Hanna Davis by reason of the deed executed to her by said Benjamin F. Powell. I am, therefore, of the opinion that this exception to the title of said first parcel of land above described may now be safely waived.

(2). The only other exception noted with respect to the above described property is that the undetermined taxes for the year 1928 are unpaid and are a lien on said premises.

The warranty deed executed by The Licking County Building and Savings Company conveying said parcels of land to the State of Ohio has been properly executed and is in form sufficient to convey to the State of Ohio a fee simple title to said property, free and clear of encumbrances, subject to the following exceptions:

1. The date on which said deed was executed does not appear.
2. The deed does not bear the seal of the corporation.

Neither of the exceptions to the deed above noted affects the validity of the same. It is, however, desirable that the deed be corrected so as to obviate the objections noted.

Encumbrance estimate No. 3182, relating to the purchase of this property, is hereby disapproved, for the reason that the same is made out in the name of one A. H. Rickert, a person other than the owner of the property.

The certificate of the action of the Controlling Board submitted to me shows that the purchase of this property has been approved by the board. Said certificate indicates that the purchase of said property was approved by the Controlling Board under the assumption that the same was owned by said A. H. Rickert above mentioned. However, I am inclined to the view that this misapprehension on the part of the board is not fatal to its action authorizing the purchase of this property.

I am herewith enclosing said abstract of title, warranty deed, encumbrance estimate and certificate of the Controlling Board above referred to.

Respectfully,
Edward C. Turner,
Attorney General.

2669.

OFFICES INCOMPATIBLE—JUDGE OF COURT OF APPEALS AND ACTIVE OFFICER OF OHIO NATIONAL GUARD—CANDIDATE FOR JUDGESHIP MAY BE SUCH AN OFFICER.

SYLLABUS:

By the terms of Section 2251, General Code, a judge of the Court of Appeals is prohibited while holding such position as judge, from being an officer on the active list in the Ohio National Guard. This ineligibility to hold these two offices does not prevent an officer in the National Guard from being a candidate for judge of the Court of Appeals, and if elected to the judgeship, he may qualify for the same upon resigning from his office in the National Guard.

Columbus, Ohio, October 5, 1928.

Hon. Frank D. Henderson, *Adjutant General, Columbus, Ohio.*

Dear Sir:—This will acknowledge receipt of your request for my opinion which reads as follows:

"Article 4, Section 14, Ohio Constitution, in part states that Judges of the Supreme Court and of the Court of Common Pleas shall receive no fees or perquisites or hold any office of profit or trust, under the authority of this State or of the United States, etc.

This department would appreciate an opinion whether or not an active officer of the National Guard federally recognized is rendered ineligible to serve as a Judge of the Court of Appeals in Ohio or vice versa.

This office is confronted with a case in which a National Guard officer federally recognized is a candidate for election November 6, 1928, for the office of Court of Appeals, 1st Appellate District of Ohio."

Article IV, Section 14 of the Constitution of Ohio, to which you refer, provides as follows:

"The judges of the Supreme Court, and of the Court of Common Pleas, shall at stated times, receive, for their services, such compensation as may be provided by law; which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for either of them, for any elective office, except a judicial office, under the authority of this state, given by the General Assembly, or the people, shall be void."

It will be observed that the foregoing section of the Constitution makes no mention of judges of Courts of Appeals. It is specific in its application to judges of the Supreme Court and judges of the Court of Common Pleas and therefore does not apply to judges of Courts of Appeals. So far as the provisions of that particular section of the Constitution are concerned, judges of Courts of Appeals are not precluded from holding another office of profit or trust under the authority of this State or of the United States, or from receiving fees and perquisites in addition to those incident to the office of judge of the Court of Appeals.

There are however similar provisions made by statute which specifically apply to judges of Courts of Appeals. Section 2251, General Code, provides in part as follows:

"* * * Neither the chief justice of the Supreme Court nor any judge of the Supreme Court or of the Court of Appeals, shall hold any other office of trust or profit under the authority of this state or the United States."

In a former opinion of this department reported in the Opinions of the Attorney General for 1919, Vol. II, page 1354, wherein was considered the question of the right of a Common Pleas Judge to accept a commission as officer in the Naional Guard, it was held:

"The acceptance by a common pleas judge in Ohio of a commission as officer in the National Guard results in the vacation of his judicial office."

The question therein considered was whether or not an officer of the National Guard was an office of profit or trust. In the course of the opinion, after quoting the provisions of Article IV, Section 14, of the Ohio Constitution, it was said:

"Is an office in the National Guard comprehended within this language? The authorities seem to warrant a clear, affirmative answer. Such officer

> receives compensation, exercises an authority conferred upon him by virtue of the acts of congress under its power to raise and maintain an army, and assist in the performance of a sovereign function of government."

In support of this conclusion, the Attorney General cited the cases of *State* vs. *Mayor of Jersey City*, 42 Atl. 782; *Kerr* vs. *Jones*, 19 Ind. 351; *State* vs. *De Gress*, 53 Tex. 387.

To these authorities might be added the case of *Chisholm* vs. *Coleman*, 43 Ala. 204 wherein it was held, under a similar constitutional provision, that a judge of the Circuit Court forfeited his office by accepting a commission as colonel in the Confederate Army.

While it has been held in the case of *State* vs. *Coit*, 35 Bulletin, 32, that a National Guard officer is not a public officer in the sense that the term applies to civil officers, he is nevertheless a military officer, and as the recipient of the military office under appointment of the Governor, exercises some portion of the sovereign functions of government for the benefit of the public.

Moreover, there are such emoluments and perquisites attached to the office that it may well be said to be an office of profit. In the case of *State* vs. *Mayor of Jersey City*, 42 Atl. 782, which was referred to in the 1919 opinion of the Attorney General, it was held:

> "The position of colonel in the 4th regiment of New Jersey volunteers for the United States army is an 'office,' within the meaning of the statute creating the board of street and water commissioners, which provides that, if such commissioner shall accept any other appointment to public office, his office of commissioner shall thereupon become vacant."

In the course of the opinion, the court said:

> " 'A public office is the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government,to be exercised by him for the benefit of the public. The individual so invested is a public officer.' Mechem, Pub. Off. p. 1, Sect. 1. 'An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual who for the time will be the officer.' *Cooley, J., in People* vs. *Langdon*, 40 Mich. 673. It is held in *Kerr* vs. *Jones*, 19 Ind. 351, 'that the position of colonel in the United States army is an office, and that Benjamin Harrison, by accepting the office of colonel of volunteers, vacated the office of reporter, and that no judicial declaration of forfeiture was necessary.' To the like effect are the following cases: *State* vs. *Allen*, 21 Ind. 522; *People* vs. *Noctrand*, 46 N. Y. 375; *U. S.* vs. *Hartwell*, 6 *Wall.* 385; *Rowland* vs. *Mayor*, etc., 83 N. Y. 376; *State* vs. *Stanley*, 66 N. C. 59; *State* vs. *De Gress*, 53 Tex. 387. That the position held by Col. Smith in the army is an 'office', in the legal acceptation of that term, is well supported by the weight of authority. If he is not regarded as holding an office incompatible with the civil office in Jersey City, the same rule would necessarily prevail if every other municipal officer held, at the same time, a like position in the army, and none of the civil offices would be vacant, although all the incumbents might be far distant, in Porto Rico, Alaska, or Manilla."

I am therefore of the opinion that a judge of the Court of Appeals is ineligible to be an officer on the active list in the National Guard of the State of Ohio. This ineligibility to hold these two offices does not prevent an officer in the National Guard from being a candidate for judge of the Court of Appeals and, if elected to the judgeship, he may qualify for the same upon resigning from his office in the National Guard.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2670.

FORMS—APPROVAL—DRAFTS OF RESOLUTIONS OF COUNTY COMMISSIONERS TO CO-OPERATE IN WIDENING OF STATE ROADS.

SYLLABUS:

Approval of form of resolution of county commissioners under Sections 1195 *and* 1200 *of the General Code relative to cooperation in the improvement of a state road to a width greater than eighteen feet.*

COLUMBUS, OHIO, October 5, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of September 27, 1928, in which you ask me to submit to you draft of such action as may be necessary on the part of a board of county commissioners which has proposed to the highway department cooperation in the construction or reconstruction of a state road to a width greater than eighteen feet. As I understand it, you desire the form for action taken subsequent to the original proposal to cooperate.

Section 1191 of the General Code authorizes a proposal by county commissioners to cooperate with the superintendent of highways in widening the paved portion of any state road where the paved portion of said road is constructed or reconstructed to a width greater than eighteen feet. The form which you request is for the action taken by the board of county commissioners under the authority of Sections 1195 and 1200 of the General Code.

Section 1195 of the General Code is as follows:

"If upon the receipt of a proposal to cooperate the director approves of the same, he shall enter such approval upon his journal and shall certify his approval thereof to the county commissioners; and he shall cause to be transmitted to the county commissioners copies of such maps, plans, profiles, specifications and estimates as he may prepare for the construction of the work covered by such proposal. Upon receipt of the maps, plans, profiles, specifications and estimates for the proposed improvement, the county commissioners may, by resolution, adopt the same and provide for the cooperation of the county in the construction of the work. A certified copy of such resolution shall be transmitted to the director."

Section 1200 of the General Code is also pertinent and provides:

"If the county commissioners, after adopting the maps, plans, profiles, specifications and estimates are still of the opinion that the work should be