September 30th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to your letter of the 25th inst., in re the articles of incorporation of the Tyroler Company. Having examined the same I express the opinion that the purpose clause contained therein is covered by the opinion of this department rendered to your department under date of August 16th, 1907, and that the same is in all respects legal.

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

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Articles of incorporation of funeral benefit association must show compliance with section 3631a.

In re articles of incorporation of the Improved Burial Association.

October 1st, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to the inquiry contained in your letter of September 25th, in re articles of incorporation of the Improved Burial Association. The purpose clause contained therein is as follows:

"The purpose for which said corporation is formed is to provide funds for the construction of, care for and maintain Compartment Mausoleum for burial. Purposes in accordance with the Revised Statutes of Ohio."

It is not made plain as to the character of business that this company proposes to engage in. If it is that provided for by section 3631a R. S., to-wit, "an association formed for the purpose of providing for the payment of funeral expenses of the members of such association by assessment on such members," it does not comply with such provision in the description of the business to be engaged in and in the further provision that the membership therein must be limited to the county in which the association is organized.

If it is proposed by this corporation to be organized for purposes of profit and to construct a certain form of burial device, then it does not comply with the provisions of section 3236 which provides that the name thereof shall begin with the word "The" and end with the word "Company."

As it is not made definite by the articles submitted to which class of corporations this association belongs, I return the same to you with the request that more definite information be obtained regarding the same before filing or recording the articles in your department.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — FEE FOR FILING.

In re fee for filing articles of incorporation of the Improved Burial Association.

October 1st, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — In the matter of the articles of incorporation of the Improved Burial Association I beg to advise that on this day I have had a conference with Mr. Myron S. Siebert, one of the incorporators of the proposed corporation, and he explained to me the character of the business in which such corporation seeks to engage; that it is for the purpose of obtaining ground and erecting thereon a mausoleum sufficient in size to inter many bodies; that it is not to have any capital stock and it is not organized for profit. I am therefore of the opinion that the fee to be charged thereon should be pursuant to section 148a, paragraph 5, to-wit: the sum of $2.00.

I have therefore transmitted this letter to you by Mr. Siebert, being supplemental to the opinion rendered you under even date herewith.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION OF THE GARFORD MOTOR CAR COMPANY DISAPPROVED.

October 1st, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to the inquiry contained in yours of the 26th ult., in re articles of incorporation of the Garford Motor Car Company. You have submitted the same to this department primarily for an opinion as to the legality of the purpose clause contained therein. While I do not take any exception to that portion of the purpose clause which pertains to the character of business in which the corporation proposes to engage, yet the latter part thereof providing for the method of the sale of the property of the corporation does not comply with the requirements of section 3256b and 3256c, Revised Statutes. I therefore return the same to you advising that until the same is so modified as to comply therewith that you do not approve or record the same.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — PURPOSE.

Manufacturing corporation may not be expressly authorized to deal in stock of kindred but non-competing corporations.

Articles of incorporation of the Bayne-Subers Tire & Rubber Company disapproved.

October 2nd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to yours of the 28th ult., in re articles of incorporation of the Bayne-Subers Tire & Rubber Company. Your inquiry is directed to the legality of the purpose clause contained therein. The right to manufacture and sell the articles manufactured, contained in one purpose clause has been sustained by various courts and this department expressed the opinion that the same was lawful in a letter to your department under date of August 16th, 1907. Such corporation further has the right to purchase and dispose of patented inventions and rights necessary and convenient for the manufacture, use and sale of the goods and materials which it manufactures.

But these articles of incorporation contain this further purpose, "and also of purchasing and otherwise acquiring and holding, shares of the capital stock in any other kindred but non-competing private corporations, whether domestic or foreign, which may be deemed essential in the carrying out of the aforesaid objects and purposes."

By section 3256 R. S., authority is given to any private corporation to purchase, acquire and hold shares of stock in other kindred but not competing corporations whether domestic or foreign. Such power is incidental to all private corporations but it cannot be made one of the purposes of a corporation formed for the purpose of manufacturing certain articles, as that, in my opinion, would be violative of section 3235 R. S. In these articles this is made a special business purpose of the corporation, which section 3256 R. S. does not contemplate.

I therefore return the same to you with the recommendation that the articles should not be filed until corrected.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION OF THE MERCHANTS' COMMISSION COMPANY APPROVED.

October 2nd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to your letter which accompanies the articles of incorporation of the Merchants' Commission Company, and answering the inquiry therein presented, I express the opinion that the purpose clause contained therein is in compliance with law and the same should be received and recorded.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — FEE FOR FILING.

Fee for filing articles of incorporation of a corporation not for profit but having a capital stock is $2.00.

In re articles of incorporation of the Standard Club of Cleveland.

October 2nd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to yours of the 1st inst., transmitting to this department the articles of incorporation of the Standard Club of Cleveland, Ohio, and in which you have requested an opinion as to the proper fee for filing the same.

The purpose clause contained in these articles of incorporation is as follows:

> "Said corporation is formed for the purpose of promoting good fellowship among its members, by providing a Club House for their entertainment, where at all times they may meet for social intercourse."

A capital stock is provided for therein of the amount of $20,000. This class of corporations is of that character described by the supreme court in the case of Snyder et al. v. Chamber of Commerce et al., 53 O. S. 1 (1895). In that case the court announced that the declaration in the articles of incorporation that it "is formed not for profit" is not inconsistent with the provision for capital stock. It is not a corporation for profit within the meaning of the statute for such corporations are those which are formed for the prosecution of business enterprises with a view to realizing amounts to be distributed as dividends among the shareholders in proportion to their contributions to the capital stock.

While the articles referred to name a capital stock, it nevertheless is a corporation not for profit, and the fee provided for in paragraph 5 of section 148a R. S., to-wit, $2.00 should be charged for filing the same.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

SAFE DEPOSIT AND TRUST COMPANY — CAPITAL STOCK.

Savings and loan association desiring to exercise all the powers of safe deposit and trust company, must have capital stock of $200,000; should the contemplated powers not include execution of trusts under sections 3821c and 3281d, capital stock of $50,000 sufficient.

Articles of incorporation of the Citizens' Bank & Trust Company disapproved.

October 4th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have your request of the 30th ult., in re the legality of the articles of incorporation of the Citizens' Bank & Trust Company to be located at Conneaut, Ohio.

Replying thereto, I call your attention to the opinions of this department under date of June 5th, 1905, and July 19th, 1905, (Opinions of Attorney General 1905, pp. 41, 42). In the two opinions then expressed I pointed out that if a banking corporation undertook to assume all the powers of both a savings and loan association, organized pursuant to section 3797 R. S., and a safe deposit and trust company, organized pursuant to section 3821a R. S., such corporation would be compelled to have a capital stock of at least $200,000; but this involved the proposition that such corporation would thereby be authorized to assume the powers and authority given safe deposit and trust companies by section 3821c and section 3821d R. S.

If the proposed corporation only desires to assume the powers contained in section 3821a and section 3821b R. S., together with those of a savings and loan association, as defined in section 3797 R. S. et seq., it can do so upon a minimum capital of $50,000; but if it seeks to carry out the trusts and execute the powers contained in section 3821c and section 3821d it will then be compelled to provide for a capital stock of at least $200,000 pursuant to the provisions of section 3821gg R. S.

For the reason that these articles of incorporation only provide for a capital stock of $50,000 and undertake to assume the powers contained in section 3821c R. S., I return the same to you for such modification as will comply herewith and advise that until they are so modified you do not file or record the same.

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

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Oil and gas company may not be authorized to construct and operate pipe lines, nor to deal in real property.

Articles of incorporation of the Lancaster Oil & Gas Company disapproved.

October 5th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry of the 4th inst., in re the articles of incorporation of the Lancaster Oil & Gas Company, I beg to say the purpose clause contained therein is as follows:

"Said corporation is formed for the purpose of drilling for and accumulating petroleum oil and natural gas, buying and selling oil and gas rights, privileges and leases and oil and gas, leasing oil and gas territory, constructing and operating pipe lines; refining and dealing in oil, and all things incident to said business; also the buying and selling of and developing of mineral lands, rights and privileges and minerals."

As to the legality of this purpose clause I refer you to the opinion of this department under date of August 22nd, 1907, in re articles of incorporation of the Yellow Creek Oil & Gas Company. In that opinion I advised that the articles of incorporation be not filed until the purpose clause be so modified as to eliminate the right to construct and operate pipe lines, also the assumed power of buying and selling lands, rights, privileges and minerals. Under the policy of this state as set forth in State ex rel. v. Taylor, 55 O. S. 67, I am of the opinion that the purposes aforesaid may not be combined with that of developing and dealing in oil and natural gas.

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

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Corporation organized for principal purpose of conducting commission business may not be authorized to engage in general produce brokerage business. Articles of incorporation of the Geiger-Jones Company disapproved.

October 7th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to your request of the 4th inst. as to the legality of the purpose clause contained in the articles of incorporation of the Geiger-Jones Company. The articles in question evidence the intention of the incorporators to create a company for the purpose of engaging in the brokerage commission business. In a communication of this department to your department, under date of August 16th, 1907, I expressed the opinion that a corporation may be organized in this state for the purpose of "buying, selling, negotiating, exchanging, pledging, trading and dealing in shares, stocks, bonds, notes and securities, * * * " and charging a commission therefor. But in the articles under consideration there is further inserted the right "to trade and deal in and with mines, metals, minerals, and oil, cotton, grain, produce or other commodities." I am of the opinion that this latter clause is violative of section 3235 R. S. as construed by the supreme court in the case of State ex rel. v. Taylor, 55 O. S. 61 (1896.)

I therefore advise that until the articles in question are so modified as to comply with the opinion herein expressed that the same be not filed or recorded.

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

SAVINGS AND LOAN ASSOCIATION — NAME.

Savings and loan association may not use the word "national" as part of its corporate name.

Articles of incorporation of the National Savings Bank Company disapproved.

October 9th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return herewith the articles of incorporation of the National Savings Bank Company which you have transmitted to this department for its approval before filing or recording the same.

The corporation is sought to be formed for the purpose of receiving deposits, loaning money and conducting all business authorized by law to be conducted by savings and loan associations under the provisions of chapter 16, title 2, part second of the Revised Statutes of Ohio. It has assumed a name which, in my opinion, is violative of section 5243 of the Revised Statutes of the United States, which is as follows:

> "All banks not organized and transacting business under the national currency laws, or under this title, and all persons or corporations doing the business of bankers, brokers or savings institutions, except savings banks authorized by Congress to use the word 'national' as part of their corporate name are prohibited from using the word 'national' as a portion of the name or title of such bank, corporation, firm or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is permitted or repeated."

I therefore suggest that until this name is so changed by the incorporators as to eliminate therefrom the word "national" you should not file or record the articles which are herewith returned.

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

ARTICLES OF INCORPORATION OF THE CITIZENS BANKING & TRUST COMPANY APPROVED.

October 9th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have again examined the articles of incorporation of the Citizens Banking & Trust Company to be located at Conneaut, Ashtabula county, Ohio. The incorporators have changed the purpose clause to comply with the opinion of this department heretofore given concerning these same articles by adding thereto the following language:

> "and generally for the purpose of transacting all such business and doing all such things as safe deposit and trust companies and savings and loan associations are or may be authorized or empowered to do

under and by virtue of sections 3797 et seq., 3821a and 3821b of the Revised Statutes of Ohio."

This amendment removes the objection referred to in our former opinion, and I therefore advise that the same be filed and recorded.

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

TERM OF OFFICE OF COUNTY SHERIFF AND TREASURER — EFFECT OF CONSTITUTIONAL AMENDMENT UPON CONSTITUTIONAL LIMITATION OF.

Term of office of sheriff and county treasurer extended by article XVII of the constitution, as to individuals serving second terms, despite provision of article X, section 3.

As to eligibility to re-election of individuals serving first terms, *quaere.*

October 15th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Numerous inquiries have come to this office as to the right of county sheriffs and treasurers throughout the state to serve during the one year extension of their terms authorized by the last general assembly, in view of section 3 of article 10 of the constitution of Ohio, which declares that no person shall be eligible to either of these offices for more than four years in any period of six.

With respect to sheriffs the extension is from the first Monday in January, 1908, to the first Monday in January, 1909. With respect to treasurers the extension is from the first Monday in September, 1908, to the first Monday in September, 1909.

Because of the large number of officers affected and the public interest involved, the question is of general importance throughout the state and I have given it very careful consideration. In reaching an answer the most simple and direct way is to divide the officers affected into two classes, to-wit:

First. Sheriffs and treasurers now serving their first terms.

Second. Sheriffs and treasurers now serving their second terms.

As to the first of these, there is no conflict with the provision of the constitution above referred to. At the end of the term for which they were elected they will have served two years, and if they accept the extension they will have served three years consecutively and no constitutional question now arises.

As to the sheriffs and treasurers now serving their second terms and who, if they continue in office under the extension will have served five years in a period of six, a constitutional question is immediately presented. In my judgment the adoption of the 17th amendment, conferring upon the general assembly the power to "so extend existing terms of office" as to effect the purpose of biennial elections, operates to suspend any and every constitutional provision theretofore existing as to any and every office, in so far as such constitutional provision may obstruct the object of the new amendment. The supreme court of Ohio in the case of State ex rel. Pardee v. Pattison, 73 O. S., 305, is authority for the proposition that the words "existing terms of office," as used in the new amendment, mean the *tenure of the officers,* and that the general assembly is empowered by such amendment to continue in office all incumbents whose terms have been ex-

tended. This case further holds that the legislature, in exercising the power thus conferred by the people, can extend terms only in so far as the same is *necessary* to effect the purpose designed.

In view of this decision it seems clear that all sheriffs and treasurers now in office may continue to serve during the extension created by the general assembly, and the fact that such continuance in office of sheriffs and treasurers now upon their second terms will result in their holding such offices for five consecutive years will not render unconstitutional the act authorizing such extension.

This is as far as any public consideration requires us to go in determining the constitutionality of the act of the general assembly extending the terms of sheriffs and treasurers. An additional inquiry has been suggested as to the eligibility for re-election, upon the expiration of their extended terms, of sheriffs and treasurers now serving their first terms. That question is not involved in considering the validity of the extension act, and therefore cannot be decided. As a matter of justice and equity, however, it may be contended, and doubtless the people so meant, that treasurers and sheriffs serving their first terms and accepting the one year extension, should nevertheless be eligible to re-election, even though their total consecutive service should amount to five years in six, for this would make the new biennial amendment operate alike on both first and second term sheriffs and treasurers, the only difference being that the one year extension would be added to the first term in one case and to the second term in the other.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE — PREFERRED STOCK DIVIDENDS.

Invention development company may not be authorized to deal generally in corporate securities.

Dividends exceeding 8 per cent. may not be paid on preferred stock.

Articles of incorporation of the Bayne Subers Inventions & Development Company disapproved.

October 17th, 1907

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have given consideration to yours of the 16th inst. enclosing the articles of incorporation of the Bayne-Subers Inventions & Development Company. Your inquiry is directed to the legality of the same.

(1) As to the procedure adopted by the Bayne-Subers Tire and Rubber Company to evidence the written consent of such company to the corporation adopting the name in question I find that there has been a literal compliance with section 3238 R. S., and no legal objection can be urged to the adoption of such name by the first named corporation.

(2) As to the purpose clause contained therein it appears that the corporation in question is formed to engage in a general promoting, financing and development business. The purpose clause is in the following language:

> "Said corporation is formed for the purpose of contracting, buying, using, selling, experimenting with, developing, promoting, exploiting and financing inventions and patents of every description, United States and foreign, also registered trade marks and copy-rights; and (as relative, expedient, and necessary to this purpose, and to carry the same into full

force and effect) to further operate for the purpose of promoting, securing, and furnishing the necessary capital for the contracting, buying, using, selling, experimenting with, developing and exploiting the manufacture, use or sale of inventions and patents of every description, United States and foreign; and of manipulating, placing, and disposing of the right to manufacture, use, and sell, one, any or all such inventions or patents in any part of the United States or Europe, also registered trade-marks and copy-rights, and:

For the purpose of promulgating the interest and growth in the conception of inventions, by rendering such advice, encouragement and assistance (financial) or otherwise, as may be an incentive to inventors and patentees for the more rapid development of their ideas into practicable form, so as to successfully demonstrate their practicability, utility, and commercial value; also registered trade-marks and copy-rights; and:

For the purpose of buying, selling, and dealing in steam and electric railway securities; arranging stock and bond issues for private parties or corporations; the buying, selling, dealing in, and securing loans on securities of all kinds; promoting and financing street and steam railways, using any motive power most desirable, and of doing a general promoting and financing business; and for the purpose of contracting, buying, selling, using, manipulating and dealing in all mechanical ideas, devices, and things, essential to and capable of being used in connection with all such business as aforesaid; and of purchasing, leasing or otherwise acquiring, and holding whatever real estate may be necessary or convenient to carry on the business herein contemplated, and to convey, mortgage, lease and sell or otherwise dispose of the same; (and as incident thereto), of purchasing and otherwise acquiring and holding, shares of the capital stock in any other kindred but non-competing private corporations, whether domestic or foreign, which may be deemed essential in the carrying out of the aforesaid objects and purposes, and of doing all and everything necessary, suitable, convenient, or proper for the accomplishment of any of the purposes, or the attainment of any one or more of the objects herein enumerated or incident to the powers herein named, or which shall at any time appear conducive or expedient for the protection, advancement, or benefit of the corporation."

While this department has heretofore held in its opinion of August 16th last, that a corporation can be organized in this state for the purpose of engaging in the commission business and that it can as agent for others, purchase and sell stocks and bonds, and charge a commission therefor, yet the articles of incorporation submitted do not evidence that this corporation is to engage in that character of business, hence the purpose of "buying, selling or dealing in steam and electric railway securities" seems to be foreign to the general purpose for which the corporation is created, and violates section 3235 R. S., in providing for dual purposes.

It further violates section 3235a R. S., because in making provision for issuing preferred stock it attempts to have conferred thereby upon the holders of the preferred stock the right to dividends exceeding 8 per cent. per annum, which is forbidden by the section of the Revised Statutes last above cited.

For these reasons I have returned the articles herewith advising you not to file or record the same in your department until corrected in the respects above mentioned.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION OF THE POLISH BROTHERLY AID SOCIETY APPROVED.

October 19th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to yours of the 18th inst., in re the articles of incorporation of the Polish Brotherly Aid Society, I beg to say that the form of corporation provided for by these articles is that of a mutual protection association organized pursuant to section 3630 Revised Statutes. The purpose clause contained therein is quoted from that section and is legal in all respects. Paragraph 4 of section 148a, Revised Statutes, requires that an incorporation fee of $25.00 be paid for filing the same.

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

ARTICLES OF INCORPORATION — PREFERRED STOCK — DIVIDENDS — RETIREMENT.

Dividends exceeding 8 per cent. may be authorized to be paid on preferred stock, provided percentage of such dividend does not exceed percentage of dividend contemporaneously paid on common stock by a difference of over 8 per cent.

Corporation may not be authorized to retire preferred stock and reissue it as common stock without amendment to articles of incorporation.

October 29th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — In an opinion to you on October 17, consideration was given to the purpose clause contained in articles of incorporation offered for filing by the Bayne-Subers Inventions & Development Co. In that opinion it was determined that the articles of incorporation contained a dual purpose and the right of the incorporators to file same was denied. Attention was also called to the fact that it appeared from the articles of incorporation that the company sought to create a preference in favor of preferred stockholders which would be contrary to and conflict with section 3235a of the Revised Statutes.

I have before me the amended articles of incorporation now offered for filing and it appears that so much of the purpose clause as was objectionable has been omitted so as to express but a single purpose and that purpose of the articles is approved.

Further consideration has been given to the fifth paragraph in the articles of incorporation as amended providing the agreement under which the common and preferred stock shall be held and the following facts have developed in connection therewith:

"A." Permits the preferred stockholders to receive 8% dividend when the common stockholders receive 4%, provided nevertheless, that the earnings of the company are equal to 5% of such common stock, creating thereby a preference in favor of the preferred stockholders of 4%.

"B." Permits preferred stockholders to receive 9% when the common stockholders shall have been paid 5%, provided nevertheless, that the corporation has earned 6% upon the common stock.

"C." Permits the preferred stockholders to receive 10% when the common stockholders have been paid 6%, provided nevertheless, that the company shall have earned a sum equal to 7% on such common stock, thereby creating at most a preference in favor of preferred stockholders of 4%.

The statute while not expressly authorizing the preferred stock to pro-rate with common stock after a payment of not to exceed 8% on the preferred stock, says only that a *preference* of *more* than 8% shall not be created and notwithstanding the opinion in an early Ohio case (Ryan v. Little Miami R. R. Co., 6 O. D. Reprint 1071) it has been considered allowable to permit a further distribution of profits to preferred stockholders, limiting, however, the difference between dividends paid to common stockholders and those to preferred to a sum not to exceed 8% — and this was all that was decided in my former opinion upon these "articles." Attention is called to the fact, however, that clause "D" of this paragraph is uncertain in its terms and entirely meaningless when taken in connection with clauses "A", "B", "C" and "E" and should be stricken out.

Further consideration has been given to the seventh paragraph of the articles of incorporation wherein it is provided that on the first day of July each year, after 1915, any portion or all of the company's preferred capital stock may be retired upon the payment to the stockholder of the par value thereof, together with accrued and accumulative dividends thereon, after written notice of the company's intention so to do has been given not less than thirty days prior to such date. This paragraph further provides that the company "reserves the right to reissue any preferred stock, which has been so retired, as common stock." This clause in the paragraph, in effect, is to amend the articles of incorporation by altering the proportion of the preferred and common stock authorized to be issued without meeting the requirements, as to amendments, of the statute in such case. If permitted, this reservation would allow the company to deal in its own stock by retiring it from the possession of one stockholder to reissue it into the possession of another.

It is my opinion that such construction is not in contemplation of section 3235a, which provides that the preferred stock of a corporation may, if desired, be made subject to retirement at not less than par at a fixed time and price to be expressed in the stock certificate.

In general "the amount of the capital stock of a corporation is that fixed by its charter under authority conferred by the general law and it cannot be changed without legislative authority and when authority is so conferred it must be exercised subject to the conditions and in the mode, if any, prescribed by the statutes." Marshall on Corporations, section 225.

I return herewith the articles of incorporation and further advise that until they have been amended so as to meet the view expressed above they should not be filed or recorded in your department.

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

ARTICLES OF INCORPORATION — NAME — SAVINGS AND LOAN ASSOCIATION.

Savings and loan association may not be authorized to assume name of safe deposit and trust company unless the powers of such company are lawfully authorized.

Articles of incorporation of the Shadyside Savings & Trust Company disapproved.

November 1st, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Yours of the 30th ult., containing the articles of incorporation of the Shadyside Savings & Trust Company has been received. I herewith return the same to you without my approval thereon for the reason that the corporation in question seeks to assume the name of a trust company. I refer you to the opinion of this department given to your predecessor in office, under date of October 21st, 1904 (Opinions of Attorney General, 1904, page 77) in which the view was expressed that a banking company, not organized under the safe deposit and trust company act, should not contain within its name the words "trust company" because this would have a tendency to deceive the public as to the character of the business carried on by such corporation, and the name adopted should be of such kind as to in some sense evidence the character of business in which it proposes to engage.

For the reason that the corporation in question is organized pursuant to the provisions of the act governing savings and loan associations, and not of that governing safe deposit and trust companies, the word "trust" should be eliminated therefrom.

I return herewith the articles of incorporation, suggesting that until such alteration be made in the name thereof as will comply with the opinion herein expressed, you should not file or record the same.

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

ARTICLES OF INCORPORATION OF THE CLEVELAND-ASHLAND DEVELOPMENT COMPANY APPROVED.

Recital in articles of incorporation of real estate corporation that the same shall expire by limitation in twenty-five years unnecessary.

November 12th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Replying to yours of the 7th inst., in re the articles of incorporation of the Cleveland-Ashland Development Company, I beg to say that in my opinion this is a corporation "formed for the purpose of buying and selling real estate," the other powers contained in the purpose clause being mere incidents thereto. It is not necessary that the articles of incorporation should recite that the same should expire by limitation in twenty-five years from the date of issuing the same, as the statute imposes that limitation upon such corporations without it being necessary for the articles to recite the same.

Seeing no objection to the articles, I suggest that you file and record the same as provided by the Revised Statutes.

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

ARTICLES OF INCORPORATION — MUTUAL PROTECTION ASSOCIATION.

Articles of incorporation of mutual protection association must provide that members thereof agree to be assessed specifically for incidental purposes, and must specify kinds of property to be insured.

Articles of incorporation of the Fairfield County Farmers' Mutual Insurance Company disapproved.

November 21st, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I return to you herewith the articles of incorporation of the Fairfield County Farmers' Mutual Insurance Company which has been submitted to this department for approval.

This company thus sought to be incorporated is a mutual protection association which should be organized pursuant to the provisions of sections 3686 and 3687 of the Revised Statutes.

The purpose clause of the articles should, in addition to the language therein contained, state further that, those entering therein "agree to be assessed specifically for incidental purposes," and it should further specify the kinds of property proposed to be insured. This is pursuant to the provisions of section 3687 R. S. The appropriate language can be added to the present articles herewith returned, expressing the above suggestions, and when returned to this department will be approved.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION OF THE SOUTH SIDE SAVINGS & BANKING COMPANY DISAPPROVED.

November 21st, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging receipt of yours of the 20th inst., submitting to me for approval the articles of incorporation of the South Side Savings & Banking Company, I return the same herewith without my approval for the reason that the notary public has not taken the acknowledgement of E. M. Clark, one of the incorporators, which is required to be done by the statutes of this state. I advise that until the correction is made the articles be not filed or recorded in your department.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION OF THE ODELL ABSTRACT COMPANY APPROVED.

December 3rd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of the articles of incorporation of the Odell Abstract Company, which have been submitted to this department for an opinion thereon as to the legality of the purpose clause contained therein, I

beg to say that this proposed corporation is not authorized to guarantee titles and the validity and execution of securities as contemplated by section 3821ggg of the revised Statutes, nor is it necessary for this character of corporation to qualify under that section of the statutes. It is in substance and form the same as that of the Cuyahoga Abstract Company which was filed in the department of the secretary of state, April 6, 1900.

I therefore express the opinion that the purpose clause is legal and that the same should be filed and recorded by you as required by law.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION — PURPOSE CLAUSE.

Purpose clause of articles of incorporation of the Ohio Public Service Company disapproved as being multiple.

December 3rd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of the articles of incorporation of the Ohio Public Service Company, submitted to this department for an opinion as to the legality of the purpose clause contained therein, I beg to say that in my opinion the same is violative of the provisions of section 3235 R. S., as construed by the supreme court in the case of State ex rel. v. Taylor, 55 O. S. 67.

I herewith return the same to you, advising that the articles be not filed or recorded in their present form.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

CORPORATION — HOSPITAL — DIPLOMAS FOR NURSES.

Corporation formed for purpose of conducting hospital may without specific authority issue diplomas to nurses completing course in nursing as taught in such hospital.

December 3rd, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of yours of the 22nd inst., enclosing therewith the letter and inquiry of Hollis E. Grosshans, which is in substance as follows:

> 1. Can the trustees of the city hospital of East Liverpool, Ohio, issue diplomas to such persons as pass a satisfactory examination in nursing as taught in that institution, evidencing their competency and qualification as nurses?
>
> 2. Does the proposed purpose clause enclosed with communication and to be incorporated in the articles of incorporation of such institution, sufficiently embrace such authority?

Section 3235 R. S. provides for the formation of corporations for the purpose of erecting, owning and conducting sanitoriums for receiving and caring for

patients and for the medical, surgical and hygienic treatment of such patients and for instruction of nurses in the treatment of diseases and in hygiene.

No special authority is contained in the foregoing language to issue diplomas or certificates evidencing the course of training given at such institutions, and, in my opinion, none is necessary. Such diplomas would not be in the nature of degrees or honors as conferred by colleges, universities and other institutions of learning, pursuant to the provisions of section 3726 R. S., but are merely certificates showing that the individuals obtaining them have followed the course of study and passed the examinations prescribed by the trustees or faculty of such institution. A corporation organized pursuant to the provisions of section 3235 R. S. carries with it the implied power to issue such diplomas.

I am of the opinion that the purpose clause submitted with Mr. Grosshans' letter is sufficiently broad and explicit to include the power referred to.

I herewith return to you the enclosures transmitted to me.

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

BANK — LIABILITY OF STOCKHOLDER.

Liability of stockholder of banking corporation limited to unpaid installments on par value of stock owned by him.

December 9th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to yours of the 7th inst., I beg to say that since the adoption of the amendment to section 3, article XIII of the constitution of Ohio, there is now no double liability attaching to any stockholder in any bank organized under the laws of this state. The liability as expressed in the amendment, viz: "In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her," operates to substitute such liability for that incorporated in section (3821-77) R. S.

I herewith return to you the letter of the West Milton Bank transmitted to me.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ARTICLES OF INCORPORATION OF THE INTERSTATE LIVE STOCK INSURANCE COMPANY APPROVED.

December 11th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of your favor of the 10th inst. enclosing the articles of incorporation of the Interstate Live Stock Insurance Company which have been submitted to this department by you for approval.

Mr. W. E. Sykes of Marietta, who is representing the incorporators, says in his letter to you that this company desires to organize pursuant to the provisions of section 3634 R. S. The powers of such company are not enumerated under section 3634 but are given in paragraph 3 of section 3641 R. S.

The purpose clause of the articles complying with the requirements of the section of the Revised Statutes cited, I have therefore approved the same, as required by section 3632 R. S., and return them herewith to you for filing and record.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION — SUBORDINATE LODGE OF FRATERNAL ORDER — INSURANCE.

Subordinate lodge of fraternal order may not, by articles of incorporation, be authorized to carry on insurance business, without complying with fraternal beneficiary association act.

Articles of incorporation of Fulton Council No. 328, Jr. O. U. A. M. disapproved.

December 12th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — With your letter of November 15, you submit proposed articles of incorporation of the Fulton Council No. 328, Jr. O. U. A. M., whereby it is sought by the subscribers thereto to form a corporation not for profit under the general corporation laws of this state. The purpose for which said corporation is formed is,

> First. To maintain and promote the interest of Americans and shield them from the depressing effects of unrestricted immigration; to assist them in obtaining employment and to encourage them in business.
>
> Second. To establish an insurance branch and a sick and funeral fund.
>
> Third. To maintain the American public school system, to prevent interferences therewith and to encourage the reading of the Holy Bible in the schools thereof.
>
> Fourth. To promote and maintain a national orphans' home.
>
> Fifth. Opposed to the union of the church and state.

The parent body of the Jr. O. U. A. M. is a fraternal beneficial association licensed to transact business in this state in accordance with section (3631-11) et seq., and in accordance therewith there may be also licensed by the superintendent of insurance subordinate lodges within this state but such lodges must be authorized in conformity to the act relating to fraternal beneficial associations and could not, therefore, secure the benefits which that act grants by incorporating under the general laws.

Corporations in this state, if they come within one of the many classes specially provided for by our statutes must be organized and governed entirely by such act and may not receive under the general laws the same privileges and benefits which may be secured through the special act.

The articles of incorporation which you have submitted ought not to be filed for the reason that this corporation seeks the right to do an insurance business without complying with the special statutes in that regard.

If the articles are so amended as to eliminate the insurance business from the purpose clause, there is no reason why a charter should not be granted.

Very truly yours,

WADE H. ELLIS,

Attorney General.

ARTICLES OF INCORPORATION — SAVINGS AND LOAN ASSOCIATION — CAPITAL STOCK.

Par value of shares of capital stock of savings and loan association must be $100.00.

Articles of incorporation of the Bridgeport Bank & Trust Company disapproved.

December 18th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of yours of the 16th inst., containing the proposed articles of incorporation of the Bridgeport Bank & Trust Company which you have submitted to this department for its approval.

I return the same herewith not approved for the reason that the articles disclose that the amount of the capital stock is divided into shares of $50.00 each instead of $100.00 as provided by section 3797 Revised Statutes. Please call the attention of the attorneys submitting these articles to this fact and the change will undoubtedly be made.

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

ARTICLES OF INCORPORATION — PURPOSE — PROFESSIONAL BUSINESS.

Corporation not for profit may not be authorized to employ attorneys-at-law for mutual benefit.

Fee for filing articles of incorporation of company formed not for profit but having a capital stock is $2.00.

Articles of incorporation of the National Inventors' Protective Association of the United States of America disapproved.

December 20th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of yours of the 18th inst. enclosing the articles of incorporation of the National Inventors' Protective Association of the United States of America, together with your request for an opinion as to the legality of the purpose clause contained therein and the proper fee to be charged for filing the same.

Replying thereto I beg to say in reference to the purpose clause that although it is inaccurately expressed yet the purpose seems to be implied that the corporation is to be formed to promote the social and educational welfare of the members of the association composed of inventors.

The part which in my opinion is objectionable, is the following:

> "To obtain the most efficient legal services for the answering of questions pertaining to patent and civil law and to procure patents, caveats, copyrights, etc., at a minimum cost."

This, in my opinion, is violative of that part of section 3235 of the Revised Statutes prohibiting the creating of corporations to engage in professional business. This view is sustained by the case of the State ex rel. Physicians' Defense Com-

pany v. Laylin, Secretary of State, 73 O. S. 90-100. With that portion of the purpose clause eliminated I make no other objection thereto.

This form of corporation seems to be provided for by paragraph 5 of section 148a R. S., and the fee for filing the articles of incorporation thereof as therein specified is $2.00.

I return the same to you together with the postoffice order attached thereto advising that until the above quoted matter is stricken therefrom you do not file or record the same.

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

SAVINGS AND LOAN ASSOCIATION — NAME.

Name of savings and loan association must begin with "The" and end with "Company."

Articles of incorporation of the Farmers' & Merchants' Bank disapproved.

December 24th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of the articles of incorporation of the Farmers' & Merchants' Bank to be located at Gallipolis, Ohio, I return the same herewith to you not approved for the reason that the name is not such as is authorized by law to be adopted by such corporation.

Chapter one of the corporation code is devoted exclusively to the "creation of corporations and general purposes," and in that chapter section 3236 provides that "the name of the corporation * * * shall begin with the word 'The' and end with the word 'Company' unless the organization is not for profit," etc.

In that same chapter section 3269 provides,

> "The provisions of this chapter do not apply when special provision is made in the subsequent chapters of this title, but the special provision shall govern, unless it clearly appear that the provisions are cumulative"; etc.

The corporation in question proposes to conduct a general banking business with all the powers and subject to all limitations conferred by section 3797 R. S. This character of banking corporation obtains its powers from chapter XVI, title II of the Revised Statutes, beginning with section 3797 and continuing to section 3820 inclusive. In these sections no special powers are enumerated for the form of the corporation or that would exempt it from the operation of section 3236 R. S.

The articles, therefore, do not comply with the section last cited because the name of the corporation is not made to end with the word company, which is required of all corporations organized for profit, unless the contrary appears in the statutes defining such corporation's powers.

I therefore return the articles in question to you advising that until the same be modified in the particular pointed out you do not file or record the same.

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

ELECTIONS — MUNICIPAL — RETURNS — EFFECT OF FAILURE PROPERLY TO CERTIFY.

Returns of municipal election should be certified, not to the board of deputy state supervisors of elections, but to the clerk or auditor of the municipality.

Secretary of state may order clerk of board of deputy state supervisors to re-deliver returns erroneously certified to such board.

Certificates of election may be issued after time within which returns must be made has expired.

December 24th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Replying to your letter of the 20th inst., enclosing the letter of Mr. Elias Wetherholt, clerk of the city of Gallipolis, Ohio, I beg to say that the facts set forth in the letter of Mr. Wetherholt inform me that the returns made by the judges and clerks of the election held in the city of Gallipolis were not made in compliance with section (2966-8) of the Revised Statutes governing elections in municipalities in this, to-wit, the returns were not certified to the clerk or auditor of the municipality in or for which the election was held, but by mistake were certified to the board of deputy state supervisors or other board not authorized to receive the same.

The question presented involves the power of now having the election judges certify the returns to the clerk or auditor of the city as is required by the section above cited. I am of the opinion that the error of the judges and clerks of election does not invalidate the election of the persons duly elected, and that upon proper proof of such fact it would be perfectly legal for you to require the board of deputy state supervisors to surrender to the clerk of the municipality the returns so inadvertantly made to such board. The mere fact that the return is addressed to some board or officer other than the one properly authorized to receive the same, does not invalidate such return and does not impair such return as evidence of the due and proper election of the persons therein certified to be elected to the respective offices as mentioned therein. Upon such order being made to the board of deputy state supervisors or other officer having in charge such returns, the clerk of the board of elections should deliver the same to the clerk of the municipality and the same can then be treated as originally having been made to such officer. Upon the returns being so corrected certificates of election should be issued to the persons certified therein to have been duly elected, and the qualification of such officers should be made as required by law. Because the returns were not properly made within the time mentioned in the statutes does not now operate as a bar to these proceedings being had as heretofore outlined.

Very truly yours,

WADE H. ELLIS,
Attorney General

PREFERRED STOCK — REDEMPTION OF.

Corporation may not be authorized to redeem preferred stock by exchange for common stock.

December 27th, 1907.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of yours of the 26th inst., enclosing the certificate of the increase of the capital stock of the Cogswell Dental

Supply Company, I beg to say in answer to your inquiry that the provision contained therein, for exchanging preferred stock at any time for common stock of the same company seems to be unauthorized by the Revised Statutes of this state. The provision for redeeming preferred stock is contained in section 3235a as follows:

> "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 attempt in such clause to exchange preferred for common stock, is not a redemption thereof, and is not authorized by law.

I am, therefore, unable to approve the same, and return it herewith, advising that until the objectionable portion thereof be removed the same be not filed or recorded.

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

(To the Auditor of State)

TAXATION — EXEMPTIONS.

Tests by which to ascertain whether a given property is exempt from taxation under article XII, section 2, of the constitution, and section 2732 R. S.

In re properties of the Young Men's Institute of Cincinnati and the Waddell Ladies' Home Association of Marion.

January 12th, 1907.

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

DEAR SIR: — I have your request for an opinion upon the merits of the applications of The Young Men's Institute of Cincinnati, and The Waddell Ladies' Home Association of Marion, for remission of taxes under the provisions of section 167 of the Revised Statutes and your further request for the general rules governing the exemption of property from taxation. After providing for taxing property generally by uniform rule, the constitution, article XII, section 2, provides:

> "* * * but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property, to an amount not exceeding in value two hundred dollars, for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; * * * ."

From this it appears that the constitution is not self-operative and no property is exempt until the General Assembly has by general law so provided.

Little v. Seminary, 72 O. S. 417, 426.

The constitution of 1802 contained no corresponding provision and the general assembly was unrestrained in its power to exempt property from taxation. The frequently cited case of Cincinnati College v. The State, 19 Ohio 110, therefore, is of interest so far as the statute then under consideration bears resemblance to the existing law. Exemptions are always strictly construed against the claimant and the statute at that time exempted certain property when used *exclusively* for certain purposes, and further provided that such property should not be leased or otherwise used for profit. The decision only went so far, then, as to hold that inasmuch as the property then in question was not used exclusively for the designated purposes but was leased for profit, no exemption could be allowed.

Acting under the power conferred by the section of the constitution above quoted, the general assembly provided for the exemption of

> "all public school houses, and houses used exclusively for public worship, * * * and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit; all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning not used with a view to profit, * * *. All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and

credits appropriated solely to sustaining and belonging exclusively to such institutions."

56 O. L. 177;
61 O. L. 39.

These paragraphs, with additions unimportant in this connection, are now found in the same language in section 2732 of the Revised Statutes.

The first important case under the new constitution and the statute pursuant thereto, quoted above, was Gerke v. Purcell, 25 O. S. 229. In this case it was definitely decided that to constitute a public school or public charity, such school or charity need not be owned or controlled by some division of the government nor absolutely free to all seeking to avail themselves thereof. I quote from the syllabus:

"The fact that the use of property is free, is not a necessary element in determining whether the use is public or not. If the use is of such a nature as concerns the public, and the right to its enjoyment is open to the public upon equal terms, the *use will be* public, *whether compensation be exacted or not.* Whether the use is free or not, becomes material only where some other element is involved than that of its public character, as, for instance, whether the use is charitable as well as public.

"A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor.

"Schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit, are 'institutions of purely public charity' within the meaning of the provision of the constitution, which authorizes such institutions to be exempt from taxation.

"The constitution, in directing the levying of taxes and in authorizing exemptions from taxation, has reference to property, and the uses to which it is applied; and where property is appropriated to the support of a charity which *is purely public,* the legislature may exempt it from taxation, without reference to the manner in which the title is held, and without regard to the form or character of the organization adopted to administer the charity.

"The express authority given in the constitution to exempt from taxation 'houses used exclusively for public worship,' carries with it, impliedly, authority to exempt such grounds as may be reasonably necessary for their use; but such grounds must subserve the same exclusive use to which the buildings are required to be devoted.

"A parsonage, although built on ground which might otherwise be exempt as attached to the church edifice, does not come within the exemption. The ground in such case is appropriated to a new and different use. Instead of being used exclusively for public worship, it becomes a place of private residence. The exemption is not of such houses as may be used for the support of public worship, but of houses used exclusively as places of public worship."

Following the Gerke decision the supreme court had under consideration the case of a corporation organized to afford "an asylum for destitute men and

women, and incurable sick and blind, irrespective of their nationality and creed," and held such an institution to be one of "purely public charity."

> "The word 'institutions,' in the sixth clause of section 3 of the tax law, is used to designate the corporation or other organized body instituted to administer the charity and the real estate described as belonging to such institutions has reference to property owned by them; and to entitle such institutions to hold the property exempt from taxation, they must not only own it, but it must be so used as to fulfill the requirements of the statute.
>
> "Real estate leased to such an institution for a term of years at a stipulated rent is not exempt from taxation, although, by the terms of the lease, the institution may have agreed with the lessor to pay the taxes."
>
> Humphries v. Little Sisters of the Poor, 29 O. S. 201.

In Cleveland Library Association v. Pelton, 36 O. S. 253, the claimant of the exemption was organized for "the diffusion of useful knowledge, and the acquirement of the arts and sciences, by the establishment of a library of scientific and miscellaneous books for general circulation, and a reading room, lectures and cabinet." The benefits of the association were open to all on equal terms, and a fee was exacted of each member. The association was held to be an "institution of purely public charity." This association was not, however, exclusively occupying the real estate in question and upon that point it was held:

> "Where such association owns a lot of ground, with a block of buildings thereon, constructed as an entirety, and the buildings have a basement and three stories over the same, each divided into rooms adapted to its use, and for renting, some of which, on each floor, are used by it for its purposes; some are rented out, and the rents received are applied exclusively to *keeping the property in good repair,* and to the purposes of the association, and some are vacant, held, that such parts of said building and appurtenances as are rented, or otherwise used with a view to profit, are not exempt from taxation."

It was sought by the plaintiff in the Pelton case to distinguish that case from the Cincinnati College case, 19 O. 210, because the latter was decided under the statute of 1846 which provided that exempt property should be exclusively used for the designated public purpose, while the statute of 1864, under which the Pelton case arose, omitted that word. The court points out, however, that the statute of 1864 contained an express provision that the exemption applied only to the property "not leased or otherwise used with a view to profit." Inasmuch as the present statute is in that respect identical with the statute of 1864, the Pelton case is still authoritative unless modified as hereinafter discussed.

In City of Toledo v. Hosler, 54 O. S. 421, it was determined that property owned by a municipality employed for a public purpose, though situated outside the county, (such as property owned and employed for furnishing natural gas as part of a municipal plant) is exempt.

Municipal property, however, like that of institutions not under public control is only exempt from taxation to the extent that it is devoted to public purposes.

> "Where part of a town hall, erected by taxation, in a village, is rented out for private purposes or business, to that extent it is subject

to taxation. The legislature has no power to exempt it from such taxation."

Scott v. Village of Athens, 1 N. P. 94.

But public lands when leased for a term of more than fourteen years, not subject to revaluation, are not taxable beyond the lessee's interest, notwithstanding section 2733 R. S. treats such lessee as the owner.

"Lands owned by a municipal corporation and leased for more than fourteen years, not subject to re-valuation, are under the provisions of section 2733, Revised Statutes, taxable only to the extent of the lessee's interest therein."

Zumstein, Treasurer v. Coal Co., et al., 54 O. S. 264.

Prior to this was the case of Ludlow v. Brewster, 3 C. C. 82, affirmed by the supreme court, February 2, 1892, without report, which held:

"Lands held under lease for any term exceeding fourteen years, and not subject to re-valuation, belonging to a municipal corporation, are not made subject to taxation by section 2733, Revised Statutes, as passed February 17, 1881, although they are exempt under the provisions of section 2732."

I do not attempt to reconcile these two cases and, therefore, follow the later case, the one officially reported in 54 O. S.

While, then, the court has held that a lessee of city property was only compelled to pay taxes upon the value of his interest therein and the fee was therefore exempt when leased for more than fourteen years, it was later held that where real estate was purchased by the municipality for a public purpose and never used therefor, but was rented out from year to year and the proceeds thereof turned over to one department of the city, the real estate was not exempt.

"The ownership of lands by a municipal corporation does not bring them within any statutory exemption from taxation unless they are used in the exercise of a municipal function, and this is true although they are leased by the municipality and the money realized is applied to a public purpose."

Cincinnati v. Lewis, 66 O. S. 49.

In Davis, Auditor v. Cincinnati Camp Meeting Association, 57 O. S. 257, the auditor claimed that the association, while a public charity and entitled to a proper exemption, was under the Cincinnati College case, 19 O. 110, and the Library Association case 36 O. S. 253, liable for taxation, because the association as owner of certain camp grounds, leased certain rights and privileges for profit. The court, however, distinguished the cases, the reason appearing in the syllabus:

"Where an association, organized and conducted for the purpose of a purely public charity, as a camp meeting, under the supervision and control of some church, owns real estate devoted exclusively to the same use; and thereon provides privileges for the comfort and convenience of those who may attend the meeting, the fact that it makes charges for the use of these privileges, does not subject its property, nor the privileges so provided, to taxation under the laws of this state."

The latest decision involving the exemption of public charities involves a new question under section 2732 R. S., being that part thereof exempting not the real estate of institutions of purely public charity but that part exempting the moneys and credits belonging to such institutions. It was contended that this clause was unconstitutional and that all credits exceeding the sum of two hundred dollars were beyond the legislative power of exemption. The court sustained the act and held such credits exempt in the following syllabus:

> "The sixth subdivision of section 2732, Revised Statutes, is within the authority which is conferred upon the general assembly by section 2 of article 12 of the constitution.
>
> "It exempts from taxation an endowment fund of a college which belongs exclusively to it, and which is devoted solely to deriving an income for its support."
>
> Little v. Seminary, 72 O. S. 417.

In 1890 the general assembly attempted to extend the exemptions theretofore allowed to the property of the Grand Army of the Republic and similar organizations of veterans, 87 O. L. 141, (2732-3) Bates.

In 1898 the act was further amended to include the property of the order of Masons, Odd Fellows and Knights of Pythias, (93 O. L. 219). In 1900 the act was still further amended to include:

> " * * * an association for the exclusive benefit, use and care of aged, infirm and dependent women, or religious or secret benevolent organization, maintaining a lodge system, or incorporated association of ministers of any church, or incorporated association of commercial traveling men * * * ." (94 O. L. 371).

Some question might arise as to the necessity of this subsequent legislation and its effect. It is manifest that the general assembly was only authorized to exempt such associations and orders, so far as the same were "institutions of purely public charity." If such associations are to be so regarded they were already exempted by the statute (Sec. 2732) before the supplementary acts and amendments were passed. If they are not "institutions of purely public charity," of course the general assembly could not exempt them. The only decision upon this branch of the subject is that of Morning Star Lodge v. Hayslip, 23 O. S. 144, in which it is held that.

> "A charitable or benevolent association which extends relief only to its own sick and needy members, and to the widows and orphans of its deceased members, is not 'an institution of purely public charity'; and its moneys held and invested for the aforesaid purposes are not exempt from taxation."

Whatever the courts would now hold upon the question of secret or fraternal associations in view of the recent amendments (and manifestly such amendments would be upheld unless the contrary view were imperatively required by the constitution) it seems clear that a home for indigent women, conducted without a view to profit, even though a stipulated sum is required from each inmate, is exempt, not because of the special exemption quoted but because it falls within the general provisions of section 2732.

Coming then to the two particular associations mentioned, I have to advise you that in my opinion the property of both the Young Men's Institute of Cin-

cinnati and the Waddell Ladies Home Association of Marion are exempt from taxation.

From a careful study of all the statutes and decisions upon the subject of tax exemptions in Ohio, the following several rules for the guidance of your office may fairly be deduced:

1. Property owned by a municipality, whether within or without the municipality, or within or without the county in which such municipality is located, is exempt provided such property is actually employed for a public purpose.

2. If such property is not employed for a public purpose but is leased for a period of fourteen years or more without revaluation, the interest of the lessee is separately taxed, but the fee is exempt.

3. If such property is not employed for a public purpose but is rented from year to year, even though the rental is paid into one of the departments of the municipality, the entire estate is subject to taxation.

4. If property owned by the public, is, in part, devoted to public purposes and, in part, is rented out for private purposes, such property is subject to taxation in the proportion to which it is used for private purposes.

5. The property of institutions of purely public charity, including moneys and credits endowing such charity, are exempt.

6. An institution is one of purely public charity notwithstanding a charge may be exacted from those taking advantage thereof, so long as said charge is imposed for the purpose of maintaining the charity and is not made with a view to profit.

7. So far as the real estate of an institution of purely public charity is rented out to private uses unconnected with such charity, such real property is subject to taxation, but where private enterprises are conducted upon such real property for the purpose of accomplishing the ends for which the institution was created, such enterprises do not change the character of the institution even in part and the whole estate is exempt.

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

ELECTRIC LIGHT COMPANY — RECEIVER — TAXES.

Excise tax on gross receipts of electric light company must be paid by receiver making sale of property after expiration of tax year.

January 12th, 1907.

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

DEAR SIR: — You inquire whether the excise tax on electric light companies for the year 1906 is to cover the period from May 1, 1905 to May 1, 1906, and if so whether the same is payable by a receiver of such company who sold the property July 1, 1906?

In reply thereto I will say that in my opinion the tax is made on the gross receipts for the year from May 1, 1905 to May 1, 1906.

The state board of appraisers and assessors on or before the second Monday in July, should ascertain the amount for the year aforesaid, and in the month

of November of said year, the auditor of state shall charge and collect the same. The tax in this case is properly payable by the receiver and the claim should be presented to him.

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

TAXATION — EXEMPTION.

Property of the Ohio Baptist Convention is not exempt from taxation.

January 15th, 1907.

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

DEAR SIR: — The application of the Ohio Baptist Convention for remission of taxes made under favor of section 167 of the Revised Statutes is based wholly upon the construction of the act creating the corporation and not upon any claim that the property in question is devoted to religious or charitable purposes. This association was incorporated in 1834 by special act of the general assembly as the Baptist Convention of the State of Ohio. In 1884 this name was changed to the Ohio Baptist Convention. The act of incorporation contained the following conditions:

> "Provided, that the annual income of the property of the said Convention shall not exceed five thousand dollars ($5,000). Provided, further, that all such real estate which may be set apart or appropriated for the use of schools or seminaries of learning exceeding one hundred and sixty (160) acres shall be subject to taxation for state and county purposes."

It is claimed by the applicant that the last proviso exempts from taxation all of the corporation's property up to one hundred and sixty acres on the ground that the expression of one fact involves the exclusion of others not expressed. The further claim is made that this act having been passed under the constitution of 1802 expresses a contract between the state and the corporation created by it so that subsequent constitutional and statutory provisions are not controlling upon the corporation.

I cannot assent to either of these propositions. The general assembly by the two candidates quoted placed limitations upon the corporation thus limiting its powers and privileges instead of granting additional powers and privileges. Grants of exemption are, of course, strictly construed. This act then does not grant an exemption of one hundred and sixty acres or any other amount. The exemption, if any, given from time to time by general law was, however, limited so far as this corporation was concerned to the number of acres mentioned, regardless of the fact that such general statute might be much more liberal.

In any event the corporation has no irrevocable grant from the state exempting it from taxation to any degree and it is subject to existing law. The last section of the act creating the corporation reads as follows:

> "That any future legislature shall have power to alter, repeal, amend or modify this act, but such repeal, alteration, amendment or modification shall not divert the property or funds of said corporation from the purposes expressed in this act."

From this it is apparent that the association is subject to existing law and, hence, that it is not entitled to the exemption claimed.

I return herewith papers submitted by the applicant.

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

TAXATION — EXEMPTION.

In re properties of the Cincinnati Union Bethel, the Ophthalmic Hospital of Cincinnati and the Woman's Educational and Industrial Union.

January 15th, 1907.

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

DEAR SIR: — Under the rules heretofore laid down for the exemption from taxation of the property of institutions of purely public charity, I have to advise you that the various applicants for remission under favor of section 167 are in my opinion entitled to the relief sought. The applicants are as follows:

The Cincinnati Union Bethel.
The Ophthalmic Hospital of Cincinnati.
The Women's Educational and Industrial Union.

The property of this latter institution is, however, exempt only so far as it is devoted to the direct uses of the institution. Such of the property as is rented to tenants for profit is subject to taxation even though the rents are applied to the main purposes of the institution.

I am waiting for further information before advising you as to the Harugari Liederkranz of Dayton. I enclose herewith all the papers submitted to me except as to the last mentioned association.

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

BOARD OF REVIEW — POWER OF, TO SECURE EVIDENCE.

Board of review may compel bank officers to attend and testify as to accounts of individual depositors and to refer to books of bank for that purpose.

Board of review may employ expert to investigate value of street railway property.

February 23rd, 1907.

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

DEAR SIR: — Your letter of recent date requests an opinion on the following questions:

First: Can boards of review compel the attendance of the officers of banks and require them to produce the books of the banks, showing the accounts of an individual depositor?

Second: Have boards of review authority to employ and pay for the services of an expert to value the property of street railway companies?

Boards of review for municipalities have all the powers heretofore conferred on annual city boards of equalization (section (2819-1) R. S.). The power is expressly conferred on such annual city boards

> "to call persons before them and examine them under oath in regard to their own or others property, moneys, credits and investments and the value thereof * * * and to order any property, credit or investment to be placed on the duplicate for taxation, and fix the value thereof which has not been listed for taxation."

(Section 2805 R. S.)

Power to compel a witness to refer to books and papers in his possession for the purpose of enabling him to answer proper questions is fairly implied from the power "to call persons before them and examine them under oath." This principle seems to be recognized, although not expressly affirmed, in the cases of Bank v. Hughes, 50 F. D. 1; Heffner v. Mahoney, 19 W. L. B. 369.

The following quotations from the opinion of the court in the latter case are applicable to the powers of boards of review:

> "The board has neither right nor power to question a person generally about his business, as was done by it on the 30th day of July, 1886, when it required the defendant to give the names of *all* the persons for whom he loaned money during the year 1886. The inquiries, in any given case, should be limited to some particular property or persons, the property not assessed, or the persons who may own such property.
>
> "That no particular person's tax return was then under investigation was not material. If the board was required to have some particular person's return under inquiry before it could question any one, take evidence from him, one purpose of the law would be defeated. If knowledge of who was the owner must precede investigation, then investigation would never be made in cases where the owner of property not assessed was not known to the board."

I am therefore of the opinion that boards of review can compel bank officers to attend and testify as to accounts of individual depositors, and to refer to the books of the bank for the purpose of giving such testimony.

Section (2819-3) R. S. authorizes such boards to provide for the payment of "such incidental expenses as said board shall deem necessary * * * out of the county treasury." I believe it is within the power of the board to employ an expert to investigate the value of street railway property so that he may be qualified to testify before them as to its true value. The expense thus incurred is incidental to the proper performance of the duties imposed upon the board and may be paid out of the county treasury.

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

MUNICIPAL BOARD OF REVIEW — TIME OF MEETINGS.

Board of review of municipal corporation must meet in annual session on first Monday in June, but may recess until such time as may be convenient and necessary.

April 19th, 1907.

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

DEAR SIR: — The facts set forth in the several communications transmitted to me with your inquiry of the 17th inst. seem to evidence the necessity of the boards of review for municipalities, provided for by section (2819-1) to (2819-5) of the Revised Statutes, to meet at the time the assessors are performing their work and the question presented is, whether the sessions of the board can be so provided for pursuant to the provisions of section (2819-2). That section is as follows:

> "Said board of review shall meet annually at the office of the county auditor on the first Monday in June, and shall continue in session from day to day (except Sundays and legal holidays) until the Saturday preceding the first Monday in June of the following year; provided that the state board of appraisers and assessors shall have the authority to fix the time within which the work shall be completed."

The time of the meeting of the board, to wit: on the first Monday in June, is the initial meeting annually, and that time, in my opinion, cannot be changed or altered by an action of the state board of appraisers and assessors, or otherwise, except by legislative amendment; but the state board of appraisers and assessors have the authority to fix the time within which the work of the various boards of review shall be completed. In my opinion if it is found to be necessary that the sessions should be held in the month of April the state board of appraisers and assessors can fix the time beginning with the first Monday in June, and then have the board recess from the end of the given period fixed by such state board until the first Monday in April of the succeeding year, and such order would not thereby attempt to change the time of the initial meeting on the first Monday of June.

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

DOW TAX — DISTRIBUTION OF.

Revenue derived from Dow tax on business within the limits of a municipal corporation divided between state, county and municipality; township treasury may not share therein.

May 17th, 1907.

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

DEAR SIR: — Your letter of May 15th requests my opinion as to the right of a township to share in the distribution of revenues resulting from traffic in intoxicating liquors carried on within the limits of a municipal corporation situated in the township.

Section (4364-17) R. S., after providing that three-tenths of the revenues and fines resulting under the provisions of that act shall be paid into the state treasury, provides that,

> "Five-tenths of the money so paid, shall, upon the warrant of the county auditor, be paid on account of any business aforesaid, carried on in any such municipal corporation or township into the treasury of said corporation or township, one-half to the credit of the police fund, and one-half to the credit of the general revenue fund thereof."

The only reasonable construction which can be given to this clause of the statute, considered by itself, is that the five-tenths is to be paid into the treasury of the municipal corporation in case the business was carried on within the municipal limits and into the treasury of the township in case the business was carried on in a township outside the municipal limits. The money is to be paid into "the treasury of said corporation or township." No division between the respective treasuries is authorized and no basis of such division is indicated. Since every municipal corporation is also a part of a township, the provision for the payment into the municipal treasury would be meaningless if the statute were construed as intending that in all cases where the traffic was carried on anywhere within the limits of the township, the revenue should be paid into the township treasury.

The construction above indicated is confirmed by the clause of the statute immediately following that quoted above,

> "Provided, in corporations having no police fund the *entire five-tenths* shall be passed to the credit of the general revenue fund thereof, and in townships having no police fund, said one-half of five-tenths shall pass to the credit of the poor fund thereof."

This clause excludes any hypothesis that the legislature intended a division of the fund between the township and the municipal treasury. It provides in substance that in municipal corporations having no police fund the *entire five-tenths* shall go to the general revenue fund of the corporation, and in townships having no police fund the entire five-tenths shall be divided between the poor fund and the general revenue fund.

The remainder of the statute provides that in counties having a county infirmary the remaining two-tenths goes to the poor fund of the county, and in other counties the two-tenths goes to the infirmary fund or poor fund of the municipal corporation if the business from which the revenue is derived is carried on within its limits; otherwise to the infirmary fund or poor fund of the township.

The final clause of the statute is a limitation upon the former clause which provided for the division of the five-tenths between the poor fund and the general revenue fund of the township. It provides that in counties having no county infirmary "when the money is paid on account of any business carried on in any township outside of any such municipal corporation, said five-tenths, also, shall be passed to the credit of the infirmary fund or the poor fund of said township."

It follows that township treasuries have no share in the revenues derived from business carried on within the limits of a municipal corporation.

Very truly yours,

WADE H. ELLIS,

Attorney General.

TAX INQUISITOR — COMPENSATION OF.

Tax inquisitors not entitled to compensation for services rendered subsequent to decision of supreme court in State ex rel. v. Lewis, June 26th, 1906; and in cases wherein petitions in actions to test validity of contracts were filed before that date, inquisitors not entitled to compensation for services rendered after such petitions filed.

June 7th, 1907.

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

DEAR SIR: — In answer to your recent inquiry I beg to advise you that tax

inquisitors in general are not entitled to compensation for services performed after June 26th, 1906, the date of the decision of State ex rel. v. Lewis, 74 O. S., 403; and in those instances in which suits challenging the validity of particular contracts were filed prior to that date, the parties to such contracts are not entitled to compensation for services performed after the filing of the petitions.

The recent cases of Thomas v. State, No. 9913, and Gilfillan v. State, No. 10153, involving the rights of tax inquisitors under existing contracts, were remanded to the circuit court with instructions "to enter such modified judgment as will permit payment to the plaintiffs in error of the stipulated compensation for the services which they rendered before the filing of the original petitions in these cases."

The original petition in one case was filed March 10th, 1905, and in the other June 1st, 1905, so that it is apparent from the terms of the decree of the supreme court that the filing of the petition in one case did not affect the rights of the tax inquisitor whose contract was the subject of the other action.

Where suits challenging the validity of the contract of a tax inquisitor were filed prior to the decision in State ex rel. v. Lewis it is to be presumed that the supreme court would follow its decision in the cases above referred to, and would allow the tax inquisitor to be paid only for services rendered prior to the filing of the petition testing his particular contract. But if there are any such cases aside from the two just decided, they must be few in number, and the more important question is as to the status of those tax inquisitor contracts not yet fully performed, which have not been the subject of litigation.

In the decision of the Thomas and Gilfillan cases the supreme court held that tax inquisitor contracts entered into on the faith of its prior decisions in State ex rel. v. Cappellar, 39 O. S., 207 and State ex rel. v. Crites, 48 O. S. 142, holding valid the law authorizing such contracts, were to some extent protected against impairment by its subsequent decision in State v. Lewis, overruling the prior cases, and that this protection was referable to those clauses of the federal and state constitutions which prohibit the impairment of the obligation of contracts. If, however, these constitutional provisions prohibit the impairment of the obligation of contracts by judicial decisions, then tax inquisitors, having contracts for definite periods at the time of the decision in State v. Lewis, would be entitled to continue to perform them and receive the stipulated compensation until the expiration of the time fixed by their respective contracts. That provision of the contract which fixes the time during which the employment shall continue is just as inviolate as the provision which fixes the rate of compensation. Clearly the obligation of an executory contract is impaired when compensation is denied for services performed in accordance with its terms, although such services are performed after notice of a change in the law.

The true rule seems to be that neither the state nor the federal constitution prohibits the impairment of the obligation of contracts by judicial decisions unless such decisions are founded upon and give effect to a *law passed subsequent to the making of the contract.* In such cases it is, of course, the statute itself as construed by the judicial decision that impairs the obligation of the contract.

The state constitution provides, article II, section 28,

> "The *general assembly* shall have no power to pass retroactive laws or laws impairing the obligation of contracts * * * ."

The federal constitution provides, article I, section 10,

> "No state shall * * * *pass any law* * * * impairing the obligation of contracts."

The following decision of the United States supreme court in the case of National Association v. Brahan, 193 U. S., 635, 647, states the rule of the federal courts on this question:

> "The federal questions presented by the record are reducible to two, to-wit: (1) That the decision of the Supreme Court of Mississippi was in effect an impairment of the contract between the plaintiff in error and defendant in error. * * *
>
> 1. This contention is untenable. We said in Bacon v. Texas, 163 U. S. 207:
>
> "Where the federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the constitution, so as to give this court jurisdiction on a writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court. Lehigh Water Co. v. Easton, 121 U. S. 388; New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18; Central Land Co. v. Laidley, 159 U. S., 103, 109."

In the case at bar there was no subsequent statute.

> "There was a change in decision, it is contended, but against a change of decision merely section 10, article 1, cannot be invoked."

See also Central Land Co. v. Laidley, 159 U. S. 103; Story v. Cortes, 90 Texas, 283 and King v. Insurance Co. 92 S. W. 892.

The case of Douglass v. County of Pike, 101 U. S. 677, referred to in the opinion of the court in Thomas v. State, did not decide that a state court might not, by a change of decision, impair a contract entered into in reliance on prior decisions construing a statute of the state. It merely decided that the federal court was not bound to follow, and would not follow the latest decision of the state court, where the effect of such decision was to impair the obligation of contracts entered into on the faith of a prior decision. That case is explained in the following quotation from Central Land Co. v. Laidley, 159 U. S. 111:

> "The decisions cited by the plaintiff in error to support the jurisdiction of this court in the case at bar were either cases in which the writ of error was upon a judgment of a state court, which gave effect to a statute alleged to impair the obligation of a contract made before any such statute existed, as in Louisiana v. Pilsbury, 105 U. S. 278; in Chicago Ins. Co. v. Needles, 113 U. S. 574, and in Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486; or else the writ of error was to a circuit court of the United States, bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the state, as in Gelpoke v. Dubuque, 1 Wall. 175, 205; Olcott v. Supervisors, 16 Wall. 678, 690; Douglass v. Pike Co., 101 U. S. 677, 686."

The rule that the obligation of a contract cannot be impaired by a judicial decision overruling a prior decision construing a statute, in reliance on which the contract was made, is a sort of judicial estoppel, a self imposed limitation upon the power of the court. Page on Contracts, Sec. 1744; Falconer v. Simmons, 51 W. Va., 172, 178. The Ohio court might have held the tax inquisitor contracts void *in toto* and the federal supreme court would not have reviewed its judgment.

If a suitor may, as a matter of right, invoke the protection of the federal constitution against the impairment of his contract by a judicial decision then the recent tax inquisitor cases would be reviewable by the supreme court of the United States. The above quotations, however, make it clear that the federal constitution does not prohibit the impairment of a contract by a mere change in judicial decisions and therefore no federal question is raised by these cases.

It is not apparent how the fact that the original decisions gave effect to a statute can be material in determining whether or not a constitutional question is raised by the subsequent decision. It is true that the prior decisions became a part of the obligation of contracts thereafter made and no *subsequent legislation* changing the rule announced by the courts could affect such prior contracts. But judicial decisions expounding the unwritten law may also constitute the obligation of a contract. It is not the source of the obligation but the source of the act impairing the obligation that determines whether or not the constitutional provisions are applicable.

The Ohio court expressly founded its decision upon the constitutional provisions, but the actual judgment of the court was, not that the contracts might be performed according to their terms, but that the tax inquisitor might receive compensation for services performed prior to the date of the filing of the petition challenging his contract. Since contracts are not protected against changes in judicial decisions by any constitutional provision, but by a rule of judicial estoppel imposed by the courts, the court may determine the extent of the protection afforded. It seems to follow from the decision in the cases of Thomas v. State and Gilfillan v. State that that protection does not extend so far as to entitle the inquisitors to payment for services performed after they are charged with notice of the invalidity of their contracts.

The date when tax inquisitors in general were charged with notice of the invalidity of their contracts should, in my opinion, be fixed by the date of the overruling, by the supreme court, of its prior decision on which they were presumed to have relied, to-wit, June 26th, 1906.

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

ABSTRACT OF TITLE TO PROPERTY PURCHASED BY FORT MEIGS COMMISSION.

June 13th, 1907.

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

DEAR SIR:—I return herewith the abstract of property purchased by the Fort Meigs Commission which you referred to me with a request for my opinion as to the title.

I regard the title to River Tract No. 65 in Perrysburg township, Wood county, Ohio, excepting therefrom the south one hundred acres (See deed No. 2, Supplementary Abstract) and excepting also a strip 180 feet in width across the northeast corner, containing 1.81 acres (See deed No. 23, Supplementary Abstract), as good in the devisees of Thomas Hayes, to-wit: Thomas Hayes, Timothy Hayes, Michael Hayes, John Hayes, Margaret Ann Hayes, Ellen Hayes, daughter of Thomas Hayes and Mary Hayes Merrickel, subject to a charge of $500.00 in favor of James C. Hayes (See Item 2 Will of Thomas Hayes) and subject also to the life estate of Ellen Hayes, widow of Thomas Hayes. James C. Hayes and Ellen Hayes, widow of Thomas Hayes, should therefore join in

the deed to the state. The taxes and assessments for the last half of 1906 and for 1907 are a lien as stated in the certificate of the abstractor.

There is a cloud on the title arising from the deeds of Frederick A. Stuart to John E. Lovett (No. 3 Supplementary Abstract), to John E. Hunt (See No. 4 Supplementary Abstract), and to James Wilkinson (See No. 5 Supplementary Abstract). These deeds are for town lots which are described by reference to a plat of the town of Orleans located on River Tracts 65 and 66. The abstractor was unable to ascertain the location of these town lots with reference to River Lot No. 65 (See page 3 Supplementary Abstract). It does not appear from the abstract, therefore, whether the four town lots conveyed by the deeds last referred to were part of Tract 65 or not. The deed from Stuart to Lovett was dated May 25th, 1826, and the deeds to Hunt and Wilkinson were made July 25th, 1829. The deed from Stuart to Yates, under whom the present occupants claim, conveyed all of River Lot 65 and was executed June 18th, 1827. All are warranty deeds and it is not probable, therefore, that the town lots were included within the limits of River Tract 65.

I do not consider that the Stuart deeds constitute a serious cloud upon the title of the Hayes heirs since it appears that they or their privies in estate, have been in exclusive possession of all of River Tract 65 under a claim of right since 1865. The statements in the affidavit of Thomas Hayes, attached to the abstract, were confirmed by Mr. Orrin Henry of your office.

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

INTERURBAN ELECTRIC RAILWAY — ORGANIZATION OF BOARD OF APPRAISERS.

Auditor of county in which interurban electric railway company has its principal office must act as president of board of appraisers in valuation of its property, though in case such company has no part of its roadbed in such county, he has no vote in such board.

June 25th, 1907.

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

DEAR SIR: — I have yours of June 22nd, 1907, requesting an opinion of this office upon certain provisions of the statutes of this state relating to the appraisement of suburban and interurban electric railroads.

The first section of the act, 97 O. L. 375, (2776-1) Bates, provides that the county auditors of the county in which any "suburban or interurban electric railroad company now has, or hereafter may have its track and roadway, or any part thereof, shall constitute a board of appraisers and assessors for such company."

The section immediately following provides that the auditor of the county in which any such railroad company has its principal office shall be the president of this board. A president is "one who presides; one who superintends and directs the proceedings of others."

It is not necessary that the presiding officer of any board or body be a member thereof and the instances are numerous where he is not such a member. In case, therefore, any interurban electric railroad has its track and roadway, or any part thereof, in different counties and its principal office in a county in this state wherein it has no part of its track and roadway, the president of the board is the auditor of that county wherein the principal office of the company

is located, but only the auditors of those counties in which the railroad has some part of its track and roadway are members of the board and they only are entitled to a vote.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

TAXATION — EXEMPTED SECURITIES — CONSTRUCTION OF SECTION 2737 R. S.

Moneys and credits invested in non-taxable securities at date of return are subject to be listed for portion of tax year preceding such investment, and during which they were not similarly invested.

July 5th, 1907.

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

DEAR SIR: — I am in receipt of your recent favor enclosing the statement of the auditor of Vinton county as to the return for taxation of a resident of that county, upon which he requests you to secure the opinion of this department.

The facts, in substance, as given by the auditor are as follows:

> In April, 1906, W. made report to the assessor of certain notes owned by him to the amount of $4,000. February 13th, 1907, the same were paid to him and the money arising therefrom was used to purchase bonds of the city of Mt. Vernon. The bonds were received March 1st, 1907.

The question presented by the county auditor is whether the money should be listed in his return for the portion of the year that W. held it prior to its investment in the Mt. Vernon city bonds.

By the facts as shown above, the notes were returned for taxation. On February 13th, 1907, the notes were paid and the money was deposited in a bank for the purpose of purchasing city bonds and the bonds were actually received the first of March, 1907. The money, as money, was in the hands of W. about 15 days prior to its investment in the city bonds.

By section 2737 Revised Statutes, the taxpayer is required, among other items to set forth,

> "The monthly average amount or value, for the time he held or controlled the same within the preceding year, of all moneys, 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 said day preceding the second Monday in April."

As municipal bonds have not been taxable since the first day of January, 1906, but are specifically exempted from taxation by amendment to section 2 of article XII of the constitution, such moneys, after invested in the bonds (March 1st, 1907) would not be taxable. In an opinion rendered to your department under date of November 23rd, 1906, upon a similar question, I then said:

> "Some question may arise as to such bonds (municipal) 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."

Recently the circuit court of Clark county in case No. 449, entitled Whitely v. Arbogast, treasurer of Clark county, held that section 2737 R. S. did not include municipal bonds, and hence that the moneys invested in municipal bonds should not be, under that provision of section 2737, returned for taxation for that portion of the preceding year wherein the investor held or controlled the same. As this case has been carried to the supreme court, and is now pending there, I adhere to the view in the opinion I expressed, above quoted, and that the moneys of W. should be returned for taxation pursuant to the provision of section 2737 R. S.

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

DOW TAX—LIEN OF.

Lien of Dow tax attaches to property under lease, although situated in a local option district, although the sales of liquor were made without the owner's knowledge, and notwithstanding a covenant in the lease against the sale of liquor on the premises.

July 17th, 1907.

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

DEAR SIR:—I desire to acknowledge your communication in which you submit the following inquiry:

> "Is the real estate in a local option district liable for the Dow tax, in case the owner of the property wherein the sales are made, has no knowledge that such sales were made in the premises, and has a lease stipulating that no intoxicating liquors are to be sold therein?"

In reply thereto I desire to say that section 2 of the Dow law provides in part that "said assessment (Dow tax) * * * *shall attach* and operate as a lien upon the real property on and in which such business is conducted."

The real estate, by the terms of the act, is subject to the assessment, and the owner cannot protect himself by a covenant in a lease, since the statute incorporates into the lease, as a part of it, that if the covenant be violated and the assessment not paid, the premises shall be bound.

This case should not be confused with an action to recover a penalty as provided by section (4364-3). Here a tax law has been substituted for the old penal enactment. The owner must protect himself by securing responsible tenants and must know at his peril whether his property is being used so as to become liable for *any* tax or assessment. As said by Judge Shearer in Simpson v. Serviss, 3 C. C., 438:

> "To hold otherwise would render the law ineffectual. All that would be necessary to secure immunity to the lessor's property would be a covenant against the traffic in the lease, and a plea of ignorance of its violation by the landlord. Thus the very objects of the law would be defeated."

It is, therefore, my opinion that under the facts stated in the inquiry the tax is a lien on said property, especially if the lease was made since the passage of the act.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

TAXATION — EXEMPTION FROM.

Real estate of educational institution, not occupied thereby, but the income of which is used for the support thereof, is not exempt from taxation, though such real estate was purchased by the use of a portion of an endowment fund.

In re properties of Cedarville College, the Memorial Association of Hamilton County and Cincinnati Lodge No. 5 Benevolent Protective Order of Elks.

October 31st, 1907.

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

DEAR SIR: — I beg leave to reply to your recent request for an opinion as to three petitions for exemption of real estate from taxation.

1. The petition of Cedarville College states that "said institution has an endowment, the income from which is used for carrying out the objects and purposes aforesaid; part of its said endowment is invested in the above described premises including the buildings thereon, and the income and revenue therefrom are used to pay its professors and expenses incidental to the institution, and that no part thereof has been or is diverted into private use or benefit."

Section 2732 provides for the exemption of "all buildings belonging to institutions of purely public charity * * * together with land actually occupied by such institutions, * * * not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain and belonging exclusively to said institutions." Since the real estate in question in this case is "leased or otherwise used with a view to profit" according to the statement of the petitioners it cannot be exempt. Library Assn. v. Pelton, 36 O. S. 253. The case of Little v. Seminary, 72 O. S. 417, cited by the petitioners, does not support their contention. This case decides merely that an endowment fund in the form of "money" or "credits" is exempt. The court, however, adopted the same rule that I have laid down above, using the following language:

> "Assuming the correctness of the decisions cited (36 O. S. 253, etc.) with respect to the taxability of land belonging to such institutions and leased for income to be devoted to their maintenance, it is entirely clear that the legislature has deliberately prescribed a different rule with respect to an endowment to be loaned for an income to be devoted to that purpose."

There is a case now pending on rehearing in the supreme court which raises questions similar to those involved in this application. But unless that court modifies or reverses previous decisions, we must regard the law as settled in accordance with the view here expressed.

2. Real estate of the Memorial Association of Hamilton county which is used exclusively for a memorial building in honor of "the fallen soldiers of this state," is exempt from taxation under section 2732 R. S., and also under section (3107-43) R. S.

3. As regards the application of the trustees of the Cincinnati Lodge No. 5, Benevolent Protective Order of Elks, I believe that it would be advisable to have a hearing upon this question before the state board of tax remission.

Very truly yours,

WADE H. ELLIS,

Attorney General.

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

CITY SOLICITOR — COMPENSATION FOR PROSECUTIONS IN MAYOR'S COURT.

County commissioners may not make allowance to city solicitor for services in prosecuting misdemeanor cases in mayor's court, as distinguished from police court; duty of solicitor to conduct such prosecutions.

January 9th, 1907.

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

GENTLEMEN: — Replying to your letter of the 4th inst. pursuant to the inquiry of the city solicitor of Delaware, I beg to say that the decision of the supreme court in the case of Smallwood v. the City of Cambridge, construing section 126, M. C., denies to the municipal officers authority to receive any fees or compensation other than the salary allowed by ordinance of council, and I assume from that decision and from the construction to be placed upon section 137, M. C., that the ordinance fixing the salary of the city solicitor, indicated by section 227, M. C., should fix it at such amount as would include all services required of the city solicitor, as such.

I am further of the opinion that when section 137, M. C., provides that

> "the solicitor shall also be prosecuting attorney of the police court, and shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow,"

such language does not authorize the county commissioners to allow additional compensation to a city solicitor, acting as prosecuting attorney of the police court, except in those cities where a police court has been heretofore established as distinguished from a mayor's court, and that it is not incumbent upon the city solicitor to act in the prosecution of cases before the mayor unless the terms of the ordinance defining his duties and fixing his compensation so require.

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

COUNCIL — POLICE AND FIRE DEPARTMENTS.

Council may not by ordinance contract for maintenance and operation of electric police and fire alarm system.

January 11th, 1907.

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

GENTLEMEN: — In your letter of the 4th inst. you have submitted to this department a communication from the mayor of the city of Salem together with an ordinance of the city council of that city, and these present an inquiry as to the validity of a contract such as is provided for in the ordinance. Upon this question you desire an opinion of this department.

In the views hereinafter expressed consideration is not given to the validity or invalidity of such ordinance at the time it was enacted, viz: March 5th, 1901, but it is only considered with a view of renewing the same or of entering into a similar contract for an additional period, and this involves construing the same in the light of the provisions of the municipal code which went into effect on the first Monday in May, 1903. While the provisions thereof could not invalidate existing contracts yet they furnish the rules under which the legality of contracts subsequently entered into must be determined.

By the terms of the ordinance the city of Salem assumes to contract with one A. L. Bush, and his assigns, for a period of years *to maintain and operate an electric police and fire patrol system within such city.*

The ordinance grants the right to Bush (designated herein as grantee) to maintain an electric patrol and fire alarm system as then constructed, to improve and extend the same, to erect the necessary poles, to string wires on electric light and telephone poles within the city, and to place police patrol and fire alarm boxes thereon, and to maintain the same during the contract period.

It provides in detail how the same shall be located and constructed and that the grantee may contract with citizens for boxes in private houses or places of business. It imposes upon the grantee the duty of keeping and maintaining *a police and fire patrol wagon with all equipment,* and of providing and keeping for use on such wagon a sufficient number of horses. He is further required to provide harness, batteries, registers, springs, fire extinguishers, extension ladders, and other devices, and to employ men to operate the same who are satisfactory to council. The title to all of this property and appliances is to be and remain in the grantee except certain hose and chemicals which the city is required to furnish. Other details are set forth as to the compensation to be paid the grantee, and as to the operation and management of such system, to which it is unnecessary to refer to determine the questions herein presented.

The validity of such contract depends upon the powers conferred upon city councils and boards of public safety.

In section 7 of the municipal code it is provided that all municipal corporations shall have the power to organize and maintain police and fire departments, erect the necessary buildings, and purchase and hold all implements and apparatus required therefor.

By section 146, and related sections of the municipal code, provision is made for the organization in each city of a department of public safety, and by section 147 thereof all powers and duties connected with and incident to the appointment, regulation and government of the *police and fire departments* of the city, together with the control of the fire alarm, telegraph and telephone system, is vested in the mayor and the board of public safety. The directors of public safety are authorized to make all contracts with reference to the management of the police and fire departments, subject to the restrictions imposed.

The subsequent provisions of the code with great particularity confer the necessary power and provide for the organization of police and fire departments and how the same shall be composed and controlled. In reference to the power to contract, and the subject matter of such contracts, section 154 M. C. provides:

> "The directors of public safety shall have power to make all contracts and expenditures of money, for acquiring lands for the erection or repair of station houses, engine houses, the erection and building of fire cisterns and plugs and the purchase of engines, apparatus, and all other supplies necessary for the police and fire departments."

Is it within the scope of its powers, thus conferred, for the board of public

safety to enter into such contract evidenced by the ordinance in question? Authority to make contracts as expressed in section 147 M. C. is not a grant of power to make or enter into any other than those named in section 154 M. C. It merely confers upon the directors of public safety the authority to make all contracts with reference to the management of the police and fire department, but makes that authority "subject to the restrictions hereinafter imposed." There is no power express or implied to change the nature of the department nor to delegate to another, by contract or otherwise, the duties incumbent upon such department.

The authority thus conferred by the municipal code to establish and control a fire department is governmental in its nature (Wheeler v. Cinti., 19 O. S. 197; Frederick v. Columbus, 58 O. S. 538). The power to organize such department does not include the right to substitute another method for that which has been provided by the legislation in question. The language employed in paragraph 14 of section 7, M. C., "to organize and maintain police and fire departments," does not include the right claimed to enter into a contract with any person or corporation to furnish the apparatus and extinguish the fires any more than it includes the right to furnish and equip a police force. The method the general assembly has thus provided is exclusive. Affirmative words are often in their operation negative of other objects than those affirmed and, in this case, a negative or exclusive sense must be given to the language employed or it will have no operation at all (Marbury v. Madison, 1 Cranch. 137). The words used by the general assembly in providing for a board of safety to have charge of the police and fire departments, in conferring upon such board the power to prepare and enforce rules for the government of such departments, in providing how members in each department shall be appointed and in surrounding them with the protection of the merit system — all suggest their plain import to be that the system thus set forth is exclusive; and if it can thus, by contract, be rendered inoperative, it can be absolutely destroyed. In Ohio, cities and villages are created and endowed with powers by the legislature. These are of a legislative, executive and administrative character to aid in the better government of their respective localities. This power exists no further than it has been delegated and municipal corporations, in their action, are confined to a strict construction of the grants of power contained in the laws of their creation. (Ravenna v. Railway Co., 45 O. S. 118).

> "Where the statute placed the care of fire departments in the hands of chief engineers, a power 'to regulate and protect fire engines,' etc., was held not to authorize a city to establish a fire board to have charge of that department."
>
> Benjamin v. Webster, 100 Ind. 15.

These principles are fully sustained by Dillon on Municipal Corporations, sections 96, 274, 443, N.

It follows from the views thus expressed that such contract under existing legislation, is unauthorized.

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

WATER WORKS — POWER OF BOARD OF PUBLIC SERVICE REGARDING EXTENSIONS.

Board of public service cannot bind city by contract to repay, out of rentals, persons depositing money to secure extension of water works system into sparsely settled portions of city; surplus arising from rentals may be applied to such extension.

January 15th, 1907.

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

GENTLEMEN: — I beg to acknowledge the receipt of yours of the 10th inst. enclosing a letter from the city solicitor of Cleveland addressed to you under date of the 10th inst. It appears from the facts stated in the letter of the solicitor that the department of public service of the city of Cleveland has, for many years, applied its surplus revenues derived from the water receipts collected by the water-works department to extensions of its pipe system in those portions of the city where the rentals received would net the department at least 6 per cent. upon the outlay expended; and that persons living upon streets so sparsely inhabited as not to produce such rate of income upon the investment and who desire to have the pipe extensions, have, at times, deposited with the water-works division of the board of public service such amount of money as was necessary to cover the expense of extending such pipes, they receiving from the department its agreement to reimburse them for such moneys when enough patrons of the system were secured to produce the minimum income of 6 per cent.

This practice has been challenged by an examiner connected with your department, his criticism being that "moneys so derived constitute a trust fund and cannot be expended in the making of extensions but must be held by the city for the purpose of making the legitimate reimbursement."

Upon the facts thus stated the question is raised of the power of the department so to do. The statutory authority so involved is contained in paragraph 15 of section 7 of the municipal code. All municipal corporations are given the following general powers and council may provide, by ordinance or resolution, for the exercise and enforcement of the same:

> "To provide for the supply of water by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs and water-works and for the protection thereof and to prevent unnecessary waste of water and the pollution thereof and to apply moneys received as charge for water to the maintenance, construction, enlargement and extension of the works and to the extinguishment of any indebtedness created therefor * * * ."

Also section 2412 R. S., still in force and effect:

> "If there is any surplus, after paying the expenses of conducting and managing the water-works, the same may be applied to the repairs, enlargement, or extension of the works, or of the reservoirs, the payment of the interest of any loan made for their construction, or for the creation of a sinking fund for the liquidation of the debt; and the amount authorized to be levied and assessed for water-works purposes shall be applied by the council to the creation of a sinking fund for the payment of the indebtedness incurred for the construction and extension of water-works, and for no other purpose whatever."

The views of the examiner may possibly have been influenced by the latter clause above quoted but that only refers to the creation of a sinking fund out of moneys "levied and assessed for water-works purposes" and they are levied and assessed pursuant to the general authority conferred by section 32 M. C. and related sections. The words "levied and assessed" do not refer to water rates or rentals as contained in section 2411 R. S. for those rents are assessed for the "purpose of paying the expenses of conducting and managing water-works," and if there is any surplus after paying the expenses of conducting and managing water-works the same may be applied, among other objects, to the extension of the works. (Sections 2411, 2412, R. S.)

Primarily, the debts which are duly created by the extension of the system are debts to be met by general taxation. (Section 32, par. 15, sec. 7 M. C.) Secondarily, they may be paid out of the surplus revenues of the water-works. Obviously, the rentals may be applied to the payment of the expense duly incurred in making the extensions.

The power of the department to create a valid contract, or to obligate the municipality for the repayment of the amounts deposited with the department to pay the expense of the extensions, must be denied for many reasons. Among others could be assigned the limitation placed upon the power of municipal officers by section 45 M. C. Also the revenue provisions of the municipal code supply the municipalities of the state with the means designed to furnish them with money for all public purposes. They seem to be exclusive. Powers are not assumed to exist merely because they may be convenient.

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

MUNICIPAL CORPORATIONS — CONTRACTS — RETENTION OF PART OF AMOUNT DUE.

Funds arising from retention of 10 per cent. of amounts due on municipal contracts as security for faithful performance thereof may not be transferred to trustees of sinking fund.

January 17th, 1907.

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

GENTLEMEN: — Your communication of the 7th inst. enclosing a letter of the city auditor of Cincinnati, informs me that since the enactment of the municipal code it has been the practice of the city officers at Cincinnati, in awarding public contracts, to retain ten per cent. of the amount thereof for the purpose of insuring the faithful performance of such contracts; that these several amounts have, in the aggregate, produced a very large fund and the sinking fund trustees have been made the custodians thereof; that such practice has been challenged by the city auditor, and you desire my opinion as to the legality of this procedure.

(1) The retention of the ten per cent. is provided for by the contract of the parties, and consented to by them. The agreement thereto by the contractor, or successful bidder, is sufficient authority for such retention for a stated period, to guarantee the sufficiency of the work and the faithful performance of the contract in all respects. There is no doubt of the authority of public officers to make such a contract.

(2) The second question involves the propriety of depositing such funds

with the sinking fund trustees. There is no statutory authority for the deposit with the sinking fund trustees of any moneys appropriated for the payment of amounts due or to become due on municipal contracts.

Old section (2729-1) of the Revised Statutes, as the same stood in 1900, required all money held by an officer or board as security for the performance of contracts to be paid over to the sinking fund trustees. It gave such trustees power to invest and re-invest such moneys and on the order of the board or officer who turned the fund over to them, to pay out the proceeds to the party lawfully entitled thereto. This section was repealed by the municipal code. All the powers and duties conferred upon the sinking fund trustees by the code relate to the control of funds of a permanent nature, bonded indebtedness, judgments final, etc. Section 112 M. C. provides:

> "The trustees of the sinking fund shall have power to investigate all transactions involving or affecting the sinking fund of (in) any branch or department of the municipal government, and they shall have such other duties, not inconsistent with the nature of the duties prescribed for them by law, and (as) may be conferred or required by council."

I understand that the city solicitor of Cincinnati has advised the sinking fund trustees that this section authorizes council to transfer to the sinking fund trustees the percentage retained as security for the performance of municipal contracts. I am unable to agree with this view. It seems to me that the "other powers and duties" referred to in section 112 are powers and duties of the same nature as those expressly conferred by that section and that it was not intended to authorize the council to transfer to the sinking fund trustees the custody and control of funds which would, in accordance with other provisions of the code, be controlled by other officers of the municipality.

Section 43a M. C. provides:

> "Any unexpended balance remaining in a fund which was created by an issue of bonds the whole or any part of which issue is still outstanding unpaid and unprovided for, shall, *when such balance is no longer needed for the purpose for which said fund was created,* be transferred to the trustees of the sinking fund to be applied in the payment of the bonds. All acts or parts of acts inconsistent with this provision be and the same are hereby repealed in so far as such inconsistency exists."

Where the fund to meet the expenses of a municipal improvement has been raised by the sale of bonds issued for that purpose, the above section expressly authorizes the transfer of any unexpended balance to the sinking fund trustees to be applied by them to the payment of that particular bond issue. But the 10 per cent. retained as security for the performance of contracts is neither an unexpended balance nor moneys "no longer needed" for the purpose for which the fund was created; and the fact that express authority is given to transfer to the sinking fund trustees moneys *not* needed for the purpose for which they were designed would seem to negative any implied power in council to authorize the transfer to the sinking fund trustees of moneys that *are* needed for the purpose for which they were appropriated.

Section 133 M. C. provides that the auditor "shall not allow the amounts appropriated for one item of expense to be drawn upon for any other purpose."

Section (1536-656) R. S., M. C., page 339, directs the treasurer to "so arrange his books that the amount received and paid on account of separate funds or

specific appropriations, shall be exhibited in separate accounts." If the auditor draws his warrant upon the treasurer for 10 per cent. of the amount appropriated for a specific contract and the treasurer transfers this amount to the trustees of the sinking fund, the latter might, under the authority conferred by section 110 M. C., use such money "for the satisfaction of any obligation under their supervision." The separation of accounts so carefully provided for by the sections above quoted would no longer exist. The accounts of the treasurer would not show the manner in which the 10 per cent. paid to the sinking fund trustees, was expended.

It is the policy of the law to require, as far as possible, a uniform system in the accounts of public officers. It appears that in some cases the council has directed the 10 per cent. retained to be paid to the sinking fund trustees, while in other cases it remains in the custody of the treasurer. If city councils are permitted to authorize the transfer of the amount retained as security for the performance of some contracts to the sinking fund trustees, and in other cases the treasurer is the custodian of such funds, confusion must result. There is no express statutory authority for such procedure and it is not, in my opinion, permissible.

A further objection to the practice of transferring the funds in question to the sinking fund trustees is that such procedure interferes with the system of uniform accounting prescribed by the bureau of inspection and supervision of public offices under authority of sections 181*a*, (181-1), (181-10) R. S.

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

MUNICIPAL CORPORATIONS — BONDS — ADVERTISEMENT OF SALE.

Requirement that sale of municipal bonds shall be advertised may not be avoided by colorable offer to trustees of sinking fund, when trustees have no money to invest therein.

January 22nd, 1907.

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

GENTLEMEN: — I have given consideration to the supplemental report of the examiner, appointed by your department to make an examination of the financial affairs of the village of Marysville. In it he has especially reported upon the method adopted by the council in the issuing and sale of the bonds of the village for street improvements. This report has been supplemented by a statement made by J. T. Tracy of your department, bearing further upon the practices adopted and commented upon in such report.

It is apparent from a consideration thereof that there was no publication of such sale as is required by section 97 M. C., and from the explanation received from your Mr. Tracy, it appears that the method was pursued of offering the bonds at par and accrued interest to the trustees of the sinking fund, but that the trustees had no money to invest in the same, nor had they any intention of taking the same pursuant to the provisions of sections 97 and 109 M. C., but adopted that method in order to offer the same at private sale, without advertisement, to the highest bidder.

There are two features of the plan adopted that are illegal: First, the sale of the bonds should have been advertised as provided in section 97 M. C.;

Second, the requirement of public notice to purchasers cannot be avoided by offering the bonds under the circumstances to the trustees of the sinking fund.

An acceptance of the bonds by the trustees of the sinking fund when they had no money to invest therein, as provided by section 109 M. C., and merely for the purpose of offering them at private sale, is a violation of the provisions of section 97 M. C.

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

MUNICIPAL CORPORATIONS — EMPLOYES — CHANGE IN COMPENSATION.

Compensation of municipal employes whose salary is fixed by council may not be changed during term of employment; board of public service may change compensation of employes of its department; rule that salary may not be changed during existing term may not be avoided by colorable resignation and reappointment or imposition of new duties.

January 26th, 1907.

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

GENTLEMEN: — Your letter of recent date, enclosing an inquiry from the city auditor of Cincinnati, requests an opinion as to the powers of the several departments of a municipal government to change the salaries of employes during the terms for which they were appointed.

Your question specifies several distinct classes of employes: Those, generally, whose salaries are fixed by the council, those employed in the department of the clerk of council, the department of public safety and the department of public service.

You ask further whether the resignation and reappointment of an employe, or the imposition of additional duties upon one, validates an increase in the salary of such employe, to take effect during the term for which he was originally appointed.

With respect to all officers, clerks and employes, of the city government, whatever their terms of employment or the work in which they are engaged, *if their salaries are fixed by council,* under section 126 of the municipal code, such salaries cannot be increased or diminished during the term of such appointment or employment.

Section 126 reads as follows:

> "Council shall fix the salaries of all officers, clerks and employes in the city government, except as otherwise provided in this act, and, except as otherwise provided in this act, all fees pertaining to any office shall be paid into the city treasury. 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; * *"

The word "employe" as used above, was manifestly intended to include those who have, not strictly speaking, a term of office as that phrase has generally been defined; the purpose being that *all* public servants, including the humblest employe, whose compensation is required to be fixed by council, should not be

subject to change in that compensation during the time for which they were employed. This provision was evidently intended to give stability to the general salary law of the city government, to induce the fixing of definite terms of employment or appointment just as the code otherwise fixes definitely the terms of elective offices, and to prevent favoritism or extravagance in official compensation.

Among the employes whose salaries are fixed by council are those in the offices of the city clerk and of the board of public safety. Appointments here should be for definite terms and the compensation should not be changed during such terms.

When we come to consider the employes of the board of public service, a different rule seems to prevail. While it might be contended that the words in section 126 of the municipal code, "salary of any officer * * * so fixed," include salaries to be fixed "as otherwise provided in this act" as well as salaries fixed by council, thus bringing within the inhibition against changing compensation the department of public service as well as every other branch of the municipal government, I am not inclined to believe that such intention can fairly be inferred from the language used. The board of public service is the chief administrative arm of the local government. It is required to employ large numbers of day laborers and the scope of its duties is such as makes natural the expectation that many of its employes in all departments will have work of a more or less temporary character. This fact was a sufficient reason for excepting the department of public service from the operation of the general rule that no officer, clerk or employe of a city government should have his salary changed during his term. In the exercise of this power the board of public service ought not to recognize the exception to any extent beyond the reason which justifies its adoption. In other words while the board of public service apparently has power to change the compensation of the heads of its sub-departments such as superintendents, engineers, inspectors and others, as well as of the clerks and laborers under its charge, every consideration of the public interest and every incentive to harmony in the operation of municipal laws should induce the board to fix definite terms for all of its more important subordinates and assistants and to refrain from changing any salaries during the terms so fixed.

The prohibition against changing the salary of an officer during his term cannot be evaded by resignation and reappointment. State v. Hudson, 44 N. J. L., 388; Larew v. Newman, 81 Cal. 588. The fact that a person holds a municipal office does not, however, prevent him from resigning that position and accepting different employment at a different salary. But whether the imposition of new duties upon an employe would authorize an increase in salary must depend to some extent upon the circumstances of each particular case. The courts would not sanction a change in salary where the change in duties was merely colorable. If adding a new duty to an existing office or taking an old one from it warrants a change in the salary of an officer during his term, the prohibition against such change in salary would be so easily evaded as to be practically of no effect.

The fact that the changes referred to in your letter were made to take effect January 1st, 1907, is immaterial unless the former terms of the employes affected ended on December 31st, 1906.

I believe the above answers all the questions you have submitted.

Very truly yours,

WADE H. ELLIS,

Attorney General.

BOARD OF PUBLIC SERVICE — COMPENSATION OF EMPLOYES.

Compensation of employes of board of public service may be fixed by that board, but may not exceed in the aggregate the amount appropriated by council for that purpose.

February 2nd, 1907.

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

GENTLEMEN: — The inquiries presented by the letters of the city auditor and the clerk of the board of public service of Lima, Ohio, which are referred to this department for answer, present the following question:

Can the board of public service in fixing the compensation of its employes exceed the appropriation made by council for that purpose?

The powers conferred upon the city council by the sections of the municipal code governing the making of the annual budget give to that body the authority to reduce or omit any item in the annual estimates furnished by the directors and officers of the municipality. This gives to council the right to decrease the items of salary or compensation fixed by the board of public service for its employes etc. The provisions of section 43 M. C. against exceeding appropriations made by council, forbid the board of public service to fix the salaries or compensation of its employes in excess of the appropriation so made by council; and section 133 M. C. declares that the auditor shall not permit "the amount set aside for any appropriation to be overdrawn."

These provisions all indicate that while section 145 M. C. gives to the board of public service the authority to fix "the compensation of all persons appointed or employed" by such board, yet the amount fixed cannot exceed the appropriation made by council for such purpose.

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

COUNCIL — MEMBER OF — EXPENSE.

Expense of members of council incurred on trips of inspection may not be paid out of public funds.

February 20th, 1907.

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

GENTLEMEN: — I have yours of the 18th inst. presenting the question of the right of a city to defray the expenses of its councilmen incurred upon trips to other cities for inspecting methods used in elevating tracks of railroads and also for viewing various park systems.

In my opinion such expenses do not constitute a proper charge against municipal funds.

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

COUNCIL — VILLAGE — ELECTION OF VILLAGE OFFICERS.

Mayor may cast deciding vote in council upon election of village officers.

February 25th, 1907.

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

GENTLEMEN: — In response to your inquiry coming from officers of the village of Lakewood, Ohio, as to the right and duty of the mayor of a village to cast the deciding vote where the council is a tie, upon the election of a village solicitor or other officer required to be elected by council, I beg to advise you as follows:

The legislative power of villages is reposed in the councils thereof. Such councils are authorized, under sections 195, 199, and other provisions of the municipal code, to provide such employes for the village as they may determine and to choose a legal counsel or a solicitor for the municipality or any department or official thereof, for a period not exceeding two years. Section 200 of the municipal code provides that the mayor of a village shall be president of the council, shall preside at all regular and special meetings thereof and shall have no vote except in case of a tie. In my judgment this means that in *all* cases or matters in which council has authority to act, whether it be the election of officers or employes, the passage of ordinances and resolutions, or any other action to be taken by council, the mayor has the deciding vote whenever council is equally divided upon a question.

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

SUPREME COURT CLERK — FEES OF.

Clerk of supreme court is not entitled to fees under section 421*b* for making index of pending cases provided for by section 421*a*.

February 28th, 1907.

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

GENTLEMEN: — Your letter of February 25, 1907, requests my opinion as to the right of the supreme court clerk to fees for keeping the index required by section 421*a* R. S. This section contains no provision for compensation. The following section, 421*b* R. S., provides for the making of a different index, namely, an index of cases disposed of prior to the enactment of the two sections referred to. For making the latter index a fee of 10 cents for each cause is provided.

The reason for the distinction between the two indexes is apparent. Section 421*a* merely points out the manner in which the index of pending cases required by Sec. 421 shall be kept. The duty of keeping a complete and convenient index of cases filed during the term is one which is naturally, almost necessarily, incident to the office of clerk of court. The clerk is compensated for the performance of such duties by the salary and fees provided for by Sec. 422 R. S. and Sec. 1284 R. S. The making of an index of all cases disposed of by the supreme court prior to his term of office is, on the other hand, a special duty, not con-

nected with the current business of the court. For such work the clerk is very properly allowed extra compensation.

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

VILLAGE BOARD OF TRUSTEES OF PUBLIC AFFAIRS — APPOINTMENT OF CLERK.

Village board of trustees of public affairs may not appoint one of their own number clerk.

March 22nd, 1907.

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

GENTLEMEN: — You have submitted for my consideration the following question:

> Can a member of the board of public affairs of a village organized pursuant to section 205 of the municipal code elect one of their number as clerk of the board, for his services in which position is fixed a certain compensation?

Section 205 M. C. provides that;

> "Said board shall organize by electing *one* of *its number* president, and shall have authority to elect a clerk, who shall be known as the clerk of the board of trustees of public affairs."

This language would seem to imply that while one of the members should be elected president of the board that the same power is not accorded to the board in the choice of a clerk.

It is announced as a general principle by standard authorities on the duties of public officers that where the power of appointment is conferred upon a given body, the members of such body should not be permitted to discharge it for their own benefit or to promote their private interests. (Throop on Public Officers, section 121, section 611; Mechem on Public Officers, section 112).

I am therefore of the opinion that such power does not abide in the board of trustees of public affairs.

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

MUNICIPAL IMPROVEMENTS — PAYMENT OF COMPENSATION OF ENGINEER.

Compensation of engineer specially employed on particular municipal improvement may be paid out of proceeds of sale of bonds issued to meet expenses of such improvement, or fund raised by special assessment levied for that purpose; if engineering work on such improvement is done by city engineer or his assistants, compensation may not be paid out of such funds.

April 1st, 1907.

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

GENTLEMEN: — I am in receipt of yours of the 22nd ultimo, in which the following question is presented:

> In the estimate prepared by the engineer for the construction of a bridge from the proceeds of the sale of the general bonds of a city, is included an estimate for the ordinary engineering and superintending of construction of said bridge. May the expenses of engineering be legally paid from the proceeds of the bond sale, or should such expenses be borne by the appropriation made by council for engineering and assistants payable from the service fund raised by taxation? If the expenses of engineering in connection with municipal improvements are not payable from the appropriation for engineering and assistants made semi-annually by council, just what class of engineering expenses should be paid from said appropriation and what should be charged to special improvements payable either by general bond issue or special assessments?

The construction of a bridge by a municipality is, subject to the provision hereinafter referred to, paid for by general taxation and not by special assessments on any class of property within the municipality; therefore the latter part of the question should be distinguished from the preceding portion because the latter part may contemplate the expense of engineering in connection with certain municipal improvements paid for by assessments.

If the superintending and engineering in connection with the construction of a bridge were performed by the engineer of the city or his assistants who were appointed as such at a fixed salary, which is paid out of the general funds of the municipality, the cost of such superintending and engineering cannot be paid from such bond issues; but if a special engineer of such an improvement is necessary, other than those regularly employed by the city, and is employed for that purpose, the amount allowed for his services may properly be paid from the proceeds of the bond issue, provided the amount of his compensation has been duly appropriated for that purpose, by council. (Section 45 M. C.; Longworth v. Cinti., 34 O. S. 101; Commissioners v. Fullen, et al., 118 Ind. 158; Pittinger v. Wellsville, Vol. 52, O. L. B. 83.)

The latter portion of your question should be answered in the light of the foregoing authorities by stating that if the board of public service is of the opinion that special engineers should be employed in connection with any particular character of improvement, and whose employment is merely temporary, as distinguished from a fixed term, and limited to such improvement, the compensation of such engineers as fixed by the board may be paid as part of the cost of the improvement, when duly appropriated therefor, either from the fund raised by special assessment or the proceeds of a sale of bonds made for the purpose of constructing such improvement.

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

MUNICIPAL CORPORATION — EMPLOYE — CHANGE IN COMPENSATION.

Appointee to fill vacancy in municipal office or employment whereof a definite term is fixed may not receive additional compensation provided by ordinance passed prior to his appointment, but during the term of his predecessor.

April 1st, 1907.

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

GENTLEMEN: — I have yours of the 29th ult. proposing the following question:

> "Does the provision of section 126 of the code to the effect that the salary of any officer, clerk or employe shall not be increased or diminished during the term for which he may have been elected or appointed, apply to an appointee selected to fill a vacancy, said appointment having been made subsequent to the passage of an ordinance by council making a change in the compensation affixed to said position?"

Where an appointment has been made to fill a vacancy the theory of the law is that the appointee is holding the original term and that the salary that applied to the original term should also apply to such appointee. And as a change had been made in the salary prior to such appointment, but during the term for which the officer held, such change in the salary could not affect the officer originally elected or appointed and likewise could not affect the appointee who is filling the vacancy for the unexpired portion of the term.

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

VILLAGE WATER WORKS — CONSTRUCTION OF — RESPECTIVE POWERS OF COUNCIL AND BOARD OF TRUSTEES OF PUBLIC AFFAIRS.

Plans and estimates for construction of village water works must be made under direction of council; contract must be awarded by and under direction of board of trustees of public affairs.

April 2nd, 1907.

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

GENTLEMEN: — Yours of the 29th ultimo presents the following question:

> The council of a village employs an engineer to make plans and estimates for the construction of a water works plant; thereafter bonds were issued to provide the necessary funds to construct the same, such bonds being authorized by vote. Subsequently, a board of trustees of public affairs was appointed to construct the plant. Question: Is the board of public affairs governed by the original plan and estimate adopted by council previous to the vote, or may they prepare new plans and estimates without submitting the same to the approval of council?

A consideration of the question thus presented involves the construction of the powers of the board of trustees of public affairs as provided for by section 205 of the municipal code, which is, in part, as follows:

> "In all villages in which water works, electric light plants, artificial or natural gas plants or other similar utilities are situate at the time of the passage of this act, or which at such time are in process of construction, or when council orders water works, electric light plants, * * * or other similar public utility to be constructed or to be leased, or purchased from any individual company or corporation, council shall at such time establish a board of trustees of public affairs for such village, consisting of three members who shall be residents of the village and shall be each elected for a term of two years. * * *
>
> "Said board shall organize by electing one of its number president, and shall have authority to elect a clerk, who shall be known as the clerk of the board of trustees of public affairs. Said board shall have all the powers and perform all the duties that are provided to be performed by the trustees of water works in sections 2407" (and certain other sections of the Revised Statutes to and including section 2435 R. S.)

It will be observed that the powers conferred upon such boards are the same as those heretofore conferred upon trustees of water works in the sections named. Turning to the original act providing for trustees of water works, which is chapter XXV of the municipal code, May 7th, 1869, (66 O. L. 205 to 209 inclusive) there will be found in section 342 the powers conferred upon trustees of water works, which are the same powers referred to in the sections above quoted as part of section 205 municipal code.

Section 342 thereof (66 O. L. 206) is as follows:

> "The said trustees shall be authorized to make contracts for the building of machinery, water works buildings, reservoirs, and the enlargement and repair thereof, and the manufacture and laying down of pipe and for all other necessary purposes to the full and efficient management and construction of water works."

This section in connection with the related sections, being part of the same chapter, evidenced the most full and ample authority conferred upon the trustees and which is a measure of the authority of the board of trustees of public affairs as provided by section 205, municipal code. Power is conferred upon the council of the village by section 334 of said act to enter upon and take possession of any land obtained for the construction or extension of water works, reservoirs, etc. This evidences certain powers that must be exercised by council and certain powers are still preserved by the new municipal code in the village council, concerning which the board of trustees of public affairs have no authority at all. In the acquiring of lands and the construction of water works the limitations of authority of each body must be respected. No authority is conferred upon the board of trustees of public affairs to choose, elect or appoint an engineer, and in so far as an engineer would be necessary to draft plans and prepare estimates for such utility the employment of such engineer, the definition of his authority and provision for his compensation are all vested in the village council.

The authority to make contracts for buildings, reservoirs, machinery, etc., is vested in the board of trustees of public affairs by virtue of the section above

cited. I am therefore of the opinion that the original plans and estimates adopted by council should be accepted by the board of trustees of public affairs and the contract, if awarded, should be for the construction of the works as evidenced in such plans.

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

OFFICES FOR MUNICIPAL OFFICERS.

April 26th, 1907.

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

GENTLEMEN: — Replying to yours of the 22nd inst., I beg to say, power is given to municipal councils, by paragraph 21 of section 7 of the municipal code, to establish, erect and maintain public buildings. It is within the power of the council to provide offices in such buildings, or elsewhere, for city and village officials. If, in the discretion of the council, such buildings or offices are provided, it is the duty of the officials, at reasonable times, to be present at such offices and to therein transact the public duties devolving upon them as such officials, but this does not require them to be present at such offices continuously.

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

CLERK OF COUNCIL — FEES.

Fees of clerk of council for making transcripts of proceedings in sale of bonds must be paid into municipal treasury.

May 9th, 1907.

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

GENTLEMEN: — I have your letter of the 7th inst., containing the following question upon which you have requested an opinion from this department.

"May the clerk of council legally receive a reasonable compensation for making transcripts of proceedings in the sale of municipal bonds?"

The cases of Cambridge v. Smallwood, Portsmouth v. Milstead and Portsmouth v. Baucus, recently decided by the supreme court of this state, in some respects construe the provisions of section 126, as the same bears upon the fees of mayors and chiefs of police; but these cases do not involve the question of fees for such services performed by the clerk of council.

In my opinion that portion of section 126 of the municipal code which provides that "all fees pertaining to any office shall be paid into the city treasury," requires that while the clerk of council should collect the proper fees from those desiring transcripts of proceedings in which they are interested, such fees should be by him paid into the city treasury. The case of Hatch v. Cincinnati, 17 O. S., 48, is confirmatory of this view.

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

TRUSTEES OF SINKING FUND — SECRETARY.

Trustees of sinking fund of municipal corporation may elect city auditor or village clerk secretary of their board, at compensation to be fixed by council; when so elected, additional compensation may not be allowed for services properly within the scope of the duties of such secretary.

May 10th, 1907.

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

GENTLEMEN: — Replying to the inquiries contained in yours of the 8th inst., I beg to say that pursuant to section 104 of the municipal code, if the trustees of the sinking fund desire so to do, they may elect the auditor of the city or clerk of the village to act as the secretary of the board, and pay to him such compensation as council may provide by ordinance and such compensation may be paid out of the funds under their control.

As to the question of the legality of the trustees of the sinking fund employing the city auditor to bring up old records, perfect files and perform similar duties for which they intend paying him a compensation, I express the opinion that if the city auditor or the clerk of the village be appointed secretary of the board, such duties as are mentioned above would attach to the office of the secretary of the board, and he should not be paid any compensation therefor other than his regular allowance fixed by ordinance and paid to him by the board.

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

MAYOR — VETO POWER.

Mayor's power of veto extends to measures necessarily involving expenditure of money as well as to specific appropriations; items of ordinance providing for establishment of market-house may be vetoed.

May 16th, 1907.

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

DEAR SIR: — Replying to your inquiry of the 8th inst. as to the validity of the action of the mayor of Galion in vetoing a certain portion of an ordinance whereby it is sought to establish a market-place within such city, it is my opinion that section 125 of the municipal code authorizes the mayor to approve or disapprove any portion of an ordinance which contemplates the expenditure of money on behalf of the city. As such ordinance contemplates the expenditure of money on behalf of the city both in establishing the market and in paying the expenses of the market-master, the authority of the mayor as expressed in section 125 M. C. would apply thereto, independently of whether the particular items disapproved by him did or did not appropriate money for such purpose.

In my opinion the test of such power is whether the ordinance contemplates the appropriation or expenditure of money for its purposes and not whether the particular section in question disapproved by the mayor provides for such appropriation or expenditure.

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

FIRE DEPARTMENT SURGEON — EMPLOYMENT OF.

Council may employ surgeon to render professional services to firemen temporarily disabled in the discharge of their duties.

June 15th, 1907.

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

GENTLEMEN: — Replying to the inquiry which you have recently submitted to this department as having been made of your department by the city solicitor of Akron, I am of the opinion that the municipal council has authority to employ a surgeon to render professional services to firemen who have been temporarily disabled in the discharge of their duty. If the formal requisites of such employment have been in all respects regular and the services have been performed, pursuant to such employment, I am of the opinion that the bill so contracted should be paid.

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

MUNICIPAL CORPORATION — CIVIL SERVICE—SPECIAL POLICEMEN.

Mayor is not required to make appointments of special policeman to serve temporarily from eligible list.

August 23rd, 1907.

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

GENTLEMEN: — I beg to acknowledge receipt of your favor of even date, containing an inquiry made by the city solicitor of Mansfield, Ohio, relative to the appointment of members of the police force to serve temporarily. The question presented is whether or not such appointment must be made from the list of those eligible to appointment as permanent members of the force. Replying thereto I beg to say: First, that section 166 of the municipal code does not require that the temporary appointments made by the mayor shall be made from the eligible list; second, the authority to make such temporary appointments is conferred by section 166 M. C., so as to prevent the stoppage of public business or to meet extraordinary exigencies and may be made to cover all occasions that may arise, when the regular policemen are temporarily absent and until the vacancies caused by the resignation or dismissal of others can be regularly filled, as provided by the requirements of the municipal code.

In making such appointments the mayor can make the same from the eligible list but he is not required to do so by any provision of law.

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

MUNICIPAL CORPORATION — ILLEGAL EXPENDITURE OF FUNDS — DUTY OF CITY SOLICITOR.

City solicitor may not institute action to recover funds illegally expended by municipal authorities.

August 26th, 1907.

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

GENTLEMEN: — Replying to your inquiry of recent date containing the letter of Mr. G. M. Cummings, city solicitor of Mansfield, Ohio, I beg to say the question presented by him involves the right of the city solicitor, as such officer, to institute an action to recover back moneys which had been expended for a road roller by the board of public service when there was no ordinance or resolution of council authorizing the contract to be made or ordering the purchasing of the roller. I am informed by the city solicitor that an appropriation was made of the necessary moneys in the semi-annual appropriation ordinance to purchase the necessary implements of this character, but that it is contended by the city council that because there was no ordinance or resolution, as required by section 143 of the municipal code authorizing the expenditure to be made, for that reason the expenditure was void, and the city solicitor is directed to begin an action to recover the money back.

I am informed further by the city solicitor that the roller in question was delivered to the city some months ago and has been accepted and used by it, and that the amount of money provided in the contract made by the board of public service has actually been paid. Under these circumstances can such action be instituted to recover the money so paid?

The powers conferred upon the city solicitor by sections 1777 and 1778, Revised Statutes, it will be observed, are to "restrain the misapplication of funds of the corporation or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing the same or which was procured by fraud and corruption."

This proceeding thus provided for by section 1777 R. S. is the extent of the city solicitor's power in such proposed actions, and this does not contemplate the right to recover in the name of the city solicitor against any company, moneys which have been paid under circumstances as in the question submitted. Where the moneys have actually been paid and the machine delivered and accepted by the city, under the circumstances in question, no right of action arises in favor of the city solicitor against the company selling the machine; but it would have been different if the funds had not actually been paid to the company, or if the contract had not been fully performed as in this instance, because then the right of action would have arisen in favor of the city solicitor to restrain the misapplication of funds or the execution of the contract made in contravention of the laws or ordinance governing the same.

As bearing upon this proposition, which so far as I have examined has not been directly passed upon by the supreme court of this state, the following authorities are helpful: Mt. Vernon v. State, 71 O. S. 428-454; Water Co. v. Defiance, 68 O. S. 522; Columbus v. Federal Gas & Fuel Co., 14 Dec. 262, 267 (affirmed in 72 O. S. 632); Crawford v. Madigan, 13 O. D. 499; Columbus v. Bohl et al., 13 O. D. 569; Herenstein, Taxpayer v. Herman et al., 6 N. P. 98; 20 Am. & Eng. Enc. of Law 1182.

In the consideration of this question I do not pass upon the right of a

municipality to institute an action against a vendor of a machine, or other property, for damages caused by a failure of the machine to perform the work for which it was purchased or to recover in any case upon a failure of the consideration, the same as an individual might do under circumstances which authorized his right to recover.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

MAYOR — FINES — REMISSION OF.

Mayor may not remit fine imposed in prosecution for violation of state law or of municipal ordinance.

October 24th, 1907.

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

GENTLEMEN: — Replying to your inquiry of the 22nd inst., relative to the power of mayors of municipalities to remit fines and costs in cases brought before such officers for violation of the statutes and of municipal ordinances, I beg to say there is no express authority conferred by the statutes of this state upon such officers to remit any fines due the state of Ohio. The duties of such officers in regard to fines adjudged for violations of the statute law and the ordinances of municipal corporations, are included in the following provisions of the Revised Statutes:

Section 7327 R. S. provides:

> "When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced shall remain confined in the county jail until the fine and costs are paid, or secured to be paid, or the offender is otherwise legally discharged."

Section 7328 R. S. provides:

> "When a magistrate or court renders judgment for a fine an execution may issue for the same, and the costs of prosecution, to be levied on the property, or, in default thereof, upon the body of the defendant; * * "

Section 6802 R. S. provides:

> "An officer who collects any fine shall, unless otherwise required by law, within twenty days after the receipt thereof, pay the same into the treasury of the county in which such fine was assessed, to the credit of the county general fund * * * ."

Fines imposed by mayors for violation of city ordinances when collected are to be paid into the city treasury as distinguished from those which, under section 6802, are to be paid into the county treasury. (Section 1864).

By section 1866 R. S., it is provided:

> "When a fine is imposed for the violation of an ordinance of a corporation, and the same is not paid, the party convicted shall, by order of the mayor, or other proper authority, or on process issued

for that purpose, be committed until such fine and the costs of prosecution are paid, or the party is discharged by due process of law."

2570 &c.

By section 1028 R. S., the auditor of the county may discharge from imprisonment any person who is confined in the county jail for the non-payment of any fine or amercement due the county, except fines for contempt of court or some officers of the law, when it is made clearly to appear to him that such fine or amercement can not be collected by such imprisonment. In a proceeding brought pursuant to such provision the circuit court of the third circuit, in the case of In re Moore, *habeas corpus,* (14 C. C. 237) held that a fine imposed by a court on a defendant in a *state* case, although payable into the county treasury to the credit of the general county fund, is not a debt due the county, and is not a subject for compounding or releasing by the county commissioners.

As the county commissioners could not, in such case, compound, release or remit any fine made payable to the state of Ohio, neither could the mayor after rendering judgment against the accused in a state case, remit, release or compound the same because the same becomes a claim due the state of Ohio, although when collected paid into the county treasury.

With regard to *fines* imposed for the violation of municipal ordinances such officer has no authority to discharge the same except by full payment thereof.

As the mayor of a city is not entitled to fees in prosecutions for a violation of penal ordinances, he would have no authority to even remit the *costs* taxed for his services, in such cases, but he should pay the same into the treasury of the corporation.

Smallwood v. Cambridge, 75 O. S. 339;
Section 126 M. C.;
Section 200 M. C.;
In re William Mullee, 7 Blatchf. (U. S.) 23;
Luckey v. State, 14 Texas, 400.

It follows that mayors have no authority to remit fines or costs payable either into the county or municipal treasuries, in state cases or cases brought for the violation of municipal ordinances.

In the foregoing, no question is made as to the authority of a mayor to revise or modify his judgment, in any such cases, by proper proceedings for such purpose.

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

HUMANE AGENT — SALARY OF AGENT.

No claim for salary of agent of humane society exists against city unless council has fixed amount thereof and appropriated money therefor.

December 10th, 1907.

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

GENTLEMEN: — Replying to the inquiry which you have transmitted to this department as coming from the city solicitor of Van Wert, Ohio, I beg to advise that while section 3718 R. S. provides that the council of any city shall not pay less than $20.00 per month to the agent of the humane society, yet the agent

cannot recover on a claim for additional salary against the city by reason of such provision in the statute cited. The statute does not fix the amount of the salary; that is left to be determined by the council. The statute only establishes the minimum. Before any part of the amount could be lawfully paid it would be necessary for the city council to provide by appropriation therefor. It would also be necessary for the council to evidence by ordinance, lawfully passed, the amount of the salary to be paid to such agent.

I assume that the council has not fixed the amount of the salary by ordinance, and until that is done and until an appropriation has been made commensurate therewith, the payment of the claim cannot be made.

The mere failure to keep a record of the appointment of such agent, as provided for by section 3718, does not invalidate the appointment if otherwise legally made.

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

BOARD OF EDUCATION — TELEPHONES.

Board of education may not pay for exchange service of telephone instruments located in residences of superintendent of schools and superintendent of buildings.

December 13th, 1907.

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

GENTLEMEN: — Replying to your letter of December 9th, I am unable to find any legal authority by which a board of education may pay for telephone exchange service in the residence of either the superintendent of schools or the superintendent of buildings.

Such a payment would seem to be not only in contravention of law but contrary to a well established public policy. Matters of this kind should be considered when the salaries for these officers are fixed by the board of education.

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

MUNICIPAL CORPORATIONS — WATER WORKS — PAYMENT OF CITY'S RENTALS DUE PRIVATE CORPORATIONS.

Rentals due from municipal corporation to private corporation operating water works may be paid, if possible, from funds at disposal of board of public service, upon order issued by such board; otherwise, funds in hands of sinking fund trustees may be applied to such indebtedness by suffering judgment to be taken against city in suit thereon; municipality may borrow money to pay such indebtedness.

December 18th, 1907.

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

GENTLEMEN: — Replying to your inquiry of the 14th inst., and to the questions presented by the city solicitor of Newark, relative to the method of paying

certain rentals due the water company operating in that city, I beg to advise that out of that portion of the amount which the city has now on hand to the credit of the board of public service, it can be paid as any other claim against the city under the control of that department by the board of public service issuing an order on the city auditor for the payment of the same.

As to that portion of the indebtedness due from the city to the water company and for the payment of which there are now no moneys on hand, it can be taken care of if the sinking fund trustees have moneys applicable to the payment of judgments, by the water company beginning an action against the city, and the sinking fund trustees paying the judgment rendered in such action.

If the amount of the latter indebtedness does not exceed the amount of the taxes and revenues estimated to be received at the next semi-annual installment of tax collections for such fund, the city might borrow money and issue its certificates of indebtedness therefor for the payment of such amount.

As the condition of the revenues of the city is not disclosed by the letter of the city solicitor, I am unable to advise with regard to the city adopting the procedure last outlined.

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

(To the Treasurer of State)

SCHOOL LANDS — PROCEEDINGS FOR SALE OF — COSTS.

Attorney fees may be included in costs of proceedings for sale of school lands.

February 6th, 1907.

HON. W. S. MCKINNON, *State Treasurer, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you ask my opinion as to whether attorney fees may be taxed in the costs of the sale of school lands, under section 1437 R. S.

In reply I beg to say section 1437 provides that:

> "The fees for services under this chapter in relation to sales, shall be as follows: The court shall tax such fees on any petition filed in the same, as are allowed for similar services on proceedings for partition."

The costs and expenses in an action in partition are provided for by section 5778 R. S., which is as follows:

> "The court, having regard to the interest of the parties, and the benefit each may derive from a partition, and according to equity, shall tax the costs and expenses which accrue in the action, including reasonable counsel fees, which shall be paid to plaintiff's counsel, unless the court award some part thereof to other counsel for service in the case for the common benefit of all the parties; and execution may issue therefor as in other cases."

This section authorizes the taxing of reasonable counsel fees in the costs of the case and section 1437 authorizes the same fees to be taxed in an action for the sale of school lands as are taxed in an action for partition. I am, therefore, of the opinion that reasonable counsel fees may be included in the costs in an action for the sale of lands, under section 1418, 1437 R. S., inclusive.

Very truly yours,

WADE H. ELLIS,

Attorney General.

BENEVOLENT INSTITUTION — CONTRACT — EFFECT ON INTEREST OF STATE OFFICER.

Validity of contract of trustees of hospital for insane, let after competitive bidding, not affected by interest therein of officer in state department.

August 6th, 1907.

HON. CHARLES C. GREEN, *Cashier State Treasury Department, Columbus, Ohio.*

DEAR SIR: — In answer to your inquiry dated August 5th, 1907, I beg to advise you that the fact that you are cashier in the office of the treasurer of

state, and are also interested in a company which has been awarded a contract by the trustees of the Columbus state hospital, does not affect the legality of such contract, the contract having been awarded to the lowest bidder after competitive bids and due advertisement.

Very truly yours,
W. H. MILLER,
Asst. Attorney General

(To the State Commissioner of Common Schools)

SCHOOLS — TUITION — TEACHERS PENSIONS — DUVALL LAW.

Tuition of pupil attending a school other than that to which he is assigned is payable by board of education of district wherein he or his parents pay taxes.

Pension fund for school teachers may not be established until one third of the teachers in the district have accepted provisions of pension act.

No state fund exists out of which aid can be extended to weak school districts under the "Duvall law," 98 O. L. 200.

Provision of section 4007 R. S. that schools shall be kept open eight months is directory.

January 8th, 1907.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your letter of recent date requests opinions on four questions which I will take up in order:

> *First.* Section 4022*a* provides that when pupils live more than one and one-half miles from the school to which they are assigned in the district in which they reside, they are entitled to attend a nearer school in the same district, or if there be no nearer school in said district, they may attend the nearest school in another school district, in all grades below the high school, and the board of education of the district in which they reside is compelled to pay their tuition.
>
> When this is the case and one of the pupils or a parent of a pupil is a tax-payer in the district in which said pupil attends school, can the amount of school tax paid, as specified in section 4013, be credited on the tuition bill which the *board of education* has to pay?

This question must be answered in the affirmative. Section 4013 R. S. provides:

> "When a youth between the age of six and twenty-one years or the parent of such youth owns property in a school district in which he does not reside, and said youth attends schools of said district the amount of school tax paid on such property shall be credited on the tuition of said pupil."

This statute does not limit the credit to cases where the tuition is paid by the pupil himself. Section 4022*a* requiring the board of education to pay the tuition of the pupil in the case put by you was passed at the same time as section 4013.

> *Second.* Has the board of education of a school district authority to provide for the pensioning of its teachers under section 3897*b* R. S. if less than one-third of the teachers of such district have accepted the provisions of that act?

Section 3897*b* R. S. provides that the school teachers' pension fund shall be under the management and control of a board of trustees a certain number of whom must be elected by the teachers who have accepted the provisions of the act. The statute further provides:

> "the first election to be at a meeting to be called by such super-

intendent when one-third of the teachers of the public schools of such school district shall have accepted the provisions of this act."

Section 3897c R. S. provides for notice to all school teachers of the resolution passed by the board declaring the advisability of creating a school teachers' pension fund and requires the teachers to notify the board in writing in thirty days whether they consent or decline to accept the provisions of the pension act.

> "And from and after the *election of the board of trustees* herein provided for the sum of $2.00 shall be deducted from the monthly salary of each teacher who may have accepted the provisions of this act," etc.

A legal board of trustees cannot be elected until one-third of the teachers have accepted the provisions of the act. The board of education has no authority to manage the pension fund nor to delegate its management to any other board than the one expressly provided for by the statute above referred to. If one-third of the teachers of the district do not notify the board of education of their acceptance the board has no authority to take any further action toward the establishment of a pension fund.

> *Third.* In the event that no special appropriation was made for the payment of state aid to weak school districts provided for by S. B. 103 (98 O. L. 200) can this deficiency be paid from any other fund or is there any other way through which state assistance can be furnished to meet the requirements of the law before the next session of the general assembly?

There is no state fund out of which the payments referred to can lawfully be made, the general assembly having neglected to make any appropriation. 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 the subsequent appropriation by the legislature. There is, of course, no certainty that the legislature will make such appropriation.

> *Fourth.* When a board of education of any school district makes a levy of only six or seven mills or any rate less than the maximum and as a result does not have sufficient funds to pay the minimum salary for eight months and can continue the school only seven months at the $40.00 rate, can said board of education be compelled to meet the requirements of the law? If so, what should be the mode of procedure?

The act to provide state aid for weak school districts does not require schools to be kept open eight months in the year, nor does it require boards of education to make the maximum levy. It encourages boards of education to keep their schools in session for the full eight months by providing that in case the board, after making the maximum levy, has not sufficient funds to pay $40.00 per month for eight months the state will make up the deficit.

Section 4007 R. S. provides that each board of education

> "shall continue each and every elementary day school so established not less than (twenty-eight) thirty-two nor more than forty weeks in each school year," etc.

This statute is mandatory in form. It must, however, be read in connection with other statutes *in pari materia*, and section 3969 R. S. passed on the same date as section 4007, provides:

> "If the board of education in any district fail in any year to estimate and certify the levy for a contingent fund as required by this chapter, or if the amount so certified is deemed insufficient for school purposes, or if it fail to provide sufficient school privileges for all the youth of school age in the district or to provide for the continuance of any school in the district *for at least seven months in the year* * * * the commissioners of the county to which such district belongs, upon being advised and satisfied thereof, shall do and perform any or all of said duties and acts in as full a manner as the board of education is by this title authorized to do and perform the same," etc.

Reading the two statutes together my conclusion is that the requirement of section 4007 R. S. that schools shall be continued for eight months should be construed as directory rather than mandatory. It is undoubtedly the duty of boards of education to keep the schools open for eight months in the year if the funds available render it possible to do so, but I regret to say that under existing statutes I do not believe mandamus would lie to compel the performance of this duty. The statutes should be amended by the next general assembly so as to harmonize the provisions as to the length of the school session now found in sections 3969 and 4007 R. S. and in the recent act to provide state aid to weak school districts (98 O. L. 200).

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

SCHOOLS — TEACHERS' INSTITUTE.

Teachers entitled to compensation for attending county institute only, not city institute.

January 19th, 1907.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your letter of January 17th requests my opinion on the following questions:

> *First.* If a board of education in a city school district appropriates five hundred dollars for the support of an institute for the instruction of the city teachers and the institute is held when the schools are not in session, either in time of vacation or on four Saturdays within the school year, are the city teachers who attend said institute the full time, entitled to one week's additional pay for such attendance?

Section 4092 R. S., which authorizes the board of education of city school districts to hold yearly institutes for the benefit of the teachers therein, contains no provision requiring boards of education to pay teachers for attendance at such institutes. It does provide that:

> "If the board of any district do not provide for such institute in

any year it shall cause the institute fund in the hands of the district treasurer for the year to be paid to the treasurer of the county wherein the district is situated, who shall place the same to the credit of the county institute fund, and the teachers of such district shall be entitled, in such case, to the advantage of the county institute, subject to the provisions of the preceding section."

This section clearly authorizes teachers of city districts to attend the county institute in case no city institute is held, and entitles them to pay for such attendance in accordance with the provisions of section 4091. But neither statute can be construed to require payment for attendance at city institutes. Your first question should, therefore, be answered in the negative.

Second. If a board of education in a city school district appropriates five hundred dollars for the maintenance of an institute and the money is used for the partial support of a joint city and county teachers' institute in time of vacation, are the city teachers who attend such joint institute for the full time, entitled to the one week's additional pay the same as the other teachers of the county receive under the provisions of section 4091?

There is no such thing as a joint county and city institute recognized by the statutes. The institute described in your question would, it seems, be a county institute, and the city teachers would therefore be entitled to one week's additional pay the same as the other teachers in the county.

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

SCHOOLS — PHYSICAL EXAMINATION OF PUPILS.

Board of education may not employ physician to conduct physical examinations of pupils; such measures should be provided for by board of health or council.

April 4th, 1907.

HON. E. A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your letter of April 2nd requests my opinion as to the authority of boards of education to expend school funds in the employment of physicians to make physical examinations of pupils.

I have been unable to find any provision in the statute which would justify such expenditure. The power conferred by section 4017 R. S. to appoint "such other employes as the board may deem necessary, and fix their salaries" should, I believe, be limited to employes of the same character as those specified in that section, i. e. truant officers, superintendents of buildings, janitors, etc.

Section 3986 R. S. authorizes boards of education to make and enforce rules and regulations to prevent the spread of smallpox but provides that

"The boards of health and councils of municipal corporations, and the trustees of townships, shall, on application of the board of education of the district, provide at the public expense, without delay, the means of vaccination to such pupils as are not provided therewith by their parents or guardians." (69 v. 22, Sec. 1.)

If the physical examination of school children is necessary or desirable in order to prevent the spread of disease I am of the opinion that it should be provided for by the board of health or the council rather than by the boards of education.

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

BOARD OF EDUCATION — PRESIDENT — REMEDY OF BOARD FOR FAILURE TO PERFORM HIS DUTY.

Board of education may not remove president who fails and refuses to perform his duty; remedies in such case.

November 2nd, 1907.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — In your communication of October 29th, you ask the following questions:

> "In case the president of a board of education refuses to sign orders approved by a majority of the members of the board, refuses to put motions properly made, or fails in other ways in important matters to perform his duty as president, is it within the province of a majority of the members of the board to depose said official and elect another presiding officer? If so, what should be the mode of procedure?"

Under sections 3897a, 3911, 3920 and 3933 the president of a board of education is elected for a term of one year. He, therefore, does not serve during the pleasure of the board and the rule that the appointing power has by implication the right of removal does not apply. Section 3977 provides that the prosecuting attorney "shall prosecute all actions against a member or officer of a board of education for malfesance or misfeasance in office." Section 3981 R. S. provides that "vacancies * * arising from * * removal from office shall be filled by the board of education." However, I find no statute making provision for such prosecution or for declaring the office of president of a board of education vacant. In the case of Board of Education v. Best, 52 O. S. 138, the court say at page 152,

> "the authority of boards of education is strictly limited. They have only such power as is expressly granted or clearly implied and doubtful claims as to the mode of exercising the powers vested in them are resolved against them."

In the absence of specific provision in the statutes for the removal of the president of a board of education I do not believe that it is within the province of the members of the board to remove him and elect another presiding officer.

Under section 3982 "upon any motion or resolution any member of the board may demand the yeas and nays and thereupon the clerk shall call the roll and record the names of those voting 'yea' and those voting 'nay'." If the president then refuses to declare the motion carried there will nevertheless be a sufficient compliance with the law to make the motion valid. In cases where the president of the board of education has no discretion and the law is mandatory

as to the performance of a duty in his official capacity he may be compelled by mandamus to perform such duty.

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

SCHOOL DISTRICT — SPECIAL — DISPOSITION OF PROPERTY AND VALIDITY OF CONTRACTS.

Property of abandoned special school district should be delivered to board of education of township district of which such special district was formerly a part; contracts with teachers for such special district should be re-executed by board of such township district.

September 16th, 1907.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your communication of September 12th, as to the abandonment of the Malaga special school district, is received. You ask:

> First. Whether the books of the special school district should be turned over to the board of education of Malaga township, of which we understand this district was a part prior to an act of the legislature passed March 7, 1894, making it a special school district.
>
> Second. Whether the board of education of Malaga township should re-hire the teachers of the Malaga special school district.

Section 3935 R. S. provides as follows:

> "The legal title of the property of the special school district shall in the event of abandonment or failure to continue, be vested in the board or boards of education of the township or townships in which such property is situated."

The books above mentioned should therefore be turned over to the board of education of Malaga township.

Inasmuch as the supreme court decided, October 31, 1905, in the case of Bartlett et al v. the State of Ohio, 73 O. S. 54, that all special school districts which have been created under the provisions of special acts of the general assembly are illegal and void and that the provision of section 3928 R. S., declaring them legal is unconstitutional and void, it would be best to have new contracts with the teachers entered into by the township board of education.

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

BOARD OF EDUCATION — TOWNSHIP — EMPLOYMENT OF ATTORNEY.

Township board of education may employ attorney other than the prosecuting attorney to prosecute or defend action in their behalf, and may pay attorney fees and court costs from school fund.

September 27th, 1907.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — In your recent communication you ask the following question:

> Can a township board of education be enjoined from employing an attorney other than the prosecuting attorney of their county and from paying attorney fees and court costs in case they refuse to follow the advice of the prosecuting attorney?

Section 3977 R. S. provides as follows:

> "The prosecuting attorney shall be the legal adviser of all boards of education in the county in which he is serving, * * * ; he shall be the legal counsel of said boards or the officers thereof in all civil actions brought by or against them and shall conduct the same in his official capacity."

While this section makes it the duty of the prosecuting attorney to act, without charge, for the township board of education, it does not prohibit the employment of another attorney. Since this section authorizes boards to sue and be sued by implication it confers upon them the power to do these things which are necessary to successfully prosecute or defend a suit.

Section 1274 R. S., as amended March 31st, 1906, 98 O. L. 160, also provides:

> "This section shall not be construed to affect the provisions of sections 1271 and 7196 R. S., nor to prevent any board of township trustees or any school board from employing counsel to represent them; and such counsel, if employed by the township trustees, shall be paid from the township fund, and if employed by the school board, shall be paid from the school fund."

It seems, therefore, that the township board of education may employ and pay an attorney either to assist the prosecuting attorney or to act alone, when the board considers such employment essential to their interests in case of suit. The board cannot, therefore, be enjoined from payment of fees of such attorney and of course cannot be enjoined from paying the court costs in any suit brought by or against them.

Regarding your other question as to whether a person under eighteen years of age who has, in ignorance of the law, received a teacher's certificate from the county board of examiners, and who has in good faith been employed by a township board of education, can compel payment of his salary for the time he has taught, I understand that the particular case cited has been decided in the affirmative and that it is now pending in the circuit court. I am, therefore not at liberty to give an opinion upon this question as it would be in effect an anticipation of the court's decision.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

(To the State Board of Public Works)

CANALS — POWER OF BOARD OF PUBLIC WORKS

Board of public works may not authorize a city to fill up any portion of canal bed or tow-path; board may not lease any portion of tow-path.

January 3rd, 1907.

Board of Public Works, Columbus, Ohio.

GENTLEMEN: — Your letters of recent date requesting opinions from this department have to do with the same subject matter and will, therefore, be taken up together.

Your letter of December 20th state that the city of Newark, through its board of public service, has applied to the state board of public works for permission to fill in the Ohio Canal to the present street grade at the crossings on First, Second, Third, Fourth, Fifth and Sixth, also Webb and Morris streets, said city to do the work at its own expense and agreeing, by ordinance passed December 3rd, 1906, to remove the fills at any time the board of public works may notify said city to do so.

You desire to know whether the board of public works has authority to grant such permission.

"The board of public works possesses no powers except such as are expressly conferred by law, or as are necessarily implied, the purpose of which is to perfect, render useful, maintain, keep in repair and protect and make the canals useful as navigable highways." State vs. Railway, 37 O. S. 157-174.

I am unable to find any authority in the statutes for the board to grant a permit to fill up the canal.

Section (218-224) provides:

> "That each and every tract of land, and any part of the berme bank of any canal, canal basin, reservoir and outer slope of the towing path embankment, which said commission shall find to be the property of the state of Ohio, the use of which, in the opinion of said commission, the board of public works and the chief engineer of the public works, if leased would not materially injure or interfere with the maintenance and navigation of any of the canals of this state, shall be valued by said commission at its true value in money, and if such land shall not then be under an existing lease, may be leased for any purpose other than for railroads operated by steam, but said commission, the board of public works and the chief engineer of the public works shall have power to make leases and prescribe regulations for the crossing of the canals, canal basins or canal lands by any railroad operated by steam, electricity or other motive power, or for the necessary use, for railroad purposes, of any part of the berme banks of a canal, canal basin, or any portion of the canal lands for a distance not exceeding two miles, or if then under an existing lease, then at the expiration of such lease, may be leased on the terms and conditions hereinafter in this act provided for."

Section (218-226) provides:

> "The said commission, board of public works and chief engineer of the public works may lease for the term of fifteen years, at six per cent. per annum, rental to be paid semi-annually in advance, on a valuation made by said commission, the right to erect buildings across

any of the canals not less than ten feet above high water line, to be constructed under the direction of the chief engineer of the public works in all respects so as not to interfere with the maintenance of the embankments and operation of the canal under said buildings."

These statutes authorize the lease of every part of the canal with the exception of the towing path and the inner slope of the towing path embankment, provided the use to be made of the leased land will not materially injure or interfere with the maintenance and navigation of the canals. The board is granted power in general terms to make leases and prescribe regulations for the crossing of the canals by railroads. But when the clause conferring this power is read in connection with the other provisions of the statute, it is reasonably clear that the power of the board as to railroad crossings is limited to the authorization of crossings of such nature as will not materially injure or interfere with the maintenance and navigation of the canals.

If the board of public works has authority to lease any part of the canal for any purpose, provided the lease contains a covenant by the lessee to remove any structure on demand of the board, it is apparent that the entire canal system might, in a few years, be blocked with encroachments of every description. Instead of a canal route open to improvement and renewed use for canal purposes at any time, the state would merely have title to a strip of land covered by all sorts of obstructions, many of which the state might be compelled to remove at its own expense. At best the removal would necessitate considerable delay and more or less litigation.

If the board may authorize a city to fill up the bed of the canal and to obstruct the towing path by an embankment, instead of building a bridge across the canal, it is difficult to see where the authority of the board would stop.

I am, therefore, of the opinion that the board has no power to grant the permit requested.

Your letter of December 19th states that on the 9th day of May, 1905, the state of Ohio, through the board of public works, the chief engineer of the public works and canal commission, constituting the joint board, granted to the Baltimore & Ohio R. R. Company a lease for certain canal lands on the berme side of the Ohio Canal, opposite its shops, in the city of Newark, Licking County, Ohio, said piece of land being the berme bank and wide water of the canal, reserving a 40 foot canal.

In occupying said leased land and constructing switch tracks thereon, said company constructed one track on the 40 foot strip reserved by the state. It also filled up the canal for quite a distance and erected thereon sand and coke bins and a platform and other open bins.

The board, on learning this situation, visited the premises and ordered said company to remove the said track and other structures.

Pending the removal of said structures the company made application for the use of the canal property, unlawfully occupied by it, agreeing to vacate the same upon request of the board of public works if the same shall be needed for canal purposes, and that it will return the canal in the same condition it found it or provide another route for the canal.

You desire to know whether the board has authority to lease the towing path or bed of the canal to the railroad company.

Section (218-225), above quoted, authorizes the lease by the board for railroad purposes "of any part of the berme banks of the canals, canal basins or any portion of the canal lands for a distance not exceeding two miles."

While the words "any part of the canal lands" would, if standing alone, include the towing path, the fact that the berme bank of the canal and canal

basins are specifically mentioned indicates that the term "canal lands" is not intended to embrace the banks and bed of the canal itself.

This clause refers, I believe, to lands acquired by the state in such manner as to constitute a part of the canal system, but not a part of the canal proper. It has the same meaning as the clause "each and every tract of land" used in the beginning of this section. Both general phrases are limited by the enumeration of specific portions of the canal proper which are declared to be subject to lease.

I am of the opinion that the board has no authority to lease the towing path or the inner slope of the towing path embankment but that it may lease the berme bank of the canal or canal basins for railroad purposes for a distance not exceeding two miles.

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

CANALS — VARIOUS QUESTIONS CONCERNING PORTION OF MAD RIVER FEEDER TO MIAMI AND ERIE CANAL IN THE CITY OF DAYTON.

Title of state to both banks of Mad River feeder to Miami and Erie Canal between Wayne street and Atlantic and Great Western Railway crossing in city of Dayton.

Board of public works may lease both banks of such feeder subject to rights of city under special act in 74 O. L. 473.

Board of public works may by lease authorize the erection of buildings within such city across such feeder at any height above high water level.

Rights of city of Dayton under special act in 74 O. L. 473 limited to privilege of building stationary bridges at any height above high water level at street crossings only; consent of board of public works necessary to construction of such bridges; no title acquired by city under said act.

Rights of railroad companies under special acts in 85 O. L. 127, 86 O. L. 270 and 94 O. L. 345 limited to privilege, under grant of city council, of constructing bridges, trestles, etc.; consent of board of public works as to model and location of such structures necessary.

Railroad bridges may be built at street intersections in such city at any height above high water level subject to consent of city council and board of public works.

Railroad company may not occupy berme bank of such feeder without lease from board of public works.

February 6th, 1907.

To the State Board of Public Works, Columbus, Ohio.

GENTLEMEN: — Your letter of recent date requests an opinion upon the following questions:

1st. What title has the state to that portion of the Mad River feeder to the Miami and Erie Canal that lies between the westerly line of Wayne street and the crossing of the Atlantic and Great Western Railway in the city of Dayton?

2nd. Has the board of public works power to lease both banks of the feeder and authorize the construction of buildings across it?

3rd. Has the Pennsylvania Railroad Company the right to maintain a 500 foot platform along the feeder for general railroad purposes under authority from the city of Dayton?

4th. Has the Pennsylvania Railroad Company the right to maintain a switch track on the berme embankment of the feeder under authority of the city of Dayton?

First. Title of state to Mad River feeder.

The supreme court in the case of State ex rel. v. C. H. & D. Ry. Co., 73 O. S. 343, held that the state was the owner in fee simple of a portion of the tow path embankment of the Mad River feeder 1979.1 feet in length by 15.68 feet in width. That was the only part of the feeder title to which was involved in that suit. The decision was based upon a finding of fact that the feeder was a part of the canal system of the state and that the minimum tow path embankment, appropriated at the time the canal was constructed, was 15.68 feet wide. I am informed that the minimum berme embankment so appropriated was 11.12 feet wide. If so, the state has title to a strip of land on the berme embankment of said feeder 11.12 feet in width.

Second. Power of board of public works to lease banks of Mad River feeder and authorize construction of buildings across it.

The portion of the Mad River feeder referred to in your letter was originally a part of the Miami and Erie Canal. It has, however, long since ceased to be a part of the canal proper. This fact is important since the power of the board of public works to lease the canal proper is subject to certain limitations which do not apply to its power over other portions of the canal lands. The change in the legal status of this section of the canal is sufficiently evidenced by an act of the general assembly passed April 26, 1877, 74 O. L. 473. This act provides for the maintenance of this section as a feeder, but clearly recognizes its abandonment as a navigable canal. It is therefore subject to control by the board of public works to the same extent as other feeders, except in so far as the authority of the board is limited, if at all, by the provisions of the special act above referred to. That act is as follows:

AN ACT.

"To authorize the city of Dayton to build and maintain stationary bridges across the Mad River feeder of the Miami and Erie Canal.

Section 1. Be it enacted by the General Assembly of the State of Ohio, That the city of Dayton shall be and is hereby authorized to build and maintain stationary bridges, at any height above high water level, across the Mad river feeder of the Miami and Erie canal, at any point thereon between the western line of Wayne street and the bridge of the Atlantic and Great Western railway, across said feeder.

Sec. 2. Said portion of said feeder shall be kept open and in repair, and the flow of water therein shall not, in any manner, be diminished, obstructed or impeded, and said city shall forever maintain the banks of said part of said feeder in good condition, and shall remove the sediment which may be deposited in the same.

Sec. 3. The city council of said city may grant, upon such terms as may be deemed equitable, to any railroad company or companies, the privilege to build similar bridges and other structures across said part of said feeder; but no such bridge or structure shall be built without authority therefor first obtained from said city council.

Sec. 4. Said bridges shall not be built until the board of public works shall have consented thereto, nor until the written consent of

the lessees of the public works thereto shall have been first obtained by said city, and filed in the office of the board of public works, or until said city shall have appropriated the right of said lessees to navigate the same, nor shall any such bridge be built until the written consent of owners of property abutting on any part of such feeder, which would be closed to navigation by the building thereof, shall have been in like manner obtained and filed, or until said city shall have appropriated any right which such owners may have to the use of such portion of said feeder for navigable purposes. Authority is hereby granted to any city of the second class to make such appropriations, by proceedings to be instituted and carried on in the manner provided for the appropriation of property in the 'act to provide for the organization and government of municipal corporations,' passed May 7, 1869, and the amendments thereto, so far as the same are applicable.

Sec. 5. Nothing in this act, or in the exercise of any privilege authorized thereby shall be held to create or work a forfeiture or reversion of any land heretofore dedicated to any public use."

At the time this act was passed general laws forbade the construction of bridges across canals, navigable feeders, or navigable rivers connected with the canals, unless the plans for such bridges were submitted to and approved by the board of public works or the canal commissioners. (Sections (218-73), (218-81), 4937 and 3317 R. S.)

Section 3317 R. S., empowered the board of public works to authorize the construction of permanent railroad bridges over canals, or any navigable waters, but provided that such bridges should be not less than 10 feet above top water-line of the canal. Section 4937 authorized county commissioners and city councils to construct swing bridges or self closing bridges where highways crossed the canal, but the consent of the board of public works to the model and location thereof was required.

But for the special act above quoted the city would have had no power to construct stationary bridges over the feeder except at two points specified in a prior act (218-267) R. S., and neither the city nor the board of public works could have authorized the railroad company to construct a permanent bridge less than 10 feet above the top water-line of the canal. The purpose of the special act was to release the city from the restrictions in the general statutes as to the character and height of bridges across canals. To effect this purpose it was not necessary to extend the power of the city to structures across the canal at places where the city would theretofore have had no right to construct bridges of any sort. Where city streets crossed the line of the canal the city already had the right to construct draw and swing bridges with the consent of the board of public works. The special act conferred upon the city power to build, and to authorize rairoad companies to build, stationary bridges at any height above high water level. But it did not transfer to the city title to any part of the state lands, nor was it intended, in my opinion, to vest in the city any right to bridge or authorize others to bridge the feeder, except where city streets cross the canal.

Section 4 provides that "such bridges shall not be built until the board of public works shall have consented thereto." The word "bridges" here used must refer to the "similar bridges and other structures" mentioned in the preceding section as well as to the bridges to be constructed by the city, for it would be absurd to require the consent of the board to the construction of the two bridges specifically authorized by the legislature and not require such consent as a condition precedent to the construction of bridges and other structures authorized by the city. (Railway Company v. Jump, 54 O. S. 651, 653).

The final clause of section 3, "but no such bridge or structure shall be built without authority therefor first obtained from said city council" refers to stationary railroad bridges less than 10 feet above the top water-line of the canal. The general power of the board to authorize the construction of railroad bridges more than 10 feet above the high water-line was not curtailed by the special act. But the right of railroad companies to build stationary bridges less than 10 feet above high water level, at least at all points where city streets cross the feeder, was made dependent upon the consent of the city as well as upon the consent of the board of public works. This is the sole limitation which the special act imposed upon the board of public works in its control of this section of the canal.

It is true that the power of the city to construct and to authorize the construction of bridges is nowhere expressly limited to bridges at street intersections. But the fact that the act did not confer upon the city title to the banks of the feeder makes it most improbable that the legislature intended to confer upon it the right to control railroad crossings from bank to bank not extending over upon municipal property nor otherwise affecting municipal interests. Public grants must be construed strictly in favor of the state. The construction before suggested accomplishes the apparent purpose of the act and at the same time avoids hampering the state in its control of portions of the feeder which are not needed for public crossings.

But whether or not the consent of the city must be obtained to the construction of railroad bridges at other points than street intersections is a question which need not be decided at this time. Your letter states that the present crossings were consented to by the city. Should the board hereafter determine to grant new crossing rights to railroad companies I will give this question further consideration.

It remains to consider what the general powers of the board of public works are as to leasing lands which are a part of non-navigable feeders. The board has no power to lease the tow path embankment of a canal proper but when a portion of a canal has, by act of the legislature, been abandoned as a navigable canal, there is no longer any basis in reason for a distinction between its banks. The board may therefore lease either or both banks of the Mad River feeder provided the use thereof will not materially interfere with the maintenance and navigation of any of the canals, (Sec. (218-225) R. S.).

Section (218-226) R. S., provides that the board "may lease the right to erect buildings across any of the canals not less than 10 feet above the high water-line." The fact that the special act as to Mad River feeder authorizes the construction of permanent structures at any height above high water level leaves no doubt in my mind as to the right of the board to "lease the right to erect buildings across said feeder" at any height above high water level, provided such buildings will not interfere with the maintenance of the canal.

The owners of the lease to D. Z. Cooper cannot object to the construction of buildings across the canal, provided their right to receive the stipulated amount of water through the feeder is not interferred with.

It appears from your letter that a lease of a portion of the feeder, formerly made to the C. F. Ware Coffee Company, has been abandoned by the lessee. This lease should be cancelled.

Third. The right of the Pennsylvania Railroad Company to maintain a platform across said feeder for general railroad purposes.

The acts authorizing the lease of canal lands by the board were not passed until ten years after the enactment of the special act, (85 O. L. 127, 86 O. L. 270, 94 O. L. 345). Neither the city nor the board of public works had authority,

under the special act, to permit the railroad company to occupy canal lands except where the railroad crossed the feeder.

Section 3 of the special act provides that "The city council of said city may grant, upon such terms as may be deemed equitable, to any railroad company or companies, the privilege to build similar bridges and other structures across said part of said feeder." The general words "other structures" are limited by the words "similar bridges" which immediately precede them. Eastman v. State, 4 N. P. 163, Hamilton Electric Co. v. State, 1 N. P. 366. Other similar structures would include trestles, swing and draw bridges, or indeed any structure primarily designed or used for the purpose of conveying the tracks of a railroad across the feeder. This is in accordance with the opinion of the referee in the case of the State ex rel. v. C. H. & D. Ry. Co.

> " .. .. had the legislature intended that the railroads should occupy the tract of land in question, *or more of it than is necessary to enable them to build their bridges across said canal, it would have set forth such intent in the act itself.*
>
> Counsel for the railroad company makes the proposition that the railroad tracks occupying the land in question come under the head of "other structures," and are therefore properly on said land.
>
> I do not think that a strip of railroad running parallel with the canal 1779.1 feet is such "other structure," as was contemplated by the act of April 26, 1877, but rather that the words *"other structures"* were used in the sense that the words "other fixtures for crossing" were used in Section 3317." (Report of Referee, page 41).

Under the special act the railroad company could acquire no right to maintain a platform of greater extent than was reasonably necessary to carry the railroad tracks across the feeder.

But, if I am fully informed as to the facts, the railroad company acquired no rights whatever under the special act. Neither the city nor the railroad company ever obtained the consent of the board of public works to the platform referred to. On May 20, 1877 the board of public works passed an order consenting that the city of Dayton might authorize structures to be built across the feeder on certain conditions, one of which was that a bond in the sum of $50,000 be given to the state by the city, conditioned that the requirements both of the act and of the order be complied with. This order was formally approved by the then attorney general on May 30, 1877. I am unable to concur in his opinion as to the legality of this proceeding. The act provides that "said bridges shall not be built until the board of public works shall have consented thereto." The consent here required is not a general consent to the grant of power to the city of Dayton. It is rather a "consent to the model and location" of each bridge as required by section 4937 R. S., passed three years previous to the special act. I find nothing in the act to justify an interpretation which would give to the board of public works power to divest itself and its successors in office of the right and duty of approving or disapproving the construction of each bridge or other structure thereafter constructed across the feeder. It is clear that no rights can be claimed under the order above referred to since one of the conditions upon which the general consent depended, viz., the giving of the bond, was never complied with.

I am, therefore, of the opinion that the railroad company has no authority to maintain the platform in question without a lease from the board of public works.

The right of the railroad company to maintain a track on the berme bank.

The railroad company has no right to occupy the berme bank of the feeder without a lease from the board of public works. R. S. (218-225); State ex rel. v. C. H. & D. Ry. C., 73 O. S. 343; State ex rel. v. Railway Company, 53 O. S. 157.

I believe the above answers fully the questions submitted. If the railroad company will not lease the lands from the board at a proper valuation, suit should be brought to oust it from the occupation thereof.

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

CANALS — TITLE OF STATE TO CERTAIN LANDS AT INTERSECTION OF CUYAHOGA RIVER AND OHIO CANAL.

Manner in which state acquired title to land on which outlet lock at intersection of Ohio canal and Cuyahoga river is situated; state may acquire title by adverse possession; state as owner of tract abutting on former bed of Cuyahoga river owns to center of former stream, such tract being bounded by lines drawn at right angles with thread of stream to intersection of shore lot lines.

February 11th, 1907.

The Board of Public Works, Columbus, Ohio.

GENTLEMEN: — Your letter of recent date requests an opinion as to the title of the state to several pieces of land bordering on the Cuyahoga river in the city of Cleveland.

The first tract referred to is that occupied by the outlet lock connecting the Ohio canal with the Cuyahoga river. This lock was constructed pursuant to an act of the general assembly passed April 29th, 1872, (69 O. L. 182) which granted to the city of Cleveland a large tract of land then occupied by a portion of the canal on condition that the city should

> "at its expense and under the direction of the board of public works connect said canal with the Cuyahoga river at or near the southerly terminus of that portion to be occupied by said city, *procure the right of way unless the same shall be owned by the state at the desired locality*, make the necessary excavations, embankments, walls, gates and locks needed to connect said canal with said river at the point aforesaid," etc.

The act further provided that the governor "on behalf of the state, being satisfied that said connection has been so made and approved *and accepted by the board of public works*" shall execute a deed.

It appears from your letter that the land on which the connecting lock was constructed was purchased by the city of Cleveland for the purpose of complying with the terms of the grant from the state. In view of the terms of the act itself and the uniform practice on the part of the state to acquire the *fee simple* title to land used for canal purposes, there is no doubt in my mind that the state acquired the title to the land occupied by and used in connection with the lock, at the time it was constructed and accepted by the state. It is not therefore necessary for the state to rely on title by adverse possession, but inasmuch as

you ask whether the state can acquire title in this way I beg to advise you that it may do so.

Stanley v. Schwabley, 147 U. S. 508;
Coles v. State, 115 N. C. 175;
Eldredge v. Binghampton, 120 N. Y. 309;
Baxter v. State, 10 Wis. 454.

The second tract about which you inquire is a portion of the former bed of the Cuyahoga river abutting on land acquired by the state from A. Holly, shown on exhibit "B" accompanying your letter. The course of the river at the point in question has been changed by artificial improvements made by the city, so that the former river bed is now dry land. The side lines of the abutting lot owned by the state intersect the former river bank at oblique angles.

The first question to be determined is, whether the state's property in the river-bed is bounded by the side lines of the upland lot protracted to a line coincident with the former thread of the stream, or whether it is bounded by lines drawn perpendicular to the former thread of the stream to the points where the side lines intersect the bank.

In Ohio the rule is well settled that "the owners of land situate on the banks of navigable streams running through the state, are also owners of the beds of the river to the middle of the stream as at common law." (June v. Purcell, 36 O. S. 396, 405.)

The common law rule is that the title of an abutting owner to lands in the bed of a stream under water does not depend on the direction of the lot lines on the land. Where the stream is straight the property of the abutting owner is bounded by lines drawn at right angles with the thread of the stream protracted until they reach the intersections of the shore lot lines with the bank of the stream. Where the stream curves the same principle applies, the lines running from the shore converging or separating according as the land lies within or without the curve.

Clark v. Campau, 19 Mich. 329;
Knight v. Wilder, 2 Cush. 199, 209;
Hardin v. Jordan, 140 U. S. 397, 399.

It is of course possible for the owner of land in the bed of the stream to control the amount which his grantee will take, by exact description, but where the deed describes the lot as bounded by a line running to the river and thence down the river to another line, etc., the grantee takes the bed of the stream opposite under the common law rule. This rule is applicable to the lot owned by the state shown on the map marked exhibit "B", accompanying your letter. The sudden change in the course of the stream worked no change in the title to its bed. The state owns to the middle of the channel marked "O."

This opinion is based entirely upon the facts stated in your letter and merely holds that *by virtue of its ownership of the Holly tract,* shown on exhibit "B," the state acquired no title beyond the middle of the channel marked "O." Whether the state has title to other parts of the channel through other conveyances or by virtue of its ownership of other abutting land, has not been considered.

The third tract about which you inquire has been formed by accretions on the property acquired from the city at the time the connecting lock was constructed. I am of the opinion that the state owns so much of this accretion as lies east of a line drawn perpendicular to the thread of the old river channel from the westernmost point, on the river bank, of the property acquired from the

city of Cleveland at the time of the construction of the lock. It may have acquired title beyond this line by adverse possession.

I believe that this answers all the questions submitted.

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

CANALS — WATER POWER — RIGHT OF STATE AS TO SALE OF, AS AFFECTED BY LEASE HELD BY COOPER HYDRAULIC COMPANY.

July 2nd, 1907.

HON. GEORGE H. WATKINS, *President, State Board of Public Works, Columbus, Ohio.*

DEAR SIR: — Your communication of June 27th is received, together with copies of the contract made with the Dayton Electric Light Company, and the water lease from the State of Ohio to D. Z. Cooper, which said lease is now held by the Cooper Hydraulic Company. You ask for an opinion on the following questions:

1. Has the state the right to sell water from the premises affected by the rights of the Cooper Hydraulic Company to be diverted entirely from the canal or dispose of such water for purposes where the water will not be diverted, but after its use will be returned back to the same level?

2. What rights have the Cooper Hydraulic Company in the premises except for water power purposes? That is, has the Cooper Hydraulic Company in itself, the right to sell and dispose of water to be diverted from the canal uses, such as the sale of water for locomotive purposes and other manufacturing purposes whereby the water will be entirely abstracted from the premises?

In answer to these inquiries it is my opinion:

First: The state may contract to sell the use of water from the premises affected by said lease when the water will not be diverted and will be returned so as not to infringe upon the rights of the Cooper Hydraulic Company to its use of the water for hydraulic purposes.

Second: The Cooper Hydraulic Company has no right under its lease to sell and dispose of any water to be diverted from canal uses, "whereby said water will be entirely abstracted from the premises."

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

BOARD OF PUBLIC WORKS — PURCHASE OF DREDGE.

Board of public works may purchase such machinery as is in their judgment necessary to the maintenance of the public works.

July 24th, 1907.

To the State Board of Public Works, Columbus, Ohio.

GENTLEMEN: — In reply to your inquiry as to the right of your board to purchase a certain dredge owned by the Acme Paving Company, I beg to say

section (218-20) of the Revised Statutes defines the general powers of the board of public works in purchasing property and privileges for the state. Said section is in part as follows:

> "The board of public works shall have charge of the public works of the state, and shall have power to *perfect, render useful, maintain, keep in repair and protect the same;* and to that end shall have power to remove obstructions therein or thereto, and to make such alterations or amendments thereof (whether now or hereafter constructed), and to make such feeders, dikes, reservoirs, locks, dams and other works, devices and improvements, as they may think proper for the respective purposes aforesaid; *that to enable them to exercise the powers aforesaid,* it shall be *lawful* for the board of public works to purchase in the name and on behalf of the state, *such real or personal property,* rights or privileges, as may be *necessary* for the respective purposes aforesaid;"

Under the above provisions I am of the opinion that the board of public works may purchase the dredge in question if the purchase of the same is in their judgment necessary to perfect, render useful, maintain, keep in repair, or protect any of the public works of the state.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

CANAL LANDS — LEASE — RIGHT OF BOARD OF PUBLIC WORKS TO TERMINATE, IN CERTAIN CASES, BECAUSE OF USE OF PROPERTY FOR IMMORAL PURPOSES.

August 3rd, 1907.

State Board of Public Works, Columbus, Ohio.

GENTLEMEN: — Your letter of July 31st requests an opinion as to the right of the state board of public works to terminate certain leases, forms of which you enclose, because of immoral and disorderly conduct on the part of the lessees.

One of the leases submitted contains an express condition that the lesseee shall not permit the property leased to be used for immoral purposes. The board has the right to terminate such a lease by resolution whenever this condition is violated. In order to get possession however, in case the tenant does not surrender the premises, the board must serve a notice to leave the premises and bring forcible entry and detainer proceedings; and at the trial it would be necessary to prove the facts which justify the forfeiture.

The other lease submitted contains no covenant against the use of the premises for immoral purposes. Formerly the statutes gave the lessor of a building used by a tenant for certain immoral purposes the right to terminate the lease; (53 O. L. 140) but the section which conferred this power was repealed June 20, 1879, R. S. 1880 Sec. (7437-260.) In the absence of such a statute and of specific covenants in the lease, immoral and disorderly conduct by the lessee does not work a forfeiture of the lease. Miller v. Forman, 8 Vroom 55.

The best available remedy for existing conditions would seem to be the arrest of the lessee.

I herewith return the leases which you submitted.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

CANAL RESERVOIR — BOAT LICENSE. SAME — PATROLMEN — SECURITY FOR COSTS.

Act authorizing confiscation of boats operated on state reservoirs without licenses unconstitutional.

Security for costs may not be exacted of police patrolmen appointed under act for protection of reservoirs.

August 7th, 1907.

State Board of Public Works, Columbus, Ohio.

GENTLEMEN: — Your letter of August 1st requests an opinion from this department as to the power of the board of public works to enforce, by seizure and sale of unlicensed boats, the provisions of section (218-321) and section (218-322) R. S., requiring the payment of a license fee for all boats operated on the state reservoirs.

You mention particularly the case of an abutting owner whose ancestors owned a portion of the land occupied by Turkey Foot Lake, now a part of the public parks known as Portage Lakes in Summit county.

The abutting owner referred to has no greater rights than any other citizen of the state. The state acquired the title in fee simple to the land occupied by the state reservoir in Summit county by the appropriation thereof for canal purposes prior to 1851, Ohio ex rel. v. Railway Co., 53 O. S. 189, and has a right to exact a toll or license fee for all boats operated on the reservoir.

It is, however, very doubtful whether the provisions of Sec. (218-322) R. S., providing for the confiscation of unlicensed boats would be upheld by the courts. This section provides for the seizure of unlicensed boats by the police patrolman and authorizes him to sell the same at public auction, after advertisement, in case the fees due are not paid within a certain time. No legal proceedings whatever are provided for by which the property rights of the owners of boats confiscated are protected.

The supreme court held an act of the legislature authorizing the confiscation and sale, without legal proceedings, of fish nets maintained in violation of law, unconstitutional. Edson v. Crangle 62 O. S. 49.

The court says, page 65:

> "This section gives the right of confiscation, but fails to provide a legal proceeding by which the confiscation may be adjudged, and there being no other statute providing a proceeding in such cases, it attempts to take and sell private property and place the proceeds in the public treasury without any process of law. The section is therefore in conflict with article 1, section 16 of our constitution."

In the subsequent case of State v. French, 71 O. S. 186, the court held that an act declaring nets maintained in violation of law a public nuisance and authorizing their destruction was constitutional.

Section (218-322) R. S. does not, however, declare unlicensed boats to be a public nuisance, and even if the act did so declare, its constitutionality would be doubtful to say the least.

State v. French, 71 O. S. 186; Lawton v. Steel, 152 U. S. 133-140-141.

Edson v. Crangle was not overruled by State v. French. If the act in question should be held unconstitutional by the courts, the owners of boats confiscated by the police patrolman could replevy the boats or sue the police patrolman for their conversion.

It would therefore seem inadvisable to attempt to enforce the provisions of

the acts above referred to against parties who do not voluntarily pay the license fee. The act should be amended by the next legislature.

In answer to a further inquiry in your letter I beg to advise you that justices of the peace have no right to require security for costs in criminal prosecutions brought by the police patrolmen appointed under the provisions of section (218-317) R. S.

Section 7136 R. S. provides:

> "When the offense charged is a misdemeanor the magistrate may, before issuing the warrant, require the complainant, or, if he considers the complainant wholly irresponsible, that he procure some person, to become bound for costs in case the complaint be dismissed, and the complainant or other person shall acknowledge himself so bound, and the magistrate shall enter the acknowledgment on his docket, but no such bond shall be required of a sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman or police officer, when in the discharge of their official duties."

Section 213 R. S., also provides:

> "No undertaking or security is required on behalf of the state or of any officer thereof in the prosecution or defense of any action, writ or proceeding; nor is it necessary to verify the pleadings on the part of the state or any officer thereof in any such action, writ or proceeding."

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

BOARD OF PUBLIC WORKS — ABATEMENT OF NUISANCE.

Board of public works should not proceed summarily to remove telegraph poles erected on state lands without authority.

August 8th, 1907.

State Board of Public Works, Columbus, Ohio.

GENTLEMEN: — Your letter of August 1st requested advice from this department as to the right of the state board of public works to remove telegraph poles erected on state lands without authority. In answer thereto I beg to advise you that section (218-229) provides that in case the board finds that any person or corporation is unlawfully in possession, use or occupation of any land belonging to the state of Ohio, it shall direct the attorney general to bring civil action for the recovery of such lands, or such other action or actions as he may consider appropriate. In case the owner of encroaching poles neglects to remove them after the board has made the finding and given the notice required by section (218-227), this department will bring an injunction suit to compel the removal of the encroachments.

The abatement of a nuisance without legal proceedings, especially where property of considerable value would be injured, should only be resorted to in cases of emergency, and in view of the fact that the statute expressly directs a civil action to obtain the removal of encroachments the remedy by summary abatement would be of doubtful legality.

You also request advice as to the right of the board to make a lease to a telephone company terminable at the will of either party. In my opinion the board

has no power to make land leases for any other term than fifteen years, except for pipe line purposes. Sections (218-230), (218-225), (218-226), Revised Statutes.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

FORFEITURE OF FRANCHISE OF COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

September 26th, 1907.

State Board of Public Works, Columbus, Ohio.

GENTLEMEN: — I desire to acknowledge the receipt of your communication with reference to the lease of certain canal lands by the Columbus, Hocking Valley & Athens Railroad Company. From your letter it appears that on May 18th, 1894, the legislature granted to this company a franchise to construct a railroad along portions of the Hocking Canal. Amendatory acts were passed thereto on April 23rd, 1898 and April 16th, 1900, extending the time for the completion of the railroad, which period expired in October, 1905.

You state that no actual work has ever been performed in the construction of said road, that the annual rentals have not been paid and that the company has never taken possession of the premises and attempted to use the franchise granted to it.

After a consideration of the acts of the legislature and the statement of facts contained in your letter I am of the opinion that this canal property has reverted to the state of Ohio and that the franchise granted to the company is no longer of any force and effect.

I do not believe that any legal proceedings are necessary to terminate the same but I suggest that if your board intends to enter into a lease with another company for the use of the land it would be advisable and proper to notify the Columbus, Hocking Valley & Athens Railroad Company, its officers or agents, that their franchise has become terminated and the canal property has reverted to the state.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

(To the Various Appointive State Officers)

NATIONAL GUARD — OFFICER — INTEREST IN CONTRACTS.

National guard officer detailed by adjutant general as post commissary may not purchase supplies from firm or corporation in which he is personally interested.

July 10th, 1907.

GENERAL A. B. CRITCHFIELD, *Adjutant General, Columbus, Ohio.*

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

Captain Perin B. Monypeny, the commissary officer of the 4th Regiment of the O. N. G., has been detailed by the Adjutant General of Ohio for special duty as commissary of the post during the annual shoot at Port Clinton this fall. He will probably, in the discharge of his duties, be required to purchase about $15,000 worth of supplies. Can he legally purchase such supplies from a wholesale grocery in which he is personally interested?

In reply I beg to say there are two sections of the Revised Statutes of Ohio, to-wit, sections 6969 and 6976 which restrict the right of public officers to be directly or indirectly interested in contracts for the purchase of supplies for public use. Section 6976 only applies to municipal officers and township trustees, while section 6969 is broader in its scope and evidently intends to embrace in its terms all public officers and employes.

In the case of Doll v. State, 45 O. S. 445 the supreme court held this section to apply to a member of the board of public works of the city of Cincinnati. Section 6969 provides as follows:

> "It shall be unlawful for any person holding any office of trust or profit in this state, either by election or appointment, or any agent, servant or employe of such officer or of a board of such officers to become directly or indirectly interested in any contracts for the purchase of any property, supplies or fire insurance for the use of the county, township, city, village, hamlet, board of education or public institution with which he is connected."

Is Captain Monypeny, while performing the duties of post commissary officer, holding an "office of trust or profit in this state," or is he the "agent, servant, or employe of any such officer"?

It was held in the case of State v. Coit, 8 Ohio Dec. 62 that:

> "The defendant by virtue of his military office of Colonel of the 14th Regiment of the Ohio National Guard did not become a public officer. He was an officer simply of a military company and was no more a servant of the public than any member of the military company over which he had command."

The duties to be performed by Captain Monypeny as post commissary do not result from his position as commissary of the 4th Regiment, but come to him directly by virtue of his appointment to this post by the adjutant general of Ohio.

The adjutant general of Ohio is a "public officer" and by virtue of the statute quarter-master of the Ohio national guard and as such he is charged with the duty of providing supplies for the national guard, and in detailing Captain Monypeny as post commissary, he thereby makes him his agent.

In my judgment Captain Monypeny while performing the duties of post commissary at Port Clinton is the "agent" of an "officer in this state" and while it may not be within the strict letter of the statute to regard the Ohio national guard as a "public institution," yet it is plainly within its policy. I am, therefore, of the opinion that Captain Monypeny may not purchase supplies from a wholesale grocery with which he is personally connected for the use of the troops while engaged in practice shooting at Port Clinton.

Very truly yours,
W. H. MILLER,
Asst. Attorney General

BOND INVESTMENT COMPANY — WHAT IS.

Loaning company issuing certificates redeemable in merchandise or money is not a bond investment company under section 3821r.

March 8th, 1907.

HON. O. P. SPERRA, *Supervisor of Bond Investment Companies, Insurance Department, Columbus, Ohio.*

DEAR SIR: — Your inquiry regarding the Ohio Credit Company has received my consideration. I have examined the literature issued by this corporation which you transmit with your letter and have further received, through the counsel for the company, the forms of scrip or orders which the company has issued.

It appears that the Ohio Credit Company is a corporation of the state of Ohio authorized to loan money and credit on mortgage and pledge of real and personal property and to do all things incident thereto. The plan of the company is, in brief, to loan to a patron or applicant an amount of money for which the latter executes his note with simple interest at the rate of 6 per cent. The applicant may receive money to the full amount of the loan or may take in lieu thereof a number of purchase checks or orders on certain stores which have entered into exchange relations with the credit company, and which checks or orders are received at such stores in payment for merchandise at current prices. If the borrower agrees to accept the whole or a portion of his loan in such checks or orders, the stores having such contractual relations with the credit company, receive the same from such borrower for merchandise and turn in such checks or orders to the credit company, to which company said stores pay a certain percentage upon the amount of the checks or orders thus handled by them. The question you ask is whether or not such business comes within the provisions of sections 3821r R. S., et seq. The act to which you call attention includes two kinds of business, viz: First, "the business of placing or selling certificates, bonds, debentures or other investment securities of any kind or description, on the partial payment or installment plan"; second, that "of an investment guaranty company doing business on the service dividend plan." If the business in which the Ohio Credit Company is engaged is comprehended within either of such classes it is required to deposit with the state treasurer $100,000 in cash or bonds, as therein described, for the protection of the investors in such certificates, debentures or other investment securities, and is further required to comply with the other provisions of said act.

I am of the opinion that the business being done by the Ohio Credit Company does not come within either of these classes, and that this company is not required to comply with the act referred to.

First, as to the business of placing or selling certificates, bonds, debentures

or other investment securities. Each of these terms has received accepted definitions by the courts and the standard dictionaries and it seems quite clear that the checks or orders issued by the Ohio Credit Company do not come within such definitions. For definitions of these various terms see

Reed v. Board of Education, 39 O. S. 638;
Payne v. Watterson, 37 O. S. 125;
McNeill v. Hagerty, 51 O. S. 267;
People ex rel. v. Feitner, 167 N. Y. 1, 10;
Una v. Dodd, 39 N. J. Eq. 186;
23 Cyc. 349.

Second, as to whether or not the business engaged in by the Ohio Credit Company can be likened to that "of an investment company doing business on the service dividend plan" it seems unnecessary to discuss such a proposition. Whatever such a company may be it is clear that the Ohio Credit Company is something else.

Having examined the orders, checks or scrip issued by this company and having determined that the business thus done is not such as is subject to the regulations of sections 3821r, et seq., of the Revised Statutes, it might be proper to say further that these orders, checks or scrip are similar in character and legal effect to trading stamps, which are in general use in some of the cities of the state. In effect they are similar to the coupons issued by the Insurance Exchange Coupon Company, which were reviewed in an opinion of this department given to the superintendent of insurance, and which were held not to be embraced within sections 3821r R. S., et seq. In that opinion (while the propositions therein involved were disposed of on other grounds) the following language was used in describing the character of such coupons:

> "I am of the opinion that the character of coupon issued by the Insurance Exchange Coupon Company does not bring it within the definition of certificates, bonds, debentures or other investment securities as mentioned in such act (Sections 3821r to 3821z R. S.) and therefore that the proposed policy of that company is not in violation of the act referred to."

These orders or stamps issued by the Ohio Credit Company seem to be redeemable not only in goods, wares and merchandise, but in cash, and express upon their face their full cash value, thus apparently obeying the law with respect to trading stamps as contained in the act of April 23rd, 1904 (97 O. L. 277), Sec. (4427-13) R. S.

Being of the opinion that the debenture law to which you refer does not apply to such corporations as the Ohio Credit Company, and observing no other question as to the right of such company to do the business proposed, I conclude that such business may be lawfully done in this state.

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

INSURANCE COMPANY — FALSE STATEMENT — DISCRETION OF SUPERINTENDENT OF INSURANCE AS TO PENALTY.

Superintendent of insurance may exact interest on omitted taxes due from insurance company unintentionally making false statement, instead of revoking license of such company.

December 11th, 1907

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — In reply to your recent inquiry as to whether or not you can lawfully insist upon the payment of interest upon omitted taxes due from the Equitable Life Assurance Society of the United States under the provisions of section 2745, Revised Statutes, I beg to advise you that you may exercise a discretion in the matter of revoking licenses where the statement required from the insurance company under the statute above referred to is "false or incorrect," and may when you find that said statement was not intentionally false and no culpable negligence was committed in compiling it, do less than revoke the license by merely insisting that the state shall be made whole for its loss of the use of the money to which it was entitled under a true and correct statement.

As to what interest under such circumstances should be charged, I am inclined to think that you may well be guided by section 180 of the Revised Statutes which requires that all claims due the state shall bear interest at the rate of 6% per annum from the date on which they fall due until payment thereof is made.

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

EMPLOYMENT AGENCY — PRIVATE.

Association may lawfully secure employment for its members without charge.

August 28th, 1907.

HON. M. D. RATCHFORD, *Commissioner of Labor Statistics, Columbus, Ohio.*

DEAR SIR: — In reply to your inquiry of recent date I desire to say that it is my opinion that an association which secures employment for members without charge to any person whatsoever, or without the collection of any commission or revenue of any sort does not violate the private employment agency law, especially where the object is to secure employment for members of the association only.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ROADS AND HIGHWAYS — CONSTRUCTION AND REPAIR — STATE AID.

Applications for state aid for construction or repair of roads may not be received by state highway commissioner after December 31st.

February 2nd, 1907.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — Your communication is received requesting my opinion upon the following inquiry:

"Have I the option under section 21 of the law establishing the highway department to decide whether or not I will turn over the amount apportioned to any county for improved road repairs upon application filed January 1st, or later?"

Section 21 of the law to which you refer provides that applications may be made to the state highway commissioner before January 1st of each year. Section 3 of this act also provides that:

"The county commissioners in order to avail themselves each year, of the aid provided by the state of Ohio, for assistance in constructing highways, shall make application to the highway commissioner before the first of January of each year; provided, however, that for the year 1906 such application may be filed not later than April 30th, 1906, and any part of the appropriation for 1906 unexpended February 15th, 1907, shall be available for the several counties until February 15th, 1908."

You will observe in this section that the legislature specifically extended the time in which applications might be made to the highway commissioner for the year 1906, although any part of the appropriation for 1906 unexpended February 15th, 1907, is available as late as February 15th, 1908. This clearly indicates that without such extension, applications could not be received later than the last day of December in each year.

I am, therefore, of the opinion that the time limit fixed in section 3 and section 21 of said law is mandatory and that the state highway commissioner is without authority to receive applications for state aid either for construction or repair after the time fixed in said sections.

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

TOWNSHIP IMPROVED ROADS — CONSTRUCTION OF.

State highway commissioner must superintend and direct construction of permanent highways in townships under sections 2 and 21 of the good roads law.

March 20th, 1907.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to the authority of township trustees in townships having no improved roads to expend the money provided by section 21, of the good roads law, in constructing permanent highways without having such construction superintended and directed by the state highway commissioner.

In reply I beg to say section 21 of the good roads law contains the following provision:

"Provided, however, that those townships that have not constructed permanent highways as herein provided, shall not use their portion of the funds for any other purpose than the construction of improved highways *in the manner herein provided.*"

The *manner* of constructing permanent highways under the good roads law provides that said construction "shall be under the direction of the highway commissioner in such counties and townships of the state of Ohio as shall comply with the provisions of this act." (Section 2).

I am therefore of the opinion that in all cases in which the state aids in the construction of permanent highways such construction must be under the direction and supervision of the state highway commissioner.

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

ROAD IMPROVEMENT—STATE AID—PRIVATE DONATION IN LIEU OF—APPLICATION OF STATE HIGHWAY DEPARTMENT LAW.

State highway commissioner may superintend improvement of road when private donation is made in lieu of state aid, but remaining provisions of state highway department act are not applicable to such improvement.

April 22, 1907.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

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

> "The county commissioners of Portage county have filed with this department a petition for the improvement of the Ravenna and Charlestown road. A road has already been let in that county that will practically absorb all available money from the state for this year. Dan R. Hanna proposes to pay 50 per cent. of the cost of construction in lieu of state aid. The county commissioners desire to have the road built under the direction of the State Highway Department in order that they may have authority to levy the necessary tax to pay the county's share in excess of Hanna's proposition. Can this department proceed to carry out the provisions of the highway law in the construction of the road?"

In reply I beg to say, I see no objection to the state highway commissioner superintending and directing the construction of the proposed improvement in as much as a part of the duties imposed upon the state highway department are, in a sense, educational. The laws governing the construction of roads by state aid will not, however, be applicable in the construction of this road.

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

ROADS AND HIGHWAYS—TOWNSHIP IMPROVEMENTS.

Township trustees, in proceeding under section (4614-20) et seq. to improve roads, must apportion cost thereof between county and owners of abutting property in manner prescribed for county commissioners by prior sections of same act; assessments may not be levied prior to completion of such improvement.

July 15, 1907.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your communication under date of July 13th, together with copy of an opinion of the prosecuting attorney of Franklin county, relative to the apportionment of township's share of the costs between the whole township and the abutting property owners, is received.

In reply I beg to say section (4614-22) of the Revised Statutes provides that the township trustees, in making such apportionment, shall proceed in like manner as county commissioners under section (4637-4), (4637-5), (4637-6) and (4637-7) as indicated in the copy of the opinion of the prosecuting attorney.

Section (4614-20) contains no provision authorizing township trustees to make assessments prior to the completion of the improvement and the certifying of costs thereof by the state highway commissioner.

Yours very truly,
W. H. MILLER,
Assistant Attorney General.

STATE HIGHWAY COMMISSIONER—FORFEITED CHECKS.

State highway commissioner may require certified check to be deposited with bid to secure execution of contract. Such check, upon forfeiture, should be covered into state treasury.

December 21, 1907.

HON. SAM HUSTON, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—From your recent communication I take it that under the provisions of section (4614-19) R. S., permitting you to impose "such other regulations necessary to secure fair bids" you imposed the following regulation:

> "Before any bid shall be opened or considered by the highway commissioner, the respective bidders shall deposit as directed a certified check to the amount of $300 on each section included in the bid, which shall be forfeited by the bidder to the state of Ohio, in case the bidder fails to enter into bond and contract within five (5) days of notice of acceptance."
>
> SAM HUSTON,
> *State Highway Commissioner."*

Such a check for $300 I understand has been forfeited and is now in your hands.

Section (200-2) R. S. provides:

> "Every state officer, employe, board, department or commission, receiving money, checks or drafts, for or on behalf of the state, from fees, rentals, penalties, costs, fines, sales of property, or otherwise, shall on or before Monday of each week, pay to the treasurer of state, all such money, checks or drafts received during the preceding week and on the same day file a detailed, verified statement of such receipts with the auditor of state."

Since this regulation was made by you and under its provisions the check was "forfeited by the bidder to the state of Ohio," I believe that the full amount

should be covered into the state treasury, inasmuch as no provision is made by law for an apportionment of such money between the state and the county.

Inasmuch as the county is required to pay three-fourths of the additional expense necessary for advertising for new bids, etc., it might be more equitable to provide in future regulations either that one-fourth of the $300 should be forfeited to the state and three-fourths to the county or that the additional expense to the county, caused by such forfeiture, should be refunded from the state treasury out of this amount.

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

STATIONARY ENGINEERS — RESPECTIVE LIABILITY OF CHIEF EXAMINER AND DISTRICT EXAMINERS FOR MONEY COLLECTED.

District examiners of stationary engineers liable for money collected by them and lost or destroyed prior to monthly remittance to chief examiner.

November 1st, 1907.

HON. WILLIAM E. KENNEDY, *Chief Examiner of Stationary Engineers, Columbus, Ohio.*

DEAR SIR: — I have examined the law relative to the question you have submitted as to your liability for money collected by the district examiners and lost or destroyed prior to the 5th day of the month, on which date it should be paid over to you. I am of the opinion that you would not be liable in such a case. The money collected between the remitting dates is in the custody of the district examiners and the question as to whether or not you are liable hinges upon the determination of the further question as to whether or not the custody of such district examiners is, in law, your custody. I do not think that such is the case.

The various sections of the act, sections (4364-891) to (4364-89w) inclusive, confer such powers upon the district examiners as constitute them, in my opinion, public officers. They are subordinate, it is true, to the chief examiner, but this subordination is expressly limited to such as is "not inconsistent with the powers and duties vested in them by law" (Sec. 5). Among the duties vested in such district examiners by law, is the duty to hold the money collected from the issue and renewal of licenses and to pay it over on the 5th day of each month and the discharge of that duty cannot in any wise be interferred with by the chief examiner. Therefore, in this respect, at least, the district examiners are not subordinates of the chief examiner, but are co-ordinate public officers.

From the foregoing consideration I am of the opinion that the liability for the loss of money collected by the district examiners from the issue and renewal of licenses between remitting days, rests upon the district examiner and not upon the chief examiner.

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

NATURAL GAS COMPANY — METER PROVER.

Natural gas companies are not required to comply with the act providing for the testing of meters.

May 10th, 1907.

PROF. B. F. THOMAS, *State Sealer of Weights and Measures, Ohio State University.*

DEAR SIR: — You have submitted to this department the question whether the provisions of sections 3553 et seq., Revised Statutes, providing for the testing of meters to be used by consumers of illuminating gas apply to corporations selling natural gas. You inform me that there is a well defined commercial distinction between illuminating gas and natural gas. I am of the opinion that, although the sections in question were enacted before the adaptation of natural gas to illuminating purposes, the legislature must have intended that the distinction above referred to should be observed. I am led to this conclusion by the following language of section 3561a:

> "The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings and manufacturing establishments of all cities of the third grade of the second class * * with natural gas, or fuel."

Since the general assembly deemed it necessary to enact this section in order that natural gas companies might, to a limited extent, be brought within the provisions of the preceding sections, it is evident that such preceding sections were not considered, in themselves, as applicable to natural gas companies. I am of the opinion, therefore, that natural gas companies are not required to comply with section 3561 of the Revised Statutes.

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

NITRO-GLYCERINE — AUTHORITY OF CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES.

Chief examiner of workshops and factories may refuse to approve location of nitro-glycerine magazine at distance of over eighty rods from inhabited building.

October 26th, 1907.

HON. JOHN H. MORGAN, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR: — Replying to your recent communication, both the act of April 16th, 1900, as contained in section 6953 R. S., and the act of April 22nd, 1904, as contained in section (4238-26a) and 26b, are in effect and neither one abrogates the other. No such factory, store house or magazine where nitro-glycerine, or any compound thereof, in quantities exceeding 100 pounds is stored, may be located within the limits of any municipal corporation or within eighty rods of any occupied building, dwelling or public building under the act of April 22nd, 1904. However, you may refuse to approve the plans and location of any factory, store house or magazine at a distance even greater than eighty rods from any factory,

occupied dwelling, etc., if, in your judgment, it shall be found not to be located at a safe distance from such factory, occupied dwelling, etc.

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

DYNAMITE — POWER OF CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES.

The handling of dynamite in transit, including its storage in cars temporarily on a siding, and in a general freight house may not be interferred with by chief inspector of workshops and factories.

November 22nd, 1907.

HON. JOHN H. MORGAN, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR: — In your letter of November 20, you ask the following questions:

1. Does the handling of dynamite while in transit come within the jurisdiction of your department?
2. Do cars loaded with dynamite and standing on sidings come within the jurisdiction of your department?
3. Does the storage of dynamite in freight houses come within the jurisdiction of your department?

First. Upon an examination of all the laws upon this subject, I am of the opinion that the handling of dynamite while in transit does not come within the jurisdiction of your department.

Second. I believe that the same is true as to cars loaded with dynamite and standing temporarily upon a siding.

Third. The act of the legislature contained in 97 O. L. 302, sections (4238-26a) and (4238-26b) R. S., sseems to apply only in cases where the "persons, etc., * * * handling or storing, powder, dynamite, etc.," have magazines or store-houses at which such explosives are stored or regularly kept. Under this law I believe your department will not have jurisdiction as to ordinary freight houses which are used for the receipt and delivery of goods but only in the case of freight houses which are regularly employed for keeping and storing quantities of such explosives. Section (4238p) R. S., should be construed in like manner. A remedy for some of the conditions you present is found in section (4238-24), but the enforcement of this section does not come within the duties prescribed for your department.

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

(To Various State Boards)

COMMERCIAL FEED STUFFS — ANNUAL LICENSE.

Payment of franchise tax under Willis law does not exempt corporation from payment of annual license fee for sale of commercial feed stuffs.

April 18th, 1907.

HON. T. L. CALVERT, *Secretary, State Board of Agriculture, Columbus, Ohio.*

DEAR SIR: — In reply to your communication of April 15th, I beg to say, the payment of the tax of one-tenth of one per cent. on the capital stock of a corporation, as provided in the Willis law, works no exemption of the payment of the annual license provided for in section 3 of the law to regulate the sale of commercial feed stuffs in Ohio.

The tax imposed by the Willis law is for the privilege of being a corporation without regard to the nature of the business engaged in, while the annual license fee upon commercial feed stuffs is for the regulation of the manufacture and sale of commercial feed stuffs within the state of Ohio.

Every manufacturer, importer or agent of any commercial feed stuffs, whether a corporation or not, is required to pay annually, on or before the first day of March a license fee of $25.00 on each brand.

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

JUVENILE PRISONERS — DETENTION OF.

Juvenile prisoners under twelve years of age may neither be detained nor imprisoned in sheriff's residence within jail inclosure.

Juvenile prisoners between ages of twelve and seventeen may be temporarily detained in such residence, but may not be confined therein after sentence.

December 10th, 1907.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR: — Your recent communication as to the "detention of juvenile offenders in the county jail" is received. You ask whether a child may be kept in "that part of the jail building known as the sheriff's residence," and whether juvenile detention quarters must be independent of the premises of a county jail.

Section 11 of 97 O. L. 565, section (548-36n) R. S., provides:

> "No court or magistrate shall commit a child under twelve (12) years of court or magistrate shall commit a child under twelve (12) years of age to a jail or police station, but if such child is unable to give bail it may be committed to the care of the sheriff, police officer or probation officer, who shall keep such child in some suitable place provided by the city or county outside of the enclosure of any jail or police station.
>
> "When any child shall be sentenced by a juvenile court to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same building with such adult convicts, or to confine such child in the same yard or enclosure with

such adult convicts, or to bring such child into any yard or building in which adult convicts may be present."

It is clear from this section that no child under 12 years of age may be placed in any part of a jail building in which adults are confined or within the yard or enclosure of such building. After sentence, taking the definition of "child" contained in section 1, 98 O. L. 314, section (548-36d) R. S., no child under 17 years of age may be confined in the same building or yard or enclosure of such building in which adult convicts are or may be prisoners.

In neither of these cases can the child be kept in that part of the jail known as the sheriff's residence. The intention of the law is that the child shall be entirely disassociated from any connection with any part of any jail building or yard. There is further no provision of law recognizing a sheriff's residence as a part of a jail building separate from the jail.

Children between the ages of 12 and 17 years may be temporarily kept in a jail prior to sentence, but those under 16 years of age must, under section (7377-4), be kept separate from adult prisoners. In this class of cases only may children be kept in the sheriff's residence in the jail building.

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

HEALTH OFFICER — TENURE OF OFFICE.

January 8th, 1907.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR: — Upon the facts stated in yours of the 4th inst., I am of the opinion that a health officer appointed August 28th, 1905, for a period of two years, such appointment having been approved by your board, would serve until the first Monday of January, 1908.

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

MUNICIPAL CORPORATIONS — REGULATION OF PLUMBING.

Council, not local board of health, has power to regulate the business of plumbing.

March 8th, 1907.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR: — I have your recent letter submitting two inquiries:

First: What is the power of a local board of health to adopt an order requiring that before a plumber can put plumbing into a house a permit for the work must be secured from the board?

Second: After such order is adopted may the board of health compel a person who is not a plumber and who is building a house for himself and expects to do the plumbing work therein, to secure a permit before such work is done?

Answering your second question first, I will say that whatever order or regulation may be made or enforced by the board of health, or any other proper authority, with respect to plumbing in general may be made and enforced against any person in the community whether he is building his own house or hiring somebody else to do it for him.

As to the general power to regulate the construction of buildings and the plumbing done therein for the purpose of protecting the public health, I am inclined to think that under section 2118 R. S., which authorizes the board of health of any city, village or township, to make such orders for the public health, the prevention or restriction of disease and the abatement or suppression of nuisances, this power might, to some extent at least, be exercised by such board. But in view of the fact that in all municipal corporations, including both cities and villages, the council is expressly empowered by paragraph 13 of section 7 of the new municipal code, to provide for the inspection of all buildings or other structures and for the licensing of house movers, plumbers and the like, I am inclined to the opinion that it would be safer and better to leave to such councils to regulate, by ordinance, the business of plumbing and to require permits or other safeguards in advance of such work. Council might further require, by ordinance, that no permits should be issued except such as were approved by the board of health.

In brief, the regulation of plumbing or the plumbing business ought to be left to the municipal councils where such power is reposed by the code.

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

HEALTH OFFICERS — ANNUAL CONFERENCE OF.

Health officers attending annual conference authorized by act in 98 O. L. 205, entitled to actual expense only.

June 17th, 1907.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR: — In reply to your communication of July 17th, I beg to say the act to provide for annual conferences of health officers, passed by the last general assembly (98 O. L. 205) only provides for the actual necessary expenses of the delegates attending such annual conferences. I am, therefore, of the opinion that delegates attending such conferences are not entitled to any other compensation.

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

TOWNSHIP TRUSTEES — POWERS OF, ACTING AS BOARD OF HEALTH.

June 28th, 1907.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry of the 24th inst., I beg to say that the trustees of the township, pursuant to section 2117 R. S., constitute a board of health which shall be for the township outside of the limits of any city or village, and such boards have the same duties and powers as are imposed upon

or granted to boards of health in cities and villages. The powers defined by statutes, as granted to city and village boards, should therefore be construed as extended to township trustees. Their power to act in the case cited depends upon the fact whether or not the building in question constitutes a nuisance and is detrimental to the public welfare; if so the board can proceed according to the provisions of sections (1536-733) and (1536-737) Revised Statutes (old section numbers 2121 and 2124). The procedure therein outlined is sufficiently definite and explicit to guide the township trustees as to their duties in the premises and needs no further comment. Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF HEALTH — LOCAL — LIVE STOCK.

Local board of health may adopt and enforce regulation prohibiting keeping of hogs in a corporation within certain distances of inhabited dwellings, if such keeping constitutes a public nuisance.

July 13th, 1907.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR: — Relative to yours of the 28th ult., making inquiry of this department as to whether a board of health has authority to adopt and enforce a regulation providing that no live hogs may be kept in a corporation within certain distances of any occupied dwelling, I beg to say that the test of the foregoing question is in the condition created by such practice. If in fact the keeping of live hogs within a given distance of a dwelling becomes offensive, noisome and of such a nature as to create a nuisance, there is undoubted authority in the various boards of health to provide by regulation that the same cannot be done, (Dillon on Municipal Corporations, Vol. 1, Sec. 374).

Very truly yours,
W. H. MILLER,
Asst. Attorney General

BOARD OF HEALTH — LOCAL — DANGEROUS BUILDINGS.

Local board of health may condemn as a public nuisance a building which is dangerous to passers-by.

July 13th, 1907.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR: — Replying to your inquiry of the 6th inst., which refers to the communication of this department of the 28th ult., making the same more specific, I desire to say that it is not necessary, in order to constitute an old and dangerous building a nuisance, that it have noxious or unhealthful odors emanating therefrom, but the definition given by the courts in such cases to nuisances of this character, is that if it is dangerous to the community in passing where the same is located, it can be condemned as a nuisance and proceeded against by the local board of health under the sections of the Revised Statutes referred to in my former communication. Very truly yours,

W. H. MILLER,
Asst. Attorney General.

BOARD OF HEALTH — STATE — EXPENSE OF EXAMINATION OF MUNICIPAL FILTRATION AND SEWAGE DISPOSAL PLANTS.

Municipal board of public service may not expend money in assisting state board of health to make examination of municipal filtration and sewage disposal plants, authorized by act in 98 O. L. 11.

July 15th, 1907.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR: — Replying to your communication as to the power of the board of public service of the various cities to spend money for extra labor and livery for the purpose of assisting the state board of health in its examinations of water and sewage purification, I beg to say that the work of your department is presumed to be done by virtue of the act of the general assembly passed February 23rd, 1906, entitled, "An act to direct the state board of health to examine and report upon public water purification works and sewage purification works in the state of Ohio, and make an appropriation therefor" (98 O. L. 11).

Section 2 of the act provides that in making this investigation the state board of health may employ necessary assistants, and for the purpose of carrying out the provisions of the act the sum of $7,500 was appropriated to pay the expense of investigation during the year ending March 1st, 1907, and a like amount for the expense during the year ending March 1st, 1908.

None of this expense is placed upon the respective cities and villages of the state, but it is presumed to be borne by the state board of health and paid for out of the above appropriations.

The limitations of the municipal code which are required to be observed by the board of public service in expending moneys appropriated for that department, would forbid that the same be expended in such examinations, unless duly appropriated for such purpose. I anticipate that the municipalities of the state have not made appropriations for such purpose. If such appropriations are not duly made the cities and villages cannot lawfully assist in bearing the expense of such examinations.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

BOARD OF MEDICAL REGISTRATION AND EXAMINATION — PRELIMINARY REQUIREMENTS FOR EXAMINATION.

Applicants for examination by board of medical registration and examination, may not be admitted to such examination upon certificates other than those issued by state board of examiners for entrance to medical colleges.

July 16th, 1907.

Ohio State Board of Examiners for Entrance to Medical Colleges, Columbus, Ohio.

GENTLEMEN: — I have your communication of the 13th inst., to which I have given due consideration. The question presented involves the construction of that part of section 4403c of the Revised Statutes of Ohio pertaining to the examination conducted under the direction of the state board of medical registration and examination by the certified examiners appointed for that purpose. You specifically inquire as to what is meant by the expression "examination by *any* state board," and whether or not it contemplates any other board than that designated

by the statute as "certified examiners" and which is now known as "Ohio State Board of Examiners for Entrance to Medical Colleges."

The further question which you have submitted can be answered in this same connection, and which is in substance whether your board has the right to interpret the values of certificates of preliminary education issued "by other state boards of examiners, boards of health, or boards of various titles exercising similar functions."

Replying thereto, I beg to say that the medical law, so called, provides for a standard of education which is to be determined by a proper board, preliminary to the admission of applicants to the examination under the medical act. This standard of education is not set forth specifically in the statutes, but is left to the discretion of the certified examiners conducting such examination and conformably to the requirements of the state board of medical registration and examination.

By the consideration of section 4403c, the following language will be observed wherein the law mentions the requirements of such preliminary examination, viz:

> "A medical student's certificate issued upon examination by the state board * * *" or "a certificate of his having passed an examination conducted under the direction of the State Board of Medical Registration and Examination by certified examiners, etc., etc."

Upon investigation of the preceding acts of the general assembly upon this subject to-wit, the act of February 27, 1896 (92 O. L. 45) and the act of April 14, 1900 (94 O. L. 198), it becomes apparent that by the last mentioned act it was provided that a medical student's certificate issued "upon examination by *any* state board" would be sufficient to entitle one to be admitted to the medical examination, but by the act of March 19, 1906 (98 O. L. 82) the word "any" was stricken out of the act and the word "the" was inserted, so that it is not sufficient at this time for a medical student to present a certificate of examination by "any state board" other than the state board, meaning thereby the board of certified examiners acting ancillary to the state board of medical registration and examination.

It is thus apparent from the reading of the statute that the two statutory methods of describing the certificate referred to are tautological. They now refer to the certificates issued by the same state board and that is the board of certified examiners. Theoretically the examination is made by the state board of medical registration and examination, but practically and in reality it is made by your board of certified examiners conducted under the direction of the state medical board. So that, in answer to the first question suggested, the expression *"any* state board," is now eliminated from the statute, and the language substituted therefor *"the* state board" refers to the board of certified examiners acting under the direction of the state board of medical registration and examination.

2. As to the question of the right of any other board of examiners to issue certificates as to the preliminary education of an applicant, I beg to say that the medical law does not contemplate the acceptance by the state board of medical registration and examination or by the board of certified examiners, of any certificate or certificates of any other board of examiners than that mentioned in section 4403c R. S. There are other boards provided for by law for examining applicants for admission to the bar, engineers, etc., but there is no provision that such examination so conducted by such other boards, should be accepted by the state board of medical registration and examination as conclusive evidence of the general educational requirements possessed by the holders thereof. There might be a certain evidential value attached to such certificates but it is not in-

cumbent upon your board to accept the same in lieu of or as a substitute for the examination provided for by section 4403c R. S.

Respectfully submitted,

SMITH W. BENNETT,

Special Counsel.

PHARMACY LAW — PAYMENT OF FINES TO TREASURER OF STATE BOARD OF PHARMACY.

Fines imposed by police court of municipal corporation for violation of pharmacy law, and collected by clerk of said court, should be paid by him directly to treasurer of state board of pharmacy, and not included in monthly settlement with county treasury.

May 28th, 1907.

DR. F. H. FROST, *Clerk, Ohio Board of Pharmacy, Columbus, Ohio.*

DEAR SIR: — You have submitted to me the question whether a fine paid by a person convicted of a violation of the pharmacy law to the clerk of a police court is by such clerk to be paid directly to the treasurer of the board of pharmacy or into the county treasury under section (1536-838).

The pertinent provisions of the Revised Statutes are as follows:

> Section 4412. " * * * All fines assessed and collected under prosecutions begun or caused to be begun by the Ohio board of pharmacy shall be paid to the treasurer thereof and by him covered into the state treasury monthly to be credited to the fund for the use of the Ohio board of pharmacy."
>
> Section 6802. "An officer who collects any fine shall, unless otherwise required by law, within twenty days after the receipt thereof, pay the same into the treasury of the county in which such fine was assessed * * * ."
>
> Section (1536-838) old number 1807. "He (the clerk of the police court) shall, on the first Monday of every month, make * * * to the city auditor, a report of all fines * * * imposed by the court in city cases * * ; and also, at the same time, he shall make a like report to the county auditor, as to state cases; and he shall immediately pay into the city and county treasuries respectively the amount then collected, or which may have come into his hands from all sources during the preceding month."

Nowhere is there to be found, so far as I have been able to ascertain, a specific provision of law prescribing the time at which the payment to the treasurer of the board of pharmacy, provided for in section 4412, shall be made, or defining the duty of the clerk of the police court as to such fines. Nevertheless, I am of the opinion that the fines collected by the clerks of police courts in such cases, should be paid immediately by them to the treasurer of the Ohio board of pharmacy. Such would seem to be the only reasonable implication to be derived from the several statutes above quoted taken together.

I am fortified in this opinion, however, by the supreme court of this state in the case of City of Mt. Vernon v. Mochwart, decided February 5, 1907, 75 O. S. 529. In that case there was involved the question as to the duty of

the clerk of the court of common pleas regarding the disposition of money received by him from fines imposed upon persons convicted in that court for violation of the so-called "Beal Local Option Law." Section (4364-20g) of that act provides that all

> "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."

Discussing the effect of this section taken together with section 6802 and section (1536-643), which is the section referring to mayors and parallel to section (1536-838), the court say:

> "But for the enactment of section (4364-20g) all fines collected for violations of the municipal local option law, including fines collected for violations of the law as to Sunday sales, and requiring Sunday closing, would have to be paid into the county treasury, whether such fine was imposed and collected in the court of common pleas, or in the mayor's, or other municipal court."

In my opinion there is no difference between the application of section (4364-20g) and that of section 4412 arising out of the mere fact that the former provides that the fines shall be paid directly into the city treasury whereas the latter provides that the payment shall be made to the treasurer of the board of pharmacy and by him to the state treasury. Neither section contains a specific grant of authority or direction to the collecting officer to make direct payment, nor is there any express provision negativing the possible inference that the monthly settlement of the collecting officer must include all moneys received by him. The court in the case cited clearly expressed the opinion although the same is not absolutely necessary to the decision made therein, that the fines should be paid over directly.

I suggest that the clerk might include vouchers for the money thus paid out by him in his monthly report.

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

CONSTITUTIONAL LAW — EX PARTE ORDER.

Railroad commission might be authorized by statute to issue *ad interim* order *ex parte*, subject to review by courts.

March 11th, 1907.

HON. O. P. GOTHLIN, *Railroad Commissioner, Columbus, Ohio.*

DEAR SIR: — In answer to your communication I beg to say that there does not occur to me to be any constitutional reason why the railroad commission of Ohio could not be authorized to make an *ad interim* order *ex parte* such as that quoted by you, but this order like the final order of the commission would be subject to review in the courts.

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

BOARD OF VETERINARY EXAMINERS — CERTIFICATES.

State board of veterinary examiners has no legal authority to issue certificates other than those authorized by the act creating such board.

January 9th, 1907.

DR. DAVID S. WHITE, *Secretary, Ohio State Board of Veterinary Examiners, Columbus, Ohio.*

DEAR SIR: — I have you letter of January 6th, in which you desire my opinion respecting the authority of the state board of veterinary examiners to issue a certificate to a person who had been in practice for three years prior to the passage of the act of May 21st, 1894, without the presentation of a diploma from a veterinary college.

In my opinion the board has no authority to issue a certificate to such person. The authority of the board to issue certificates of any nature is derived from sections 2, 7 and 9 of the act (Sections (4412-2), (4412-7), (4412-9), R. S.) These sections authorize the board to issue certificates to persons who have passed a prescribed examination satisfactorily and to those who have presented a properly issued diploma from a reputable veterinary college, the course of study of which is approved by the board.

It is further expressly provided that such certificate shall state that the person to whom it is given has passed the prescribed examination.

The board is without authority to issue certificates to persons other than those described in the act or to use a form of certificate different from that prescribed by the act.

The second question stated in your letter is sufficiently answered by the foregoing.

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

(To the Officers of the Various State Institutions)

BLIND — OHIO STATE SCHOOL FOR — ADMISSION OF NON-RESIDENT AND ADULT PUPILS.

Duty of trustees of Ohio state school for the blind in the matter of the application of a certain person, being a non-resident of the state but intending to reside therein, for admission as pupil.

Construction of section 667 as to admission of adult pupils.

September 3rd, 1907.

HON. EDWARD M. VANCLEVE, *Superintendent, Ohio State School for the Blind, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of the 31st ultimo, containing two questions presented to this department for opinions thereon:

> First: Can a pupil be admitted to the Ohio state school for the blind who has formerly been a pupil in such institution but who has been living with her parents in South Carolina and intends changing her home to that of an aunt now residing in Columbus?

The answer to the foregoing question depends on the construction of sections 665 and 668 of the Revised Statutes of this state. It is unnecessary to cite these sections of the Revised Statutes in full, but the first section above cited confers the authority upon the trustees to receive into the institution such blind and purblind persons, residents of the state, as the trustees and superintendent are satisfied, from reliable information and examination, are persons suitable in age and mental capacity to receive instruction by the methods pursued in such institutions.

The second cited section to be construed in *pari materia* is section 665. It provides that 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.

Pursuing the method provided by either of these sections the pupil may be admitted without any terms being imposed by the trustees if the trustees are satisfied that such pupil has *bona fide* changed her residence from the state in which she formerly resided, to this state. The application might, in such case, be made by the aunt of the pupil and satisfactory evidence given that such pupil is residing with her aunt in the city of Columbus, or elsewhere, within the state of Ohio.

The admission of the pupil can also be provided for as a non-resident of the state of Ohio if the facts show her to be such a non-resident, upon the usual terms imposed by the trustees of the institution pursuant to the provisions of section 668 R. S.

> Second: The inquiry is further presented as to the construction of section 667 R. S., with particular reference to the provision for admission of adults to the institution, and the length of time they are permitted to remain therein.

The regular pupils must be at least six years of age and none can be admitted under eight years of age except for special reasons; and pupils admitted under the age of fourteen may remain until the age of twenty-one years. Pupils

admitted between the ages of fourteen and twenty-one years may remain for a period of seven years, if in the judgment of the trustees or the superintendent, under their direction, the character, progress, capacity and conduct of the pupil in each case justifies so long a pupilage.

The minimum age is thus fixed at six and the maximum at twenty-one years. Section 667 R. S. provides an exception to the foregoing that:

> "Persons over twenty-one years of age may be received for one year for the purpose of learning any trade or employment taught in the mechanical department," etc.

And in addition to the *one* year specified for those over twenty-one years of age, females over twenty-one years of age may be allowed to remain three years more, if their capacity renders it advisable. A further exception is made in favor of former pupils for a period not exceeding one year, to return to the institution for the purpose of reviewing or perfecting their studies *but not at an age beyond the oldest period provided for in this chapter.*

It would appear from the provisions thus made that persons *over* twenty-one years of age may be received for one year for the purpose of learning a trade or employment taught in the mechanical department, and such persons may also receive instruction in one or more studies, if this can be done without interfering with the purpose for which they are admitted. As no particular limit has been fixed by statute to those who may enter the institution pursuant to the provisions of section 667 R. S., *over twenty-one years of age,* it would appear that the limitation of one year for the purposes recited is imposed upon those over twenty-one years of age without reference to the number of years they may have exceeded that age.

The limitation of three years, as applied to females over twenty-one years of age, should receive the same construction the statute meaning thereby that such females as are incorporated in section 667 R. S., *over twenty-one years of age,* may be allowed to remain three years more, if their capacity renders it advisable. There being no qualifying words to the expression "over twenty-one years of age," that expression embraces all those above that age and they may be permitted to remain in the institution three years after being received therein, if their capacity renders it advisable.

Very truly yours,
W. H. MILLER,
Asst. Attorney General

BOYS' INDUSTRIAL SCHOOL — COMMITMENT TO — AGE LIMIT.

Juvenile court may commit delinquent boys between ages of sixteen and seventeen to boys' industrial school.

July 12th, 1907.

COL. C. B. ADAMS, *Superintendent, Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR: — Your letter of recent date has been received, in which you ask an opinion as to the age limit at which boys may be committed to the boys' industrial school.

In reply I desire to say that while section 753 R. S. provides that boys between the ages of ten and sixteen years may be committed to the institution by certain courts on conviction of an offense against the laws of the state, yet

the juvenile court act, section (548-36d) et seq., applies to children seventeen years of age and under, and such court has jurisdiction to deal with any child within the provisions of such act and to make orders committing them to the care of suitable state institutions or the industrial school within the age limit therein provided.

Very truly yours,
W. H. MILLER,
Asst. Attorney General

BOYS' INDUSTRIAL SCHOOL—COMMITMENT TO—SUSPENSION OF SENTENCE.

Probate court, after judgment against youth charged, under the compulsory education act, with being a "juvenile disorderly person," and sentence of commitment to boys' industrial home, may suspend such judgment and sentence.

September 5th, 1907.

COL. C. B. ADAMS, *Superintendent, Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of yours of the 3rd, presenting the question as to the power of the probate court to suspend the sentence of commitment to the boys' industrial school after such sentence has been duly made, pursuant to the provisions of the compulsory education act, being sections (4022-1) to (4022-14) inclusive. You have accompanied your letter with a copy of the judgment of the probate court of Crawford county in which the individual has been adjudged a juvenile disorderly person within the meaning of section (4022-4) R. S. The order suspending such judgment recites that:

> "For good cause shown said order of commitment made on said 17th day of April, 1907, is hereby suspended for such time as the said G. C. regularly attends school and properly conducts himself."

The judgment of the court is duly certified to by the probate judge. Under section (4022-8) of the Revised Statutes provision is made as follows:

> "Any order of commitment to a juvenile reformatory may be suspended in the discretion of the probate judge for such time as the child may regularly attend school and properly conduct itself."

In my opinion the foregoing language is broad enough to include the boys' industrial school and therefore the probate court had the jurisdiction to make the order, which has been duly certified to you.

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

BOYS' INDUSTRIAL SCHOOL—EXPENSES OF INMATES—PAYMENT OF ACCOUNTS.

Account of boys' industrial school against county for expenses of inmates must be paid by county auditor upon presentation to him.

December 13th, 1907.

COL. C. B. ADAMS, *Superintendent, Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR: — Replying to the inquiry as presented by Mr. W. N. Hilles, the financial officer of your institution, relative to the method of rendering accounts against the various counties for the payment of incidental expenses and necessary clothing of the inmates of your institution charged to such counties, I beg to say it appears that by the statements rendered against the county of Warren, the same comply with the requirements of section 632 of the Revised Statutes and the duty of the various counties is comprised in the following portion of said section:

> "The account so drawn up, signed by such officer, countersigned by the superintendent, and sealed with the seal of the institution, shall be forwarded to the auditor of the county from which the person came, who shall pay the amount of said bill out of the county funds to the financial officer of the institution, to be audited to the current expense fund, and such auditor shall then proceed to collect the same in the name of the state of Ohio, as other debts are collected."

Pursuant to this provision, upon the presentation of the statement of account to the auditor of Warren county, the amount thereof should be paid out of the county funds to the financial officer of your institution.

I herewith return to you the statement of account presented against Warren county.

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

BENEVOLENT INSTITUTION — CONTRACT — BIDS.

Bid for contract for construction of improvements at state benevolent institution must disclose whether it is intended to cover all work delineated in plans, or only that required in specifications, if there is a difference.

October 7th, 1907.

HON. J. W. JONES, *Secretary Board of Trustees, Ohio Institution for the Education of the Deaf and Dumb, Columbus, Ohio.*

DEAR SIR: — Your communication of recent date is received, in which you request an opinion as to the legality of the bid of the Samuel A. Esswein Heating & Plumbing Company, submitted to your board of trustees at their meeting on the 17th ult.

You say that at a regular meeting of the board of trustees of your institution on July 17th, 1907, Richards, McCarty & Bulford, architects, were employed to make plans and specifications for a system of hot water heating under forced circulation in all of the buildings of your institution; that said plans and specifications were prepared and regularly approved by said board of trustees; that you, as secretary of said board, advertised for sealed bids to be presented at 12 o'clock noon, September 17th, 1907, as provided in section 794 R. S., and that six bids were received, among which was the bid of the Samuel A. Esswein Heating & Plumbing Company. Said Esswein bid is as follows:

> "We hereby propose to furnish all material, tools and labor necessary to install a hot water heating plant in the several buildings of

your institution, according to plans and specifications prepared for same by Messrs. Richards, McCarty and Bulford, architects, all for the sum of Twenty-four thousand three hundred and eighty-five ($24,385.00) dollars.

Yours very truly,
The Samuel A. Esswein Heating & Plumbing Co.,
By O. J. WHEELER, *Vice-president.*"

On an examination of the specifications I find the following provision under the sub-head of "Indirects — Main Building":

> "Take out the present steam indirect radiators in the basement of the main building and in each casing put 35 square feet of indirect radiation satisfactory to the architects, suitable for the forced water circulation system, connected all completes and with casings replaced. Any parts of the casings that are injured must be made new. This will include the indirect radiators in the front east and west corridor in the main building and ten indirects under the west dormitories and four indirects under the east dormitories, *but it will not include the other indirects shown on plans. State in bid how much additional it will cost to put radiation in the remainder of the indirects shown.*"

In reply I beg to say the point at issue in the bid of the Samuel A. Esswein Heating & Plumbing Company is whether said bid is a bid for *all* the work mentioned in said plans and specifications or whether for that portion absolutely required. It is clear that said bid does not comply with the provisions of the specifications above quoted for the reason that it contains no separate bid for the additional cost to put radiation in the remainder of the indirects shown as therein provided.

I am, therefore of the opinion that said bid does not disclose whether it is intended to cover all of the work mentioned in the plans and specifications or whether for that portion only, which by said plans and specifications is absolutely required, and is therefore under the holding of the supreme court in the case of Beaver & Butt v. Trustees of the Institution for the Blind, 19 O. S. 97, irregular and should be rejected.

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

BENEVOLENT INSTITUTION — TRUSTEES — LONG TIME CONTRACT.

Board of trustees of institution for education of deaf and dumb may not bind their successors by contract with corporation for furnishing of electric current and hot water for period of ten years.

December 6th, 1907.

HON. CARL NORPELL, *Trustee, Ohio Institution for the Education of Deaf and Dumb, Newark, Ohio.*

DEAR SIR: — Replying to the inquiry contained in yours of the 30th ult., in regard to the power of the trustees of the Ohio institution for the education of the Deaf and Dumb to enter into a contract with a public service corporation of this city to furnish the electric current and the hot water to heat the plant for

ten years at $14,400 per year, I express the opinion that such contract would violate the provisions of article VIII, section 3, of the constitution of Ohio, as the same has been construed by the supreme court in the case of the State of Ohio v. Medbery et al., 7 O. S. 522. It therefore follows that the board of trustees have not the power to enter into such contract for such period of time.

Very truly yours,
W. H. MILLER,
Asst. Attorney General

REQUISITION — FUGITIVE INSANE PERSON.

Insane and epileptic person escaping from hospital for epileptics and fleeing into another state, may not be compelled by requisition to return.

December 21, 1907.

HON. WILLIAM H. PRITCHARD, *Superintendent, Ohio Hospital for Epileptics, Gallipolis, Ohio.*

DEAR SIR: — Replying to your letter of December 18th, I am of the opinion that you cannot by requisition compel the return of an insane and epileptic person who has escaped from your hospital to Indiana. Interstate extradition, as authorized by the United States Constitution and Act of Congress, applies only to "a person charged in any state with treason, felony, or other crime, who shall have fled from justice and be found in another state."

Under the reasoning of a New York case (3 Daly's Reports 529), an Indiana court having power to exercise care and custody of insane persons has power to direct the removal of an insane person who has come into the jurisdiction of the court to a place beyond its jurisdiction and to appoint a temporary committee to accompany him thither under the instruction of the court. I see no other legal way to effect his return to your institution unless his relatives and friends surrender him voluntarily to your agent. Should he again come within the state you may have him returned at once in the usual way, inasmuch as he has not been discharged from your institution.

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

GIRLS' INDUSTRIAL HOME — FINANCIAL OFFICER.

Financial officer, as well as steward, should be appointed for girls' industrial home; such financial officer may not be a resident of Delaware county; such officer must give bond in sum of $10,000.

June 18th, 1907.

Board of Trustees, Girls' Industrial Home, Rathbone, Ohio.

GENTLEMEN: — I beg to submit the following in compliance with your request for an opinion from this department on the questions, first, is a resident of the county in which the girls' industrial home is located eligible to appointment as financial officer of such institution, and, second, is such officer required to give a bond in the sum of $10,000.00?

There is considerable confusion in the statutes arising from the indiscriminate use of the words "steward" and "financial officer." These terms seem to

be used indifferently to describe the person who performs the duties of a financial officer as prescribed by sections 649, 650 and 650a R. S.

There is no general statute applying to all state institutions which prescribes the duties of a "steward" *eo nomine*.

Section 640 R. S. provides for the appointment of stewards as follows:

> "Upon the nomination of superintendents, boards of trustees may appoint stewards, but said steward so appointed shall not, at the time of his appointment, be a resident of the county in which said institution is located of which he is to be steward, * * *."

Section 632 R. S. requires the "steward or other financial officer" to provide clothing for and pay all necessary incidental expenses of inmates.

Section 648 requires the "steward or other financial officer" to give bond in the sum of $10,000.00.

Section 653 requires stewards to reside in and devote their entire time to the institution with which they are connected.

Section 753 fixes the duties of the steward of Longview asylum, and these duties are very similar to those prescribed for the "financial officer" by section 649.

The word "steward" as defined by the Century dictionary is especially applicable to one who superintends the finances of an institution.

The statutes above referred to compel the conclusion that the words "steward" and "financial officer" are used interchangeably and that the provisions of section 640 and 648 as to eligibility and bond are applicable to officials who perform the duties of "financial officers."

The supreme court has held that the provisions of the first, second and third chapters of the fifth title of the Revised Statutes require the appointment of a financial officer at state institutions as well as a superintendent, and that the same person cannot perform the duties of both offices. State ex rel. v. Oglebee, 37 O. S. 142.

Very truly yours,
W. H. MILLER,
Asst. Attorney General

STENOGRAPHER — COMPENSATION OF.

What is a "folio".

May 18th, 1907.

HON. THOMAS AUSTIN, *Steward, Cleveland State Hospital, Cleveland, Ohio.*

DEAR SIR: — I have received a communication from Mr. B. F. Perry, Jr., a member of the board of trustees of the Cleveland state hospital, relative to the payment of Mrs. S. Louise Patteson for transcribing the evidence submitted in the recent investigation of your institution.

From Mr. Perry's letter I understand that the board contracted with Mrs. Patteson to transcribe the evidence "at 10c. per folio," and a controversy has arisen as to the number of words necessary to constitute a "folio" under the laws of Ohio.

In reply I beg to say a "folio," as that word is used in the Revised Statutes of Ohio in fixing the compensation of stenographers, constitutes one hundred words. I am, therefore, of the opinion that the stenographer in this case is only entitled to receive 10c. for each one hundred words actually transcribed.

I am sending this communication to you at the request of Mr. Perry.

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

BENEVOLENT INSTITUTION — PLUMBING — CITY ORDINANCE.

City ordinance may not be enacted preventing employes of state hospital for insane from installing ordinary water pipes and making ordinary repairs within institution.

August 16th, 1907.

HON. CHARLES H. CLARK, *Superintendent, Cleveland State Hospital, Cleveland, Ohio.*

DEAR SIR: — In answer to your letter of August 14th, with reference to the employment of licensed plumbers, I have no hesitation in advising you that the work referred to, i. e., the installation of hot and cold water pipes, and the completion of all necessary work for the shower-bath system, as well as the ordinary repairs to water pipes, may be done by the regular employes of the institution. You state that the contract for the construction of the soile pipes, vent pipes, floor drains and closet drains, were let to a licensed city plumber and that the work has been completed, inspected and passed upon by the public health department.

The ordinance of the city of Cleveland which forbids any person to "construct, connect or repair any plumbing or do any work in connection therewith usually done by plumbers unless such person has a license so to do from the board of health, is, as construed by the plumbing inspector, so unreasonable as to be void.

Municipal corporations have express power to provide for the licensing of plumbers. Unquestionably the ordinance in so far as it requires persons engaged in plumbing as a business to take out a license, is valid (State v. Gardner, 58 O. S. 599) but the ordinance in question prohibits every individual, no matter how great his mechanical skill, from repairing a broken pipe on his own premises and from doing any construction or repair work in his own house unless he first procures a certificate from an examining board of plumbers, files a bond for $5,000, conditioned, in substance, to save the city harmless from any loss occasioned by want of care or skill on the part of the licensee or occasioned by reason of openings or obstructions in the street, etc. Even if it is within the power of the municipality as a health regulation to require a person to pass some sort of an examination before permitting him to do any work usually done by plumbers it is certainly unreasonable to require a person to give the bond provided for by section 574, unless he proposes to engage in plumbing as a business.

Dillon on Municipal Corporations, section 320;
State ex rel. v. Tooker, 5 N. P., 122;
Toledo v. Buechele, 19 C. C., 127.

It is entirely proper that the local board of health should inspect all plumbing work at the state hospital but I believe you are entirely within your rights in having the work done, which you refer to, by salaried employes of the institution who have the requisite skill.

Very truly yours,
W. H. MILLER,
Asst. Attorney General

PUBLIC BUILDING CONTRACT — TIME OF PERFORMANCE.

Provision in public building contract that contractor shall forfeit and pay the state a fixed sum for each day's delay after time fixed for performance, in

conformance with section 793 R. S., is a penalty; trustees of state institution entering into such contract may remit so much of such penalty as exceeds actual damage and damage caused by their own agents.

February 25th, 1907.

HON. A. F. SHEPHERD, *Superintendent, Dayton State Hospital, Dayton, Ohio.*

DEAR SIR: — Some time ago you requested my opinion as to the duty of the trustees of the Dayton state hospital to retain the full amount of the stipulated damages for delay in the performance of their contract with the B. F. Sturtevant Company. I have just received the contractor's statement mentioned in our previous correspondence.

The contract in question fixed a time for performance and provided that the contractor should forfeit and pay to the state the sum of $15.00 per day, for each day's delay thereafter. Section 793 R. S. requires such a provision to be inserted in all public building contracts. The statute does not itself provide that the contractor shall forfeit a fixed sum for each day's work, but merely requires that such a provision be inserted in the contract. The amount of the per diem damage is left to the determination of the agents of the state in each particular case. The preliminary estimate of damages may be carefully made, with a view to approximating, as nearly as possible, the damages which will actually result from delay, or it may be fixed at a sum which, in the opinion of the agents making the contract will surely exceed any probable damages. In other words the stipulated sum may be regarded in some instances as liquidated damages, in others as a penalty. The language of the statute itself affords some indication that a provision for a penalty was intended. The words "forfeit and pay" are more appropriate to a penalty than to liquidated damages, and the latter term is not used.

In the construction of contracts the rule is that unless it clearly appears that a stipulated sum is intended as liquidated damages it will be held to be a penalty to secure actual damages. Hattersly v. the Village of Waterville, et al., 4 O. C. C. N. S. 249. The reasons which justify this rule in the construction of contracts make it equally applicable to the construction of statutes.

I am therefore of the opinion that section 793 R. S. does not require the stipulated per diem penalty for delay in public building contracts to be deducted by the state's agents if, in their judgment, such amount exceeds the actual damage. The purpose of the statute is, I believe, to insure the collection by the state of damages actually sustained and to induce the prompt performance of public contracts by subjecting the contractor to the liability of losing a stipulated sum for each day's delay. Neither the terms of the statute nor its purpose make it the absolute duty of the agent of the state to exact the full amount of the stipulated damage. To do so in cases where the stipulated sum is clearly in excess of damages actually sustained, or where the delay by the contractor was due in some measure to delay by agents of the state, would be most inequitable.

It may be competent for the parties to a public building contract to agree on a fixed sum as liquidated damages but in such case the agreed sum derives its character from the contract and not from the statute. The particular contract in question was made on a printed form which described the stipulated sum as "liquidated damages." But if the sum fixed in this contract was intended as liquidated damages surely the same persons who were authorized to estimate in advance the damages which might result from delay should have the power to revise such estimate if experience demonstrated that it was excessive. Some discretion must be allowed the state's agent in the enforcement of contract provisions of this nature or the grossest injustice would sometimes result.

The certificate of the state's engineer that the company is without valid excuse for the delay may be conclusive against the contractor, but does not bind the trustees. They may and should remit the damages for all delay chargeable to their own agents.

In estimating damages resulting from delay they are by no means limited to the consideration of specific items of damages of such nature as can be clearly shown. The inconvenience resulting from failure to have a building completed on the day fixed may justify the retention of the entire sum provided for by contract, even though no direct monetary loss can be proved.

I have not given any consideration to the facts alleged by the contractor as an excuse for delay in performance. Your inquiry was very properly limited to questions of law. It is for the trustees to determine whether the delay was excusable, and, if not, what damage was sustained thereby.

Very truly yours,
WADE H. ELLIS,
Attorney General

CONVICT LABOR.

Power of board of managers of penitentiary to enter into contracts between March 29th, 1906, and April 14th, 1907; contracts entered into prior to former date unaffected by act in 98 O. L. 177.

January 14th, 1907

HON. O. B. GOULD, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR: — Replying to the inquiry of the board of managers of the Ohio penitentiary made in your letter of the 11th inst., I beg to say that section 1 of the act of March 29, 1906 (98 O. L. 177, 181) operates to repeal the authority heretofore conferred upon the board of managers to make contracts by which the labor or time of the prisoners in the penitentiary has been contracted with persons, firms and corporations. In the second paragraph of the act there is a saving clause operating as an exception to the general repeal of the act which provides that:

> "This act shall not be construed to invalidate any legal contract now in force between the board of managers of any state penal institution, and any person, firm or corporation now employing convict labor. The board of managers of any state penal institution may contract for such labor in any such institution as is not employed under the provisions of this act in the same manner as contracts are made prior to the passage of this act, provided, however, that no such contract shall be entered into to continue for longer than twelve months after the passage of this act; nor shall any such contract be entered into after the expiration of said twelve months."

The effect of the provision above quoted is to permit the board of managers to only make and enter into such contracts as will terminate on or before the 14th of April, 1907.

As to contracts which were made and entered into prior to March 29th, 1906, the same are not affected by the operation of the act in question.

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

PENITENTIARY — PRISONER — CONDITIONAL PARDON.

Prisoner returned to penitentiary for violation of conditional pardon must serve remainder of original sentence without deduction for time during which he was out under such pardon.

February 6th, 1907.

HON. O. B. GOULD, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR: Your communication is received in which you request my opinion upon the following inquiry:

Ed Cox, a prisoner, has been returned to the penitentiary for a violation of a conditional pardon granted him by the governor July 23rd, 1906. Does the prisoner lose the time he was out on this conditional pardon or does his time go on just the same as if he had not been pardoned?

In reply I beg to say a pardon granted by the governor by virtue of section 11, article 3, of the constitution releases the prisoner from the control of the managers of the penitentiary whether such pardon is conditional or absolute.

I am therefore of the opinion that in computing the service of time under the sentence imposed no account should be taken of the time the prisoner was out on pardon and he should now be required to serve that part of the time remaining unserved at the date of the pardon.

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

PENITENTIARY — PROPERTY OF DECEASED CONVICT.

Duty of warden of penitentiary as to disposition of money due convict dying without known relatives.

February 7th, 1907.

HON. O. B. GOULD, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR: — I have received your communication of February 4th, in which you submit the following question:

"A prisoner died in the penitentiary a few days ago and so far as we have been able to determine has no relatives. There is a credit of $18.00 due the deceased prisoner on our books. What disposition should be made of this money?"

I suggest that the money be held a reasonable length of time so as to afford an opportunity to any one having a lawful claim to the same to present it. Should no claim be made and you become satisfied that the deceased prisoner has no heirs, the money, in my judgment, will escheat to the state under section 4163 R. S.

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

PENITENTIARY — PAROLE OF PRISONER SERVING CUMULATIVE SENTENCE.

Prisoner in penitentiary serving cumulative sentence is not eligible to parole until minimum of second sentence has been served.

March 4th, 1907

HON. O. B. GOULD, *Warden, Ohio Penitentiary, Columbus, Ohio.*

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

> "A prisoner has a sentence of two years on the first count, and five years on the second count of his indictment. Sentences not to run concurrently. When is said prisoner eligible to parole?"

Section (7388-9) Revised Statutes, empowers the board of managers to parole any person 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. I am, therefore, of the opinion that the prisoner in question is not eligible to parole under the second sentence until he has served a minimum term thereunder as provided by law. Very truly yours,

W. H. MILLER,
Asst. Attorney General

PENITENTIARY — PAROLE — POWER OF BOARD OF MANAGERS TO REVOKE.

Board of managers of Ohio penitentiary has power to revoke parole granted under misunderstanding of facts.

In re Homer Morrison.

May 17th, 1907.

To the Honorable, the Board of Managers of the Ohio Penitentiary, Columbus, O.

GENTLEMEN: — Replying to your letter of May 10th, asking for an opinion as to the power of your board to revoke the parole recently granted to Homer Morrison, I beg to advise you as follows:

Under section (7388-9) of the Revised Statutes of Ohio, your board has full power to revoke a parole already granted and to recall or re-take a paroled prisoner at any time in its discretion, and especially it has such power if it was misinformed as to the facts upon which the parole was granted or had proceeded without observing the statutory notice required, or other jurisdictional conditions precedent to its lawful action.

In this instance I am advised by the prosecuting attorney of Williams county that his certificate, to the effect that no other indictments were pending against Morrison, was given in entire good faith and believed to state the fact at the time, although by some inadvertence or misunderstanding at the trial requisite action was not taken to dispose of other charges against the prisoner. However this may be, if your board, either by reason of this certificate or for any other reason, feels that it had not before it all the facts to justify the parole, or had not observed the statutory requirements in the proceeding, it may now revoke said parole.

I come to this conclusion the more readily because I have already advised your board, in answer to a request for an opinion, that the board of managers of the penitentiary were without authority to parole Homer Morrison in the first instance, and this, although it may appear that a former attorney general has expressed a contrary view in a similar case.

Very truly yours,

WADE H. ELLIS,
Attorney General.

OHIO STATE REFORMATORY — LIFE SENTENCE — PAROLE AND DISCHARGE.

Prisoner sentenced for life to Ohio state reformatory under conviction for burglarizing inhabited dwelling may be paroled by board of managers but may not be discharged.

January 25th, 1907.

HON. FRED S. MARQUIS, *Secretary, Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR: — Your communication dated January 23rd, relative to the parole of inmates of the Ohio state reformatory who have been convicted without recommendation of mercy for burglarizing inhabited dwellings and sentenced to life imprisonment, is received.

In reply I beg to say the statute fixing the penalty in this class of offenses provides no minimum or maximum except mercy is recommended by the jury in its verdict.

I am therefore of the opinion that while the board of managers may under the provisions of section (7388-29) Revised Statutes, parole such inmates there can be no final discharge except upon intervention of the governor either by pardon or commutation of sentence.

Very truly yours,

WADE H. ELLIS,

Attorney General

OHIO STATE REFORMATORY — FINANCIAL OFFICER.

The superintendent of the Ohio state reformatory is the financial officer thereof, with authority to act under sections 648, 649 and 650 R. S.

March 15th, 1907.

Board of Managers, Ohio State Reformatory, Mansfield, Ohio.

GENTLEMEN: — I have your letter of the 12th inst., in which the opinion of this department is asked upon the question as to who is the financial officer of the institution of which you have charge.

Sections 648, 649 and 650 of the Revised Statutes point out certain duties to be performed by the "financial officer" of each institution, thereby recognizing that those duties shall be performed by one of the corps of offices connected therewith as embraced in chapter 3, title V, part 1, Revised Statutes.

A steward is not expressly designated by the act providing for the organization and government of the Ohio state reformatory, but undoubtedly if such officer is necessary to the proper management of the institution the authority is conferred by statute to create such office, and appoint a proper person to fill the same. In the absepce of the appointment of such particular officer and the designation of his duties as that of the financial officer of the institution, the one who is required to perform the duties of such officer, independent of the title or name assumed by him, becomes, in law, the financial officer of the institution.

I am of the opinion that as the reports required by section (7388-25)R. S. and other financial transactions, shall be made and attended to by the superintendent of such institution that he, in fact, becomes the financial officer as designated in sections 648, 649 and 650 R. S.

The answer thus given covers your several inquiries.

Very truly yours,

WADE H. ELLIS,

Attorney General.

OHIO STATE REFORMATORY — DUTY OF SUPERINTENDENT AS TO DISPOSITION OF MONEYS DEPOSITED BY RELATIVES OF PAROLED PRISONERS.

April 5th, 1907.

The Board of Managers, Ohio State Reformatory, Mansfield, Ohio.

GENTLEMEN: — Replying to your inquiry of the 30th ultimo, I beg to say that the moneys deposited in the nature of a parole deposit, by the relatives of the inmates of your institution, should be placed in the hands of the superintendent who is held by a former opinion of this department to be the financial officer of the institution.

If the funds thus created are placed in a bank in the name of the superintendent, as superintendent of the Ohio state reformatory, by resolution of the board of managers thereof, I am of the opinion that in case of the failure of the institution occasioning the loss of the moneys or any portion thereof referred to, without any neglect or act of the superintendent contributing thereto, the superintendent would not be personally responsible for such loss.

In regard to the bonds of the bank held by the superintendent as security for the moneys so deposited, if these bonds are kept in a safety deposit box, entirely separated from the other assets of the bank, in case of the failure of the bank the bonds would be treated as the collateral of the superintendent and the same could be exhausted by him in order to cover any loss which might result to the institution from the failure of the bank.

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

EMPLOYE OF STATE INSTITUTION — ASSIGNMENT OF WAGES.

Financial officer of state institution may not issue voucher or check in favor of assignee of wages of employe.

October 8th, 1907.

HON. CARL E. STEEB, *Secretary, Board of Trustees of Ohio State University, Columbus, Ohio.*

DEAR SIR: — You have submitted to me the question whether as bursar of the Ohio state university you should honor the demand of the assignee of wages of one of the employes of the university.

I beg to advise you that in my opinion you should refuse to issue a voucher or a check to any person save the individual with whom your board has contracted for services. Your power is limited to such expenditures as have been authorized by the legislature in the appropriation for the support of the university. A further reason for my conclusion is that even if the assignee has a right by virtue of the assignment, the same cannot be enforced, as any action that would be brought against you would be, in effect, a suit against the state.

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

MIAMI UNIVERSITY — CONSTRUCTION OF ADMINISTRATION OFFICES.

Building erected through expenditure of fund appropriated for erection of college auditorium for Miami university may contain rooms to be used as administration offices.

Revenues derived from lands granted by state may be used in construction of such offices.

March 19th, 1907.

DR. GUY POTTER BENTON, *President, Miami University, Oxford, Ohio.*

DEAR SIR: — Your letter of March 16th states that you desire if possible, to include administration offices in the auditorium building for the construction of which an appropriation was made by the last general assembly. The appropriation was "for the erection of a college auditorium," 98 O. L. 385. The funds so appropriated can be used for no other purpose. The auditorium building may, however, contain such rooms in addition to the main hall as the trustees of the university consider convenient for use in connection with and as adjuncts to the auditorium proper, and these rooms may be used as administration offices when not otherwise occupied.

If the appropriation is not sufficient for the construction of a combined auditorium and administration building such as you desire the extra expense of the administration offices may be paid out of other resources of the university. The revenues from the land granted to the university at the time of its incorporation may be expended in this way. The act of incorporation provides:

> "That the clear annual rents, issues and profits of all the estate real, personal or mixed, of which the said corporation shall be seized or possessed in their corporate capacity, shall be appropriated to the endowment of the said university, in such manner as shall most effectually promote virtue, morality, piety and knowledge of such languages, liberal arts and sciences, as shall hereafter be directed from time to time, by said corporation."

7 O. L. 184, 188. See also 8 O. L. 94.

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

UNIVERSITIES — COMBINED NORMAL AND INDUSTRIAL DEPARTMENT OF WILBERFORCE UNIVERSITY — QUALIFICATIONS OF TRUSTEE.

Non-resident of Ohio may not be appointed trustee of combined normal and industrial department of Wilberforce university.

July 16th, 1907.

Board of Trustees, Wilberforce University, Wilberforce, Ohio.

GENTLEMEN: — I desire to acknowledge the receipt of your secretary's letter submitting the following question:

> "Can one who is not a resident of the state of Ohio be appointed a member of the board of trustees of the combined normal and industrial department of Wilberforce University?"

In reply thereto I desire to say that such trustees are appointed pursuant to section (4105-55) et seq., of the Revised Statutes of Ohio. While the act does not state that such trustees shall be residents of Ohio, yet the constitution of Ohio, article XV, section 4 provides: "No person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector."

It is, therefore, my opinion that a non-resident is not eligible to such appointment.

Very truly yours,
W. H. MILLER,
Asst. Attorney General

(To the Prosecuting Attorneys)

BOARD OF HEALTH — TOWNSHIP.

Township trustees must act as board of health without additional compensation.

January 2nd, 1907.

HON. FRANK Z. BALLINGER, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR: — Your letter under date of December 31st, inquiring as to whether or not township trustees while acting as a board of health are entitled to compensation, is received. In reply I beg leave to say section (1536-729) R. S. provides that the township trustees shall constitute a board of health and provides that such board shall have the same duties and powers as are imposed or granted to boards of health in cities and villages, but fixes no compensation for services rendered. Under the decision of our supreme court where no compensation is provided for the performance of official duties, such service is presumed to be gratuitous.

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

JUVENILE COURT — BUILDING FOR.

County commissioners may purchase site for juvenile court.

January 8th, 1907.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR: — Your communication under date of December 29th, relative to the authority of the county commissioners to purchase a lot for the erection of a building to be used as a juvenile court, is received. In reply I beg leave to say section 870 R. S. provides that:

> "The county commissioners may, when, in their opinion, it is necessary, purchase a site for a court-house or jail, or land for an infirmary, at such price and upon such terms of payment as are agreed upon between them and the owner or owners of such property; and the title of such real estate shall be conveyed to the county in fee simple."

Under this section the county commissioners may, in my judgment, purchase said lot for the purpose of erecting a juvenile court building.

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

SCHOOLS — CHILDREN'S HOME PUPILS.

County commissioners may not donate money for construction of separate room in township building for children's home pupils.

January 10th, 1907.

HON. J. A. SCHAEFFER, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR: — Your recent communication in which you inquire as to the authority of the county commissioners to donate money, under section (929-1)

for the erection of an additional room to the township school building for the accommodation of the inmates of the children's home situate within said townships school district, is received.

In reply I beg leave to say section (929-1) is as follows:

> "In any county in the state of Ohio, where there now is or hereafter may be an incorporated 'children's aid society,' or 'children's home,' or 'industrial school,' or 'industrial school and home,' or any other incorporated society whose object is the care, aid and education of neglected or destitute children, the county commissioners of such county, or the city council of any city or cities in such county, in addition to the powers now conferred upon such commissioners or city council, are hereby authorized, if they deem it judicious, to aid any such institution to purchase land, erect buildings, either by subscription with others to raise a fund for that purpose, or by direct aid or donation, or otherwise, in amount not exceeding six thousand dollars as they may deem expedient."

I am of the opinion that under the above quoted section the county commissioners are not authorized to donate money to construct an additional room to a public school building belonging to a township school district, that is, county commissioners are only authorized, under this section, to aid in the purchase of lands or erection of buildings for the use and benefit of a children's home and the title to said lands or buildings must be in said children's home.

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

CLERK OF COURTS — FEES — NATURALIZATION.

Clerk of courts may retain fees earned by him under naturalization laws of the United States.

January 11th, 1907.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR: — Your communication of January 2, inquiring whether or not fees earned by the clerk of the common pleas court in naturalization cases shall be turned into the county treasury or retained by the clerk, is received.

In reply I beg to say that I have not at hand the complete text of the naturalization act passed June 29, 1906. If, however, as you state in your letter, said act authorizes the clerk to retain one-half of the fees earned in naturalization cases and to remit the other half to the department at Washington, then in my judgment the county salary law, passed by the last Ohio general assembly, in so far as it provides that the clerks of the common pleas courts shall receive no compensation other than the salary therein provided, does not apply to the case about which you inquire for the reason that the fees coming to the clerk in naturalization cases are not county or state moneys — are authorized by a federal statute, and the state legislature is without authority to regulate or control them.

The question as to the duty of the clerk to perform the services required by said naturalization law is not raised here, for the reason that the clerk is willing to perform the same. Nor is it decided in this opinion that the federal government has power to impose these additional duties upon state or county officers of Ohio, for such power has long been acquiesced in and may be assumed.

Answering therefore the specific question which you propound, I am of the opinion that the clerk of the court of common pleas may retain as his own earnings all fees allowed him under the naturalization laws of the United States.

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

PROSECUTING ATTORNEY — SALARY — DELINQUENT TAXES.

Basis of computation of salary of prosecuting attorney.

Prosecuting attorney may not be employed by county commissioners to collect delinquent personal taxes.

January 12th, 1907.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR: — Your communication dated January 11th, in which you submit the following questions, is received:

> *First.* Is a prosecuting attorney under section 1297 R. S. as amended 98 O. L. p. 161, entitled to compensation for a fractional part of a thousand of the population of the county?
>
> *Second.* May the county treasurer under the authority of the county commissioners employ a prosecuting attorney to collect delinquent personal taxes, under section 2858 R. S.?

In reply to these inquiries I beg leave to say:

First. Section 1297 R. S. as amended is as follows:

> "The prosecuting attorney shall receive an annual salary, not exceeding the sum hereafter mentioned in each county of the state; sixty dollars for each full one thousand of the first fifteen thousand of the population of the county as shown by the federal census next preceding his election; fifty dollars for each full one thousand of the second fifteen thousand of the population of the county; sixty dollars for each full one thousand of the third fifteen thousand of the population of the county; forty dollars per thousand for each full one thousand of the fourth fifteen thousand of the population of the county; thirty dollars per thousand for each full one thousand of the fifth fifteen thousand of the population of the county; ten dollars per thousand for each full one thousand of the sixth fifteen thousand of the population of the county; ten dollars per thousand for each full one thousand of the population of the county in excess of ninety thousand; but no prosecuting attorney shall receive a salary in excess of five thousand five hundred dollars."

The above section contains no provision authorizing compensation for the fractional part of a thousand. I am therefore of the opinion that the compensation of a prosecuting attorney will be computed upon the population of the county exclusive of the fractional part of a thousand, over and above the full thousand.

Second. Under section 2858 of the Revised Statutes the county commissioners are required, at their September session, annually, to cause the list of persons delinquent in the payment of taxes on personal property to be publicly read. Said commissioners may, if they deem the same necessary, authorize the treasurer to employ *collectors* to collect the same, or any part thereof.

While the county commissioners have authority under said section to employ collectors to collect delinquent personal taxes, yet I am of the opinion that said commissioners may not employ the prosecuting attorney as such collector for the reason that section 1274, as amended by the last general assembly, requires the prosecuting attorney to perform all duties and services as are required to be performed by legal counsel under section 845. The part of section 845 fixing the duties of the legal counsel thereunder is as follows:

> "Whenever the board of county commissioners of any county deems it advisable, it may employ legal counsel and the necessary assistants upon such terms as it may deem for the best interests of the county, for the performance of the duties herein enumerated. Such counsel shall be the legal adviser of the board of county commissioners and the board of control, where there is such board, and of all other county officers, of the annual county board of equalization, the decennial county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and officers may require of him written opinions or instructions in any matters connected with their official duties. He shall prosecute and defend all suits and actions, which any of the boards above named may direct, or, to which it or any of said officers may be a party, and shall also perform such duties and services as are now required to be performed by prosecuting attorneys under Sections 799, 1277, 1278*a* and 3977 of the Revised Statutes, and as may at any time be required by said board of county commissioners."

Under this provision it is the duty of the legal counsel to prosecute and defend all suits and actions to which any of the county officers may be a party. These duties which devolve upon legal counsel under section 845 have now been transferred to prosecuting attorneys under Section 1274, as amended.

Under section 2859 the county treasurer, in addition to any other remedy provided by law for the collection of delinquent personal taxes, is specially authorized and empowered to enforce the collection by a *civil action in the name of the treasurer,* and the prosecuting attorney is required, under section 1274, as amended, to prosecute the suits.

Section 1274 also requires the prosecuting attorney to advise the county commissioners, and other county officers, in all matters connected with their official duties. The prosecuting attorney may, therefore, be required to pass upon and approve the contract made by the county treasurer under the authority of the county commissioners with the collector provided for in section 2858.

I am therefore of the opinion, inasmuch as the official duty of the prosecuting attorney is to represent the county treasurer in all suits brought for the collection of delinquent personal taxes and to advise the county treasurer and county commissioners in the making of contracts for the employment of collectors, that the duties to be performed by a collector appointed under section 2858 are incompatible with those of the prosecuting attorney and that a prosecuting attorney is not, therefore, eligible to the appointment of collector under section 2858.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ROADS — TWO MILE ASSESSMENT PIKE — ENGINEER.

Engineer employed prior to amendment of county surveyor's act to superintend improvement of roads under two mile assessment pike law entitled to complete work under contract at compensation provided for county surveyor by law in force at time of his employment; not entitled to expense.

January 12th, 1907.

HON. GEORGE H. BAYLISS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR: — Your communication dated January 3, in which you submit the following inquiry is received. The county commissioners of Paulding County, prior to the amendment of section 1166 by the last general assembly, acting under section 4841 R. S., appointed an engineer other than the county surveyor, to superintend the performance and completion of the construction of certain improved roads under the two mile assessment pike laws; the engineer so appointed has not been able to complete the work on said pike improvements before section 1166, as amended, became effective. You inquire:

First. Are sections 4841 and 4849 R. S. repealed by the operation of section 1166, as amended by the last general assembly?

Second. Is the engineer, so appointed by the county commissioners, entitled to complete his work on said pike improvements under his said employment by the county commissioners and, if so, would he be entitled to the same compensation as provided for county surveyors in section 1183 as amended, 98 O. L. p. 296?

Third. Would meals be included in the "reasonable and necessary expenses incurred in the performance of his official duties" as provided in section 1181?

In reply to the above inquiries I beg to say:

First. Section 1166 as amended, 98 O. L. 245, provides as follows:

"The county surveyor shall perform all duties for such county as are now or may hereafter be authorized or declared by law to be done by any civil engineer or surveyor. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts, for the construction or repair of all bridges, culverts, roads, drains, ditches and other public improvements (except buildings) which may be constructed under the authority of any board within and for such county. He shall make an inspection when required by the commissioners of all bridges and culverts and report their condition to the county commissioners on or before the first day of June of each year, or oftener if required by the commissioners. He shall be responsible for the inspection of all public improvements that are made under the authority of the board of county commissioners. He shall keep in suitable books a complete record of all estimates and summaries of bids received and contracts for the various improvements together with the record of all estimates made for the payments on the work. He shall make all surveys required by law to be made, and perform all necessary services to be performed by a surveyor or civil engineer in connection with the construction, repair or opening of all county roads, turnpikes, and ditches constructed under the authority of the board of county commissioners, and shall perform such other duties as said board may from time to time require."

This section was passed April 2, 1906, became a law without the approval of the governor, and repeals section 4841 and section 4849 R. S. insofar as said sections authorize the county commissioners to employ engineers other than the county surveyor in the construction of pikes under the two mile assessment laws.

Second. Inasmuch as the appointment of an engineer in this instance was made by the county commissioners prior to the amendment of section 1166, I am of the opinion that said engineer is entitled to complete his work under said appointment. If said appointment was made after section 1183 R. S. as amended by the last general assembly, became effective, then said engineer is entitled under the provisions of section 4849 to the compensation provided for county surveyors under said section 1183 as amended. If, however, his appointment was prior to the amendment of section 1183, then said engineer would be entitled to such compensation as was fixed by law for the county surveyor at the time of his appointment.

Third. The language "reasonable and necessary expenses incurred in the performance of his official duties" as found in section 1181, is an amendment to original section 1181, and if such amendment was made subsequent to the appointment of said engineer, said engineer is not entitled to his reasonable and necessary expenses as provided therein.

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

TAXATION — BUILDING AND LOAN ASSOCIATION — PERSONAL PROPERTY.

Personal property of building and loan association taxable in county where such property is located.

January 14th, 1907.

HON. CHAS. S. SHEPPARD, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR: — The inquiry made by you regarding the return of certain property for taxation by the Home Building & Savings Company of Zanesville, has received my consideration. Your letter informs me that the place of business of this company is in Muskingum County, and that it acquired a farm in Guernsey County which was taken as security for a debt owing to it; that the farm has been operated by the company and stocked with different kinds of stock and a manager has been assigned by the company to manage and control the same; that the assessor for that portion of Guernsey County has each year assessed the value of the stock of the farm and returned it with his returns to the auditor of Guernsey County, who placed such stock on the tax duplicate where it now stands charged against the building and savings company.

The question that is presented is as to the legality of such charges so made upon the chattel property of the company in Guernsey County.

Section (3836-7) R. S., being section 7 of the chapter of the Revised Statutes governing building and loan associations (88 O. L. 469), provides the following exemptions from taxation:

> "The shares and loans, advanced to its members, shall be exempt from taxation, except shares or stock upon which no loans have been made or money advanced by the company, shall be considered and held as credits, and the said members individually shall list for taxation the

number of shares held by them, and the true value thereof in money, on the day preceding the second Monday in April in each year, and the same shall be assessed at such valuation for taxation and taxes as other property."

This provision should be construed as placing upon the individual member of the corporation the duty of returning his individual shares in accordance therewith. But it still leaves the company to return for taxation the property, being personally owned by it. The place of return of such farm stock as your letter refers to is fixed by section 2735 as follows:

"and all personal property upon farms shall be listed in the township, city or village in which the same may be situated."

Section 2744 provides how the list of taxable property shall be made by corporations generally, as follows:

"The president, secretary and principal accounting officer of every * * * joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporations, *within the state,* at the actual value in money, in manner following: In all cases return shall be made to the *several auditors of the respective counties where such property may be situated,* together with a statement of the amount of said property which is situated in each township, village, city or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village or township."

The latter quoted section is perfectly consonant with the provisions of section 2735 R. S. and sustains the view that the return shall be made to the auditor of Guernsey County of the farm stock located therein belonging to such company and the tax shall be paid to the treasurer of that county and not to the county in which the corporation's place of business is located.

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

TOWNSHIP DITCH SUPERVISOR..

Township trustees may not appoint township ditch supervisor until vacancy occurs after first election for such office.

January 15th, 1907.

HON. CHARLES GERHARDT, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR: — Your communication dated January 12, relative to the power

of township trustees to appoint a ditch supervisor, as provided in section 1 of the act passed by the last general assembly (98 O. L., 280), is received.

In reply I beg to say that said section only authorizes the township trustees to appoint a ditch supervisor when a vacancy occurs. There can, of course, be no vacancy until after a ditch supervisor has been elected, as provided in said section. There will be, under this section, at the next November election a township ditch supervisor elected in all townships within the state in which there have been located and established county or township ditches. The appointment of a ditch supervisor by the township board of trustees in one of the townships of your county, referred to in your letter, is invalid.

I agree with your suggestion as to the method to be pursued for the cleaning out of ditches until after ditch supervisors are regularly elected. I desire to say further that the word "may," as used in section 1 of said act, should in my opinion be construed to mean "shall," and that the election of ditch supervisors is not, therefore, optional but mandatory.

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

SHERIFF — EXPENSE.

Expense of sheriff for transportation in service of process may not be paid by county.

January 17th, 1907.

HON. FRED H. WOLF, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR: — I herewith enclose you the full text of the opinion furnished the bureau of inspection and supervision of public offices relative to the additional expenses allowed sheriffs under section 19 of the county salary law.

From the numerous inquiries received at this office I am led to believe that sheriffs and other county officers have a wrong impression of its import. I have not held it to be unlawful for sheriffs, in the performance of their official duties, to travel on railroads and traction cars. I have said, however, that the legislature has not included in the actual and necessary expenses allowed sheriffs, under section 19 of said salary law, any expenses for railroad and traction car transportation in the service of civil processes, summoning juries and subpoenaing witnesses in civil and criminal cases.

The inconvenience to the prompt administration of the duties of the sheriffs' office in this regard is commented on in the enclosed opinion but the inconvenience and hardships resulting therefrom do not cure the omissions in the law.

Section 18 of said law provides that the salaries of all officers as fixed by said law,

> "Shall be in lieu of all fees, costs, penalties, percentages, allowances, and all other perquisites of whatsoever kind which any of the officers herein named may now collect and receive."

If this section stood alone a sheriff could not be reimbursed for *any* expenses incurred in the discharge of his official duties. *All* expenses of his office would have to be paid out of his salary. That the words "allowances" and "perquisites" include expenses is shown by the construction given to such words in the constitution of Ohio. Section 31 of article 2 provides that "the members and officers of the general assembly shall receive a fixed compensation, to be prescribed by

law, and no other allowance or perquisites, either in the payment of postage or otherwise." The postage of members of the general assembly used in the discharge of their duties is certainly an expense incident to their offices and the framers of the constitution said that no such allowance or perquisite should be permitted them. Surely the general assembly of Ohio if it desired could require that every public officer should pay all the expenses of his office out of a certain salary fixed by law. There is no natural or inalienable right in a public officer to have the expenses of his office defrayed by the public in addition to his compensation for performing his duties. The legislature may, if it wants to, authorize the payment of such expenses either out of public funds or out of the officer's salary. In either case the public pays the bill, for where the expenses are required to be paid out of the officer's salary it is to be presumed that the salary is made large enough to cover the expenses. The officer has no right to regard all the salary as his personal property if a portion of it is required by law to be devoted to paying any of the expenses of his office. In such case it is just as much the officer's duty to expend such portion of his salary in paying expenses as it would be to devote to that purpose an additional allowance provided expressly for expenses. The money is not his in the one case any more than it is in the other. If an officer is required to pay certain expenses out of his salary and it becomes necessary for him, in the proper discharge of his duties, to incur such expenses, he cannot refuse to discharge the duty because the expenditure thereby occasioned will reduce the net income of his office. If he does so refuse in order to keep the money which would otherwise be expended in the performance of the duty, he misappropriates public funds.

But while the section of the salary law above quoted, if standing alone, would require the sheriff to pay *all* expenses out of his salary, the legislature has seen fit to expressly provide that *certain* expenses shall be paid out of the public treasury as an extra allowance for that purpose to the officer. The legislature has specifically enumerated these expenses in section 19 of the county salary act. It has provided for certain definite railroad expenses and certain other expenses for the maintenance of horses and vehicles and has omitted any allowance for railroad or street car expenses in the service of civil processes and the summoning of juries and the subpoenaing of witnesses in civil and criminal cases. It follows therefore that the general assembly is presumed to have intended that these expenses should be paid by the sheriff out of his salary.

Whether the general assembly intended to make this omission or not, whether it is just or unjust, whether the next legislature will amend the act so as to reimburse county sheriffs for such expenses paid out of their salaries are not questions with which we are now concerned. The only question is what the law is upon the subject, and the plain language of the statute cannot be twisted to make something out of it which is not there. Nor can the common law be resorted to to repeal the statutes of Ohio. It is the statutes which repeal the common law as every one knows who has studied either.

I have advised the bureau of inspection and supervision of public offices that county commissioners are without authority to make any allowance to sheriffs for these particular expenses and county treasurers are without authority to pay out any funds for such purpose. I regret that the legislature has made what appears to be such an absurd exception in the allowance of actual and necessary expenses to the sheriffs of the state, but the attorney general has no power to make the law; he can only declare it.

Very truly yours,

WADE H. ELLIS,

Attorney General.

PROSECUTING ATTORNEY — EXPENSE. BLIND FUND — TRANSFER OF.

Prosecuting attorney may include telephone service and postage in his expense account.

County commissioners may make transfers from fund for support of the worthy blind.

January 19th, 1907.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR: — Your communication dated January 17th, inquiring whether or not telephone service and postage may be allowed prosecuting attorneys under the prosecuting attorneys' salary law (98 O. L. p. 160) is received. In reply I beg leave to say that the provision in said law allowing the reasonable and necessary expenses incurred in the performance of the official duties of the prosecuting attorney or in furtherance of justice, will include postage and telephone service used in the discharge of official duties.

In response to your inquiry under separate cover relative to the disposition of the blind fund, I beg to say county commissioners may, if they desire, transfer any or all of said fund to any other fund over which they have control under the provisions of sections (22*b*-2) and (22*b*-3.)

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

COSTS — EXPERT WITNESS.

Compensation of expert witness employed by state in felony case may not be included in costs.

January 25th, 1907.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR: — Your communication dated January 23rd relative to the refusal of the warden of the penitentiary to allow and the auditor of state to issue a voucher for an item of $25.00 for services of an expert witness in the criminal cost bill in the case of State vs. Taylor, is received.

In reply I beg to say section 7332 R. S., which provides for the bill of costs in felony cases, is as follows:

> "Upon sentence of any person for felony, the officers claiming the costs made in the prosecution shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and the seal of the court, a complete bill of the costs made in the prosecution, including any sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, or on the request of the governor made to the president of the United States, which said complete bill of costs shall be presented by the clerk to the prosecuting attorney and it shall be his duty to examine into the correctness and legality of each and every item therein charged, and to certify to the same if correct and legal."

This section allows in addition to the costs made in the prosecution "any sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, etc."

While section (1302-1) R. S. authorizes the county commissioners to pay expert witnesses such compensation as the court approves and said commissioners may deem just and proper, yet there is no statute authorizing compensation so paid to be taxed in the bill of costs.

> "The word 'costs' has a legal signification and includes only those expenditures which are by law taxable."

State ex rel. The Board of Commissioners of Gallia County v. The Board of Commissioners of Meigs County. 14 C. C., page 26.

Inasmuch as section 7332 does not provide that compensation paid expert witnesses shall be taxed in the bill of costs, I am of the opinion that this item of $25.00 should not have been included in the cost bill and that the auditor of state rightfully refused to pay the same.

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

CRIMINAL PROCEDURE—INSTRUCTION.

Trial court in criminal case may upon its own motion instruct jury to return verdict for defendant.

January 25th, 1907.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR:—In a recent communication you state that in a criminal case, where no motion was made at the conclusion of the state's testimony the trial judge directed the jury to return a verdict for the defendant. You inquire whether the court was authorized to do this. In reply thereto I will say that it is the duty of the trial judge to instruct the jury upon any question of law and he may do this without being so requested. When all the evidence has been offered by the state, if it is not sufficient to sustain the indictment, it is the duty of the court to direct an acquittal. This becomes then a question of law, for if the facts presented would not sustain a verdict, such verdict would have to be set aside. It is my opinion that it is not only proper but may become the duty of the trial judge to direct a verdict though no motion is made by the defendant. The court, however, has no power to direct a verdict where there is testimony to sustain the verdict.

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

DITCH ASSESSMENT—COLLECTION FROM MUNICIPAL CORPORATION.

County treasurer, settling with municipal treasurer, may not withhold amount due from municipal corporation for ditch assessments.

January 26th, 1907.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR:—In a recent communication you inquire if the county treasurer, at the time of settlement with the treasurer of a municipal corporation under

section (1536-660) R. S., may withhold from payment to such municipal treasurer the sum due the county from the municipal corporation for ditch assessments.

It is my opinion that the county treasurer must perform the ministerial act provided for under the section above quoted and that he should collect ditch assessments in a separate proceeding. I refer you to the statutes for his remedy.

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

SHERIFF — FEES.

Sheriff not entitled to mileage for transporting person to or from state hospital for insane.

January 28th, 1907.

HON. A. C. DENBOW, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR: — Your communication dated January 24th, inquiring whether or not a sheriff may draw mileage, as provided in section 719 Revised Statutes, in addition to his actual and necessary expenses allowed under section 19 of the county salary law for conveying and transferring persons to and from any state asylum for the insane, is received.

In reply I beg to say the mileage provided in section 719 was intended to cover both expenses and compensation when sheriffs were acting under the fee system but under the operation of the salary law sheriffs are compensated by a fixed salary and section 18 of said law expressly provides that "said salaries shall be in lieu of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of the officials herein named may now collect and receive," thereby expressly denying either extra compensation or personal expenses to sheriffs in the discharge of their official duties.

Therefore, the provision in section 719 allowing mileage to sheriffs in transferring and conveying persons to and from insane asylums is impliedly repealed.

The salary provided in the county salary law is intended to compensate the sheriff for the performance of *all* of his official duties including transporting and conveying all persons to and from any state asylum for the insane. The actual and necessary expenses incurred by the sheriff in conveying and transferring persons to and from any state asylum for the insane are, however, authorized to be paid under section 19 of said law when properly itemized and verified as provided therein.

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

PROSECUTING ATTORNEY — DELINQUENT TAXES.

Prosecuting attorney may not be employed to collect delinquent real estate taxes.

January 28th, 1907.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR: — Your communication dated January 26th, in which you inform me that you have received from the bureau of inspection and supervision of

public offices the opinion rendered said bureau relative to the employment of prosecuting attorneys to collect delinquent personal taxes, under section 2858 R. S., is received. You also inquire whether or not a prosecuting attorney may still be employed, notwithstanding the provisions of section 1274 as recently amended, to collect delinquent real estate taxes as provided in section 1104 R. S.

In reply I beg to say the same objections as to incompatibility exist in the employment of a prosecuting attorney to collect delinquent real estate taxes, under section 1104 R. S., as exist in the employment of a prosecuting attorney to collect delinquent personal taxes, under section 2858 R. S.

The county treasurer, under the first paragraph of section 1104, is authorized to enforce the collection of delinquent taxes on real estate by civil action in his own name and the prosecuting attorney, under section 1274, as amended, is required to represent the county treasurer in all such actions; he would also be required upon the request of the treasurer to pass upon the validity of the contract of employment made with the collector.

I am, therefore, of the opinion that the prosecuting attorney may not be employed as a collector to collect delinquent real estate taxes under the provisions of section 1104 of the Revised Statutes.

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

ROADS AND HIGHWAYS — WEEDS.

Road superintendent may employ land owner to cut weeds; compensation may be credited on road tax.

January 28th, 1907.

HON. WM. MAFFETT, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR: — Replying to your communication of January 12, 1907, I desire to say that road superintendents may employ land owners and tenants to cut and destroy noxious weeds growing in the road on which their lands abut. The superintendent should pay them a compensation therefor not exceeding $1.50 per day, payable out of the proper fund. The last legislature repealed the provisions of law by which the road tax could be paid in work, but re-enacted the provision which allowed land owners to receive credit for cutting weeds as above stated. While the machinery for making this provision operative is not fully provided, yet it is my opinion that the road superintendent may allow such owners to perform such labor, and that the superintendent or land owners may present the claim to the county commissioners which may be allowed and certified to the auditor, who may then credit the same on the road tax.

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

INFIRMARY DIRECTORS — OUTSIDE RELIEF.

Authority of infirmary directors to render permanent outside relief; temporary relief must be furnished by township trustees.

January 30th, 1907.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR: — Your communication dated January 26th, enclosing inquiry ad-

dressed to you by the board of infirmary directors of your county, with a request for an opinion on the same, is received. The inquiry submitted is as follows:

> Are infirmary directors permitted to render permanent or temporary outdoor relief under sections 974 and 975 R. S.?

In reply, I beg to say section 974 R. S. is as follows:

> "When, in any county having an infirmary, the trustees of a city or township shall, after making the inquiry provided for, be of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of said facts, so far as they have been able to ascertain the same, to the infirmary directors, and if it appears that such person is legally settled in said township or has no legal settlement in this state, or that such settlement is unknown, 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, or otherwise, and thereupon the liabilities of the township in the case shall cease, but the infirmary directors shall not be liable for any relief furnished, or expenses incurred by the township trustees. The infirmary directors shall report quarterly to the board of state charities, the names of all persons to whom relief has been given outside of the infirmary, whether medical or otherwise, together with their age, sex and nationality, whether such persons are married or single, and if married the number of persons in the family, and the ages of each; also the reasons for extending relief, the nature of the relief given, the amount of same, and any other information that may be prescribed by said board."

The following language in said section "They shall forthwith receive said person and provide for him or her in said institution, or *otherwise*," authorizes the infirmary directors, in my judgment, to exercise their discretion as to whether they will provide for the paupers properly coming under their charge, in the infirmary or outside. I desire to say, however, that this discretion may be abused. It is manifestly the intention of the law that paupers coming under the charge of infirmary directors shall be provided for in the county infirmaries and unless there be sufficient cause to justify the infirmary directors in providing for a person who is a county charge outside of the infirmary it is the duty of the infirmary directors to provide for all paupers coming under their charge, inside the county infirmaries.

Infirmary directors are not, however, authorized to furnish temporary outside relief. That duty devolves upon the township trustees under section 1491, and succeeding sections of the Revised Statutes.

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

PROSECUTING ATTORNEY — DELINQUENT TAXES.

Prosecuting attorney not entitled to additional compensation for prosecuting action at direction of auditor of state for collection of delinquent taxes.

February 1st, 1907.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR: — Your inquiry relative to the right of the prosecuting attorney to receive the fees provided in the latter part of section 1104, Revised Statutes, for the prosecution of civil actions under the direction of the auditor of state as provided therein, is received.

In reply I beg to say the service to be performed by the prosecuting attorney under the direction of the auditor of state, as provided in the latter part of section 1104, Revised Statutes, is identical with the service required of the prosecuting attorney in the first paragraph of section 1104, and the service in each instance, is a part of the official duty of the prosecuting attorney and the compensation, therefore, is provided in section 1297, as amended.

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

ROADS AND HIGHWAYS — SPECIAL ACT.

Special act relating to improvement of roads unconstitutional.

February 2nd, 1907.

HON. CHARLES C. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR: — I have your letter of January 29th, inquiring as to the constitutionality of the special act passed February 10th, 1888, (85 O. L., 374), requiring the county treasurer of Shelby County, Ohio, to pay over to the treasurer of the village of Sidney, Ohio, a sum equal to two-thirds of all the taxes collected after the passage of the act above referred to upon the taxable property of said village for the repair of improved roads.

In reply I beg to say that all laws providing for the improvement and repair of public roads are of a general nature and come within the provisions of section 26, article 2 of the constitution and may not, therefore, be the subject of special legislation. The decisions to this effect are numerous,

While I hesitate to anticipate the action of the courts in determining questions of this character, I am clearly of the opinion that this law is unconstitutional. Should there be any doubt, however, as to its validity, I suggest that you institute the proper action to determine its constitutionality in a court of competent jurisdiction.

You also ask for the ruling of this department as to the holding over of the old assessors or the appointing of new ones for the year 1907. I have given no opinion upon this question. I understand, however, that the secretary of state has passed upon it, and I have referred this inquiry to that officer for reply.

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

JAIL — APPOINTMENT OF MATRON.

Sheriff may appoint jail matron.

February 2nd, 1907.

HON. D. B. WOLCOTT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR: — Your communication in which you inquire as to whether or not the county salary law by implication repeals the authority of the county sheriff to appoint jail matrons, under section 7388*a* R. S., is received.

In reply I beg to say, in my judgment, the county salary law in nowise affects the authority of the sheriff to appoint jail matrons, under section 7388a, above referred to. The deputies, assistants, bookkeepers, clerks and other employes of the county officers whose compensation is provided for in the county salary law are paid out of the fee fund of the respective offices. Jail matrons, however, are appointed by the sheriff, on the approval of the probate judge, and the probate judge fixes the compensation and such compensation is paid out of the general fund of the county.

I am, therefore, of the opinion that sheriffs still have the right to appoint jail matrons as provided in section 7388a R. S.

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

EXTENSION OF TERM OF OFFICE UNDER CONSTITUTIONAL AMENDMENT — BOND.

Whether or not new bond should be given for extension of term of township treasurer by virtue of the adoption of article 17 of the constitution and legislation under authority thereof depends upon provisions of original bond

February 7th, 1907.

HON. HARFORD B. WELSH, *Prosecuting Attorney, London, Ohio.*

DEAR SIR: — Your communication is received in which you inquire whether or not it is necessary to have a township clerk give a new bond to the board of education covering the period of time said clerk holds over under section 3, article 17 of the constitution.

In reply I beg to say if the original bond was given for a fixed term and so conditioned in the bond, which term does not include the period of time the clerk holds over, then a new bond should be given. But if there is no limitation as to time in the bond, then the bond will be good so long as the clerk holds office.

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

PROSECUTING ATTORNEY MAY OCCUPY POSITION AND RECEIVE COMPENSATION OF AGENT OF HUMANE SOCIETY.

February 16th, 1907.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to your right to act as an agent of a humane society while holding the office of prosecuting attorney.

In reply I beg to say there are two tests to be applied in determining questions of this character: First, are the offices incompatible; second, is the officer who is to assume the duties of another office or employment required to perform the duties of said office or employment by virtue of the office he already holds?

If the duties of the offices are incompatible then the same person may not hold both offices. And if the person is required by virtue of an office he already holds to perform any of the duties belonging to another office or employment he may not receive additional compensation out of the public funds for the performance of such duties.

The powers and duties of an agent of a humane society as prescribed in section 3718 and succeeding sections of the Revised Statutes, are in no way incompatible with the powers and duties of a prosecuting attorney; nor is the prosecuting attorney required by law to perform any of the duties of the humane agent. There can be, therefore, no legal objection to your serving as an agent of the humane society and receiving compensation therefor out of the public funds while holding the office of prosecuting attorney.

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

ROAD SUPERINTENDENT — EMPLOYMENT OF MEMBER OF FAMILY.

Construction of section 1448*a*.

February 20th, 1907.

HON. WM. MAFFETT, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry: Section 1448*a* provides that "no superintendent shall receive any compensation for any team of which he is the owner, on any such roads, nor shall he employ any member of his own family in such work by which he shall himself be financially benefitted." Is such superintendent precluded from employing a member of his family who is of age and working for himself?

In reply I beg to say the restriction placed upon the road superintendent in the above provision prevents him from employing any member of his own family by which he himself shall be financially benefitted. Whether a member of his family is or is not of age, is not material. The test is, will the superintendent receive financial benefit from the employment? If so, then the employment may not be made, otherwise there can be no legal objection to the employment.

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

TAXATION — REAL PROPERTY — MINERAL VALUATION.

Annual board of equalization may decrease valuation of tract of real property if value of minerals thereon was an element in former valuation, and the same has decreased.

February 21st, 1907.

HON. E. P. CHAMBERLAIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR: — In response to your inquiry concerning the reduction in the

mineral valuation of certain lands in your county by the board of equalization, I beg to say section 2792 R. S. provides that,

> "Where the fee of the soil of any tract, parcel or lot of land, is in any person or persons natural or artificial, and the right to any minerals therein in another or others, the same shall be valued and listed agreeably to such ownership in separate entries, specifying the interests listed, and shall be taxed to the parties owning different interests, respectively";

This section further provides,

> "That the annual board of equalization may reduce the mineral value assessed against lands containing or producing petroleum (oil), natural gas, coal, ore, limestone, fire-clay, or other minerals in proportion as the product of such mineral has diminished, if such mineral product was considered as a part of the value of said real estate in its previous appraisement for taxation, etc."

Your letter does not state whether or not the mineral valuation of the land in question was assessed separately from the fee. If the present appraisement of the land includes the mineral valuation and the mineral value has decreased, then under the provisions of section 2792, as above quoted, I am of the opinion that the board of equalization may make such reduction in the valuation of the land by reason of the decrease in mineral value as they deem just and proper.

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

SCHOOLS — CONVEYANCE OF PUPILS RESIDING OUTSIDE OF TOWNSHIP. CHANGE IN BOUNDARY OF SCHOOL DISTRICT.

Upon suspension of school in sub-district containing territory annexed to township for school purposes, township board must provide conveyance to township school for pupils residing in such territory.

Change in boundary of sub-district, if involving change in boundary of township district, requires joint action of township boards.

March 6th, 1907.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR: — Your communication of March 4th is received. You say that prior to the enactment of the present school code there was a joint sub-district comprising territory in Springfield and Pulaski townships in your county; that the school house was situate in Springfield township; that under the provision of section 3923 R. S. this joint sub-district is abolished and the territory in Pulaski township is now part of the Springfield township school district. You inquire as to the authority of the board of education of Springfield township to suspend this school without providing transportation for the pupils in Pulaski township.

In reply I beg to say that under section 3922 R. S. the board of education of any township school district is authorized to suspend the schools in any and all sub-districts in a township district but upon such suspension the board *must provide* for the conveyance of the pupils residing in such sub-district or sub-districts to the public school in said township district.

Your second inquiry refers to the power of the board of education to change the boundaries of the "special" school district. I presume you mean sub-district.

If the change of the boundaries of the sub-district would change the boundary line between Springfield township school district and Pulaski township school district then such change in the boundaries would require the joint action of the board of education of Springfield township school district and Pulaski township school district.

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

ASSESSOR — ELECTION OF, WHEN TOWNSHIP DIVIDED INTO PRECINCTS.

Division of township into two precincts does not necessitate election of more than one assessor in township unless board of deputy state supervisors of election at the time such division is made, so orders.

March 14th, 1907.

HON. WILL P. STEPHENSON, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter in which you state that Winchester township was divided into two election precincts by the board of deputy state supervisors and you inquire whether this necessitates two assessors. Section (2966-15) R. S. reads,

> "Provided further that the division of any election precinct into two or more subdivisions, as herein provided, shall not be construed as requiring the election of an assessor in each such subdivision, but in all such election precincts sub-divided as aforesaid, there shall be elected one assessor for each original precinct unless the deputy state supervisors, at the time of the division, shall order that an assessor be elected in each precinct."

Since the deputy state supervisors have not ordered that an assessor be elected in each precinct, I am of the opinion that the duly elected assessor for the original precinct will hold office and continue to perform the duties of the same until his successor is duly elected and qualified.

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

POOR FUND — COUNTY — RELIEF OF.

Since infirmary directors control but the one fund, no transfers may be made to the county poor fund for the purpose of relieving a depletion thereof.

March 14th, 1907.

HON. IRVIN McD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR: — Your communication of March 12, is received in which you submit the following inquiry:

During the year from June, 1905, to June, 1906, the county com-

missioners of Highland county, under the provisions of section (670-1) Revised Statutes, paid out of the poor fund for the relief of the blind $2,698, and from June, 1906, to the time the law was declared unconstitutional, $1,802, taking altogether from the poor fund for the purpose above mentioned, $4,500, leaving the poor fund in a condition entirely inadequate to meet the infirmary expenses for the current year.

Can you suggest any remedy for the relief of the condition of this poor fund, by transfer or otherwise?

In reply I beg to say that I know of no statute which authorizes a transfer from any other county fund to the poor fund. While section (22*b*-2) R. S. authorizes the county commissioners of any county, infirmary directors of any county or municipality, etc., to transfer the public funds under their respective supervision from one fund to another, there is no other fund under the control of the infirmary directors from which a transfer could be made. In other words the only fund over which the infirmary directors have absolute control is the poor fund (Sec. 964 R. S.).

I am, therefore, unable to suggest any remedy to relieve the depleted condition of the poor fund of your county. It occurs to me, however, that the present condition of said fund might have been prevented had the county commissioners exercised the authority given them under section (670-6) of the Revised Statutes.

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

DELINQUENT CHILDREN — DETENTION HOME FOR.

County commissioners must provide a place for the detention of delinquent children.

March 14th, 1907.

HON. LYMAN W. WACHENHEIMER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to the authority of the county commissioners under section (548-36*n*) R. S. to provide a place for the detention of delinquent children.

In reply I beg to say this department has held that county commissioners have the authority to provide a suitable place for the detention of delinquent children and, in my judgment, the duty of the county commissioners to provide such place of detention is, under sections (548-36*n*), mandatory.

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

TAX MAPS — EMPLOYMENT OF PERSON TO MAKE.

County commissioners may employ county surveyor, and no other person, to make tax maps.

March 16th, 1907.

HON. E. S. STEPHENS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to the authority of the county commissioners to employ a surveyor other than the

county surveyor to make, correct and keep up tax maps, as provided in section 2789*a* Revised Statutes.

In reply I beg to say section 2789*a* authorizes the county commissioners to appoint *"the county surveyor"* to perform the services required by said section. I am therefore of the opinion that the county commissioners are without authority to appoint any other person than the county surveyor to perform said services.

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

WATER COURSE — IMPROVEMENT OF.

Procedure by which village may secure improvement of water course within corporate limits.

March 18th 1907.

HON. E. S. STEPHENS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR: — Replying to your inquiry of the 14th instant, I beg to say that in the instance cited by you of a water course located within the limits of the village of Huron, which the village authorities desire to have improved by tiling, the procedure contained in sections 4483 et seq. would be applicable thereto and the council by resolution may authorize the mayor to present a petition to the county commissioners of the county to locate, construct or improve the same and may in such petition trace the line of such improvement over any part of an old water course, creek or run within such village. The procedure outlined in sections 4483 et seq. is but supplementary to the general powers conferred upon village councils in paragraph 19, section 7 of the municipal code.

Consideration should be given to the case of the Village of Pleasant Hill vs. Commissioners, 71 O. S. 133, as marking the limitations of the authority of a village pursuant to the above cited sections.

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

SCHOOL BUILDING — ISSUE OF BONDS FOR.

Board of education may not issue bonds in excess of amount raised by levy of two mills without submitting to vote of people.

March 27th, 1907.

HON. C. L. SMITH, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR: — In your communication of March 26th, 1907, you state that the board of education of your city desires "to issue bonds to the extent of thirty thousand dollars, for the purpose of acquiring real estate and erecting and constructing thereon a high school building, without submitting the question to the qualified electors of the school district." You also state that the tax valuation is $1,500,000.

You ask for a construction of section 3994 of the Revised Statutes of Ohio as to the authority of the board of education to make such issue.

Answering your inquiry I would say that in my opinion the board of education has no such authority under section 3994. The best they could do under said

section, according to the facts presented by you, would be to issue bonds to the extent of the two mill rate or the three thousand dollars in any one year.

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

ROAD IMPROVEMENTS — ADVERTISEMENT FOR BIDS.

County commissioners proceeding to repair or improve road under section 1443*d* R. S. by contract, must advertise for bids.

March 29th, 1907.

HON. W. H. SMITH, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR: — Your communication in which you inquire as to the necessity of advertising plans and specifications for contracts to be let by county commissioners under section 1443*d* R. S. is received.

This section authorizes the county commissioners to contract for the repair or maintenance of any public road or street within their county. The letting of such contracts is not, however, mandatory under this section. Commissioners *"may contract"* is the language used.

In all contracts made by county commissioners under this section the advertisement must be published as therein provided.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

SCHOOL HOUSE — ERECTION OF, IN DISTRICT LYING IN MORE THAN ONE COUNTY.

Territory formerly a part of joint sub-district and lying in a county different from that in which is situated a township district of which it is a part should be taxed for the erection of a school house in such township district, though constructed by township board of education.

March 29th 1907.

HON. TOM O. CROSSAN, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR: — Your communication is received in which you request a construction of section 3923 relative to the building of a school house in a township school district in your county in which part of the territory is located in Fairfield county. In reply I beg to say section 3923 R. S. abolishes joint sub-districts and the territory in the township in which the school house is not located becomes a part of the township school district in which the school house is located. Therefore, the school house in question will be constructed by the board of education of Thorn township school district and all the territory in the township district including the portion in Fairfield county will be taxed for the construction of the same.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

LOCAL OPTION — JONES LAW — WHOLESALE DEALER.

Section 7 of the "Jones Law," 98 O. L. 72, construed.

A "wholesale dealer" within the meaning of said section is one whose principal business consists of sales to parties who purchase for the purpose of resale to the consumer.

As to what constitutes a sale "in wholesale quantities," *quaere.*

April 2nd, 1907.

HON. L. R. ANDREWS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR: — In compliance with your request for an opinion as to the construction of section 7 of the Jones law I beg to advise you as follows: The portion of the law concerning which you ask my opinion provides "And nothing contained in any of the sections of this act shall in any manner affect the right * * * of any bona fide wholesale dealer in said district to sell or deliver intoxicating liquors in wholesale quantities to customers of such district or to bona fide residences in such district." (98 O. L. 72).

I have been unable to find any decisions construing this section of the law. The supreme court in the case of Kaufmann v. Hillsboro, 45 O. S. 700, construed section 11 of the Dow law, section (4364-19) R. S., which gave to municipal corporations power to prohibit "places where intoxicating liquors are sold at retail for any purpose or in any quantity other than as provided for in section 8 of this act." Section 8 refers to sales on prescription or for mechanical, pharmaceutical or sacramental purposes and to sales by the manufacturer in quantities of one gallon or more at any one time. The decision of the court was as follows:

> "A sale, by one who is not a manufacturer of twenty-five quarts of beer, put up in bottles of one quart each, not upon the prescription of a physician, nor for any known mechanical, pharmaceutical or sacramental purpose, but to be drank by the person to whom sold, is a sale at retail within the meaning of the eleventh section of the act known as the Dow law; and the keeping of such place where such sales are made is a violation of the ordinance of a village prohibiting ale, beer or porter houses and other places where intoxicating liquors are sold at retail for any purpose or in any quantity, other than as permitted by the eighth section of said act."

The statute construed in that case prohibited "sales at retail" in any quantity. The terms of the Jones law on the other hand, do not prohibit sales "at retail," as that term is construed in the case just quoted, for the sale and delivery to bona fide residences in such district is expressly permitted, and such sales, not being for the purpose of re-sale by the purchaser, are sales at retail under the rule in Kaufmann v. Hillsboro.

A sale by a bona fide wholesale dealer in wholesale quantities, even if it is to be drank by the person to whom sold, is not prohibited by the Jones law. In order to ascertain what constitutes a violation of the Jones law it is therefore necessary to determine, first, what constitutes a bona fide wholesale dealer; second, what is a sale in wholesale quantities.

The first question is not difficult. A wholesale dealer is one whose principal business consists in sales to parties who purchase for the purpose of re-sale to the consumer. A dealer whose principal business is the sale of liquors to be consumed by the purchaser, even though such sales are made in wholesale quantities, is not a bona fide wholesale dealer within the meaning of the statute.

As to what constitutes a sale in wholesale quantities there is no unanimity in the decisions. The term should be, and usually is, defined by statute, but the quantity fixed on as the dividing point has varied greatly. According to Black on Intoxicating Liquors, section 23, the amount so fixed has varied from one quart to twenty-eight gallons. Section (4364-16) R. S. provides that a sale by the manufacturer at the manufactory in quantities of one gallon or more does not constitute a trafficking in intoxicating liquors within the meaning of the Dow law. But this act makes no distinction between wholesale and retail dealers and cannot be said to establish one gallon as a wholesale quantity.

The case of Gorsuth v. Wilson, 2 Wis. 237, holds that the word "wholesale" implies the selling in unbroken pieces as by barrel, pipe, casks, etc., and that the purchase of liquor in six to ten gallon kegs cannot be called a wholesale purchase. Tripp v. Hennesy, 10 R. I. 131, held that a sale of ten gallons of whisky, drawn from a large cask, was not a sale at wholesale within the meaning of a statute requiring wholesale dealers to take out licenses, for such sale was a breaking up and parcelling out of goods held by the dealer in larger parcels.

It is impossible for me to advise you positively what the courts will hold to be a sale in wholesale quantities as defined by the act in question. It is a question of fact which the court may determine upon the evidence of usage in the trade. It is probably safe to say that a dealer who receives his goods from the manufacturer in barrels, kegs or cases of bottles may sell by the barrel, keg or case without violating the act, provided the liquor is not to be drunk on the premises. It is unfortunate that the legislature did not define the term "wholesale quantity."

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ASSESSOR — VACANCY IN OFFICE. IMPROVED ROAD.

Vacancy in office of village assessor filled by appointment by township trustees. "Improved roads," what are.

April 2nd, 1907.

HON. CHARLES C. KEARNS, *Prosecuting Attorney, Batavia, Ohio.*

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

1. What is a municipality with a township organization?
2. If a municipality or a village has an assessor and the township in which it is located also has an assessor and the office of assessor in the village becomes vacant, who fills the vacancy, the county auditor or the township trustees?
3. What is an improved road as meant by the Revised Statutes?

In reply I beg to say:

First. Section 1518 R. S. provides that a vacancy in the office of assessor in any ward or precinct of "a municipal corporation not having a township organization" shall be filled by appointment by the county auditor.

This provision is made for the reason that in such municipalities the boundary lines are identical with the township, for example: Cincinnati township, Hamilton county. And there being no township trustees to fill the vacancy the duty is imposed upon the county auditor. "A municipality with a township organization" is neither used nor defined in the Revised Statutes.

Second. The vacancy will be filled by the township trustees.

Third. The term "improved roads" is not specifically defined, but there is an enumeration of roads in sections (4614-31) and 4876 R. S. which come within the term "improved roads."

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

INFIRMARY DIRECTOR — EXTENSION OF EXISTING TERM.

Term of office of infirmary director elected in November, 1904, extended until January 1st, 1909, by article XVII of the constitution and the act in 98 O. L. 271.

April 5th, 1907.

HON. WM. MAFFETT, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR: — Your communication is received in which you inquire whether or not an infirmary director whose term of office expires under section 957, in September 1907, will hold over until the next election for county officers?

In reply I beg to say that under section 957 R. S. the term of office of an infirmary director expires on the first Monday in January, instead of September. The infirmary director in your county whose term of office would have otherwise expired on the first Monday in January 1908, will continue in office until January 1st, 1909, by the provisions of section 1 of the act passed by the last legislature to conform the terms of office of various state and county officers to the constitutional provisions of biennial elections, 98 O. L. 271.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

PROSECUTING ATTORNEY — COMPENSATION OF.

Prosecuting attorney must without additional compensation defend county officers in injunction suits brought against them, prosecute actions for the transfer of funds on behalf of county commissioners, township trustees and township boards of education, and prosecute suits to collect delinquent taxes.

April 8th, 1907.

HON. TOM O. CROSSAN, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR: — Your communication is received in which you inquire whether a prosecuting attorney under sections 1274 and 1297 R. S. is required to perform legal services in the following instances, without additional compensation:

1. Defending auditor in an action in injunction brought against him to restrain him from placing Aikin tax on the duplicate.
2. Defending treasurer in an action for injunction, restraining him from collecting Aikin tax.
3. Prosecuting action in common pleas court for commissioners to transfer funds.
4. Prosecuting action in common pleas court on behalf of township trustees and school boards for transfer of funds.
5. Suits to collect taxes.

In reply I beg to say that section 1274 R. S. in fixing the duties of prosecuting attorneys provides that:

> "He shall also perform all duties and services as are required to be performed by legal counsel under section 845 and he shall further be the legal adviser for all township officers, and no county or township officer shall have authority to employ any other counsel or attorney at law."

Section 845 R. S. enumerates the duties of legal counsel employed thereunder as follows:

> "Such counsel shall be the legal adviser of the board of county commissioners and the board of control, where there is such board, and of all other county officers, of the annual county board of equalization, the decennial county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and officers may require of him written opinions or instructions in any matters connected with their official duties. *He shall prosecute and defend all suits and actions, which any of the boards above named may direct, or, to which it or any of said officers may be a party.*"

These provisions cover all the legal services indicated in the five instances cited in your communication and as section 1297 R. S. provides that the compensation fixed therein shall be in full and in lieu of all compensation and fees heretofore paid, and that it shall be in full payment of all services required by law to be rendered in an official capacity on behalf of the county or its officers, I am of the opinion that a prosecuting attorney is required to perform all of the services above indicated, without additional compensation.

I am sending you under separate cover a copy of the official opinions of the attorney general's department for the year 1905-6.

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

TOWN HALL — IMPROVEMENT OF — ELECTION.

Question of issuance of bonds and levy of tax for improvement of town hall may not be submitted to people at a special election.

April 12th, 1907.

HON. EDWARD S. STEPHENS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR: — In answer to yours of April 1st, 1907, I beg to advise you that inasmuch as section 1479 does not specifically provide for a special election to vote upon the question of an increased tax levy for the improvement of a town hall, and the issuance of bonds therefor, such election is controlled by section (2996-2), Bates, and the question must accordingly be submitted at a regular election.

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

BOARD OF EDUCATION — AUTHORITY TO ACT FOR CONVENIENCE OF PUPILS.

Board of education may construct foot bridge for convenience of pupils.

April 18th, 1907.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR: — In reply to your inquiry as to whether or not boards of education may construct, for the convenience of children attending school, foot bridges over creeks or streams, I beg to say, section 4733 Revised Statutes, referred to in your inquiry, is only applicable to township trustees, and therefore confers no power upon boards of education to construct walks and foot bridges.

I am of the opinion, however, that boards of education may construct such foot bridges over creeks and other streams as are deemed necessary for the *"convenience"* of the public schools under the authority conferred by section 3987 Revised Statutes.

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

SURVEYOR — COUNTY — HORSES AND VEHICLES.

County commissioners may not furnish or maintain horses or vehicles for the use of county surveyor or his deputies.

April 29th, 1907.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR: — Your communication is received in which you inquire as to the authority of the county commissioners to purchase the necessary horses and vehicles to be used by the county surveyor and his deputies in the performance of the duties of his office, and cite the opinion of this office whereby county commissioners are authorized to purchase the necessary horses and vehicles for the use of the sheriff in the discharge of his official duties.

In reply I beg to say section 19 of the county salary law (98 O. L. 89) *expressly* authorizes the county commissioners to pay the expenses of *maintaining* horses and vehicles necessary to the proper administration of the duties of the sheriff's office, while the surveyor's law only provides that the surveyor and his assistants and deputies *shall each be allowed* his reasonable and necessary expenses incurred in the performance of his official duties.

I am, therefore, of the opinion that the county commissioners are without authority to furnish or maintain horses and vehicles for the use of the county surveyor.

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

PROSECUTING ATTORNEY IS NOT REQUIRED TO PROSECUTE CASES IN JUVENILE COURT.

May 10th, 1907.

HON. PETER J. BLOSSER, *Prosecuting Attorney, Chillicothe, Ohio.*

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

> Is it the official duty of the prosecuting attorney to appear for the prosecution in cases before the juvenile court?

In reply I beg to say the juvenile court act contains no provision whereby the prosecuting attorney is required to prosecute cases in the juvenile court and under section 1273 of the Revised Statutes, the prosecuting attorney is only required to prosecute on behalf of the state complaints, suits and controversies in the probate court, common pleas court and circuit court.

I am therefore of the opinion that the prosecuting attorneys are not required to prosecute cases under the juvenile court act in the juvenile court.

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

BRIDGES — ISSUE OF BONDS FOR REPAIR OF.

County commissioners may issue bonds to build bridges destroyed by flood, said bonds to extend for five years, and may levy tax to pay annual installment due on such bonds.

May 10th, 1907.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR: — Replying to yours of the 9th inst., and confirming the talk had over the 'phone with you by Mr. Bennett of this department, I express the opinion that pursuant to title 8, chapter 1 (County Commissioners) of the Revised Statutes, authority is vested in the county commissioners to issue the bonds of the county for the purpose of building the bridges destroyed by the recent flood, and that it is within the authority of the county commissioners to cause such bonds to extend over a period of five years as is contemplated by their action, and that the levy made for the payment of such bonds need only be sufficient to pay the installment thereof, together with the accrued interest, which would fall due annually.

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

JAIL — REPAIRS ON SHERIFF'S RESIDENCE IN CONNECTION WITH.

County commissioners may expend money for repairs on residence for sheriff built in connection with jail and belonging to county, though originally unauthorized to construct such building.

May 18th, 1907.

HON. C. H. HUSTON, *Prosecuting Attorney, Mansfield, Ohio.*

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

When the commissioners of this county built the county jail they also built in connection therewith a residence for the sheriff. Since that time the county has kept the jail residence in repair. There are certain repairs in the interior of the residence portion of the jail, such as painting the wood-work and repairing the same and perhaps some other repairs which ought to be made. Can the commissioners make such repairs on the interior of the residence of the jail?

In reply I beg to say section 859 R. S., which fixes the duty of county commissioners in providing a jail, is as follows:

"A court-house, jail, offices for the county officers, and an infirmary, shall be provided by the commissioners, when, in their judgment, the same, or any of them, are needed, and they shall be of such style, dimensions, and expense, as the commissioners determine; and they are required to provide all such rooms, and fire and burglar proof vaults and safes, and other means of security in the office of the county treasurer, as are necessary for the perfect protection of the public moneys and property therein."

While this provision authorizes the county commissioners to provide a jail "of such style, dimensions, and expense, as the commissioners determine," yet no authority is given to provide a residence for the sheriff. But inasmuch as the commissioners of your county have built, in connection with the jail, a residence for the use of the sheriff and in view of the fact that such residence belongs to the county, I am of the opinion that the county commissioners are authorized to make such repairs as are necessary to preserve the building and pay for the same out of the funds of the county.

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

BRIDGES — REPAIR — DUTY OF TOWNSHIP TRUSTEES.

Township trustees must make necessary repairs, the cost of which does not exceed ten dollars, upon bridges erected by county commissioners at original cost of more than fifty dollars.

May 21st, 1907.

HON. CHARLES C. KEARNS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR: — Your communication is received in which you inquire whether or not township trustees are required under section 4940 R. S., to keep in repair *all* bridges constructed by county commissioners when such repairs on any one bridge in any year shall not exceed $10.

In reply I beg to say the last paragraph of section 4940 which fixes the duties of township trustees in such bridge repairs is as follows:

"But the trustees of the several townships shall cause to be built and kept in repair all bridges and culverts, except upon improved and free turnpike roads, when the cost of construction does not exceed fifty ($50.00) dollars, and shall keep in repair all bridges constructed by the commissioners; provided, however, such repair by said trustees of any such bridge in any year shall not exceed ten ($10.00) dollars and they are authorized to levy a tax for the payment of the same."

The requirement in this provision that township trustees shall build and keep in repair all bridges and culverts *except upon improved and free turnpike roads* when the cost of construction does not exceed $50, limits the general duty of county commissioners under section 860 R. S., "to construct and keep in repair *all necessary bridges* over streams and public canals on all state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, etc."

It is, therefore, the duty of the county commissioners to build all bridges on unimproved roads when the cost of construction exceeds $50, but the township trustees are required to keep all such bridges so constructed by the county commissioners in repair, "provided, however, such repair by said trustees of any such bridge in any year shall not exceed $10."

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

INFIRMARY — COUNTY — INVESTIGATION OF.

Governor may not order investigation of county infirmary by board of state charities or otherwise.

May 21st, 1907.

HON. W. R. GRAHAM, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR: — In reply to your communication of May 20th, concerning the investigation of the county infirmary of your county by your recent grand jury, I beg to say Judge Lemert, executive clerk to the governor, informed me this morning that you had made a request of the governor for the appointment of a committee of the board of state charities to investigate your county infirmary. Upon an examination of the statute governing such appointment by the governor (Section 656 R. S.) I find that the governor is only authorized to appoint such a committee to investigate "any penal, reformatory or charitable institutions of the *state.*"

I am, therefore, of the opinion that the governor is without authority to appoint a committee to investigate a county infirmary.

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

TAXATION — REDUCTION IN VALUATION.

Power of municipal board of review or county board of equalization to reduce valuation of real property on account of removal of fixtures, defined.

Refusal of one annual county board of equalization to reduce value of certain personal property does not preclude a subsequent board from making such reduction, but taxes paid may not be refunded.

June 15th, 1907.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR: — I am in receipt of yours of recent date containing a statement with reference to the valuation of certain mill property from which the machinery had been removed and replaced with machinery of less than one-half the value

of that removed. Upon this state of facts you desire an opinion as to the power of the board of equalization to relieve the owner from the burden of paying upon the basis of the former valuation.

Replying thereto I beg to say I have assumed from your statement that the machinery within such mill should be considered as fixtures and therefore as part of the real estate and the reduction in value must therefore be treated as a reduction in the value of the real estate.

I have assumed further that the mill in question is situate within the city of Marietta. If so, the relief can be afforded pursuant to section (2819-1) R. S., by the board of review; if it is not situate within the limits of the city relief can be given by the annual county board.

The only limitation upon the power of either of these boards to reduce the valuation of real estate to such amount as the evidence shows to be reasonable, is that the board shall not reduce the value of the real property of the county below the aggregate value thereof as fixed by the state board of equalization, nor below its aggregate value on the duplicate of the preceding year; in other words, every reduction in valuation must be off-set by a corresponding increase in the valuation of other property. If the proposed reduction would violate the limitation thus imposed the reduction cannot be made.

Replying to the second question presented, I am of the opinion that if the annual board of equalization considers the question of reducing the value of certain personal property and refuses to make the reduction, the next annual board may consider the question of such reduction and make such finding and order in the premises as to it may appear just and reasonable. But the tax paid upon the valuation as fixed by the preceding annual board cannot be paid back by any action of the board because the valuation so established formed the basis upon which to make the computation of the tax for that year and no power exists in the board to order a re-payment.

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

BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—COMPENSATION OF.

June 17th, 1907.

HON. GEORGE J. FREY, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—In reply to your communication of June 15th, I beg to say section (2966-4) of the Revised Statutes provides compensation for each deputy state supervisor of $3.00 for each election precinct in his respective county, provided that the compensation paid to each of said deputy supervisors shall in no case be less than $100 per annum. No provision is made for mileage.

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

ROAD LABOR—COMPENSATION OF TEAMSTERS.

Teamster employed for labor on public road should receive compensation as laborer in addition to amount received for hire of team.

June 18th, 1907.

HON. CHARLES C. UPHAM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR: — In response to your communication of June 15th, I beg to say your former letter relative to the construction of the word "teams" as used in section 13 of House Bill 385 passed by the last general assembly (98 O. L. 327) was referred to the bureau of inspection and supervision of public offices for answer. This department had advised the bureau that the word "teams" as used in said section did not include teamsters or drivers. Section 13 provides that day laborers (which in my judgment include teamsters and drivers) shall receive not to exceed 17½ cents per hour while "teams" may be employed at a rate not exceeding 35 cents per hour.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

PROBATE JUDGE — COMPENSATION.

County commissioners may not make allowance for probate judge for services in criminal cases.

July 15th, 1907.

HON. PETER J. BLOSSER, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR: — Your communication of recent date submitting the following inquiry, is received:

> "Is a probate judge entitled to compensation for services in criminal cases under section 6470, Revised Statutes, in addition to his regular salary as probate judge?"

In reply I beg to say that prior to the passage of the county officers salary law, probate judges, under section 6470 of the Revised Statutes, were not permitted to retain the fees allowed them under the fee bill in criminal cases, but were required to turn the same into the county treasury. The county commissioners were, however, authorized to make allowances to probate judges to be paid out of the county treasury for their services in criminal cases in lieu thereof.

Said section 6470, Revised Statutes, is as follows:

> "The judges of said 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 the county treasury of said counties, respectively, and said probate judges shall not receive any compensation by way of fees in any criminal business of which they have jurisdiction; but all costs, and all fines by said probate court imposed, including the fees of the judge, shall be collected in the same manner as fines and costs are now collected by the court of common pleas, and the same by said probate judges shall be paid into the county treasury."

This section has not been expressly repealed, although section 23 of the county officers salary law provides:

> "All acts or parts of acts inconsistent herewith be and the same are hereby repealed."

It therefore remains to be determined whether or not the provisions of section 6470 are inconsistent with the provisons of the county officers salary law as applied to probate judges.

Section 1 of the county officers salary law provides:

> "All the fees, costs, percentages, penalties, allowances and all perquisites of whatever kind which by law may now be *collected* or received as compensation for services by any county auditor, county treasurer, *probate judge*, sheriff, clerk of courts or recorder, shall be received and collected by all of said officers and each of them for the sole use of the treasurer of the county in which they are elected, and shall be held as public moneys belonging to said county and accounted for and paid over as such in the manner hereinafter provided."

Section 6 of said law provides:

> "Each of the officers named herein shall at the end of each quarter pay into the county treasury on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during said quarter, for his official services, which moneys shall be kept in *separate funds* by the county treasurer, and credited to the office from which the same has been returned."

Section 14 of said law fixes the salary of probate judges, and section 18 provides that:

> "Said salaries shall be in lieu of all fees, costs, penalties, percentages, *allowances* and all other perquisites of whatever kind which any of the officials herein named may now collect and receive, provided, however, that in no case shall such annual salary, payable to any of the officers aforesaid, exceed the sum of $6,000."

Under the provisions of sections 1 and 6 as above quoted, the probate judge will continue as authorized under section 6470 to collect the fees due him in criminal cases and pay the same into the county treasury, and the county treasurer will credit the same to the fee fund of the probate judge's office.

Section 18 of the county officers' salary law, as above quoted, provides that a probate judge may not receive *any allowances* other than the salary therein provided, therefore the provision in section 6470 that "the judges of said probate courts shall be paid for their services in criminal cases, such sums as the commissioners of said county may allow," is inconsistent with sections 14 and 18 of the county officers' salary law, and is by the provisions of section 23 of the county salary law impliedly repealed. It follows, therefore, that probate judges may not receive from the county commissioners an allowance for services performed in criminal cases.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

TAXATION — PERSONAL PROPERTY.

As a general rule, personal property is taxable in the county wherein its owner resides.

July 16th, 1907.

HON. CHARLES C. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR: — I am in receipt of yours of the 13th inst., submitting to this department an abstract of the proceedings had before the board of review of Sidney relative to certain property of one William P. Metcalf, in which you present the question as to whether upon the facts as shown by the statement submitted, there is any authority in the county auditor or the board of review of the city of Sidney to place the sum of $15,000 on the duplicate to be charged with taxes against the said William P. Metcalf.

I have given consideration to the letter of the county auditor and also to the abstract of testimony taken, together with the contracts of lease and the copy of the deed to certain land made by I. H. Thedieck and wife to Mr. Metcalf.

It is not made evident to me upon what theory any part of the amount of $15,000 should be chargeable against Mr. Metcalf in your county. You have said in your letter that he is a resident of Toledo and that his family live there, although he spends a great deal of his time in Sidney. If there is any contention as to the *bona fides* of his residence in Toledo, there is nothing in the statement of facts before me that challenges the statement made by you that he is a resident of Toledo.

The law is plain that personal property follows the situs of the person owning the same and is returnable by such person and should be listed by him in the township, city, or village in which such person may reside at the time of the listing thereof. To this statutory rule there are a few exceptions in regard to merchants' and manufacturers' stock and personal property upon farms as evidenced by section 2735 Revised Statutes, but the facts in th case presented are not included under either of these exceptions. I can see no grounds for the contention that the taxing authorities of Shelby county have any jurisdiction over the personal property of Mr. Metcalf for the purpose of taxation.

I assume that there has been no question raised with regard to the necessity of Mr. Metcalf paying the tax upon the real estate described in the deed attached to the statement of facts. The real estate is held for the payment of the taxes and no question can be made as to the liability of the owner thereof for such tax. I herewith return to you the copy of the proceedings had before the board of review of Sidney.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

PROSECUTING ATTORNEY — FEDERAL CASES — COMPENSATION.

Prosecuting attorney must conduct litigation in federal courts without additional compensation.

July 19th, 1907.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR: — Your letter of July 17th, receipt of which is acknowledged, requests an opinion regarding the duty of the prosecuting attorney to conduct litigation in the courts of the United States, and as to his right to receive compensation therefor in addition to the salary provided by section 1297 R. S., as amended 98 O. L. 160.

In reply thereto I beg to state that section 1274, as amended 98 O. L. 160, provides in part that,

"He (the prosecuting attorney) shall *also* perform all duties and services as are required to be performed by legal counsel under section 845."

Section 845 provides,

"He shall prosecute and defend all suits and actions, which any of the boards above named may direct, or to which it or any of said officers may be a party, and shall *also* perform such duties and services as are now required to be performed by prosecuting attorneys under sections 799, etc."

The use of the disjunctive "also" in both of these sections would seem clearly to indicate that the services referred to in section 845 are to be separate and distinct from the other services mentioned in sections 1273 and 1274. Accordingly the language of section 1273 that,

"The prosecuting attorney shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county in the probate court, common pleas court, circuit court, and he shall also prosecute cases in the supreme court in cases arising in his county in conjunction with the attorney general,"

would seem to be inapplicable to his duties as defined by section 845 and incorporated by reference in section 1274. This view is confirmed by the fact that the foregoing language of section 1273 was unchanged by the salary act, 98 O. L. 160, from which it is to be concluded that the various new duties imposed by the amendment to section 1274 were not intended to be affected in any way by that language.

The power of the county commissioners, under Sec. (1001-1) to employ counsel other than the prosecuting attorney in federal litigation is unimpaired by the salary act. That section is inapplicable to the subject under consideration except in so far as the language of Sec. 1297, amended 98 O. L. 160, precludes the the prosecuting attorney from receiving any fees under sec. (1001-2.)

It is my opinion therefore that the prosecuting attorney is required to conduct such litigation in the federal courts as may be directed by the county commissioners or any of the other boards mentioned in section 845 without receiving for such services any compensation in addition to that provided by section 1297, as amended 98 O. L. 160.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

SOLICITOR — CITY — ALLOWANCE FOR PROSECUTION OF STATE CASES.

Municipal court of Akron is a "police court" within the meaning of section 137 M. C., authorizing county commissioners to make allowance to city solicitor for prosecution of state cases therein.

July 22nd, 1907.

HON. H. M. HAGELBARGER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR: — Replying to yours of the 8th inst., the same having been delayed by reason of my absence from the office, I beg to say that pursuant to the request of the attorney general, I have given consideration to the matter involving the compensation of Mr. Scott D. Kenfield, assistant city solicitor of Akron, for services performed in the prosecution of state cases before the municipal court of the city of Akron. I have also given consideration to the opinion of the circuit court of your county in the case of the State of Ohio ex rel. Henry M. Hagelbarger, Prosecuting Attorney, v. William A. Spencer, decided at the September term, 1904, and of the opinion rendered by the bureau of inspection and supervision of public offices to you under date of November 16, 1906. In that opinion the bureau construes section 137 of the municipal code to be sufficient authority to the county commissioners to allow to the city solicitor of Akron or his assistant, such compensation as is reasonable for his services performed in such court in prosecutions under state laws. The opinion further expresses that such allowance is in the discretion of the county commissioners and is entirely legal. In the view thus expressed by the bureau I concur, and express the opinion that the character of the services performed by Mr. Kenfield, as shown by the statement rendered, entitles him to compensation, as the county commissioners may determine.

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

WATER COURSE — ACTION TO RECOVER DAMAGES FOR PROPERTY INJURED BY CHANGE IN — DUTY OF PROSECUTING ATTORNEY — EXPERT WITNESS.

Prosecuting attorney must represent county commissioners in action to recover damages for injuries to property caused by change in water course.

County commissioners may not employ and pay expert witnesses in such action.

August 2nd, 1907.

HON. C. H .HUSTON, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR: — Your letter of July 31st requests an opinion from this department as to the duty of prosecuting attorneys to represent county commissioners in suits to recover damages for property affected by changes in water courses under the provisions of title 6, chapter 1, R. S.; also as to the right of county commissioners to employ and pay expert witnesses in such proceedings.

Section 1274 R. S. makes it the duty of the prosecuting attorney to perform all duties and services required to be performed by legal counsel under section 845 R. S. The latter section requires the legal counsel therein provided for to prosecute all suits and actions to which the board of county commissioners is a party.

Section 4464 R. S. provides that the county commissioners shall be parties defendant in the proceedings above referred to. It is therefore the duty of the prosecuting attorney to represent the county commissioners in such cases.

The authority for the payment of expert witnesses out of the county treasury must be statutory. (Pengelly v. Commissioners, 8 N. P. 80.) There are statutes

which authorize the employment of expert witnesses in certain cases (Sec. [1302-1] R. S.) but I find no authority for their employment in the case put by you. Your letter states that at the former trial of the case, about which you inquire, you employed four experts and paid them for inspecting the property prior to the day of the trial. If these experts are within reach of process they can be compelled to attend and testify without extra compensation.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

HIGH SCHOOL — TUITION.

Tuition of pupil attending high school other than that as to which board of education of his district has a general contract may not be recovered from board of his district by board of district in which he attends unless by virtue of express contract, nor from his parents by such board unless by virtue of rules adopted by the board governing admission of such pupils.

August 5th, 1907.

HON. WILL P. STEPHENSON, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR: — Your recent communication has been received, in which you submit the following inquiry:

> "Eagle township, Brown county, has no high school. Washington township, Brown county, adjoins Eagle and has a high school. Eagle township has contract with Washington township, to school its eligibles. It is about 7 miles from Eagle township to Sardinia, where Washington township high school is held. It is only 3 miles from Eagle township to high school in Winchester township, Adams county. If pupils resident of Eagle township attend Winchester high school, can Eagle township be made to pay tuition? If Eagle township is not liable, can parents of pupils be made to pay?"

It is my opinion that the board of education of Eagle township is not liable for the payment of tuition to the board of education of Winchester township. The contract for admission of pupils from one district to the school of another must be an express agreement evidenced by the action of the board, and no obligation is created against the board in whose district such pupils reside merely because some other board of education allowed them to attend its school. Nor do I believe that the parents of the pupils are liable under this state of facts, unless the Winchester township school board had made rules governing the admission of pupils of other districts, and the parents sent their children to such school in compliance therewith, and under such conditions as created a contract to pay for them.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

LOCAL OPTION — TOWNSHIP — INCORPORATION OF VILLAGE.

Village incorporated within township which has previously been voted "dry" at township local option election remains "dry" after incorporation.

August 16th, 1907.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of your letter of the 10th resulted in the township voting "dry" and subsequently thereto a village has been taken in a township on the question of the sale of intoxicating liquors and has resulted in the township voting "dry" and subsequent thereto a village has been erected within such township, the territory within the village limits will be considered "dry" without any further vote being taken upon the proposition.

It has been held by the supreme court of this state in the case of Cary v. State, 70 O. S. 121, that the local option laws are in the nature of police regulations and enacted in the interest of good order and should receive a liberal construction. With this rule in view and considering the purpose of the enactment in question (section (4364-24) R. S. et seq.) it seems clear that local option once adopted by a vote of the qualified electors of any township remains the law of that township until it is repealed by a subsequent election.

Pursuant to the provisions of the muncipal code a village may be erected within the limits of a township but in so doing it does not change the police regulations which have been adopted in that given territory prior to the incorporation of the village. The status of the township in regard to such proposition remains the same, whether a village has been subsequently created or not. The township in which local option was adopted no longer exists entire as a governmental subdivision for the erection of the village has changed the government of that particular portion of the territory from that of a township organization to that of a village organization, but the territory does exist for the purposes of local option the same after as before the creation of the village. That status was engrafted on it while it existed as a township and it will continue until it is repealed by the qualified voters. To hold otherwise would destroy the right of the people, where local option has once been adopted in accordance with the statute in question, to continue that which the electors had demanded until the same was revoked by proceedings to again obtain the determination of the electors thereon.

In this connection the principle announced in the case of the State of Ohio ex rel. vs. Ward, et al., 17 O. S. 543, seems to be in point: That upon the organization of a city the boundaries of which are co-terminus with those of the township, the territory within the city does not cease to be a part of the township within the limits of which it is situated. As the proposition seems to be clearly maintained that such statute is in the nature of a police regulation governing the territory in question, the result of an election had pursuant thereto cannot be altered or changed by thereafter creating a municipality within the limits of such township.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

ELECTIONS — MANNER OF PAYMENT OF EXPENSE OF MEMBERS OF BOARD OF DEPUTY STATE SUPERVISORS — COMPENSATION OF JUDGES AND CLERKS.

Expense of members of board of deputy state supervisors of elections may be paid only upon allowance by county commissioners.

Compensation of judges and clerks of election need not be allowed for by county commissioners.

August 19th, 1907.

HON. LOUIS W. WICKHAM, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of your letter of August 17th, in which you submit the question as to the payment of proper and necessary expenses of the board of deputy state supervisors of elections and of the "per diem" of clerks and judges of election. I note that the specific inquiry in each instance is respecting the necessity of an allowance for such expenses and compensation by the county commissioners.

In my opinion the expenses of the board of deputy state supervisors of elections may be paid only upon an allowance by the county commissioners. The last paragraph of section (2966-4) provides that:

> "All proper necessary expenses of such board of deputy state supervisors shall be defrayed out of the county treasury as other county expenses."

This provision in itself clearly makes it necessary that an allowance shall be made. The language of the preceding paragraph:

> "Upon presentation of such voucher or vouchers (referring to vouchers for the compensation of members of the board of deputy state supervisors), the county auditor shall issue his warrant upon the treasurer for the amount thereof and the treasurer shall pay the same"

does not militate against the view heretofore taken as to the meaning of the above quoted language of the last paragraph but rather strengthens that view upon the principle that the expression of one thing is the exclusion of others.

Referring to your second question I may say that I do not regard the compensation provided for clerks and judges of election by section (2966-6) as in the nature of a "per diem". The compensation is by that section fixed at $3.00, regardless of the number of days required to complete their work. That being the case it is not, in my judgment, necessary that such compensation should be allowed for by the county commissioners. The same provision regarding the compensation of judges and clerks is found in section (2966-52). The principle upon which my opinion is based does not, of course, apply to other provisions of that section.

Very truly yours,

W. H. MILLER,

Asst. Attorney General.

COUNTY COMMISSIONERS — ELECTION OF.

Successors to all county commissioners in office after third Monday in Septmeber, 1907, will be elected at November election, 1908, for term of two years commencing on third Monday in September, 1908.

August 17th, 1907.

HON. CHARLES C. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR: — Your communication of August 15th in which you submit the following questions, is received.

> "One of our commissioners was elected in November, 1904, and went into office in September, 1905, for full term of three years, and his term will expire September, 1908, under old law. When should his successor be elected, and when will his term begin?
>
> "One of the commissioners was elected in November, 1905, and went into office in September, 1906. When should his successor be elected, and when will his term commence?
>
> "One of the commissioners was elected in November, 1903, and went into office in September, 1904, was re-elected in 1906, and commission issued to him for term of two years. When should his successor be elected?"

In reply I beg to say the supreme court has held in the case of State ex rel. Attorney General v. Mulhern, 74 O. S. 363:

> "The provision in the second section of the act passed April 2, 1906, entitled 'An act to conform the terms of various state and county officers to the constitutional provisions for biennial elections', which requires that the term of office of county commissioners shall commence on the first day of December next after their election is in irreconcilable conflict with the provision of the first section 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, and as both cannot be enforced, and as the last above stated provision more nearly conforms to the obvious policy and intent of the general assembly in passing the act, the provision of section 2, fixing December 1st after the election for commencement of terms is inoperative."

Under this decision county commissioners' terms of office will continue to begin on the third Monday in September. A successor to the commissioner whose term of office will expire September, 1908, will be elected at the November election, 1908 and will take office on the third Monday in September, 1909.

A successor to the commissioner who was elected in November, 1905, and took office in September, 1906, will be elected at the November election, 1908, and will take office on the third Monday of September, 1909.

The successor to the commissioner who was re-elected in 1906, for a term of two years and took office on the third Monday of September, 1907, will be elected at the November election, 1908 and will take his office on the third Monday of September, 1909.

There will, therefore, be elected at the November election, 1908, in your county, three members of the county board of commissioners for a term of two years to begin on the third Monday of September, 1909, in accordance with section 839 R. S. as amended 98 O. L. 273, except that such board will take office on the third Monday of September instead of the first day of December, as therein provided.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

COUNTY COMMISSIONERS — POWER TO EXPEND COUNTY FUNDS.

County commissioners may not, on behalf of county, subscribe to mutual telephone company.

August 21st, 1907.

HON. B. A. UNVERFERTH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR: — I desire to acknowledge receipt of your communication of August 19th, in which you inquire:

> Is it lawful for the county through its commissioners to become a member of a mutual telephone company or a stockholder of an incorporated telephone company?

In reply thereto I desire to state that it is my opinion that no such authority exists in the county or any of its officers. The powers conferred upon county commissioners must be strictly construed and they have no power to loan the credit of the county or aid corporations or individuals by subscription or investment of county funds. Taxation can only be authorized for public purposes and public credit or money can not be furnished by any of the subdivisions of the state for such purposes; nor could such power be granted by legislation for section 6, article VIII of the Constitution of Ohio prohibits the same.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

BOARD OF EQUALIZATION — COUNTY — COMPENSATION OF MEMBERS.

County commissioners and county auditor must serve as members of county board of equalization without compensation in addition to that provided by section 897 and 98 O. L. 89.

August 21st, 1907.

HON. N. H. MCCLURE, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR: — Replying to your favor of August 19th I beg to state that the question you submit therein has been passed upon by the attorney general in an opinion to the auditor of state, under date of May 10th, 1904, which opinion may be found in the annual report of the attorney general of 1904, at page 90.

On the supposition that you may not have a copy of the report referred to I beg leave to quote the following from the opinion:

> "On April 4, 1904, the legislature passed, and April 23, 1904, the governor approved an act entitled 'An act to amend section 897 of the Revised Statutes of Ohio as amended April 24, 1893 (O. L. 90, p. 258) and to repeal certain acts and sections of the Revised Statutes.' Sections 1 and 2 of this act are as follows:
>
> 'Section 1. That section 897 of the Revised Statutes of Ohio, as amended April 24, 1893, be amended so as to read as follows:
>
> Sec. 897. The annual compensation of each county commissioner shall be determined as follows:
>
> In each county in which on the twentieth day of December of the preceding year the aggregate of the tax duplicate for real estate and

personal property is five million dollars or less, the compensation shall be seven hundred and fifty dollars ($750.00), and in addition thereto in each county in which such aggregate is more than $5,000,000.00 three dollars on each full $100,000.00 of the amount of such duplicate in excess of said sum of $5,000,000.00. But in counties where ditch work is carried on by the commissioners, in addition to the salary hereinbefore provided, each county commissioner shall receive three dollars 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 three hundred dollars in any one year.

The compensation herein provided shall be paid in equal monthly installments out of the county treasury upon the warrant of the county auditor.

Sec. 2. The compensation provided in the preceding section shall be in full payment of all services rendered as such commissioner. But such total compensation shall not exceed the sum of $3,500.00 per annum.'

It is observed that by section 2 the compensation provided in section 1 is to be in full payment of all services rendered as such commissioner.

Section 2804 R. S. and section 2813a R. S. provides that the county commissioners shall act as an annual county board for the equalization of the real and personal property, moneys and credits in each county and that they shall receive the sum of three dollars for each day employed in the performance of their duty as such annual county board. The act of April 4, 1904, approved April 23, 1904, and already referred to, in so far as compensation to the commissioners is concerned supersedes section 2813a R. S. and the county commissioners are entitled only to the salary now fixed by law and their services as members of the board of equalization are compensated by their salary."

In my opinion the recently enacted county salary law (98 O. L. 89) affects the provisions of section 2813a respecting the compensation of the county auditor for services rendered thereunder precisely in the same manner as section 897 affects the provisions of the same section respecting the compensation of the county commissioners. It is my conclusion, therefore, that neither the county commissioners nor the county auditor may receive the compensation provided by section 2813a R. S.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

PROSECUTING ATTORNEY — COMPENSATION OF.

Contract of prosecuting attorney with county commissioners for services as legal counsel for county officers terminated by enactment of "Conroy law", 98 O. L. 160.

August 22d, 1907.

HON. H. L. CONN, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR: — In reply to your communication of August 19th relative to your employment by the board of county commissioners in a certain road case I beg to say the opinion heretofore rendered the prosecuting attorney of Mont-

gomery county, in my judgment, applies to your case. You are, however, entitled to compensation for all the services rendered by you in said case up to the time the Conroy bill went into effect.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

PROSECUTING ATTORNEY — DUTY OF, TO REPRESENT BOARD OF EDUCATION.

Prosecuting attorney is not required to represent township board of education in remonstrance against creation of special school districts.

August 22d, 1907.

HON. H. L. CONN, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR: — Your communication of August 20th relative to your duty to represent the board of education in its remonstrance to the creation of a special school district as provided in section 3928 R. S. is received. In reply I beg to say section 3977 makes the prosecuting attorney the legal adviser of all boards of education in his county excepting city school districts. He is required to represent any of said boards or the officers thereof in all civil actions brought by or against them. Section 3928 R. S., however, in providing the procedure for the creation of a special school district imposes no duty upon a board of education and unless the board of education is a party to the action you will not be required to represent them in your official capacity; and I am of the opinion that the board of education is not authorized to employ counsel and pay for the same out of the public funds.

Section 3928 provides for the hearing of a remonstrance signed by one or more male citizens who are electors of said district, and that said remonstrance shall be considered on a hearing of a petition, but said section contains no provision authorizing the intervention by the board of education, therefore no official duty is imposed upon a board of education to employ counsel and pay for the same out of the school funds, to resist the creation of a special school district.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

MAYOR — VILLAGE — INTEREST IN PUBLIC EXPENDITURES.

Mayor may not be interested in printing contracts of village.

August 26th, 1907.

HON. H. B. WELSH, *Prosecuting Attorney, London, Ohio.*

DEAR SIR: — I have your favor of the 23d inst., containing the following inquiry:

> "The mayor of the village of South Solon, Ohio, is also editor and owner of the only paper published in the village. Can he perform the village printing and may his paper legally publish the various ordinances that may be passed by the council of the village?"

In answer thereto I refer you to section 45 of the municipal code, especially to that part thereof which is as follows:

> "Nor shall any member of the council, board, officer or commissioner of the corporation have any interest in the expenditure of money on the part of the corporation other than his fixed compensation; and a violation of any provision of this section shall disqualify the party 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 for any offense he shall be dismissed therefrom."

Applying the above quoted portion of the municipal code to the facts in question it would appear that while acting as mayor he cannot be interested in the contracts for the public printing of the village.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

PROSECUTING ATTORNEY — DUTY OF.

Prosecuting attorney is not required to represent road superintendent in action before justice of the peace.

August 29th, 1907.

HON. TOM O. CROSSAN, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR: — Your communication of August 27th is received in which you submit your views, together with citations of the statutes, upon the question as to whether or not prosecuting attorneys are required to represent road superintendents in suits to recover penalties under section (1536-160) Revised Statutes.

In reply thereto I beg to say that I concur in your conclusion. Section 1274 contains no provision requiring prosecuting attorneys to appear before justices of the peace.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

DEPOSITORY — SCHOOL DISTRICT — ELIGIBILITY.

Unincorporated bank may be school district depository.

August 29th, 1907.

HON. JONATHAN LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR: — I desire to acknowledge your communication of August 27th in which you ask whether or not private banks can become depositories for school funds under the provisions of section 3968 which provides in part that no bank shall receive a larger deposit than the amount of its paid in capital stock.

In reply thereto I desire to say that capital stock as used in said section should be construed to mean the amount of property tangible and intangible owned by said bank. The distinction between capital stock and shares of capital stock is clearly defined in the cases cited in Farrington v. Tenn. 95 U. S. 686. See also Burrall v. Bushwick Railroad Co. 75 N. Y. 216.

Capital stock may be defined as that money and property which is paid into a single corporation by those who, by subscription thereto, become members of the corporate body. When used in reference to a partnership, capital stock means the fund of money or property which is employed as a basis of the business, and on which, and with which the business is to be commenced and carried on. See City and County of Sandusky v. Spring Valley Water Works, 63 Cal. 524.

The capital stock of a bank is the whole undivided fund paid by the stockholders, the legal right to which is vested in the corporation to be used and managed in trust for the benefit of the members. Union Bank v. State, 17 Tenn. 490.

In Barry v. Merchants Exch. Co. (N. Y.) 1 Sandf. Ch. 280 the court held that the capital stock of a corporation is, like that of a co-partnership or joint stock company, the amount which the partners or associates put in as their stake in the concern.

A number of cases could be cited in which the courts have held that capital and capital stock are in legal intendment synonymous and are used in legislative acts as equivalent terms though strictly not of the same meaning. And the words capital stock are used indiscriminately in the statute to designate the estate of corporations and partnerships.

Therefore, the capital stock of a bank is all the property of every kind, whether in the form of money, bills of exchange or any other property in possession, or anything into which the money originally contributed has been changed or which it has produced. With this construction of the words capital stock as used by the legislators, it is my opinion that any bank, whether incorporated or unincorporated, can become a depository for school funds subject to the other limitations in said section 3968 contained.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

IMPROVED ROADS — REPAIR OF — POWER OF TOWNSHIP TRUSTEES.

Township trustees may assign to road superintendent the repair of improved roads under section 4892 or they may take immediate charge of such work, as they deem best.

September 10th, 1907.

HON. PETER J. BLOSSER, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of your favor of August 31st in which you inquire as to the power of township trustees to expend the funds received from the county under the provisions of the act respecting the repair of improved roads, section 4890 et seq., R. S.

In my opinion the trustees have discretion to assign to the road superintendent the repair of improved roads and may intrust to him the expenditure of the county money or not as they may deem best.

Section 4892 R. S. confers upon the trustees power to assign such improved road work to supervisors "or to other suitable persons". Section 1448a, which provides for the employment of a road superintendent contains the following language:

> "When properly qualified the road superintendent shall have full control, under the orders of the trustees, however, of all such roads within his district *as are assigned to him* by the township trustees".

The conclusion seems clear, therefore, that the trustees may take immediate charge of the repair of improved roads or they may assign such duty to the road superintendent or to any other suitable person as they deem best.

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

PROSECUTING ATTORNEY — APPOINTMENT OF SPECIAL ASSISTANT.

Common pleas judge may appoint assistant to prosecuting attorney without consent of latter, when in his judgment the public interest requires such appointment, and may order compensation of such assistant to be paid out of the county treasury, subject to allowance by county commissioners.

September 13th, 1907.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR: — The attorney general has referred to me your inquiry of the 11th inst., requesting an opinion as to the legality of the appointment of an assistant prosecuting attorney and allowing compensation to him under the following circumstances:

> One M., who had been a witness for the state in a certain criminal prosecution had been promised immunity by you as prosecuting attorney from prosecution for the crime for which he stood indicted. The common pleas judge appointed S. as an assistant prosecuting attorney and directed him to prosecute M., you having declined as prosecuting attorney so to do because of your promise of immunity given to him. What is the court's power to allow compensation to S. under the circumstances and order the same to be paid out of the county treasury.

There can be no claim made that this appointment was made pursuant to section 1271 R. S., nor was there a vacancy in your office or any disability preventing you from discharging the duties of such office, in which event an appointment of an assistant prosecutor could be made pursuant to the provisions of section 1270 R. S. Hence I assume that the appointment of S. was made by the judge of the court of common pleas by virtue of the provisions of section 7196 R. S., which is as follows:

> "The common pleas court or the circuit court may, whenever it it is of the opinion that the public interest requires it, appoint an attorney to assist the prosecuting attorney in the trial of any case pending in such court, and the county commissioners shall pay such assistant such compensation for his services as the court approves, and to them seems just and proper."

The foregoing section vests in the respective courts named therein authority to appoint an attorney to assist the prosecuting attorney in the trial of any case pending in either of such courts. The basis of appointment is the opinion of the court that the public interest requires such appointment to be made. Authority is found for the existence of inherent power in the court to appoint such assistant independent of statutory authority, but as section 7196 R. S. expressly authorizes

the appointment, if in the opinion of the court the public interest requires it, it would seem to be beyond question that in the absence of any showing to the contrary, the appointment was properly made and the compensation for the services of such appointee may be fixed by the court and paid by the county commissioners. 35 O. S., 601; 40 O. S. 331, 332.

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

BRIDGES — ESTIMATE OF COST.

County commissioners must procure estimate of cost before inviting proposals for construction of bridge sub-structure.

Estimate of cost not required to be obtained before inviting proposals for posals for construction of bridge substructure.

If estimate not required by statute is prepared, contract may be let at price in excess thereof.

Substructure and superstructure may not be taken together as one improvement with respect to limitation of section 798, if contracts let separately.

Section 1166 does not require county commissioners to obtain estimates save when in their judgment the same are necessary.

Contract for construction of bridge superstructure need not be let to lowest bidder.

September 20th, 1907.

HON. D. F. OPENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR: — In your communications to this office you ask the following questions as to the construction of bridges in your county:

1. Is it necessary in all cases for the county commissioners to have an estimate before they can invite proposals for bridges?
2. Can they in any case exceed the estimate?
3. Under section 798 R. S. are the substructure and superstructure taken together as one improvement in arriving at the $1,000 limit?
4. Does section 1166 R. S. as amended require that county commissioners *must* secure plans, estimates, etc., before giving notice for the purchase of any bridge?
5. Can the county commissioners accept a proposal for building a bridge from a person providing his own plan and specifications at a price within the estimate of the surveyor and yet higher than the price of a party whose proposal is made according to approved plans and specifications prepared by the county surveyor?

First: As to the erection of substructures for a bridge the statutes specifically require "a full, accurate and complete estimate" "in all cases."

As to the erection of a bridge superstructure no statute *requires* the county commissioners to make an estimate, although section 796 R. S. specifically sets out, in detail, the duties of county commissioners in such matters. In case no estimate has been prepared, however, advertisement for proposals must be made according to the manner prescribed in section 798 R. S., where the estimates exceed $1,000. Notice may not be given by posters, nor may such work be let at private contract under this section unless the estimated cost has been duly ascertained.

Second: Section 800 R. S. provides as follows:

> "No contract or contracts shall be made for any public building, bridge or bridge substructure, or for any addition to, change, improvement or repair of the same, or for the labor and materials herein provided for, at a price in excess of the estimates in this chapter required to be made."

When an estimate *not required* by the statutes has been made, e. g.: where the commissioners have caused plans, specifications, etc., and an estimate thereof to be prepared for the erection of a bridge under section 796 R. S., and where they later desire to accept a proposal upon another plan, in such case a contract may be let at a price in excess of the estimate without violating the provisions of section 800 R. S. Section 796 R. S. gives the county commissioners a wide latitude in matters of this kind.

Third: Since the statutes provide for one method of letting contracts for bridge substructures and for a distinctly different method of letting contracts for erecting bridge superstructures, the substructure and superstructure will not be taken together as one improvement, provided there are separate contracts for substructure and superstructure respectively.

Fourth: County commissioners are not required, under section 1166 R. S., to procure plans, estimates, etc., "for the construction or repair of all bridges," etc. This section requires them to employ the county surveyor and no one else to prepare all plans, etc., that they cause to be prepared. Judge Wood of the common pleas court of Athens county, in a recent decision, dated September 4th, 1907, decided that this section

> "was not intended to limit the power of the commissioners in determining whether or not they should have plans, specifications and estimated cost before the contract was entered into."

but rather the intention was

> "to give into the hands of the county surveyor all the business of the county for which he was naturally qualified."

Fifth: In the case of a substructure for a bridge, section 799 R. S. provides that the contract shall be

> "awarded to and made with the person or persons who offer to perform the labor and furnish the material at the *lowest cost* and give a good and sufficient bond," etc.

Under section 796 R. S., the county commissioners shall award the contract or contracts for the furnishing of the material for the erection of a bridge superstructure

> "to the person or persons giving security, * * * who is the lowest or best bidder or bidders considering price, plan, material and method of construction."

In this latter case, therefore, the county commissioners may accept a proposal at a price higher than the price of other bidders, giving due attention to plan, material and method of construction.

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

DEPUTY STATE SUPERVISORS OF ELECTIONS — COMPENSATION.

Method of computing compensation of deputy state supervisors of elections in counties containing cities in which registration is required; total compensation from all sources may not exceed maximum; such maximum for Stark county is $400.

September 21st, 1907.

HON. CHARLES C. UPHAM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR: — Your letter of September 14th, inquiring as to the maximum compensation of deputy state supervisors of elections in your county, is received.

Section 2926t R. S. provides that in counties containing cities in which registration is required

> "the whole amount of annual compensation paid to each deputy state supervisor and to the clerk under this section and under section 4 of the supervisory election law, section (2966-4), shall not exceed, in any one year, the following: in counties containing cities having a population of 300,000 or more, as ascertained in the manner provided in section 2926a, each deputy state supervisor, $1800, and the clerk $2500"; etc.

Since this section estimates the population "as ascertained in the manner provided in section 2926a" and since section 2926a provides only for cities having a population of 11,800 or more at the last preceding federal census, the maximum compensation in your county must be based upon the total population of those cities in your county having a population of 11,800 or more. I take it that you have only two such cities in your county and that the aggregate population of these two cities is between 25,000 and 50,000. If this be true the maximum compensation for deputy state supervisor of elections in your county is fixed at $400.

The deputy state supervisors of elections may receive compensation under section (2966-4) R. S., under section 2919 R. S., and also under section 2926t R. S. Section 2926t R. S. determines the maximum amount that can be paid under sections (2966-4) and 2926t; the provisions of section 2919 R. S., which allows compensation for conducting primary elections make such compensation contingent upon the condition that the total compensation of such officers shall not exceed the maximum of compensation otherwise provided by law. In no case, therefore, can the total compensation exceed the maximum as provided in section 2926t R. S.

Very truly yours,

W. H. MILLER,

Asst. Attorney General.

PROSECUTING ATTORNEY — COMPENSATION OF.

Prosecuting attorney not entitled to additional compensation for services in supreme court rendered after date when "Conroy law," 98 O. L. 160, became effective.

September 21st, 1907.

HON. WILLIAM F. ORR, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR: — Your communication of recent date is received in which you request an opinion as to whether or not Mr. Charles F. Howard may receive compensation out of the county treasury for services rendered in the supreme

court in the case of State of Ohio on relation of W. M. Kiser v. William Dodds, auditor of Greene county, said services having been performed during the time Mr. Howard was prosecuting attorney of Greene county.

From your letter I understand these services were rendered during the years 1905 and 1906. The prosecutors' salary law became effective on the 15th day of April, 1906, and the salary therein provided covers all services rendered by the prosecuting attorney to the county or any of its officers. If Mr. Howard, as prosecuting attorney, drew his compensation under the Conroy law when it became effective, then he would not be entitled to any extra compensation for services rendered in this case after that date. He may, however, be compensated for all services rendered before the Conroy law became effective if such compensation is based upon a proper contract between the prosecuting attorney and the county commissioners.

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

ROADS AND HIGHWAYS — OPENING OF.

County commissioners may order township trustees to open roads only in case of unimproved roads, provided for by section 4638.

September 25th, 1907.

HON. A. C. DENBOW, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR: — Your recent communication relative to the opening of county roads by county commissioners is received.

In reply thereto I beg to say the order of the county commissioners to the township trustees, as authorized in section 4650 R. S., applies only to the opening of county roads, the expense of which is provided for in section 4638 R. S. Such roads when opened come under the classification of unimproved roads.

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

ELECTIONS — SHERIFF'S PROCLAMATION.

Sheriff not required to make proclamation of election for township and municipal officers.

September 25th, 1907.

HON. JAMES W. DARBY, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR: — In reply to your communication of September 24th, I beg to say I concur in your opinion that the sheriff of your county is not required to issue a proclamation under section 2977 R. S., for the election of officers at the coming November election.

The proclamation required in section 2977 R. S. is for the election of officers enumerated in section 2978, none of whom is to be elected this year.

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

COUNTY OFFICERS — DEPUTIES AND ASSISTANTS.

County officer may appoint his wife or minor child as his deputy or assistant, provided he does not thereby receive, directly or indirectly, any of the compensation paid such deputy.

September 25th, 1907.

HON. WILLIAM MAFFETT, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR: — In reply to your communication of August 31st, relative to the right of a county officer to appoint his wife or minor child as his deputy or assistant, I beg to say, section 3 of the county officers' salary law provides that "no officer shall receive or be paid, directly or indirectly, any part of the compensation of any deputy, assistant, clerk, bookkeeper or any other employe." An officer appointing his wife or minor child as his assistant or deputy does not, however, in my opinion, violate this provision, provided that such officer shall not receive, either directly or indirectly, any of the compensation paid such assistant or deputy.

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

TOWNSHIP TRUSTEES — PARTITION FENCE.

Township trustees not disqualified to divide cost of erection of partition fence by reason of fact that such fence encloses land controlled by trustees for cemetery purposes.

September 25th, 1907.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR: — In reply to your communication of September 24th, I beg to say I know of no statutory provision relative to the division of partition fences other than the sections of the Revised Statutes referred to in your letter. Notwithstanding the fact that the township trustees own the land used for cemetery purposes, and are, for that reason, interested in the partition fence, it is my judgment that this fact does not disqualify said board from making the division as authorized by sections 4242 and 4243a of the Revised Statutes.

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

JUSTICE OF THE PEACE — TERM OF OFFICE — ELECTION.

Term of office of justice of the peace elected prior to adoption of article XVII of the constitution and amendment of section 1442 began at date of his election.

Successor to justice of the peace elected in November, 1904, must be elected in November, 1907.

Successors to justices of the peace whose terms expire after January 1, 1908, must be elected in November, 1909.

September 25th, 1907.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR: — Your communication of September 23rd is received, in which you call attention to an apparent conflict in the opinions of this office relative to the election of justices of the peace who were elected at the November election, 1904.

In reply thereto I beg to say in the opinion rendered Mr. Redding, justice of the peace, W. Toledo, under date of May 26, 1906, (Annual Report 1906-1907, page 300) it is held that successors to justices of the peace whose terms will expire after January 1st, 1908, should not be elected until November 1909, while the opinion rendered to the secretary of state under date of March 18th, 1907, holds that the successor to a justice of the peace who was elected in November, 1904, and qualified in April, 1905, for a term of three years, will be elected at the November election, 1907.

Prior to the amendment of section 1442 Revised Statutes by the last legislature there was no statutory time fixed for the beginning of the term of a justice of the peace, and under the decision of the supreme court in the case of Koon v. Bushnell, the terms of all justices of the peace elected before said amendment to section 1442 began with the dates of their elections. Therefore, the term of a justice of the peace who was elected in November, 1904, began with the date of his election and will expire three years from that date, regardless of the date of his commission, and his successor will be elected at the November election in 1907, and in accordance with section 1442, as amended, take office on the first day of January, 1908. But the successors to all justices of the peace whose terms of office expire after January 1st, 1908, as held in the opinion to Mr. Redding, above referred to, will be elected at the November election in 1909.

There is, therefore, no conflict in the two opinions above referred to. One applies to justices of the peace whose terms expire after January 1st, 1908, while the other applies to justices of the peace whose terms of office expire in November, 1907.

Very truly yours,

WADE H. ELLIS,

Attorney General.

TOWNSHIP TRUSTEES — REPAIR OF IMPROVED ROADS.

Township trustees proceeding under section 4890 to repair improved roads must let contract for such repairs to lowest bidder.

September 26th, 1907.

HON. PETER J. BLOSSER, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR: — Answering your further inquiry regarding the power of the township trustees to expend the fund received from the county treasury for the repair of improved roads under section 4890 R. S., I beg to state that my former opinion was not intended to mean that the trustees may take charge of such work in the sense that they may enter into such contracts as they please and make expenditures without any restraint. In my opinion the trustees, when they elect not to assign such work to the road superintendent, must proceed under section 1459 R. S. to let such improvement by contract to the lowest bidder. In no event may the trustees themselves purchase materials or employ laborers directly.

Very truly yours,

WADE H. ELLIS,

Attorney General.

VILLAGE STREET COMMISSIONER — APPOINTMENT.

Mayor of village may appoint street commissioner after time fixed by section 223 M. C.

October 2nd, 1907.

HON. W. P. STEPHENSON, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR: — You have submitted to this department a certain memorandum relating to the appointment of Kilby Edgington as street commissioner of the village of West Union and you request an opinion as to the legality of the appointment of such officer and as to the term of his service.

Section 223 of the Municipal Code, as amended 97 O. L. 39, provides that an appointment to the office of street commissioner or to similar official positions shall be made:

> "Not earlier than the second Monday in January and not later than the first Monday in February."

I understand that your particular question involves the proposition that as Edgington was not appointed until March 4th, 1906, there was no right or authority in the appointing power to appoint him because the time was not embraced within the periods named in section 223 M. C.

It is the opinion of this department that if the mayor fails to make the appointment of such officer between the dates named in section 223, his power to so appoint at any time thereafter is not thereby destroyed, nor has he exhausted that power, but it would be perfectly legal for him thereafter to appoint, and submit his appointment to the village council for confirmation, as provided by section 203 M. C.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

POOR — MEDICAL SERVICES — LIABILITY OF COUNTY. PROSECUTING ATTORNEY — DUTY OF.

Physician seeking to hold county liable for services rendered to indigent person who is receiving partial relief from infirmary directors must show that he gave notice to the directors before rendering such services, and that his bill has been properly approved.

Prosecuting attorney may defend person charged with crime in an adjoining county.

October 4th, 1907.

HON. CHARLES C. KEARNS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR: — Your letter of September 30th is received. In view of the facts presented by you I am of the opinion that a physician can hold the county responsible for compensation for medical services rendered to a person who is receiving partial relief from the county infirmary directors, but only after due notice to the infirmary directors and then only for such services as may thereafter be afforded and in such amount as the proper officers may determine to be just and reasonable. In the absence of such notice it is presumed that the physician looks to the person and not to the county, for payment. The infirmary

directors may, of course, discontinue such services at any time. If such services are rendered under the direction of the township trustees then, under section 974, the township and not the county will be liable.

As to your second question I find no law in Ohio making it unlawful for the prosecuting attorney of the county to defend a person charged with crime in an adjoining county.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

INFIRMARY DIRECTORS — DETAILED STATEMENT OF.

Infirmary directors may not employ attorney to prepare detailed statement to auditor under section 967a, but may file such statement after time fixed by said section.

October 9th, 1097.

HON. W. R. GRAHAM, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR: — Your communication of the 7th inst., is received in which you request an opinion as to the authority of the county board of infirmary directors to employ an attorney to prepare the detailed statement required in section 967a R. S. and pay for the same out of the county treasury.

In reply I beg to say the provision in section 967a requiring the infirmary directors to furnish a detailed statement to the auditor is similar to the provision in section 967, requiring said directors to make reports to the county commissioners, and is, in my judgment, an official duty devolving upon the infirmary directors, and said directors may not employ outside help in the performance of said duty at the expense of the county.

I can readily understand the difficulties the board of infirmary directors would encounter in an attempt to make up this statement from original matter including all items required in section 967a, covering a period of twenty months, within the time fixed in the section, to-wit, twenty days. But the items included in the report required under section 967a are so similar to those required under section 967 that it would seem the board would be able to make up the statement required under section 967a largely from the reports required by section 967 on file in the auditor's office and would not, therefore, require so much time to prepare as would an original.

However, should the board, by reason of the period covered by the statement, be unable to prepare the same within the time fixed by statute, I am of the opinion that such time as is necessary to make up the statement may be taken without violating the law. That is to say, the twenty day limit contained in section 967a is, in my judgment, directory and not mandatory.

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

COUNTY COMMISSIONER — DITCH APPLICATION — INTEREST.

County commissioner not disqualified to act as member of board upon application for county ditch by reason of interest in such application.

October 15th, 1907.

HON. CHARLES C. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR: — Your communication of October 12th is received, in which you request an opinion as to the right of a county commissioner to pass upon an application for a county ditch, when he is personally interested in the same.

In reply I beg to say, section 4450 and succeeding sections, which provide the procedure for the construction of county ditches, contain no provision for the substitution of a suitable person to act in the place of a commissioner who is personally interested in the ditch improvement. Such a provision is contained, however, in section 4488 but applies only to the construction of joint county ditches and then only in cases where *two or more* of the commissioners of any county are personally interested in the improvement. Therefore, even under this section an outsider cannot be appointed in cases where only one commissioner was personally interested. Inasmuch as the sections relating to county ditches, above referred to, contain no provision for the appointment of an outsider to take the place of county commissioners who may be personally interested, I am of the opinion that such appointment may not be made, and that the personal interest of one of the commissioners in the improvement does not disqualify him from participating with the other members of the board.

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

INCOMPATIBILITY OF OFFICES.

Probate judge may not be member of village board of education.

October 26th, 1907.

HON. JOHN A. EYLAR, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR: — Your letter of October 24th, inquiring whether the probate judge of Pike county may be a member of the board of education of the village school district of Waverly, Ohio, is received.

Inasmuch as there is no statute forbidding this, the question arises whether these two offices are incompatible.

Throop on Public Officers, section 33, says:

> "Two offices are incompatible when the holder cannot, in every instance, discharge the duties of each."

Dillon on Municipal Corporations, section 166 (Note) and also Mechem on Public Offices and Officers, section 422, say: Incompatibility in office,

> "exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both."

Anderson's Dictionary of Law says,

> "Offices are said to be incompatible and inconsistent when their being subordinate and interfering with each other induces a presumption that they cannot both be executed with impartiality and honesty."

The duties of a probate judge and member of a village board of education seem incompatible under the following sections of the Revised Statutes:

Under section 3895, in case the board of education refuses, on being petitioned, to transfer school territory from one district to another, a hearing of said petition shall be had before the probate judge and his decision shall be final, judgment for costs to be rendered against either the petitioners or the board of education.

Under sections 3928 and 3929, the probate judge has exclusive jurisdiction in the creation of special school districts.

Under section 3990, where the board of education and the owner of property desired for school purposes fail to agree, appropriation proceedings are brought before the probate judge.

Under section (4022-8), after the truant officer has been requested by the board of education to examine into a case of truancy as provided in section (4022-7) and the truant officer has made a complaint that the child is a juvenile disorderly person, the probate judge shall hear such complaint.

Under section (4022-11), the probate judge has jurisdiction to try the offenses described in sections (4022-1) to (4022-14).

Section 3975 provides that the board of education may accept a bequest made to them by will. The probate judge in this case would be called upon to pass upon the validity of such bequest.

Section 3977 has no bearing upon this question since the words "other official acting in a similar capacity" refer only to a person performing the duties of either a prosecuting attorney or city solicitor.

In view of the rule as to incompatible offices (Mechem, section 425) that "the acceptance of the second office *ipso facto* vacates the first," I should deem it inadvisable for a probate judge to become a member of the board of education.

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

BOARD OF EDUCATION — FINANCIAL STATEMENT OF CLERK.

Financial report of clerk of board of education should cover period of two years.

October 30th, 1907.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR: — In reply to your communication of October 26th, inquiring whether or not the report to be made by the clerk of the board of education under section 4053 Revised Statutes, shall, by reason of the change caused by the biennial election amendment, be made for a period of two years instead of one, I beg to say that inasmuch as the purpose of the report is to give public information of the financial transactions of the district, I am of the opinion that the report should cover the entire period of two years. That is to say, the statement should disclose all the financial transactions since the last report was made.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

SCHOOL DISTRICT — CITY — ANNEXATION OF TERRITORY.

Property of school district located in territory annexed to city vests in board of education of city district; upon such annexation, distribution of funds and indebtedness, including liability for salaries of teachers, etc., as between city district and outlying district of which territory was formerly a part, should be made by probate court under section 3896.

October 31st, 1907.

HON. ROBERT R. NEVIN, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR: — Your letter inquiring as to the effect of the annexation of certain territory which was a part of the Oakland special school district to the city of Dayton is received.

Under section 3893 R. S., upon the annexation of territory to the city of Dayton such territory thereby becomes a part of the city school district and the legal title to all school property in said territory is thereby immediately vested in the board of education of the city of Dayton. In my opinion the city board will have control of the property from the time of annexation.

The proper division of funds or indebtedness between the two boards, upon application to the probate court, by either board, shall be made in accordance with the provisions of section 3896 R. S.

The contracts previously entered into by the board of education of the special school district with the teachers in this annexed territory cannot be impaired under the provisions of section 28, article II of the constitution. While I believe that the city board of education becomes responsible for the payment of salaries of teachers in the territory annexed, as provided in their contracts with the old board, the law is not clear upon this subject. In my opinion the dispute between the two boards as to their respective liabilities upon these contracts might properly be left to the decision of the probate judge under a liberal interpretation of section 3896 R. S.

Very truly yours,

WADE H. ELLIS,

Attorney General.

JUSTICE OF THE PEACE — VACANCY IN OFFICE OF — TENURE OF PERSON APPOINTED TO FILL.

Tenure of office of person appointed to fill vacancy in office of justice of the peace extends until the first day of January next succeeding the next regular election for such office, and thereafter until his successor, elected at such election, qualifies, regardless of attempted limitation of such tenure by township trustees making such appointment.

November 13th, 1907.

HON. ROBERT R. NEVIN, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR: — I have your favor of November 8th, in which you present the following statement of facts:

During the month of April, 1907, the office of justice of the peace in one of the townships of Montgomery county became vacant. The township trustees appointed a person to fill the vacancy, their minutes showing that the appointment was for a period of time ending on the 5th day of November, that being the date at which the first regular election for justice of the peace would take place. At the November election in 1907 another person was elected to the same office.

You ask whether the incumbency of the person appointed to fill the vacancy may be terminated by the qualification of the person elected at the November election at any date before January 1st, 1908.

Section 567 R. S., as amended 98 O. L. 171, provides:

> "When a vacancy occurs in the office of justice of the peace in any township, either by death, removal, absence at any time for the space of six months, resignation, refusal to serve, or otherwise, the trustees, having notice thereof, shall, within ten days from and after such notice, fill any vacancy by appointing a suitable and qualified resident of the township who shall serve as justice until the next regular election for justice of the peace, and until his successor is elected and qualified; and the votes of a majority of the trustees shall be necessary to appoint. At the next regular election for such office some suitable person shall be elected justice in the manner provided by law, for the term of four years commencing on the first day of January next thereafter; and the clerk of the court, in certifying to the secretary of state the appointment of a justice of the peace to fill any such vacancy, shall specify in his certificate, the name of the justice of the peace whose place is supplied by the person whose appointment is so certified, and also the date when such vacancy occurred."

In my opinion the township trustees were without authority to limit the length of time for which the person appointed to fill the vacancy should serve. The appointment was valid, but the term of the appointee is to be determined by the above quoted section, and is beyond the control of the appointing officers. (State ex rel. Palmer v. Darby, 12 C. C., 235; 52 O. S. 611).

The section quoted makes it clear to me that the appointee's term of office extends beyond the date of his successor's election; the phrase "and until his successor is elected and qualified" seems to be conclusive of this point. But does it necessarily extend until January 1st? The answer to this question is to be found in the answer to a further question, viz: Can the justice-elect *take office* before January 1st? For if he cannot take office until that date, and his predecessor's incumbency may be terminated at any previous date at which he happens to secure a commission, give bond, and take oath of office, then there would be a hiatus between the termination of the appointee's tenure and the commencement of his term of four years. That the legislature contemplated such a result is most improbable; nor does the section quoted naturally convey such a meaning. Therefore the appointee will continue to hold at least until the justice-elect is entitled to take office.

In my opinion the tenure of office of a justice of the peace, by virtue of a regular election, such as that provided for by section 567, cannot begin before his term of office under that section. The person chosen at such election is not, I think, entitled to assume the duties of his office until January 1st, 1908. He cannot qualify within the meaning of section 567 before that date. This view is supported by the decision of the Superior Court of Cincinnati in the case of Harte v. Bode, 7 Ohio Decisions, 74, 82, 83, wherein section 11 of the Revised Statutes was construed to apply to a state of facts substantially similar to the one in question. The court says:

> "It seems to me that in using the word "qualify" in section 11, the codifiers had in mind that he" (the officer elected at the next "proper election" under that section) "would not qualify until authorized to do so, which would be the second Monday in February."

It is my opinion, therefore, that, under the statement of facts submitted by you the person appointed by the trustees may serve until January 1st, 1908, and thereafter until his successor, elected at the November election, qualifies.

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

BOARD OF EDUCATION — TENURE OF OFFICE OF PERSON APPOINTED TO FILL VACANCY. TOWNSHIP DITCH PROCEEDINGS — JURY FEES — COSTS.

Person appointed to fill vacancy in office of member of board of education holds for unexpired term.

Jury fees should be taxed as costs in township ditch appellate proceedings.

November 22nd, 1907

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR: — Your communication of November 13th, in which you submit the following questions, is received:

> 1. Is Sec. 3981 R. S. in conflict with section 11? That is, are members of the board of education appointed to fill out the unexpired term of a vacancy to which they may be appointed, or should there be an election to fill the unexpired term?
>
> 2. On an appeal from the board of trustees to the probate court, in the establishment of a township ditch, has the court a right to tax as part of the costs the summoning and per diem and mileage of jurors serving in the probate court in hearing the case?

In reply thereto I beg to say, first, there is no conflict between section 11 and section 3981 Revised Statutes. Section 11 is a general section applying to the filling of all vacancies which are not specifically provided for in other statutes.

Section 3981 R. S. expressly provides that vacancies in any board of education shall be filled by the board of education at the next regular or special meeting or as soon thereafter as possible *for the unexpired term*, and therefore controls.

Second. Section 4541 provides that "if the report of the jury be not in favor of the appellant, all costs made on such proceedings in the court shall be taxed to and paid by such appellant," and further provides that "jurors in such cases shall be allowed one dollar and fifty cents each, together with mileage from their respective residences to the probate court at the rate of five cents per mile."

In my judgment the words "all costs" as used in this section include the per diem and mileage of the jurors and should be so taxed.

Very truly yours,
WADE H. ELLIS,
Attorney General

TURNPIKE DIRECTORS — REPAIR OF IMPROVED ROADS — ADVERTISEMENT.

County commissioners acting as turnpike directors must advertise letting of contract for repair of improved road.

November 22nd, 1907.

HON. HAMILTON E. HOGE, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR: — Your communication of November 16th is received in which you submit the inquiry as to whether or not county commissioners acting as the board of turnpike directors may contract for the repair of improved roads without first advertising, as provided in section 1448d, Revised Statutes.

In reply I beg to say that while section 4899 R. S. authorizes county commissioners, acting as turnpike directors, to contract for labor and material either at public sale or by private contract, and while said section contains no provision requiring said commissioners to advertise the letting of such contracts, yet section 1448d, which was enacted by the last legislature, expressly provides that the commissioners of any county may not make such contracts until an advertisement containing plans and specifications be published two weeks in a newspaper of general circulation, published in the political subdivision wherein such road is situated, etc.

The supreme court has held that the board of turnpike directors is not a separate and distinct board from the county commissioners but that the duties enjoined upon turnpike directors under section 4896 and succeeding sections are but added duties to the county commissioners, and while they are authorized to organize as a board of turnpike directors to perform certain duties in the repair of roads, they are still county commissioners.

In my opinion county commissioners acting as turnpike directors should follow the provisions of section 1448d as to advertising in letting contracts for road improvements.

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

COUNTY OFFICERS — EXTENSION OF EXISTING TERMS — SUFFICIENCY OF ORIGINAL COMMISSIONS AND BONDS.

November 29th, 1907.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR: — Your communication is received in which you submit an inquiry as to whether or not the prosecuting attorney and other county officers whose terms of office have been extended one year by the constitutional amendment will be required to secure new commissions and give new bonds.

In reply I beg to say the commissions now held by county officers affected by the extension are sufficient. New bonds, however, will be required if the time limit as fixed in the old bonds does not cover the period of extension.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

INFIRMARY DIRECTORS — RENTAL OF LAND.

Infirmary directors may rent additional land for use of infirmary and may pay rental out of county poor fund.

November 29th, 1907.

HON. A. O. DICKEY, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR: — Your communication of November 21st is received in which you inquire as to the right of a board of infirmary directors to rent land for the use of the infirmary and pay rental out of the poor fund.

In reply I beg to say under Sec. 961 of the Revised Statutes the board of infirmary directors are given control generally of the county infirmary and the care of its inmates, and are expressly authorized to make all contracts and purchases as are necessary for the institution. I am therefore of the opinion that if the rental of additional land is, in the judgment of the infirmary board, necessary for the care and support of the inmates of the infirmary, they may rent such lands and pay the rental therefor out of the poor fund of the county.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

PROSECUTING ATTORNEY — SPECIAL ASSISTANT—COMPENSATION.

Amount of compensation of special assistant to prosecuting attorney, appointed by court under section 7196, fixed by allowance by county commissioners, not by approval of court.

November 29th, 1907.

HON. F. A. MCALLISTER, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR: — Your communication of November 22nd, is received in which you submit the following question:

An attorney at law, appointed under the provisions of section 7196 R. S., presented to the court of common pleas a bill for $225 for its approval. The court put the following indorsement on the bill: "Approved for four days at $25.00 a day or $100.00," and signed it. The bill with such indorsement was then presented to the county commissioners, and the county commissioners believing that the amount of $100 approved by the court of common pleas was too small, made an allowance of $150. You inquire for what sum should the county auditor draw his warrant?

In reply I beg to say, the county auditor is not authorized to draw his warrant in favor of an attorney appointed under the provisions of section 7196 unless a bill has first been presented and allowed by the county commissioners; and according to the above statement of facts the bill allowed by the county commissioners was for $150.

I am therefore of the opinion that it is the duty of the county auditor to draw a warrant for the bill as allowed by the county commissioners.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

DEPOSITORY — TOWNSHIP — AWARD WHEN BIDS ARE SAME.

Township trustees may, in exercise of discretionary power, award money in hands of township treasurer to one of two or more banks making same bid, or they may divide such money among such banks.

December 3rd, 1907.

HON. C. H. HUSTON, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR: — Having considered your request of the 19th ult., for an opinion of this department as to the construction of section 1513 R. S., I beg to say that by the provisions of the act of March 31st, 1906, amending said section of the Revised Statutes, when two or more banks offer the same bid for the moneys in the hands of the treasurer of the township, it is not obligatory upon the trustees to divide the funds among the several banks making the same bid. In my opinion the trustees can ignore one and give the funds to the other making the same bid, or they can divide the funds between the banks making the same bid. Any other construction would tend to induce a combination between the banks to secure all the funds and without carrying out the intention of the statute, which is that competitive bidding should be had.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

DEPOSITORY — SCHOOL DISTRICT — BOND.

Requirement of school district depository law, as to surety company bond to be furnished by successful bank, is unconstitutional.

December 7th, 1907.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR: — I have just received your letter calling my attention to our conversation over the telephone relative to the provision in section 3968 R. S. whereby depositories for school funds are required to give surety company bonds to secure deposits.

This department has heretofore held that this provision in section 3968 R. S. bears the same infirmity as did the Crafts bonding act, which has been declared unconstitutional by the supreme court, and that it should therefore be disregarded and banks permitted to give either surety company bonds or private bonds, subject, of course, to the approval of the board of education.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

TOWNSHIP DITCH SUPERVISOR — FAILURE TO ELECT AT FIRST REGULAR ELECTION FOR TOWNSHIP OFFICERS.

Failure to elect township ditch supervisor at first regular election for township officers does not create in such office a vacancy which may be filled by appointment by township trustees.

December 7th, 1907.

HON. JOHN H. CLARK, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: — Your communication of December 5th is received in which you submit the following inquiry: In townships where no nominations were made and hence no township ditch supervisor elected, as provided for in section (4584-1),

will there not be a vacancy which must be filled by appointment by the trustees, as provided in said section?

In reply I beg to say that this department has heretofore held that no vacancy can occur in the office of township ditch supervisor until after there has been an election, as provided in section (4584-1).

This law only provides for the election of ditch supervisors in townships in which are located and established township ditches. It is not a law that provides for all the townships in all the counties of the state and the power of the trustees to appoint a supervisor is only *in case a vacancy occurs in the office.* I am unable to see how a vacancy can occur in an office to which no one has ever been elected.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

BOARD OF REVIEW — ILLEGAL VALUATION — REMEDY OF OWNER.

Municipal board of review may change valuation of real property theretofore on the duplicate and upon which no structures have been erected or destroyed, only by way of equalization; board of tax remission provided for by section 167 may remit taxes assessed upon valuations fixed in excess of such power.

December 7th, 1907.

HON. LYMAN W. WACHENHEIMER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR: — I have given consideration to the inquiry contained in yours of the 2nd inst., in the matter of a decrease of the valuation of the real estate of one Arthur C. Crooks, the valuation thereof having been increased under the circumstances as given in your letter.

The opinion of the supreme court in the case of Davies, Auditor v. Investment Company, 76 O. S. 407, is very sweeping and radically changes the practice indulged in by the board of review of your city as well as of many other cities. It seems, by reference to that opinion, that the board of review may review the returns of new entries of lands and the valuation of lands newly platted which are in the corporation. It may also review the value of new structures as returned and the value of structures destroyed as returned, and lots and lands restored to the tax list. In following such procedure it would require readjustment and equalization, and if in the course of such readjustment and equalization it is found in any case that certain real estate, as compared with other real estate in the locality, has been listed too low and other real estate listed too high, so that gross inequalities exist, the values may be increased or reduced as justice demands. It seems to be required that in order to legally increase the value of one piece of real estate above that fixed by the former decennial appraisement the board can only do it as necessary in the process of equalization and not as an original appraisal independent of equalizing it with other property.

As the facts set forth in your letter do not seem to indicate that the values affixed to the lands of Crooks were for the purpose of equalization, it would appear that he would be entitled to the benefit of the order made by the board of tax remission, acting by virtue of the provisions of section 167 Revised Statutes, the same as the other owners of real estate comprehended therein.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

COURT HOUSE COMMISSIONERS — ALTERATION AND REPAIR OF BUILDING.

Court house commissioners should be appointed to superintend alteration and repair of court house, the cost of which improvement will exceed $75,000.

December 7th, 1907.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR: — Replying to your inquiry of the 15th ult., I beg to say that in my opinion the procedure outlined in section (794-1) et seq., Revised Statutes, should be followed in the matter of the improvement, alteration and repair of the court house in your county, which improvement will, according to your statement, necessitate the expenditure of about $75,000, and which has been determined by an affirmative vote of the electors of your county.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

BOARD OF EDUCATION — APPLICATION OF PROCEEDS OF BOND ISSUE — AUTHORITY TO ISSUE BONDS IN ADDITION TO THOSE AUTHORIZED BY VOTE OF PEOPLE.

Village board of education may extend time of payment of bonds for construction of school building authorized to be issued by vote of people, within limitations of section 3994; in addition, bonds may be issued in annual installments equal to proceeds of tax at rate of two mills, without a vote of the people, and such additional bonds may be discharged by use of excess, over expense of conducting schools, of proceeds of tax at rate of twelve mills; proceeds of such specially authorized issue and of such additional issue may be used as well in purchase of site as in construction of building.

December 9th, 1907.

HON. J. T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR: — The subject of the inquiry contained in yours of the 21st ultimo, involves the construction of sections 3994 and 3959 of the Revised Statutes.

The question briefly put is as to the power of the Sabina village school district to issue bonds, with the proceeds of which to obtain and construct public school property, and it involves the amount that may be so issued and the time that the issue may be made to run.

The data with which you have supplied me contains the information that the valuation of the duplicate for the given district is $600,000; that the electors of the district have voted favorably on the issuing of bonds to the amount of $40,000 but that that amount is thought to be inadequate for the purpose of purchasing a site as well as constructing the building; that the board of education decided to purchase a site and condemnation proceedings having been instituted, resulted in the valuation of $3,450 being adjudged to be the value of the proposed lot.

The proposition does not involve the authority for issuing bonds to the amount of $40,000, which have been authorized, and the consideration of that amount is only necessary in determining the authority to raise the additional amount of $3,450 more or less.

The statement of the statutory authority leaves the balance of the question one of arithmetic, which should be easy of solution.

The board has full authority to issue bonds to obtain or improve public school property. The language contained in section 3994 R. S. can be made conjunctive "to obtain *and* improve" if necessary to accomplish the result sought. The limitations as to the amount of the bonds that may be issued, provided in the section above referred to are two, namely: the amount of such bonds issued in any one year, shall be no greater than would equal the aggregate of a tax at the rate of two mills; and the board shall not issue bonds under section 3994 for a greater amount than can be provided for and paid with the tax levy provided for under section 3959 of the Revised Statutes, and paid within forty years after the bond issue on the basis of the tax valuations at the time of the bond issue.

Section 3959 provides that the local tax levy for all school purposes shall not exceed 12 mills on the dollar of valuation of taxable property in the school district, but such levy shall not include any special levy for a specified purpose provided for and voted on by the people. As the $40,000 above mentioned has been authorized by a vote of the people, the question left for determination would involve the amount which could be raised on your duplicate without exceeding the levy of 12 mills, and will such amount be sufficient to pay the expense of conducting the schools and provide for the necessary funds to retire the bonds proposed to be issued for the additional amount without a vote of the people.

The limitation of 12 mills on the dollar must be construed in connection with the limitation of the amount of bonds that can be issued pursuant to section 3994 R. S. in any one year. This latter amount is, as before stated, the equal of the aggregate of a tax at the rate of 2 mills. The computation of 12 mills on your present duplicate would produce $7200 annually. The limitation of 2 mills would produce $1200. As the expense of conducting the schools is estimated at $5500 per annum it would seem to leave a net surplus of about $1700 which could be applied to discharge the proposed issue, supplemental to the $40,000 issue.

You have full power to extend the period of the retirement of the bonds not exceeding the time limitation in section 3994 and thereby decreasing the amount payable per annum.

This review of the entire matter leads me to express the opinion; first, that you can use the proceeds of the bond issue voted upon by the people for both obtaining a site and constructing the property; second, the board has full authority to issue the supplemental amount of bonds without a vote of the people, basing the computation upon the present value of your duplicate, and the proceeds of the bonds of the latter proposed issue can be applied to purchasing a site, if so desired. In any event, contemplated by the question submitted and the facts accompanying the same, the limitations contained in the statutes are not exceeded.

Very truly yours,

WADE H. ELLIS,

Attorney General.

SCHOOL DISTRICT — CENTRALIZATION — ELECTIONS.

Only electors of township school district may vote upon question of centralization.

December 10th, 1907.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR: — Your communication is received in which you submit the following inquiry: A school election is to be held in Lost Creek township, Miami

county, for the purpose of submitting the question of centralization of public schools. The parents of some of the children attending school in this township reside in the adjoining township but have heretofore voted on all school questions in Lost Creek township. May those electors who reside in Brown township whose children attend the school in Lost Creek township vote at said election?

In reply I beg to say only those electors who are residents of the township school district may participate in said election. However, the boundaries of the township school district need not be, and frequently are not, identical with the boundaries of the township. Persons residing in one township may be transferred for school purposes to the township school district of an adjoining township, such transfer, however, must be by resolution of the board of education, and a map placed upon the records in accordance with the provisions of section 3921 R. S. An examination of the records of Lost Creek township school district will disclose the fact as to whether or not the electors in question have been legally transferred to Lost Creek township school district and entitled to vote at elections held therein.

Very truly yours,

WADE H. ELLIS,

Attorney General.

COUNTY SURVEYOR—JANITOR FOR OFFICE OF.

Clerk in county office may be employed by county commissioners to perform janitor services in office of county surveyor if such services do not conflict with services as clerk.

December 10th, 1907.

HON. WILLIAM MAFFETT, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Your communication of December 6th, in which you submit the following inquiry is received:

May a clerk in the recorder's office perform the services of janitor and keep the office and books open for the use of the public for the county surveyor and receive compensation therefor out of the county treasury, when no allowance has been made to the county surveyor by the county commissioners as provided in section 1183 R. S.?

In reply I beg to say section 1181 R. S. provides that the surveyor shall "keep his office at the county seat in such room or rooms as are provided by the county commissioners, which shall be furnished at the expense of the county with all necessary cases and other suitable articles, etc." And section 853 authorizes the county commissioners to employ janitors to care for the public offices of the county.

I am of the opinion, therefore, that a clerk in the recorder's office may be employed by the county commissioners to do the janitor work required to take proper care of the surveyor's office, provided, of course, that the performance of said services does not interfere with the services to be performed by said clerk in the recorder's office. He may not, however, be compensated by the county commissioners out of the county funds for services rendered in attendance upon the office of the county surveyor for the purpose of keeping the office and public records therein open for the inspection and examination of the public. The performance of this service would require the employment of an assistant or clerk and would require an appropriation by the county commissioners as provided in section 1183 to provide payment.

Very truly yours,

WADE H. ELLIS,

Attorney General.

PROSECUTING ATTORNEY — COMPENSATION OF.

Prosecuting attorney may not receive additional compensation for services in behalf of township officers.

December 10th, 1907.

HON. H. L. CONN, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR: — Your communication of December 6th is received in which you submit the following inquiry:

May a prosecuting attorney receive compensation other than the salary provided in section 1297 R. S. for services to the township trustees in litigation in the court of common pleas?

In reply I beg to say section 1274 of the prosecuting attorney's salary law provides that the prosecutor "shall be the legal adviser for all township officers and no county or township officer shall have authority to employ any other counsel or attorney at law at the expense of the county except on the order of the county commissioners or township trustees, etc."

This department has heretofore held that the official duties devolving upon the prosecuting attorney under this provision include services rendered in litigation in which the township trustees or other officers are engaged. Inasmuch as the salary provided in section 1297 of said salary law is in full payment for all services required to be rendered by him in an official capacity on behalf of the county or its officers, I am of the opinion that you may not receive additional compensation for the services rendered said township trustees in said litigation.

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

INFIRMARY DIRECTOR — EXTENSION OF EXISTING TERM.

December 10th, 1907.

HON. WILLIAM L. DAVID, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR: — In reply to your inquiry of December 6th, I beg to say the term of an infirmary director which would otherwise expire on the first Monday of January, 1908, is extended to the first Monday of January, 1909, by virtue of Senate Bill No. 36, 98 O. L. 271.

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

HIGHWAYS — ONE MILE ASSESSMENT PIKES — COMPENSATION OF MEMBERS OF BOARD OF ASSESSMENT AND EQUALIZATION.

December 13th, 1907.

HON. LYMAN W. WACHENHEIMER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR: — I desire to acknowledge the receipt of your letter in which you inquire whether there is any lawful means by which the county commissioners may provide for the compensation of equalizing boards appointed pursuant to the provisions of section (4670-16).

In reply thereto I beg to say that the legislature seems to have made no provision for the payment of the compensation and expenses of such boards, and the law should be amended in this particular at an early day.

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

COUNTY ROADS — ESTABLISHMENT OF.

County commissioners may establish county road with intersection at but one end with public highway.

December 13th, 1907.

HON. HENRY T. SHEPHERD, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR: — Your communication of December 11th has been received. You submit the following question:

> "Can the county commissioners legally establish a county road with an intersection at but one end, with a public highway?"

In reply thereto I beg to say that in my opinion such road can be legally established by compliance with the provisions of the statutes applicable to county roads.

Whether or not such a road should be established depends upon considerations of public utility of which the commissioners are to judge.

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

CIVIL ENGINEER — AUTHORITY OF COUNTY COMMISSIONERS TO EMPLOY.

County commissioners may not employ engineer other than county surveyor in preparation of plans, etc., for bridge.

December 16th, 1907.

HON. HENRY M. HAGELBARGER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR: — In reply to your communication of December 10th, I beg to say section 1106 of the Revised Statutes as amended by the last legislature, provides that:

> "The county surveyor shall perform all duties for such county as are now or may hereafter be authorized or declared by law to be done by any civil engineer or surveyor."

Under this provision I am of the opinion that the county commissioners of your county are without authority to employ any engineer other than the county surveyor to prepare the plans and specifications for the bridge referred to in your letter.

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

MAD DOG — APPROVAL OF CLAIM FOR EXPENSES OF VICTIM.

County commissioners have discretion as to approval of separate items in account for expenses and medical attendance of person injured by mad dog.

December 23rd, 1907.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR: — Your communication of December 21st enclosing claim presented to the county commissioners of Lorain county under section (4215a-1) is received. You request my opinion as to which of the items as set out in said claim are proper charges against the county.

In reply I beg to say that section (4215a-1) provides that:

> "Any person 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, and which said bite or injury by said dog or canine, caused said person to employ medical or surgical treatment, and required of said person the expenditure of money in the care and treatment resulting from said bite or injury, may present a detailed and itemized account of the actual expenses incurred and amount paid for medical and surgical attendance, verified by affidavit of said injured person, administrator or executor and attending physician. * * * Said detailed statement as aforesaid must be presented within four months after the injury was received, at a regular meeting of the county commissioners of the county where the injury was received. The county commissioners shall, within a reasonable time and not later than the third regular meeting after the presentation of said verified account as aforesaid, examine the same, and if found in whole or in part correct and just, may in their *discretion* order the payment thereof, or *such parts* as they may have found in their judgment correct and just, to be paid out of the fund created by the per capita tax on dogs, but no person shall receive for any one injury under this act a sum exceeding five hundred dollars."

Under the provisions of this section the injured person may be reimbursed out of the county treasury for "all actual expenses incurred and amounts paid for medical and surgical attendance" or such parts thereof as the county commissioners may, in their discretion, deem correct and just.

The determination of the correctness and justness of the items contained in said claim rests entirely in the sound discretion of the county commissioners.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

(Miscellaneous)

JUSTICE OF THE PEACE—CITY TOWNSHIP—TERM OF OFFICE—VACANCY IN OFFICE.

Term of office of justice of the peace elected prior to adoption of article XVII of the constitution and amendment of section 1442 began at date of his election.

Vacancy in office of justice of the peace in city of Cincinnati should be filled by appointment by council of said city.

September 21st, 1907.

HON. LOUIS A. IRETON, *Legal Counsel for Hamilton County, Cincinnati, Ohio.*

DEAR SIR:—Referring to your inquiries as to the beginning of the terms of justices of the peace and the method of filling vacancies in such office in the city of Cincinnati, I beg to advise you as follows:

Prior to the amendment of section 1442 R. S. by the last legislature, there was no statutory time fixed for the beginning of the terms of justices of the peace; and this department, following the decision of the supreme court in Koon et al. v. Bushnell (decided December 1st, 1904), has heretofore held that in the absence of any date fixed by statute the terms of justices of the peace begin with the day of their election. This holding is, however, in apparent conflict with the opinion of the circuit court of the 5th circuit in Bushnell v. Koon et al., as reported in the 28 C. C. 367. But upon investigation of the record in that case it appears that the opinion of the circuit court does not express the judgment of that court as reviewed by the supreme court.

The record of the case in the supreme court (No. 8692) recites the following as the conclusion of law made by the circuit court in its judgment entry:

> "And as conclusions of law from the facts so found the court find that the first term of office of the said Samuel D. Bush *commenced with the date of his election,* to-wit: April 4th, 1899, and terminated April 4th, 1902; that his second term as such justice of the peace *commenced with the date of his election,* to-wit: April 7th, 1902, but that he was ineligible to perform the duties of that office and render the judgment complained of April 15, 1902, because he had not been commissioned under his second election nor taken the oath of office, nor given bond as required by law, and that the judgment so rendered by him on said 15th day of April, 1902, is void and of no effect and ought to be enjoined."

The supreme court affirmed the view of the law expressed in the foregoing conclusion and did not hold that the terms of justices, in the absence of a statutory provision, began with the date of their respective commissions, as stated in 28 C. C. 367. The terms of justices now begin on the first of January following their election, in accordance with section 1442 R. S., as amended by the last legislature.

The method of filling vacancies in the office of justices in the townships cannot apply to justices in the city of Cincinnati because there are no township trustees in such city to fill such vacancies.

After giving the question such consideration as my time would permit I am of the opinion that section 3 of the municipal code, (1536-3) R. S., points the way for the filling of vacancies in the office of justices of the peace in the city of Cincinnati, viz:

"When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village excepting that justices of the peace and constables shall continue to exercise their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes, and such justices and constables shall be elected at municipal elections."

As it becomes the duty of township trustees in other townships, pursuant to section 567 R. S., to fill the vacancies occurring in the office of justices of the peace, that duty, to-wit: the appointment to fill such vacancies, should be performed by the city council, it being the body corresponding within the city to that of the township trustees in the townships.

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

JUVENILE COURT — PROBATION OFFICER.

Probation officer may convey adult to workhouse under sentence of juvenile court.

January 15th, 1907.

HON. D. ROBESON, *Probate Judge, Greenville, Ohio.*

DEAR SIR: — Your communication dated January 9th, in which you submit the following inquiries is received.

First. Has a probation officer authority to convey adults to workhouse who have been convicted of being contributors to delinquency, etc.?

Second. May an adult be put upon trial in the juvenile court upon the sworn complaint of a probation officer, or must the prosecuting attorney of the county file information?

In reply to these inquiries I beg to say.

First. Section 6 of the juvenile court act passed by the last general assembly (98 O. L., 314) provides that,

"Probation officers shall be and are hereby vested with all the powers and authority of *sheriffs* to make arrests, serve processes of such court and perform all other duties incident to their office."

Under this provision probation officers have, in my judgment, authority to convey adults to the workhouse under sentence of the juvenile court.

Second. An adult in the juvenile court in Franklin county was put upon trial upon the sworn complaint of the probation officer, convicted and sentenced to the workhouse. The case has been taken to the common pleas court on error and is now pending and I am informed by Judge Black that the error complained of by plaintiff in error, is that the probate court was without authority to place said plaintiff on trial on the complaint of the probation officer.

Inasmuch as this case is pending in the common pleas court I do not feel warranted in giving an opinion, but as soon as the case is decided will inform you as to the holding of the court.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

INSANE — HOSPITAL FOR — ADMISSION OF ALIEN UNDER SPECIAL ACT.

Alien patient admitted to hospital for insane under authority of joint resolution of general assembly and thereafter discharged as cured may be re-admitted upon recurrence of insanity.

May 18th, 1907.

HON. N. V. REAM, *Probate Judge, New Philadelphia, Ohio.*

DEAR SIR: — In reply to your communication relative to the readmission of Allesandro Colarecchio, an insane person, to the Massillon state hospital, I beg to say house joint resolution No. 34 (98 O. L. 407) authorizes the superintendent of the Massillon state hospital to receive said Allesandro Colarecchio as an inmate of said institution until said person is discharged by due process of law or the rules of said institution, as in other cases.

Although said person has been admitted to said institution in accordance with said resolution and thereafter discharged as recovered and while said resolution makes no provision for a re-admission, yet the physical condition of said person which in the first instance caused the legislature to pass said resolution again exists. For these reasons I am of the opinion that the superintendent of said hospital is warranted in receiving said insane person again into the institution.

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

INSANE — HOSPITALS FOR — RELIEF WHEN QUOTA OF COUNTY IS FULL.

When quota of county in various state hospitals for the insane is full, there is no provision for the care or cure of additional insane persons in such county at any public institution.

October 31st, 1907.

HON. SAMUEL L. BLACK, *Probate Judge, Columbus, Ohio.*

DEAR SIR: — In reply to your communication of October 23rd, I beg to say that under existing legislation there seems to be no power lodged in the probate court to commit insane persons to the various asylums in the state of Ohio in excess of the quota allowed under section 700 of the Revised Statutes. Inasmuch as the legislature has forbidden the acceptance of insane persons into the county infirmaries of the state, I am unable to suggest any procedure that would give relief in the cases you suggest.

In my judgment additional legislation to increase the facilities for the care of the insane persons of the state is needed by either building more asylums or increasing the capacity of those existing.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.

BAKERIES — ACT REGULATING DRAINAGE, ETC. — DISPOSITION OF FINES.

Fines collected by magistrates in prosecutions for violations of act regulating drainage, etc., of bakeries must be paid into county treasury.

July 27th, 1907.

HON. CHARLES F. WILLIAMS, *Special Counsel, Cincinnati, Ohio.*

DEAR SIR: — By your favor of July 26, receipt whereof is acknowledged, I notice that a certain justice of the peace in the city of Cincinnati desires my opinion regarding the proper disposition of fines collected in prosecutions for violations of the act regulating drainage, plumbing and ventilation of bakeries, sections (4364-71) et seq., Revised Statutes. Replying thereto I beg to state that section 9 of the bakeries act, (4364-79) Revised Statutes, provides for no particular disposition of these fines. It is my opinion, therefore, that section 617 governs and that these fines should be paid by the justice to the treasurer of the county within thirty days after their collection.

Very truly yours,
W. H. MILLER,
Asst. Attorney General.