from the operation of the statute persons, things or cases which would otherwise have been included in it. *Black on Interpretation of Laws,* page 427.

In the case of *Buckman* vs. *State, ex rel.,* supra, it was held that as a general rule, unless the contrary intention plainly appears, a proviso is to be construed with reference to the immediately preceding paragraph to which it is attached, and qualifies or limits only the part or paragraph to which it is appended. As above noted, the exception here under consideration relating to fees of the sheriff in partition cases is to be considered as limiting either the whole of the prior paragraph or that part thereof which immediately precedes the exception. In either view, said exception relating to the fees of the sheriff in partition cases is to be considered as providing for the sheriff's fees at the prescribed rates on all of the proceeds of such sales paid into his hands, irrespective of the fact that the person bidding in the property and paying for the same is entitled as an heir or devisee to a distributive share of such proceeds.

A contrary conclusion with respect to the effect of the exception relating to fees of the sheriff in partition cases can be arrived at only by holding that said exception does not relate back to the whole of the prior paragraph, or to that part thereof immediately preceding the exception, but relates back to that part of the prior paragraph which relates to the rate of fees on the sale of real estate on order of the court generally therein contained. I know of no rule of construction which permits this interpretation of the statute.

I am of the opinion, therefore, by way of specific answer to the question made in your communication that in the sale of real estate, on order of the court in partition cases, the sheriff making such sale is entitled to poundage fees at the prescribed rate on all of the proceeds of such sale actually paid into his hands, irrespective of the fact that the purchaser bidding in and paying for said property is entitled to receive back from the sheriff a distributive share of the proceeds of said sale.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3138.

LEGAL COUNSEL—EMPLOYED TO ASSIST PROSECUTING ATTORNEY WITHOUT AUTHORITY OF COURT—NO RECOVERY OF FEES PAID BY COMMISSIONERS IN ABSENCE OF FRAUD OR COLLUSION.

SYLLABUS:

Where an attorney is engaged to assist the prosecuting attorney in the trial of pending cases, upon request of the prosecuting attorney, which employment is known to the Court of Common Pleas in which said cases are tried, and through an inadvertence, the common pleas judge did not authorize said employment until after the services were rendered and after payment had been made therefor, in pursuance to a resolution of the board of county commissioners, under such circumstances, in the absence of fraud or collusion, said payments may not be recovered from said attorney.

COLUMBUS, OHIO, January 14, 1929.

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

GENTLEMEN:—Acknowledgment is made of your recent communication which reads:

"We are enclosing herewith a copy of the resolution passed by the board of county commissioners of M. County, by the terms of which the retiring prosecuting attorney on January 5th, 1925, was employed to assist the prosecuting attorney in certain cases then pending against the County Treasurer of M. County. It developed upon investigation that the Court of Common Pleas did not approve the employment of this attorney as provided by Section 2412, General Code. The attorney was paid for his services and the Court of Common Pleas under date of January 12th, 1928, approved the employment of the attorney. A copy of the Journal Entry of the Court is herewith enclosed.

We are also submitting a statement of facts filed in this office by the present prosecuting attorney, Mr. J. W. L., and respectfully request you to furnish this department your written opinion upon the question of the recovery of the amount paid the attorney upon a finding made by one of our examiners."

The resolution of the board of county commissioners to which you refer reads as follows:

"BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF M. COUNTY, OHIO

WHEREAS, certain matters, cases and complaints were pending in the Common Pleas Court of M. County, Ohio, on January 5, 1925, in which the former prosecuting attorneys of M. County, Ohio, had given attention and study, and

WHEREAS, certain cases have been pending in said Court for some years and F. L. K., the former prosecuting attorney of M. County, has given such matters and cases some attention and is familiar with the facts connected therewith and,

WHEREAS, it has been the custom of the former commissioners of this county to employ the former prosecutor to assist in the disposition and trial of such cases, it is therefore, upon consideration of such matters deemed expedient that said F. L. K. be retained as assistant counsel in the trial and disposition of said cases.

It is therefore, upon due consideration, considered that said F. L. K. be and he hereby is employed by the Commissioners of M. County, Ohio, to assist the prosecuting attorney as above set forth the following cases now pending in the said Common Pleas Court, to wit:

(Here follows a list of 40 designated cases).

And said matters being in litigation it is impossible to determine in advance what the services of said F. L. K. are worth. It is understood and agreed that the said board of commissioners will pay said F. L. K. for his assisting in the disposition of such matters such sum as his services are fairly and reasonably worth.

He will render to this board an account for the same for the further consideration of this board.

Jesse Sell
G. W. Kinkley
Fred Goottemoeller
COMMISSIONERS."

The journal entry approved by the court to which you refer appears as follows:

"15 M. COUNTY COURT OF COMMON PLEAS
In the matter of the employment of counsel to assist the prosecuting attorney in resisting certain cases brought against the commissioners and the treasurer of M. County, Ohio. } JOURNAL ENTRY

This day this cause came on to be heard on the application of the prosecuting attorney and the commissioners of M. County, Ohio, for an order approving the action and proceedings of the prosecuting attorney and the county commissioners in accordance with the provisions of Section 2412 of the General Code of Ohio, in the employment of F. L. K., an attorney at law of C., Ohio, to assist the prosecuting attorney in the preparation for trial and disposition of the following cases pending in the Common Pleas and reviewing courts of M. County, Ohio, to wit:

(Here follows a list of 40 designated cases).

And it being made to appear to the court that at the time said services were performed by said F. L. K. in said cases in this and in the reviewing courts of this county, said prosecuting attorney was in need of temporary assistance and the said F. L. K. being the former prosecuting attorney and having much valuable information gained by research and labor on such cases, it is deemed advisable to continue the services of Mr. K. in the trial and disposal of said cases.

And it further appearing to the court that by inadvertence no entry of authority under the provisions of Section 2412 was ever entered upon the Journals of this court, the court having knowledge of the services of Mr. K. in the trial of said causes, do find that his employment was and is for the best interest of M. County, Ohio, and that the employment of Mr. K. by the said county commissioners to assist the prosecuting attorney in said matters should be and the same hereby is authorized and approved.

H. A. Miller,
Judge of Common Pleas Court."

Section 2412 to which you refer, provides:

"If it deems it for the best interests of the county, the Common Pleas Court, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board of county commissioners to employ legal counsel temporarily to assist the prosecuting attorney, the board of county commissioners or any other county board or officer, in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest in its official capacity."

It will be observed that under the facts being considered there is no dispute but that valuable services were performed by the attorney under consideration. The court states in the entry that it was by inadvertence that the attorney's employment was not authorized. In this connection the question may be presented as to whether or not the entry of the court operated as a nunc pro tunc order which would have the effect of correcting the procedure so as to eliminate any question in reference to the legality of the payments made. Of course, a nunc pro tunc entry, so to speak, is an order correcting the record so as to cause it to show an act of the court, which, though actually made at a former term, was not entered or incorrectly entered

on the journal. The power of a court to make such an order in a proper case is undisputed. *Mfg. Co.* vs. *Sweny*, 57 O. S. 169. The case last mentioned was cited with approval by the Supreme Court of Ohio in the following cases: *Boyer* vs. *Knowlton Co.*, 85 O. S. 118; *State ex rel.* vs. *Wesselmann*, 101 O. S. 525; *First Natl. Bank* vs. *Smith*, 102 O. S. 122. It, of course, is very doubtful whether the entry under consideration could be regarded as a nunc pro tunc order correcting the proceedings. However, in view of the fact that it is one of the proper functions of the court to determine the qualifications of the attorneys appearing before it in a given cause, and in view of the fact that the entry recited that the service performed by the attorney employed to assist the prosecuting attorney was done with the knowledge of the court and the cases in which he was employed apparently having been tried before the same judge, the circumstances relative to said employment are so closely connected with the proceedings before the court as to suggest that the question of said employment was before said court.

To state the matter in another way, it would appear that in forty separate and distinct cases, the attorney so employed appeared before the Court of Common Pleas representing the county commissioners. In each instance, theoretically speaking, at least it was the business of the court to determine whom the attorneys appearing therein represented. Unless the attorney so employed was properly employed as a matter of law, he had no legitimate right to represent the commissioners. The court consenting and permitting said attorney to represent the county at least constructively had information with reference to his employment. The court would be bound to know that in order to be legally so employed, the authority of the court would have to be given, and therefore, such action of the court may have been an implied authorization of said employment. In view of these circumstances, it is believed that, with some merit, it can be argued that the entry put on by the court operated as a nunc pro tunc order, and therefore, corrected the proceeding so as to remove the legal objection to the payments made.

However, it is believed that it is unnecessary to rely upon the proposition hereinbefore discussed in order to decide the case presented. In my opinion, No. 2996, issued on December 10, 1928, it was held, as disclosed by the syllabus:

> "1. The driver of a school wagon or motor van who does not give a satisfactory and sufficient bond and who has not received a certificate of good moral character as provided by Section 7731-3, General Code, can not recover for his services as such driver.
>
> 2. When the driver of a school wagon or motor van is employed by a board of education otherwise than in strict conformity with the provisions of Section 7731-3, General Code, and renders satisfactory service as such driver in reliance upon such contract and is paid therefor, in the absence of a showing of fraud or collusion in the transaction, no recovery can be had on behalf of the school district for the moneys so paid."

The above opinion was based in part upon the pronouncement of the court in the case of *State ex rel.* vs. *Fronizer*, 77 O. S. 1. In that case it appeared that a contract had been entered into by the county commissioners and a bridge company for the furnishing of materials and performing of work for the construction of certain bridges. It further appeared that by an inadvertence, a certificate by the county auditor that the money was in the treasury to the credit of the fund from which said expenditures were to be made for the payment of such costs of labor and materials, had not been made. In that case, there was no doubt as to the services having been performed, and as to the county having received full value for the money paid.

In view thereof, it was pointed out that in the absence of fraud or collusion, an action would not lie to recover the funds so illegally paid.

In the case under consideration the attorney so employed by the county commissioners, having rendered said valuable services to the county, there apparently being no fraud of any character intervening and the payment having been made, such payment can not be recovered.

Based upon the foregoing, you are specifically advised that where an attorney is engaged to assist the prosecuting attorney in the trial of pending cases, upon request of the prosecuting attorney, which employment is known to the Court of Common Pleas in which said cases are tried, and through an inadvertence, the common pleas judge did not authorize said employment until after the services were rendered and after payment had been made therefor, in pursuance to a resolution of the board of county commissioners, under such circumstances, in the absence of fraud or collusion, said payments may not be recovered from said attorney.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3139.

TEACHERS' RETIREMENT SYSTEM—PENSIONER UNDER FORMER LOCAL DISTRICT TEACHERS' SYSTEM ELIGIBLE TO MEMBERSHIP AND EMPLOYMENT—NO CREDIT TOWARD NEW PENSION FOR SERVICES UPON WHICH OLD PENSION WAS BASED.

SYLLABUS:

1. *It is not unlawful to employ a person who is a pensioner by virtue of a former local district teachers' pension system, to teach in the public schools in any of the school districts of the State, in any school or college or other institution wholly controlled and managed, and wholly or partly supported by the State or any subdivision thereof, the board of trustees or other managing body of which has accepted the requirements and obligations of the teachers' retirement law or in the State Department of Public Instruction.*

2. *When a person is so employed, he may lawfully draw his pension during the time he is in active service. He becomes upon such employment, a "member" of the Teachers' Retirement System, and thereby becomes subject to the rights and obligations of the State Teachers' Retirement Law, including the right of retirement thereunder, or the right to the withdrawal of his accumulated contributions under Sections 7896-40 and 7896-41, General Code, as the case may be.*

3. *A person so employed becomes a "member" of the State Teachers' Retirement System at the time of such employment, with the status of a "new entrant". Thereafter, upon retirement he would receive no credit as and for "prior service", in computing his "total service", for services rendered prior to his having been granted the pension by the local district pension system. Any prior service certificate he may have held, for services rendered prior to his having been granted a pension would be thereafter no longer in full force and effect.*